

**Communiqué to the Office of the Prosecutor of the International Criminal Court**  
Under Article 15 of the Rome Statute

**The Situation in Nauru and Manus Island:  
Liability for crimes against humanity in the detention of refugees and  
asylum seekers**

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### A note from the authors

The information and analysis presented in this Communication is based on publicly available sources, as well as over 70 interviews conducted between May 10 and May 25, 2016 in Australia by the Stanford International Human Rights and Conflict Resolution Clinic (“The Clinic”). The Clinic interviewed individuals formerly held in the offshore detention centres, others with first-hand knowledge of the facts, and legal experts. The Clinic has kept the identities of the interviewees who were formerly detained confidential out of respect for their privacy and safety. We have substituted their names with pseudonyms and marked those with asterisks where applicable, and we are grateful to them for sharing their stories with us.

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## Table of Contents

<b>Executive Summary</b> .....	<b>5</b>
<b>Part I: Background and Request</b> .....	<b>7</b>
1. Introduction.....	7
2. Legislative Framework and Context.....	9
<b>Part II: Factual Allegations</b> .....	<b>12</b>
1. Australian Officials Developed Offshore Detention to “Deter” Refugees and Asylum Seekers from Coming to Australia.....	13
2. The Statutory and Legal Landscape of Australia, Nauru and Papua New Guinea Results in Indefinite Detention and Renders Domestic Legal Remedy Impossible .....	16
A. The Australian Government Passed Multiple Pieces of Legislation—Stretching Back to 1992—Seeking to Legitimate Offshore Detention .....	16
B. Australian Government Officials, in Coordination with Government Officials in Papua New Guinea and Australia, Maintain Secrecy Concerning Conditions at and Practices of Detention Centres.....	17
C. Australia’s Legal System Has Not Provided Adequate Remedies.....	19
D. Nauru’s Legal System Has Not Provided Adequate Remedies .....	21
E. Papua New Guinea’s Legal System Has Not Provided Adequate Remedies.....	22
3. Australia’s Offshore Detention Centres’ Practices and Operations.....	23
A. Nauru.....	25
B. Manus Island, Papua New Guinea .....	36
4. Evidence of Australian Government Officials’ Knowledge of and Effective Control over Conditions on Nauru and Manus Island.....	52
5. Evidence of Corporate Officers’ Knowledge of and Effective Control over Conditions on Nauru and Manus Island .....	56
6. Widespread Condemnation and Thorough Documentation of Crimes on Nauru and Manus Island.....	58
<b>Part III: Alleged Offences</b> .....	<b>59</b>
1. Australian Government Officials and Their Agents Knowingly Committed Prohibited Acts as Part of a Widespread or Systematic Attack Against Refugees and Asylum Seekers .....	59
2.....Australian Officials and Their Agents Knowingly Imprisoned a Civilian Population in Contravention of the Fundamental Rules of International Law, within the meaning of Article 7(1)(e) of the <i>Rome Statute</i> .....	63
3.....Australia and Its Agents Tortured Refugees and Asylum Seekers within the meaning of Article 7(1)(f) of the <i>Rome Statute</i> .....	74
4...Australian Government Officials and Their Agents Knowingly Committed Other Inhumane Acts, within the meaning of Article 7(1)(k) of the <i>Rome Statute</i> .....	83
5. Australian Officials and Their Agents Committed the Crime of Deportation, within the meaning of Article 7(1)(d) of the <i>Rome Statute</i> .....	87
6. Australian Officials and Their Agents Committed the Crime of Persecution within the meaning of Article 7(1)(h) of the <i>Rome Statute</i> .....	92

A. Article 25 Liability for Public Officials and Corporate Actors.....	96
1. Direct (individual) perpetration .....	97
2. Co-perpetration .....	97
3. Indirect (co-)perpetration .....	100
4. Aiding and Abetting.....	101
B. Superior Responsibility of Public Officials and Corporate Actors .....	101
<b>Part IV: Elements for Preliminary Assessment by Prosecutor .....</b>	<b>106</b>
1. Jurisdiction .....	106
2. Admissibility: Complementarity .....	107
3. Admissibility: Gravity.....	110
<b>Conclusion .....</b>	<b>115</b>

## Executive Summary

This communication calls upon the Office of the Prosecutor (OTP) of the International Criminal Court to launch an investigation regarding crimes against humanity which may have been committed against asylum seekers and refugees in Nauru and Manus Island, Papua New Guinea.

A coalition of legal experts from several jurisdictions, assembled by the International Human Rights and Conflict Resolution Clinic of Stanford Law School (“The Stanford Clinic”) and the Global Legal Action Network, has authored the communication. The communication analyses a decade of arbitrary and inhumane offshore detention, established and maintained by Australian governments. The evidence compiled during this time, which the Stanford Clinic corroborated in its fieldwork in Australia, amounts to a reasonable basis for the OTP to find that Australian agents and personnel of their corporate partners have perpetrated crimes against humanity.

Since 2008, successive Australian governments have carried out a policy of preventing asylum seekers and refugees arriving by boat from accessing asylum procedures in Australia. As is documented by UN and other observers, they have implemented an offshore detention and resettlement scheme violating core human rights of one of the world’s most vulnerable populations. These centres’ locations, conditions, and extended periods of detention often lasting years all point to a criminally prohibited policy. This policy is calculated to inflict pain and suffering, both physical and mental, upon asylum seekers and refugees, for the sole purpose of “deterrence.” With Manus nearly 3000kms and Nauru over 1000kms from the Australian mainland, those held against their will are not only denied proper legal support and medical help but also hidden from public scrutiny.

Approximately 1246 asylum seekers and refugees are currently held on Manus Island, and on Nauru. The privatized camps entail indefinite detention in inhumane conditions, often including physical and sexual abuse of both adults and children. The conditions and resulting hopelessness have caused what experts describe as “epidemic levels” of self-harm among those held on these islands. The communication details the overcrowded and unsanitary conditions of detention; extensive physical abuse at the hands of guards and local gangs, in many instances meeting the threshold of torture; incidents of sexual violence, including against children; inadequate access to food, water and medical treatment; and extensive mental suffering of detainees, including children.

The communication finds that there is a reasonable basis to believe that public officials and corporate actors may have committed and may continue to commit the crimes against humanity of unlawful imprisonment, torture, deportation, persecution and other inhumane acts. These crimes are at the heart of Australia’s immigration detention policy and constitute a widespread and systematic attack against a civilian population, within the meaning of Article 7 of the Rome Statute of the International Criminal Court.

Australian governments have attempted to contract-out the detention facilities, and thereby avoid responsibility, by concluding agreements with Nauru and Papua New Guinea and by contracting with private corporations to run the facilities. Nevertheless, that liability for international crimes can be traced not only to direct perpetrators on the ground, but also to public officials and corporate officers and directors. Such individuals are participating and essentially contributing to an overall common plan. That plan includes a critical element of criminality. The structures of government and corporate effective control over the camps further establish the superior responsibility of high-level public officials and corporate officers.

The International Criminal Court is a court of last resort. The absence of domestic criminal investigations or prosecutions means that the Court should exercise its jurisdiction, as required by Article 17 of the Rome Statute. Moreover, the crimes are particularly grave. Quantitatively, the crimes affect a large number of asylum seekers and refugees. Qualitatively, the nature of the crimes and the manner of their commission is grave, as they include instances of severe physical and sexual violence against vulnerable victims, and the systematic involvement of state and corporate superiors.

Crucially, the impact of the crimes extends far beyond those detained: the Australian policy is intended to deter future asylum seekers and refugees. As the refugee crisis spreads, states are looking to the “Australian model.” The danger of the spread and normalisation of the crimes committed in this context heightens their gravity. While the Court has so far predominantly focused on investigations of spectacular violence in Africa, and has been criticized for this, the gravity of the crimes described here supports prioritizing this examination.

## Part I: Background and Request

### 1. Introduction

*“I want death, I need death.”*

- Child on Nauru<sup>1</sup>

*“We do have a tough border policy, you could say it’s a harsh policy, but it has worked.”*

- Malcolm Turnbull, September 2015<sup>2</sup>

*“[W]e are the envy of the world when it comes to strong border protection policies.”*

– Scott Morrison, Treasurer of Australia<sup>3</sup>

This Communiqué to the Office of the Prosecutor (“OTP” or “Prosecutor”) of the International Criminal Court (“ICC” or “Court”) provides information on crimes within the jurisdiction of the Court, as envisaged in Article 15(1) of the *Rome Statute* of the ICC. It is submitted with a view to the opening by the Prosecutor *proprio motu* of an investigation into crimes against humanity committed by individuals and corporate actors in continuance of Australia’s immigration policies, which mandate the indefinite detention of asylum seekers and refugees who arrive in Australia by boat without a visa. Though this policy began with the introduction of Australia’s immigration measures in 1992, this Communiqué relates to crimes committed within the Court’s temporal jurisdiction, which begins July 1, 2002. It demonstrates a reasonable basis for the Prosecutor to open an investigation *proprio motu*, in accordance with Article 15 of the *Rome Statute*. Successive Australian governments—in coordination with the states of Papua New Guinea and the Republic of Nauru, (the latter also a signatory to the *Rome Statute*)—imprison and severely deprive refugees and asylum seekers of their liberty through detention offshore, torture these individuals, and commit other criminal acts all rising to the level of crimes against humanity. These crimes are grave, and no action has been taken in relation to them under Australia’s criminal justice system.

Australia’s offshore detention centres—one located on Manus Island, which lies at the northern end of the Papua New Guinean archipelago, and a second on the remote island nation of Nauru—have become notorious for their abject conditions. Australian officials, in cooperation

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<sup>1</sup> Paul Farrell, *‘I want death’: Nauru files chronicle despair of asylum seeker children*, THE GUARDIAN, Aug. 9, 2016, <https://www.theguardian.com/news/2016/aug/10/i-want-death-nauru-files-chronicle-despair-of-asylum-seeker-children>.

<sup>2</sup> Ben Doherty, *Australian immigration regime on Nauru an ‘open-air prison’ and akin to torture, says Amnesty*, THE GUARDIAN, Oct. 26, 2016, <https://www.theguardian.com/australia-news/2016/oct/17/australian-immigration-regime-on-nauru-an-open-air-prison-and-akin-to-torture-says-amnesty>.

<sup>3</sup> Katharine Murphy, *Scott Morrison says Trump travel ban shows ‘world is catching up’ to Australia*, THE GUARDIAN, Jan. 29, 2017, <https://www.theguardian.com/australia-news/2017/jan/30/scott-morrison-trump-travel-ban-world-is-catching-up-to-australia-border-protection>.

with private contractors, have subjected thousands of men, women and children—many fleeing oppressive regimes—to frequent abuse, sexual abuse, inhumane facilities, and resulting violent protests and extreme rates of self-harm. This communication lays out the legal and factual bases for investigating such treatment for crimes against humanity.

Australian government officials knowingly and purposefully designed these camps to be punishing. To stem “dangerous” immigration to Australia by sea, successive Australian governments crafted a system of inhumane detention designed to warn would-be refugees and deter further attempts to seek refuge on its shores. A functional hanging in the public square, the indefinite and mandatory detention of asylum seekers is designed to intimidate future asylum seekers and deter them from attempting the journey. However, “[i]t is a fundamental principle of human rights law that one person cannot be punished only for the reason of deterring another.”<sup>4</sup>

The government, in an attempt to keep its own hands clean, has outsourced the management of these camps to private corporations. Many directors and employees of these corporations are nationals of States Parties to the Rome Statute.

Numerous organisations, universities, public officials, think-tanks, UN bodies, and international coalitions have condemned Australia’s treatment of these refugees and asylum seekers.<sup>5</sup> Parliamentary and Senate inquiries in Australia have extensively documented the conditions in the offshore centres.<sup>6</sup> The conditions within the offshore detention centres, and the indefinite detention of migrants and refugees, violate international treaties, customary international law, and the most fundamental principles of human dignity. Yet, officials within the Australian

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<sup>4</sup> Press Release, Human Rights Council Office of the High Comm’r, ‘Australia’s human rights record blemished by punitive approach to migrants,’ U.N. Press Release (Nov. 18, 2016), (quoting François Crépeau, Special Rapporteur on the human rights of migrants), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20889&LangID=E#sthash.VRd3ikds.dpuf>. See also *infra* Part II, Section 1 (describing Australia’s deterrence policy).

<sup>5</sup> See *infra* Part II, Section 6 (describing widespread condemnation of Australia’s detention policies).

<sup>6</sup> See AUSTL. SENATE SELECT COMM. ON THE RECENT ALLEGATIONS RELATING TO CONDITIONS AND CIRCUMSTANCES AT THE REGIONAL PROCESSING CTR. IN NAURU, TAKING RESPONSIBILITY: CONDITIONS AND CIRCUMSTANCES AT AUSTRALIA’S REGIONAL PROCESSING CENTRE IN NAURU (Aug. 2015), [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regional\\_processing\\_Nauru/Regional\\_processing\\_Nauru/~media/Committees/nauru\\_ctte/Final\\_Report/report.pdf](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru/~media/Committees/nauru_ctte/Final_Report/report.pdf); [Hereinafter TAKING RESPONSIBILITY] Senate Legal and Constitutional Affairs Committee Inquiry, Conditions and Treatment of Asylum Seekers and Refugees at the Regional Processing Centres in the Republic of Nauru and Papua New Guinea, May 5, 2016, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Offshore\\_RPCs/~media/Committees/legcon\\_ctte/Offshore\\_RPCs/Interim\\_Report/c01.pdf](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Offshore_RPCs/~media/Committees/legcon_ctte/Offshore_RPCs/Interim_Report/c01.pdf); Australian Department of Immigration and Border Protection, *Submission: Senate Inquiry into the Conditions and Treatment of Asylum Seekers and Refugees at the Regional Processing Centres in the Republic of Nauru and Papua New Guinea*, March 2016, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Offshore\\_RPCs/Submissions](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Offshore_RPCs/Submissions) [Hereinafter DIBP submission]; AUSTL. HUMAN RIGHTS COMM’N, THE FORGOTTEN CHILDREN: NATIONAL INQUIRY INTO CHILDREN IN IMMIGRATION DETENTION 185 (2014), <http://www.humanrights.gov.au/publications/forgotten-children-national-inquiry-children-immigration-detention-2014/1-introduction> [hereinafter FORGOTTEN CHILDREN].



government have failed to remedy the situation. Troublingly, despite the international backlash, several nations appear poised to model Australia's approach to refugee and immigration detention.<sup>7</sup> Indefinite, offshore detention of refugees and asylum seekers may be quickly normalised absent a definite determination of its illegality.

The Stanford International Human Rights and Conflict Resolution Clinic, the Global Legal Action Network (GLAN), and the undersigned legal scholars offer this submission by way of information on crimes within the jurisdiction of the Court, within the meaning of Article 15(1) of the *Rome Statute* of the ICC. This Communiqué should assist the OTP in assessing which Australian officials and their corporate partners may be responsible for crimes against humanity, falling within the jurisdiction of the Court, committed in the territory of Papua New Guinea and Nauru.

The submission shows that these crimes were committed as part of a widespread or systematic attack against a civilian population in furtherance of a state policy designed to deter immigration to Australia. Several of these crimes may be ongoing, requiring urgent consideration by the OTP.

## 2. Legislative Framework and Context

Australia has a long history of measures aimed at controlling and deterring the entry of foreign nationals and deterring the flow of asylum seekers into Australia.<sup>8</sup> In late 2013, the Australian government launched Operation Sovereign Borders (OSB) under the aegis of the Joint Agency Task Force (“JATF”), comprising groups in the Australian Federal Police, the Australian Border Force, and the Department of Immigration and Border Protection.<sup>9</sup> The mandate of OSB is to prevent boats from landing irregularly in Australia through “turnbacks” or “pushbacks” conducted by Australian forces, such as the Navy.<sup>10</sup> Moreover, the Australian government relies on offshore processing of asylum seekers, detained on Manus Island in Papua New Guinea, and Nauru. These two nations lie to the northeast of Australia. As the Liberal Party stated in its *Operation Sovereign Borders* Policy brief in July 2013, “[f]or years the Coalition has advocated

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<sup>7</sup> See Section IV, Part B, “Gravity.”

<sup>8</sup> JANET PHILLIPS, AUSTL. PARLIAMENTARY LIBRARY, A COMPARISON OF COALITION AND LABOR GOVERNMENT ASYLUM POLICIES IN AUSTRALIA SINCE 2001, at 3 (Feb. 28, 2014), [http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/3024333/upload\\_binary/3024333.pdf;fileType=application%2Fpdf#search=%22library/prspub/3024333%22](http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/3024333/upload_binary/3024333.pdf;fileType=application%2Fpdf#search=%22library/prspub/3024333%22).

<sup>9</sup> *Operation Sovereign Borders*, AUSTL. DEP'T OF IMMIGRATION AND BORDER PROT., <http://www.osb.border.gov.au/en/Operation-Sovereign-Borders> (last visited Jan. 24, 2017).

<sup>10</sup> Amnesty Int'l, *By Hook or By Crook: Australia's Abuse of Asylum-Seekers at Sea*, AI Index ASA 12/2576/2015 (Oct. 2015), <https://www.amnestyusa.org/sites/default/files/australia-by-hook-or-by-crook.pdf>.

a strong and consistent policy stance that focuses single-mindedly on deterrence. These policies are well known and include . . . third country offshore processing on Nauru and Manus Island.”<sup>11</sup>

This framework has long roots in Australian refugee policy. In the early 1990s the Keating government implemented mandatory detention for all non-citizens lacking a valid visa.<sup>12</sup> In September 2001, after the *Tampa* incident,<sup>13</sup> the Howard government began a maritime operation with the intention of physically diverting and pushing back boats filled with asylum seekers hoping to reach Australia (“Operation Relex”). On 26 September 2001, the Howard government passed the *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth), marking what came to be known as the “Pacific Solution.” Australia signed a Memorandum of Understanding (MOU) with Papua New Guinea on 11 October 2001 and with Nauru on 11 December 2001 for the accommodation of asylum seekers during the processing of their claims.<sup>14</sup> Thereafter, Australian forces intercepted unauthorised boat arrivals at sea and either returned them to their departure country, or removed them to Nauru or Manus Island, Papua New Guinea. The Rudd government dismantled the Pacific Solution in 2008, announcing that the offshore centres would no longer be used.

However, in the face of rising boat arrivals, the Gillard government, in 2010, began discussions with other countries for a regional processing centre. An Expert Panel on Asylum Seekers convened in 2012, leading to the reintroduction of offshore processing on Nauru and Manus Island. Australia signed updated MOUs with Nauru and Papua New Guinea in August and September of 2010, and began to transfer asylum seekers shortly thereafter.<sup>15</sup> Undergirding the return to offshore processing was the new principle of “no advantage,” whereby “irregular migrants gain no benefit by choosing to circumvent regular migration mechanisms.”<sup>16</sup>

In June 2013, Kevin Rudd became Prime Minister again and announced even tougher changes to Australia’s asylum policies: all asylum seekers travelling by boat without a valid visa would be sent offshore for processing; no refugees would be resettled in Australia; those with unsuccessful claims would be returned to their home country or held in a transit facility indefinitely.<sup>17</sup> At the

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<sup>11</sup> Liberal Party of Australia, THE COALITION’S OPERATION SOVEREIGN BORDERS POLICY, at 5 (July 2013), <http://sievx.com/articles/OSB/201307xxTheCoalitionsOSBPolicy.pdf>.

<sup>12</sup> JANET PHILLIPS, *supra* note 8, at 6.

<sup>13</sup> In August 2001, Norwegian sailors rescued 433 asylum seekers from a sinking Indonesian fishing vessel en route to Australia. The container ship—the *MV Tampa*—attempted to deliver these asylum seekers to Australia, but Australian border force agents rebuffed them at sea. A five-day standoff ensued, while the fates of these individuals swung in the balance.

<sup>14</sup> JANET PHILLIPS, *supra* note 8, at 4-5.

<sup>15</sup> *Id.* at 5.

<sup>16</sup> Press Release, Parliament of Austl., Report of the Expert Panel on Asylum Seekers Released (Aug. 13, 2012), [http://www.goodsams.org.au/wp-content/uploads/2012/09/120813\\_media\\_release\\_final\\_report\\_recommendations.pdf](http://www.goodsams.org.au/wp-content/uploads/2012/09/120813_media_release_final_report_recommendations.pdf).

<sup>17</sup> Press Release, Kevin Rudd, Prime Minister and Att’y Gen. Minister for Immigration, Australia and Papua New Guinea Regional Settlement Arrangement (July 19, 2013),

first OSB media briefing on 23 September 2013, the Minister for Immigration and Border Protection, Scott Morrison, stated that the government would make an effort to transfer all new boat arrivals from Australian detention facilities to Papua New Guinea or Nauru within 48 hours of their arrival.<sup>18</sup>

More recently, the Australian Parliament passed the *Australian Border Force Act 2015 (Cth)*, first entering into force in July 2015 and since amended in June 2016, preventing Immigration and Border Protection workers from disclosing or making records of protected information.<sup>19</sup> The Act applies to Immigration officials, as well as contractors or consultants performing services for the department, among others.<sup>20</sup> The law makes the unauthorised disclosure of records an offence punishable by imprisonment of up to two years.<sup>21</sup> The information that may not be disclosed without committing an offence includes all information obtained by an Immigration and Border Protection worker in their capacity as such a worker.<sup>22</sup> This Act has suppressed information about the offshore processing centres by threatening these workers with criminal sanctions.

Rising domestic and international criticism of its government officials' treatment of refugees and asylum seekers has led the Australian government to seek alternative resolutions, short of allowing refugees and asylum seekers to enter Australian territory. During the past decade, Australia has repeatedly entered into negotiations with third countries to resettle the refugees held on Manus Island and in Nauru, with little success. In 2007, Australia and the United States reached a refugee swap deal. Under that deal, up to 200 refugees a year held on Nauru could have been swapped for Cuban and Haitian refugees held at Guantánamo Bay. But no refugee was ever exchanged under that deal.<sup>23</sup> In 2011, the Gillard government announced an agreement with Malaysia, under which Malaysia would accept the transfer of up to 800 asylum seekers from Australia. In return, Australia would resettle 4000 refugees from Malaysia. The Australian High Court invalidated the solution, however, citing the fact that Malaysia is not a party to the *Refugee Convention* or its Protocol, and was not legally bound under either international or domestic law to provide the access and the protections that were required by the *Migration Act 1958 (Cth)*.<sup>24</sup> In

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<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F2611769%22>.

<sup>18</sup> Press Conference, Scott Morrison, Minister for Immigration and Border Prot., Operation Sovereign Borders (Sept. 23, 2013),

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F3099126%22>.

<sup>19</sup> Australian Border Force Act 2015 (Act No. 40, 2015) (Austl.).

<sup>20</sup> *Id.* § 4.

<sup>21</sup> *Id.* § 42.

<sup>22</sup> *Id.* § 4.

<sup>23</sup> Associated Press, *Report: U.S. Close to Accepting Hundreds of Australia's Refugees*, N.Y. TIMES, Nov. 10, 2016, [https://www.nytimes.com/2016/11/11/world/australia/australia-asylum-seekers-united-states.html?\\_r=1](https://www.nytimes.com/2016/11/11/world/australia/australia-asylum-seekers-united-states.html?_r=1).

<sup>24</sup> Plaintiff M70/2011 v Minister for Immigration and Citizenship [2011] HCA 32; (2011) 244 CLR 144. See Jeremy Thompson, *High Court scuttles Malaysia swap deal*, ABC NEWS, Sept. 5, 2011, <http://www.abc.net.au/news/2011-08-31/high-court-rules-on-asylum-seeker-challenge/2864218>.

2014, Australia's then-Minister of Immigration and Border Protection Scott Morrison signed a deal with Cambodia. Pursuant to this agreement, Australia pledged to pay the government of Cambodia approximately \$55 million. In return, Cambodia would only accept refugees who voluntarily chose to be relocated, and had an exclusive right to choose the number it would take and when. The deal was opposed by many refugees, as well as the United Nations High Commission on Refugees ("UNHCR").<sup>25</sup> Only four refugees from Nauru volunteered to resettle in Cambodia as part of a trial. They were later joined by another. The original four all left Cambodia for their home countries from which they had once fled.<sup>26</sup>

Most recently, in November 2016, Australia announced that the United States would resettle up to 1,800 refugees held on Nauru and Papua New Guinea,<sup>27</sup> subject to an 18-to-24-month screening process by the Department of Homeland Security.<sup>28</sup> After the inauguration of President Donald Trump, however, the viability of that agreement has been called into question. Australian officials have said that the deal would still be honored, meaning the refugees can still express interest to resettle in the U.S. However, given recent limitations imposed by the United States on refugees from many of the countries represented in Australia's refugee population, it is unclear how many would be successfully resettled.<sup>29</sup>

## Part II: Factual Allegations

As authorised by the *Pacific Solution*, Australian government officials and their corporate partners, in association with government officials on Nauru and Papua New Guinea, established many detention centres, including sites on Manus Island, in Papua New Guinea<sup>30</sup> and on Nauru. Australia signed an MOU with Papua New Guinea on 11 October 2001 and with Nauru on 11 December 2001 for the accommodation of asylum seekers during the processing of their

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<sup>25</sup> MADELINE GLEESON, OFFSHORE: BEHIND THE WIRE ON MANUS AND NAURU 295-96 (2016).

<sup>26</sup> See Lauren Crothers, *Last refugee among group Australia sent to Cambodia returns to home country*, THE GUARDIAN, May 27, 2016, <https://www.theguardian.com/australia-news/2016/may/28/last-refugee-among-group-australia-sent-to-cambodia-returns-to-home-country>; Lindsay Murdoch & Michael Koziol, *Australia's Cambodia refugee resettlement plan 'a failure'*, THE SYDNEY MORNING HERALD, Apr. 3, 2016, <http://www.smh.com.au/world/australias-cambodia-refugee-resettlement-plan-a-failure-20160403-gnx3jv.html>. See also MADELINE GLEESON, OFFSHORE: BEHIND THE WIRE ON MANUS AND NAURU 292-304 (2016).

<sup>27</sup> Associated Press, *Report: U.S. Close to Accepting Hundreds of Australia's Refugees*, N.Y. TIMES, Nov. 10, 2016, [https://www.nytimes.com/2016/11/11/world/australia/australia-asylum-seekers-united-states.html?\\_r=1](https://www.nytimes.com/2016/11/11/world/australia/australia-asylum-seekers-united-states.html?_r=1).

<sup>28</sup> Michelle Innis, *As Trump Nears Office, Australian Deal to Move Refugees to U.S. Is in Doubt*, N.Y. TIMES, Nov. 17, 2016, <https://www.nytimes.com/2016/11/18/world/australia/australia-us-refugee-deal.html>.

<sup>29</sup> Jacqueline Williams, *Australia Says Trump Will Honor One-Time Deal to Accept Refugees*, N.Y. TIMES, Jan. 30, 2017, [https://www.nytimes.com/2017/01/30/world/australia/trump-us-refugee-manus-nauru.html?\\_r=1](https://www.nytimes.com/2017/01/30/world/australia/trump-us-refugee-manus-nauru.html?_r=1).

<sup>30</sup> The Australian government, in conjunction with Papua New Guinea, established the Manus Island detention centre in October of 2001. See AUSTL. PARLIAMENTARY LIBRARY, THE 'PACIFIC SOLUTION' REVISITED: A STATISTICAL GUIDE TO THE ASYLUM SEEKER CASELOADS ON NAURU AND MANUS ISLAND (Sep. 4, 2012), [http://www.aph.gov.au/About Parliament/Parliamentary Departments/Parliamentary Library/pubs/BN/2012-2013/PacificSolution](http://www.aph.gov.au/About%20Parliament/Parliamentary%20Departments/Parliamentary%20Library/pubs/BN/2012-2013/PacificSolution).

claims.<sup>31</sup> Thereafter, Australian border force authorities intercepted unauthorised boat arrivals, and either returned them to their departure country or removed them to Nauru or Manus Island.

## 1. Australian Officials Developed Offshore Detention to “Deter” Refugees and Asylum Seekers from Coming to Australia

Australian government officials, in coordination with corporate employees and officers working for or contracted by them, have pursued a long-standing policy of deterring refugees and asylum seekers from securing haven on its shores. In pursuance of the “Pacific Solution” (approximately 2001 – 2007 & 2012 – present), and supported by a number of naval operations the most recent of which is “Operation Sovereign Borders (approximately 2013 – present), Australian government officials crafted a complicated legal architecture seeking to legitimate the indefinite detention of refugees and asylum seekers entering the country by sea. Australian representatives had introduced a policy of indefinite administrative detention for refugees and asylum seekers in the early 1990s, ostensibly in response to a “wave of Indochinese boat arrivals.”<sup>32</sup> Their goal was to stem “fears of an increased movement of asylum seekers,” whose presence “symbolise[d] the inability of governments to control their borders, and in Australia’s case, to protect the integrity of its immigration programme.”<sup>33</sup> This programme of mandatory, indefinite detention has been intensified by successive administrations since 2001. In its current form, it seeks to deter refugees from traveling to Australia “irregularly” by a) attempting physically to divert boats away from Australian shores; b) detaining refugees and asylum seekers indefinitely offshore; c) declaring that “unauthorised” refugees and asylum seekers can never settle in Australia; and d) maintaining such torturous and dehumanising conditions that other refugees are deterred from attempting to seek asylum in Australia through such means.

Australian government officials designed and implemented this programme with the express intention of deterring migration. In 2010, Prime Minister Gillard framed offshore processing as

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<sup>31</sup> JANET PHILLIPS & HARRIET SPINKS, AUSTL. PARLIAMENTARY LIBRARY, IMMIGRATION DETENTION IN AUSTRALIA (Mar. 20, 2013),

[http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BN/2012-2013/Detention](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/Detention), at 4-5.

<sup>32</sup> *Id.*

<sup>33</sup> AUSTL. PARLIAMENT JOINT STANDING COMM. ON MIGRATION REGULATIONS, FIRST REPORT: ILLEGAL ENTRANTS IN AUSTRALIA – BALANCING CONTROL AND COMPASSION 12-14 (Sept. 1990),

[http://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_committees?url=reports/1990/1990\\_pp210.pdf](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_committees?url=reports/1990/1990_pp210.pdf). Statutory enactments strengthening these detention policies were catalysed in August 2001, when 433 asylum seekers were rescued from a sinking Indonesian fishing vessel en route to Australia via a Norwegian container ship. The container ship—the *MV Tampa*—attempted to deliver these immigrants to Australia, but were rebuffed at sea. A five-day standoff ensued, while the fates of these immigrants swung in the balance. The standoff, popularly known as the “Tampa Incident,” received significant media attention and is frequently recognized as the justification for Australia’s harsh offshore detention practices.

critical to “stop the boats not at our shoreline but before they even leave those faraway ports.”<sup>34</sup> To do this, refugees must be told that they can never settle in Australia if they arrive by boat seeking asylum, regardless of the strength of their asylum claims, thereby ensuring that “people smugglers have nothing to sell.”<sup>35</sup> In 2012, the architect of offshore detention and head of the Expert Panel on Asylum Seekers, Air Chief Marshall Angus Houston, stated that Australia must “shift the balance of risk and incentive in favour of regular migration pathways and established international protections and against high-risk maritime migration.”<sup>36</sup> In other words, offshore processing was needed “as a matter of urgency,” to serve as a “necessary circuit-breaker to the current surge in irregular migration to Australia.”<sup>37</sup> As the Coalition Party stated in its *Operation Sovereign Borders Policy* brief in July 2013, “[f]or years the Coalition has advocated a strong and consistent policy stance that focuses single-mindedly on deterrence. These policies are well known and include . . . third country offshore processing on Nauru and Manus Island.”<sup>38</sup>

Australian authorities expressly advertise this intent. The official government poster<sup>39</sup> for “Operation Sovereign Borders” depicts a brutal, choppy sea, stormy conditions, and a single, unstable vessel riding a whitecap. Writ large across the sky, in red lettering, is the phrase: “NO WAY, you will not make Australia home.”<sup>40</sup> It details that “the rules apply to everyone: families, children, unaccompanied children, educated and skilled. There are no exceptions.”<sup>41</sup> These intimidating images are designed to deter those who might seek asylum on Australia’s shores.

Accounts from former employees with first-hand knowledge of the conditions provide further evidence that government officials, in coordination with corporate agents, designed conditions offshore to be cruel, so as to further deter arrivals. Greg Lake, a former department official at a processing centre, stated that the government specifically interned children to show how terrible offshore processing could be, thereby deterring individuals who might seek refuge in Australia.

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<sup>34</sup> Julia Gillard, Prime Minister, *Moving Australia Forward*, Address at the Lowy Institute, Sydney, at 7 (July 6, 2010), available at [https://www.lowyinstitute.org/sites/default/files/pubfiles/Moving-Australia-forward\\_Julia-Gillard-PM\\_1.pdf](https://www.lowyinstitute.org/sites/default/files/pubfiles/Moving-Australia-forward_Julia-Gillard-PM_1.pdf).

<sup>35</sup> *Id.* See also Khalid Koser, *Smashing the people smugglers’ business model*, THE LOWY INSTITUTE: THE INTERPRETER (Nov. 3, 2011, 1:44 PM), <https://www.lowyinstitute.org/the-interpreter/smashing-people-smugglers-business-model>.

<sup>36</sup> ANGUS HOUSTON, PARIS ARISTOTLE, & MICHAEL L’ESTRANGE, AUSTRAL. EXPERT PANEL ON ASYLUM SEEKERS, REPORT OF THE EXPERT PANEL ON ASYLUM SEEKERS 8 (Aug. 2012), <http://www.kaldorcentre.unsw.edu.au/sites/default/files/expert-panel-report.pdf>.

<sup>37</sup> *Id.* at 47.

<sup>38</sup> Liberal Party of Australia, THE COALITION’S OPERATION SOVEREIGN BORDERS POLICY, at 2 (July 2013), <http://sievx.com/articles/OSB/201307xxTheCoalitionsOSBPolicy.pdf>.

<sup>39</sup> Michael Outram, *Chief Executive Certification for Government Advertising Campaigns*, AUSTRAL. CUSTOM AND BORDER PROT. SERVICE (May 2015), <https://www.border.gov.au/AccessandAccountability/Documents/CEO-certification-phase-3-onshore-campaign-advertising.pdf#search=no%20way> (Chief Executive Officer Michael Outram, “certify[ing] that the *No way campaign* . . . complies with the Short-term *Interim Guidelines on Information and Advertising Campaigns by Australian Government Departments and Agencies* (Guidelines)”).

<sup>40</sup> Austl. Gov’t *Operation Sovereign Borders, No Way. You will not make Australia home*, YouTube (Apr. 15, 2014), <https://www.youtube.com/watch?v=rT12WH4a92w>.

<sup>41</sup> *Id.*

He affirms, they “wanted to send a deterrent message” and “it was important to send some children” who, while over seven years old, “looked the youngest”<sup>42</sup> to detention centres.

According to Lake, by making conditions cruel and targeting children, the government believed boat arrivals might cease.<sup>43</sup> Mark Isaacs, a former employee at a processing centre, stated that dehumanising treatment is “exactly the point;” “cruelty and isolation have become Australia’s strategy” in deterring migration.<sup>44</sup> Australia’s government officials and representatives encouraged stories of hardship in detention to filter back to friends and family, thereby deterring future journeys. As the former head of the detention health provider IHMS stated, treatment of asylum seekers on Nauru is “akin to torture.”<sup>45</sup> Liz Thompson, a former migration agent involved in refugee assessment interviews, described these camps as “an experiment in the ultimate logic of deterrence, designed to frustrate the hell out of people and terrify them so that they go home.”<sup>46</sup>

A number of recent human rights reports have strongly criticised the Australian government’s use of a policy of brutalisation to deter other asylum seekers. The UNHCR has condemned this strategy, stating “the Australian government’s clear policy of using detention of asylum seekers for the purpose of deterrence is contrary to international law.”<sup>47</sup> In October 2016, Amnesty International released a report entitled *Island of Despair*, based on interviews with refugees, asylum seekers, and current or former contract workers who had delivered services on the part of the Australian government in Nauru.<sup>48</sup> It documented multiple allegations of recurrent self-harm, persecution, corporal punishment of children, attempted suicide, intimidation, sexual assault, and isolation, concluding that the evidence presented in the report made clear that ‘the Australian Government’s refugee policies – far from minimizing harm and maximizing protection – have been explicitly designed to inflict incalculable damage on hundreds of women, men and children on Nauru, whose only “crime” was to seek Australia’s protection, and to lack a visa while doing so’,<sup>49</sup> and that ‘[t]he Government of Australia’s “processing” of refugees and asylum-seekers on Nauru is a deliberate and systematic regime of neglect and cruelty, and amounts to torture under

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<sup>42</sup> *National Inquiry into Children in Immigration Detention 2014: Sydney Public Hearing*, Austl. Human Rights Comm. (July 31, 2014), <https://www.humanrights.gov.au/sites/default/files/Mr%20Lake.pdf>, (statement of Greg Lake, former official, Australian Immigration Detention Centre).

<sup>43</sup> Stanford Clinic interview with Greg Lake in Sydney, Australia (May 11, 2016).

<sup>44</sup> Mark Isaacs, *The Intolerable Cruelty of Australia’s Refugee Strategy*, FOREIGN POLICY, May 2, 2016, <http://foreignpolicy.com/2016/05/02/australia-papua-new-guinea-refugee-manus-nauru/>.

<sup>45</sup> Lexi Metherell, *Immigration detention psychiatrist Dr. Peter Young says treatment of asylum seekers akin to torture*, ABC NEWS, Aug. 5, 2014, <http://www.abc.net.au/news/2014-08-05/psychiatrist-says-treatment-of-asylum-seekers-akin-to-torture/5650992>.

<sup>46</sup> *Manus and Nauru*, REFUGEE ACTION COAL. SYDNEY, (2016) [http://www.refugeeaction.org.au/?page\\_id=4528](http://www.refugeeaction.org.au/?page_id=4528).

<sup>47</sup> Expert Roundtable organised by the U.N. High Commissioner for Refugees, *Summary Conclusions: Article 31 of the 1951 Convention*, §11(c), U.N. doc. A/55/383 (Nov. 2000), <http://www.unhcr.org/419c783f4.pdf>.

<sup>48</sup> AMNESTY INT’L, *ISLAND OF DESPAIR: AUSTRALIA’S “PROCESSING” OF REFUGEES ON NAURU*, AI Index ASA 12/4934/2016 (2016),

<https://www.amnesty.org/download/Documents/ASA1249342016ENGLISH.PDF> [hereinafter ISLAND OF DESPAIR].

<sup>49</sup> *Id.* at 54.

international law’.<sup>50</sup> The end of mission statement made by François Crépeau, the UN special rapporteur on the human rights of migrants following his official visit to Australia in November 2016, criticised Australian authorities for adopting ‘a very punitive approach to unauthorised maritime arrivals, with the explicit intention to deter other potential candidates’, noting that ‘this situation is purposely engineered by Australian authorities so as to serve as a deterrent for potential future unauthorised maritime arrivals’.<sup>51</sup>

## **2. The Statutory and Legal Landscape of Australia, Nauru and Papua New Guinea Results in Indefinite Detention and Renders Domestic Legal Remedy Impossible**

### **A. The Australian Government Passed Multiple Pieces of Legislation—Stretching Back to 1992—Seeking to Legitimate Offshore Detention**

Australian representatives and officials created a legal framework that purports to legitimate its illegal offshore detention policy. All asylum seekers arriving by boat are detained pursuant to Section 189 of the *Migration Act 1958*.<sup>52</sup> The *Migration Amendment Act 1992 (Cth)* made this detention mandatory—initially as an interim measure to deal with “designated persons” (Indochinese unauthorised arrivals), and eventually with the *Migration Reform Act 1992 (Cth)*,<sup>53</sup> the detention expanded to be applied to *all* “unlawful” immigrants,<sup>54</sup> requiring migration officers to detain any person suspected of being “unlawful.”<sup>55</sup> Additionally, in 2001, as a response to the “Tampa Incident,”<sup>56</sup> the Australian Parliament passed both the *Migration Amendment (Excision from Migration Zone) Act 2001* and the *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001*, giving effect to a policy of offshore detention and transfer colloquially known as the “Pacific Solution.”<sup>57</sup>

The “Pacific Solution” articulates a policy of transfer of asylum seekers to offshore detention centres. Of note, the “Pacific Solution” excised Christmas Island, Ashmore and Cartier Islands,

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<sup>50</sup> *Id.* at 43.

<sup>51</sup> End of mission Statement by the UN Special Rapporteur on the human rights of migrants on his official visit to Australia (1-18 November 2016) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20885&LangID=E#sthash.inqfs0Le.dp>.

<sup>52</sup> *Migration Act 1958*, § 189 (1958) (Austl.).

<sup>53</sup> *Migration Amendment Act 1992*, No. 24 (Austl.).

<sup>54</sup> *Migration Reform Act of 1992*, No. 184 (Austl.).

<sup>55</sup> AUSTL. PARLIAMENT JOINT STANDING COMM. ON MIGRATION, IMMIGRATION DETENTION IN AUSTRALIA: A NEW BEGINNING – CRITERIA FOR RELEASE FROM IMMIGRATION DETENTION 3, 151 (Dec. 2008), [http://www.aph.gov.au/PARLIAMENTARY\\_BUSINESS/COMMITTEES/HOUSE\\_OF\\_REPRESENTATIVES\\_COMMITTEES?url=mig/detention/report/front.pdf](http://www.aph.gov.au/PARLIAMENTARY_BUSINESS/COMMITTEES/HOUSE_OF_REPRESENTATIVES_COMMITTEES?url=mig/detention/report/front.pdf) [hereinafter A NEW BEGINNING].

<sup>56</sup> *See supra* text of note 32.

<sup>57</sup> A NEW BEGINNING, *supra* note 55, at 152. DIAC now acknowledges that more families began to arrive by boat due to the lack of family reunion options under the TPV regime. *See* Andrew Metcalfe, Austl. Sec’y, Dep’t of Immigration and Citizenship, Supplementary Budget Estimates 2011–12, Discussion at the Senate Legal and Constitutional Affairs Legislation Committee, (Oct. 17, 2011), available at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Festimate%2Ffc41d33f3-455d-4f98-ba56-42dc68511fc3%2F0002%22>.



and the Cocos (Keeling) Islands from Australia's "migration zone," meaning that non-citizens arriving there to seek asylum cannot apply for protection visas, to enter Australia.<sup>58</sup> Instead, those asylum seekers must be transferred to Offshore Processing Centres on Nauru and Manus Island (Papua New Guinea). Though successive Australian Parliaments repeatedly tinkered with the "Pacific Solution,"<sup>59</sup> one theme remains consistent: individuals arriving to Australia by boat will be placed in offshore detention and "will never be resettled in Australia."<sup>60</sup>

## **B. Australian Government Officials, in Coordination with Government Officials in Papua New Guinea and Australia, Maintain Secrecy Concerning Conditions at and Practices of Detention Centres**

Successive Australian Parliaments attempted to place the detention centres outside the public's reach and understanding, releasing little information about offshore detention and criminalising whistleblowers. In 2013, Australian government representatives codified a series of policies through its "Operation Sovereign Borders," designed to implement a "zero tolerance" posture for boat arrivals in Australia. The government adopted a deliberate media strategy to withhold information and stonewall reporters.<sup>61</sup> Through its enabling legislation, the Australian government "commenced a new practice of withholding information about asylum seekers that previous governments had routinely released."<sup>62</sup> The *Australian Border Force Act 2015 (Cth)*, which makes it a criminal offence for people who work in Australia's detention system to disclose facts they observe during their work,<sup>63</sup> intensified this secretive policy. The Act makes it "unlawful for a Department of Immigration and Border Protection employee or contractor, such as a doctor or welfare services provider, to disclose or record information obtained by them in that capacity."<sup>64</sup> This legislation has had a significantly chilling effect on potential whistleblowers and witnesses to the conditions of detention in the offshore facilities. Doctors registered significant concern about their inability to report abuses and what they described as dire medical conditions at the centres.<sup>65</sup> After facing a High Court challenge, the Australian

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<sup>58</sup> SENATE SELECT COMM., REPORT ON A CERTAIN MARITIME INCIDENT 8 (2002), [https://www.aph.gov.au/binaries/senate/committee/maritime\\_incident\\_ctte/report/report.pdf](https://www.aph.gov.au/binaries/senate/committee/maritime_incident_ctte/report/report.pdf). See also ILAN KATZ, ET AL., THE EXPERIENCES OF IRREGULAR MARITIME ARRIVALS DETAINED IN IMMIGRATION FACILITIES (July 2013), <https://www.border.gov.au/ReportsandPublications/Documents/research/IMA-experiences-IDF.pdf>.

<sup>59</sup> Indeed, the Pacific Solution ended in 2007, but was revived in 2012 and continues under the current government.

<sup>60</sup> *Asylum seekers arriving in Australia by boat to be resettled in Papua New Guinea*, ABC NEWS, July 19, 2013, <http://www.abc.net.au/news/2013-07-19/manus-island-detention-centre-to-be-expanded-under-rudd27s-asy/4830778>.

<sup>61</sup> Kellie Tranter, *No comment on operations: how Morrison's media strategy took shape*, THE GUARDIAN, Jul. 10, 2014, <https://www.theguardian.com/commentisfree/2014/jul/10/no-comment-on-operations-how-morrison-media-strategy-took-shape>.

<sup>62</sup> HUMAN RIGHTS LAW CTR., SAFEGUARDING DEMOCRACY 25 (2016) [hereinafter SAFEGUARDING DEMOCRACY].

<sup>63</sup> Australian Border Force Act 2015, § 42 (Austl.).

<sup>64</sup> SAFEGUARDING DEMOCRACY, *supra* note 62, at 26.

<sup>65</sup> Marie McNerney, *Australia refugees: Detention centre 'gag' angers medics*, BBC NEWS, Aug. 16, 2015, <http://www.bbc.com/news/world-australia-33923485>.

government backed down from this harsh stance and carved out an exception for “health professionals.”<sup>66</sup>

Additionally, Section 70 of the *Crimes Act 1914 (Cth)* threatens government employees with two years in prison for recording or disclosing information about events that they witness.<sup>67</sup> Moreover, the *Australian Special Intelligence Operation Act 1979 (Cth)* grants “ASIO agents . . . legal immunity for engaging in a range of otherwise criminal conduct” and penalises “disclosure” of information obtained from the detention centres, imprisoning violators for 5-10 years.<sup>68</sup>

The Australian Government has also denied Human Rights monitoring bodies access. On September 26, 2015, UN special rapporteur François Crépeau cancelled his planned trip to Nauru and Manus for fear that detention centre staff would be criminally prosecuted for providing him with information about the camps.<sup>69</sup> Under section 42 of the *Australian Border Force Act* an ‘entrusted person’ may face up to 2 years imprisonment for disclosing ‘protected information’.<sup>70</sup> He later stated, “[t]his threat of reprisals with persons who would want to cooperate with me on the occasion of this official visit is unacceptable. The Act prevents me from fully and freely carrying out my duties during the visit, as required by the UN guidelines for independent experts carrying out their country visit.”<sup>71</sup> As noted above, Crépeau subsequently made an official visit to Australia in November 2016, on which he visited Nauru and was highly critical of the situation there.

Since January of 2014, the Nauruan government has only granted two visas to journalists who might wish to enter Australian-run detention centres.<sup>72</sup> Access to Nauru remains limited: the non-refundable visa application fee for visiting journalists is AUD \$8,000, and as the UN Committee on the Rights of the Child notes, “some international organisations have been subjected to intimidation” when they attempt to access detention centres.<sup>73</sup> The Papua New

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<sup>66</sup> Ben Doherty, *Doctors freed to speak about Australia’s detention regime after U-turn*, THE GUARDIAN, Oct. 19, 2016, <https://www.theguardian.com/australia-news/2016/oct/20/doctors-freed-to-speak-about-australias-detention-regime-after-u-turn>; Ben Doherty, *Immigration detention doctors challenge Border Force Act’s secrecy clause in court*, THE GUARDIAN, July 26, 2016, <https://www.theguardian.com/australia-news/2016/jul/27/immigration-detention-doctors-challenge-border-force-acts-secrecy-clause-in-court>.

<sup>67</sup> SAFEGUARDING DEMOCRACY, *supra* note 62, at 25.

<sup>68</sup> *Id.*

<sup>69</sup> Jane Lee, *UN cancels Australia visit over Border Force laws*, THE SYDNEY MORNING HERALD, Sept. 26, 2015, <http://www.smh.com.au/federal-politics/political-news/un-postpones-australian-visit-over-failure-to-guarantee-protection-of-detention-centre-whistleblowers-from-recrimination-20150926-gjvgm2.html>.

<sup>70</sup> Australian Border Force Act 2015, § 42 (Austl.).

<sup>71</sup> *Id.*

<sup>72</sup> See *Human Rights Watch Submission to the Committee on the Rights of the Child Concerning Nauru*, HUMAN RIGHTS WATCH, Sept. 13, 2016, <https://www.hrw.org/news/2016/09/13/human-rights-watch-submission-committee-rights-child-concerning-nauru>.

<sup>73</sup> U.N. Comm. on the Rights of the Child, *Concluding observations on the initial report of Nauru*, CRC/C/NRU/CO/1 (Sept. 31, 2016), [http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/NRU/INT\\_CRC\\_COC\\_NRU\\_25458\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/NRU/INT_CRC_COC_NRU_25458_E.pdf).

Guinean government only permitted journalists to enter the Manus detention centre after the National Court ordered temporary access.<sup>74</sup>

### C. Australia's Legal System Has Not Provided Adequate Remedies

Australia's courts have upheld these legislative enactments, justifying the harsh and unlawful detention of refugees and asylum seekers as lawful under Australian law. This has been the case for indefinite detention: in 2004, the High Court of Australia (Australia's highest court of appeal) held that a non-citizen who does not have a visa, and is refused a protection visa but cannot be removed from Australia (on account of being stateless), could remain in detention for the rest of her life.<sup>75</sup> That same year, the Court also determined that the harsh detention conditions in the Woomera detention centre did not render detention unlawful.<sup>76</sup> In 2016, a plaintiff detained on Nauru brought a case before the High Court arguing that her detention was illegal because the Commonwealth either participated in or controlled the detention and that her detention was unconstitutional. The High Court of Australia upheld the Australian government's assertion that Nauru – and not Australia – is responsible for treatment in the offshore facilities.<sup>77</sup> The High Court ruled in that case that once an “unauthorised maritime arrival” leaves Australian custody for processing at Nauru, all “restrictions applied to the plaintiff are to be regarded as the independent exercise of sovereign legislative and executive power by Nauru.”<sup>78</sup> Given that there was no “condominium” or legal arrangement for joint exercise of sovereignty by Nauru and Australia over Nauruan territory, and that the facts (as agreed between the parties) accepted that the Commonwealth or its contractors would not have imposed restrictions on the plaintiff without Nauru's imposing restrictions on the plaintiff, the Court reasoned that, “if Nauru had not detained the plaintiff, the Commonwealth could not itself do so.”<sup>79</sup> This lack of concurrent authority, and the fact that the Commonwealth could not compel Nauru to detain asylum seekers, indicated to the Court that Nauru is an independent actor. The Court stated that, because Australia could not enforce detention on Nauru, they therefore did not exercise control. As elaborated further below, this is not the case.<sup>80</sup> The High Court thus allows the government of Australia to sidestep all legal responsibility for crimes and violations committed in offshore detention facilities—facilities they not only fund, but in which they may also “take, or cause to be taken, any action in relation to the arrangement or the regional processing functions of the country.”<sup>81</sup>

The Australian government has passed and drafted laws designed to remove access to the judiciary for asylum seekers and those transferred by Australian maritime forces. The *Migration*

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<sup>74</sup> *Id.*

<sup>75</sup> *Al Kateb v. Godwin* [2004] 219 CLR 562 (Austl.) at 92.

<sup>76</sup> *Behrooz v. Sec'y of the Dep't of Immigration and Multicultural and Indigenous Affairs* [2004] HCA 36 (Austl.).

<sup>77</sup> *M68-2015 v. Minister for Immigration and Border Prot.* [2016] HCA 1. ¶ 102 *et seq.*

<sup>78</sup> *Id.* ¶ 34.

<sup>79</sup> *Id.* ¶ 35.

<sup>80</sup> See Part II, Section 4.

<sup>81</sup> Migration Act 1958, § 198AHA (1958) (Austl.).

*and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) amended by the *Maritime Powers Act 2013* (Cth), authorising the Minister to, inter alia, a) “make a determination that a vessel or class of vessels may be used to place, restrain, remove or detain a person to take them to the destination; and b) “make a determination authorising the exercise of powers in relation to a foreign vessel outside territorial waters, relating to detaining, or taking a vessel to a destination, or the treatment of persons while doing so.”<sup>82</sup> It also amended schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (the “ADJR Act”) to ensure the above decisions by the Minister are excluded from this, more accessible, form of judicial review.<sup>83</sup> The stated purpose of this was to deter “the making of unmeritorious claims as a means to delay an applicant’s departure from Australia.”<sup>84</sup> This constraint on review is, according to the government, “limited to circumstances . . . [in which] review by lower courts and on broader grounds would be inappropriate in respect of complex and highly sensitive operational matters.”<sup>85</sup> Consequently, petitioners may only seek review of decisions under the *Maritime Powers Act 2013* (Cth) based on constitutional remedies.<sup>86</sup> The government also proposed the enactment of the Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 (Cth), which would have limited the government’s liability for uses of force against asylum seekers in detention centres.<sup>87</sup> Though the Bill did not pass the Senate when considered in 2015,, the proposed powers would have allowed private contractors, acting on a reasonable belief of necessity, to use reasonable force against any person in order to protect the safety of another person or to maintain the good order, peace or security of an immigration detention facility.<sup>88</sup> The Bill would also have sought to preclude asylum seekers from bringing legal proceedings, including personal injury claims, against the Commonwealth and private contractors acting on behalf of the Commonwealth, where force was used in good faith.”<sup>89</sup>

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<sup>82</sup> AUSTL. LAW REFORM COMM’N., TRADITIONAL RIGHTS AND FREEDOMS – ENCROACHMENTS BY COMMONWEALTH LAWS §18.40 (July 2015), [https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc\\_127\\_interim\\_report.pdf](https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc_127_interim_report.pdf).

<sup>83</sup> *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) § 31.

<sup>84</sup> AUSTL. H.R. EXPLANATORY MEMO , MIGRATION AND MARITIME POWERS LEGISLATION AMENDMENT (RESOLVING THE ASYLUM LEGACY CASELOAD) BILL 2014 (2013-14), [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr5346\\_ems\\_a065619e-f31e-4284-a33e-38215222022%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr5346_ems_a065619e-f31e-4284-a33e-38215222022%22).

<sup>85</sup> *Id.*

<sup>86</sup> S. STANDING COMM. FOR THE SCRUTINY OF BILLS, FIFTEENTH REPORT OF 2014, at 923 (2014). Since the case of *S157*, review of decisions by officers of the Commonwealth, including government Ministers, by the High Court has been constitutionally protected to some degree: *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2; 211 CLR 476.

<sup>87</sup> See Paul Farrell, *Government Seeks Immunity over Use of Force in Immigration Detention*, THE GUARDIAN, Apr. 7, 2015, <http://www.theguardian.com/australia-news/2015/apr/08/government-seeks-immunity-over-use-of-force-in-immigration-detention>.

<sup>88</sup> Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 (Cth) § 5 (see proposed section 197BA).

<sup>89</sup> *Id.*

Finally, and crucially, the Australian criminal justice system has neither prosecuted nor investigated the criminal aspects of the detention practice discussed below and has thus failed to provide adequate remedies to the victims.

#### **D. Nauru's Legal System Has Not Provided Adequate Remedies**

Nauru's judiciary has neither investigated nor prosecuted crimes committed in detention facilities. Nauru's courts are underfunded and limited,<sup>90</sup> advocates and judges are routinely conscripted from Australia to provide legal services.<sup>91</sup> Of note, the Nauru government briefly placed Nauru under emergency rule in 2014. The nation's resident magistrate and Supreme Court registrar were removed from office, and the Nauruan government cancelled the visa of their Australian-based Chief Justice.<sup>92</sup> A broad swath of organizations within the Nauruan and Australian legal communities condemned these actions, arguing that their visa revocation and dismissals were unconstitutional and politically motivated.<sup>93</sup> According to the Judicial Conference of Australia, the Law Council of Australia, and the Australian Bar Association, these actions threatened "the existence of an independent, impartial and competent judiciary."<sup>94</sup> Geoffrey Eames, the deported Chief Justice, resigned that year, stating, "[he] could not be assured that the separation of powers and the independence of the judiciary would be respected."<sup>95</sup> Eames contends that his functional dismissal was because the Nauru government "doesn't like [my] decisions" and that the government's actions leave "every judge . . . at risk of having his independence undermined."<sup>96</sup> The government appointed three new judges that year<sup>97</sup> to replace the post vacated by Eames, changing the structure of the judiciary in an ad hoc fashion. It is also worth noting that, apart from constitutional law matters and a few other exceptions, the High Court of Australia acts as Nauru's highest court of appeals.<sup>98</sup>

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<sup>90</sup> Paul Farrell, *Revealed: Nauru prosecutors under fire from judiciary in asylum-seeker cases*, THE GUARDIAN, Oct. 30, 2016, <https://www.theguardian.com/world/2016/oct/30/revealed-nauru-prosecutors-under-fire-from-judiciary-in-asylum-seeker-cases>.

<sup>91</sup> Press Release, Nauru Gov't, Nauru appoints three new judges to oversee nations court (2014), available at <http://www.naurugov.nr/government-information-office/media-release/nauru-appoints-three-new-judges-to-oversee-nation%E2%80%99s-court.aspx>.

<sup>92</sup> Kelly Buchanan, *Nauru: Government Actions Against Judiciary Raise Concerns*, LIBRARY OF CONGRESS GLOBAL LEGAL MONITOR, Feb. 3, 2014, <http://www.loc.gov/law/foreign-news/article/nauru-government-actions-against-judiciary-raise-concerns/>.

<sup>93</sup> *Id.* (groups speaking out against these measures included the Law Council of Australia, the Australian Bar Association, the Nauru Law Society, the South Pacific Lawyers Association, and the Commonwealth Magistrates' and Judges' Association).

<sup>94</sup> Paul Farrell, *Nauru Judicial Interference Condemned by Australian Legal Community*, THE GUARDIAN, Jan. 20, 2014, <http://www.theguardian.com/world/2014/jan/21/attack-on-nauru-judiciary-denounced-by-australian-legal-community>.

<sup>95</sup> Michael Safi, *Nauru's Australian Chief Justice Resigns After 'Losing Faith' in the System*, THE GUARDIAN, Mar. 12, 2014, <http://www.theguardian.com/weather/2014/mar/12/naurus-australian-chief-justice-resigns-after-losing-faith-in-the-system>.

<sup>96</sup> *Id.*

<sup>97</sup> Nauru appoints three new judges to oversee nations court, *supra* note 91.

<sup>98</sup> Nauru Courts System Information, Pacific Islands Legal Institute, <http://www.paclii.org/nr/courts.html>

According to the Kaldor Centre at the Faculty of Law at the University of New South Wales, while there is “at least one legal challenge to the offshore processing regime before the Nauruan courts,” it is “moving slowly due to delays in the Nauruan judicial system and other matters.”<sup>99</sup> At best, this delay might be attributed to an inability of the government to handle the claims, similar to the Nauruan government’s “concerns that, given its small size and relatively limited resources,” it may not be “capable of supporting refugee resettlement.”<sup>100</sup>

### E. Papua New Guinea’s Legal System Has Not Provided Adequate Remedies

Papua New Guinea has not pursued criminal prosecution of crimes and human rights abuses related to detention. A successful civil suit before the Papua New Guinea Supreme Court purported to end its detention practices in late April 2016. However in April 2016, in *Namah v Pato*, the Supreme Court of Papua New Guinea unanimously held that the detention of asylum seekers on Manus Island was illegal and unconstitutional.<sup>101</sup> Specifically, the Court addressed whether the Papua New Guinea legislature legitimately amended Section 42(1)(g) of their Constitution to explicitly allow for the indefinite detention of refugees and those seeking asylum.<sup>102</sup>

The plain language of the Papua New Guinea constitution, prior to amendment, disallowed detention; Section 42(1)(g) allowed detention in very limited, traditionally criminal circumstances.<sup>103</sup> However, shortly after agreeing to the MOU with Australia, the Papua New Guinea legislature amended the Constitution to state: “for the purposes of holding a foreign national under arrangements made by Papua New Guinea with another country or with an international organisation that the Minister responsible for immigration matters, in his absolute discretion, approves.”<sup>104</sup> After discussing what “personal liberty” means in the context of their Constitution<sup>105</sup> and exploring the requirements of international law—including the *European Convention on Human Rights*<sup>106</sup>—the Supreme Court determined this amendment was not “reasonably justifiable in a democratic society having a proper respect for the rights and dignity of mankind.”<sup>107</sup> Equally, the failure to process their asylum claims and respect “the rights and freedoms of the *Constitution*” indicated that this was an unlawful detention.<sup>108</sup> Consequently,

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<sup>99</sup> MADELINE GLEESON, OFFSHORE PROCESSING: REFUGEE STATUS DETERMINATION FOR ASYLUM SEEKERS IN NAURU (May 1, 2016), <http://www.kaldorcentre.unsw.edu.au/publication/offshore-processing-refugee-status-determination-asylum-seekers-nauru#reactions> [hereinafter OFFSHORE PROCESSING].

<sup>100</sup> *Id.*

<sup>101</sup> *Namah v. Pato* [2013] SCA84 (Papua New Guinea) (unanimous decision, with one additional concurrence (Kandakasi, J.) not disagreeing with reasoning or judgment).

<sup>102</sup> *Id.* at 11.

<sup>103</sup> *Id.* at 14-15.

<sup>104</sup> *Id.* at 16.

<sup>105</sup> *Id.* at 12.

<sup>106</sup> *Id.* at 13.

<sup>107</sup> *Id.* at 20 (quoting the Constitution of Papua New Guinea).

<sup>108</sup> *Id.* at 24.

the court ordered that “[b]oth the Australian and Papua New Guinea governments shall forthwith . . . cease and prevent the continued unconstitutional and illegal detention of the asylum seekers or transferees at the relocation centre on Manus Island and the continued breach of the asylum seekers or transferees Constitutional and human rights.”<sup>109</sup>

While the following day the PNG Prime Minister Peter O’Neill announced that the centre would be closed and Australia would have to make other arrangements for the detainees,<sup>110</sup> to date no such arrangements have been made and the men remain on Manus Island.

### 3. Australia’s Offshore Detention Centres’ Practices and Operations

As of January 2017, according to the Australian authorities,<sup>111</sup> the Australian government held 1,233 individuals in offshore detention.<sup>112</sup> However, other groups report that there are as many as 2,500 asylum seekers and refugees, including 240 children, in offshore detention.<sup>113</sup> The “type” of refugee varies: 501 are “illegal maritime arrivals,” 351 overstayed Australian visas, 70 arrived by plane, and 10 arrived by chartered vessel.<sup>114</sup>

Since the Australian Government introduced the Migration Reform Act of 1992, the previous time-limit of 273 days for mandatory detention was abandoned. The detention of asylum seekers

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<sup>109</sup> *Id.* at 28.

<sup>110</sup> Stephanie Anderson, *Manus Island detention center to close, Peter Dutton and PNG Prime Minister confirm* (Aug. 17, 2016) <http://www.abc.net.au/news/2016-08-17/manus-island-to-close-png-prime-minister-confirms/7759810>.

<sup>111</sup> Other reporting agencies disagree as to these numbers. See, example given, Amnesty International reports that 1,159 asylum-seekers and refugees are currently housed on Nauru. ISLAND OF DESPAIR, *supra* note 48. However the Australian government reports only 410 refugees are housed on Nauru, as it does not count those in “open detention.” James Griffiths, *Australia accused of turning Nauru into ‘open-air prison,’* CNN, Oct. 18, 2016, <http://edition.cnn.com/2016/10/18/asia/australia-nauru-offshore-amnesty/>.

<sup>112</sup> Department of Immigration and Border Protection, Operation Sovereign Borders Monthly Update, January 2017 (Feb. 6, 2017), <http://newsroom.border.gov.au/channels/media-releases/releases/operation-sovereign-borders-monthly-update-january-3>.

<sup>113</sup> SAVE THE CHILDREN, AUSTRALIA, AND UNICEF, AT WHAT COST, THE HUMAN, ECONOMIC AND STRATEGIC COST OF AUSTRALIA’S ASYLUM SEEKER POLICIES AND THE ALTERNATIVES (Sept. 2016) [hereinafter AT WHAT COST]. This estimate is based upon publicly available information as well as informal consultations with a variety of organisations. See Kaldor Ctr. for Int’l Human Rights, *Transfer Tracker*, UNSW LAW (Sept. 21, 2016), <http://www.kaldorcentre.unsw.edu.au/publication/transfer-tracker>; FORGOTTEN CHILDREN, *supra* note 6, at 185; AUSTRAL. DEP’T OF IMMIGRATION AND BORDER PROT., IMMIGRATION DETENTION AND COMMUNITY STATISTICS SUMMARY (July 31, 2016), <https://www.border.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-31-july-2016.pdf>. See also Kara Vickery, *Peter Dutton pledges to be tough on people smugglers regardless of what High Court decides on Nauru*, NEWS CORP AUSTRALIAN NETWORK, Feb. 3, 2016, <http://www.news.com.au/national/politics/peter-dutton-pledges-to-be-tough-on-peoplesmugglers-regardless-of-what-high-court-decides-on-nauru/news-story/dccbbfd4d2ed3bdc11908cb6684bbb42>; Michael Gordon, *Peter Dutton vows children released from detention are still bound for Nauru*, THE SYDNEY MORNING HERALD, Apr. 4, 2016, <http://www.smh.com.au/federal-politics/political-news/peter-dutton-vows-children-released-from-detention-are-still-bound-for-nauru-20160404-gnxklk.html>.

<sup>114</sup> Griffiths, *supra* note 111.

is, accordingly, open-ended and potentially indefinite. The Australian High Court, which found that although asylum seekers should be removed from detention “as soon as reasonably practicable,” this did not mean that detention would be ‘limited to a maximum period expiring when it is impracticable to remove or deport the person.’<sup>115</sup> The Court further held that the indefinite detention of a failed applicant for a protection visa who could not be deported was authorised by the Migration Act. This indefinite aspect of Australia's detention scheme has been widely condemned, including by the UN Special Rapporteur on the human rights of migrants.<sup>116</sup>

Australian authorities have taken advantage of this permissiveness. Indeed, the average time in immigration detention is 454 days, and the majority of people held in detention have been there for more than 730 days.<sup>117</sup> The consequences on the detainees’ mental health are particularly dire, as discussed below.<sup>118</sup>

In September 2016, a confidential source at the Manus RPC told The Guardian Australia about an attitude of hopelessness among those in indefinite detention, severe enough for affirmed (“positive”) refugees to reject their valid protection claims:

*“Some guys put their hand up [to be returned]. Their attitude is ‘I don’t care if I get locked up when I go back, at least I’ll know it is for 10 years, I’ll get sentenced for a specific period of time and then it will be over.’ On Manus they don’t know how long the punishment will last. Men who have been found to be refugees, have waited and waited, and then given up and gone home. They have been worn down, unable to endure endless uncertainty.”<sup>119</sup>*

Amnesty International estimates that the total costs of Australia’s deterrence policy between 2003 and 2016 has been approximately \$7.3 billion.<sup>120</sup> UNICEF estimates the real cost of running this programme (from 2013-2016) has been \$9.6 billion.<sup>121</sup> UNICEF has described this “system” of detention as one that inflicts “cruel, inhuman or degrading treatment on children” and “violates a number of other core human rights principles.”<sup>122</sup>

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<sup>115</sup> *Al-Kateb v. Godwin* [2004] HCA 37, ¶34 (Austl.).

<sup>116</sup> See End of Mission Statement by the UN Special Rapporteur on the Human Rights of Migrants on his Official visit to Australia (1-18 November 2016) (November, 2016), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20885&LangID=E#sthash.inqfs0Le.dpuf>

<sup>117</sup> *Id.*

<sup>118</sup> See *infra* Part II, Section 3.B.iv.

<sup>119</sup> Ben Doherty, ‘*It’s simply coercion*’: *Manus island, immigration policy and the men with no future*, THE GUARDIAN, Sept. 28, 2016, <https://www.theguardian.com/australia-news/2016/sep/29/its-simply-coercion-manus-island-immigration-policy-and-the-men-with-no-future>.

<sup>120</sup> ISLAND OF DESPAIR, *supra* note 48, at 11.

<sup>121</sup> AT WHAT COST, *supra* note 113, at 4.

<sup>122</sup> *Id.* at 29. FORGOTTEN CHILDREN, *supra* note 6, at 195; U.N. GAOR, 28th Sess., Agenda item 3, U.N. Doc. A/HRC/28/68/Add.3, ¶¶ 19, 80 (Dec. 29, 2014); U.N. Comm. against Torture, CAT/C/AUS/CO/4-5, ¶ 17 (Dec. 23, 2014). See also, United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; Press Release, Comment by the Spokesperson for the UN High Commissioner for Human Rights, Rupert Colville, on the possible transfer of 267 people from Australia to Nauru, U.N. Press Release (Feb. 3, 2016),



## A. Nauru

Nauru is the world's smallest independent republic, located in the Pacific Ocean, south of the Marshall Islands.<sup>123</sup> The island is 21 square kilometres with no arable land—indeed, phosphate mining operations left the central 90% of Nauru a “wasteland.”<sup>124</sup>

The Australian government first began sending refugees to Nauru in 2001.<sup>125</sup> While the Australian border force and its overseers suspended transfers in 2007, they resumed them on August 29, 2012, when the governments of Australia and Nauru entered into a “Memorandum of Understanding,” codifying their policies “Relating to the Transfer To and Assessment of Persons in Nauru, and Related Issues.”<sup>126</sup> Here, Australia outlined the transfer and detention of those who have attempted to enter Australia “irregularly by sea” or “been intercepted by Australian authorities in the course of trying to reach Australia by irregular maritime means.”<sup>127</sup> They explicitly include those who migrate for the purpose of securing asylum under international law.<sup>128</sup> The Memorandum states, in part, that 1) “Australia will make all efforts to ensure that all Transferees depart the Republic of Nauru within as short a time as is reasonably necessary for the implementation of this MOU;” 2) “Australia will assist [Nauru] to settle in a third country all Transferees who [Nauru] determines are in need of international protection;” and 3) “Nauru undertakes to enable Transferees who it determines are in need of international protection to settle in Nauru.”<sup>129</sup> Of note, Australia and Nauru highlight the purpose of this Memorandum: “combating people Smuggling and Irregular Migration in the Asia-Pacific region.”<sup>130</sup> The two countries underscore this point repeatedly in the Agreement, stating the need for “a disincentive against Irregular Migration” and a policy that delivers “no benefit” to those who “circumvent[] regular migration arrangements.”<sup>131</sup> Additionally, both Australia and Nauru acknowledge their commitments to the *1951 Convention Relating to the Status of Refugees* and the *1967 Protocol*.<sup>132</sup>

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<http://www.ohchr.org/en/newsevents/pages/DisplayNews.aspx?NewsID=17024&LangID=E> (“We believe that transferring these 267 individuals to Nauru could further damage their physical and mental health, and would put Australia at risk of breaching its obligation not to return any person to cruel, inhuman or degrading treatment under the Convention against Torture.”).

<sup>123</sup> CIA, *The World Factbook: Nauru*, (Jan. 12, 2017), <https://www.cia.gov/library/publications/the-world-factbook/geos/nr.html>

<sup>124</sup> *Id.*

<sup>125</sup> AT WHAT COST, *supra* 113, at 13.

<sup>126</sup> This original Memorandum was later updated and superceded in August 2013, Memorandum of Understanding Relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues, Nauru-Austl., Aug. 3, 2013, <http://dfat.gov.au/geo/nauru/Documents/nauru-mou-20130803.pdf>.

<sup>127</sup> *Id.* at 3.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 4.

<sup>130</sup> *Id.* at 3.

<sup>131</sup> *Id.* at 2.

<sup>132</sup> *Id.* at 1.

Amnesty International, after interviews with service providers, employees and government officials, described Nauru as “effectively a client state of Australia.”<sup>133</sup> In exchange for hosting and operating the detention centre, the Nauru government charges Australia a monthly fee of USD \$2,270 per refugee and USD \$756 per asylum seeker.<sup>134</sup> In 2012, the Australian government signed a USD \$78 million contract with Canstruct to build a new regional processing centre on Nauru.<sup>135</sup> Indeed, according to Nauruan authorities, “the major source of revenue for the Government now comes from the operation of the Regional Processing Centre in Nauru.”<sup>136</sup> In 2016-17, Australia will provide over AUD \$25.5 million in overseas development assistance to Nauru, as compared to Nauru’s GDP of USD \$117 million in 2014.<sup>137</sup> As the Global Detention Project summarises, “[e]vidence from the Australian High Court, financial contracts for the RPC, and the Nauruan security forces, as well as contracts for private management of the offshore facility highlight the blurred lines of accountability and responsibility.”<sup>138</sup> Finally, the CIA World Factbook deemed Australia “Nauru’s . . . former occupier and later major source of support . . . [where] the cost to Australia of keeping the [Nauruan] government and economy afloat continues to climb.”<sup>139</sup>

The Australian Government has contracted with a number of entities to operate the detention facilities on Nauru. These include security companies,<sup>140</sup> welfare services,<sup>141</sup> health care services<sup>142</sup> and legal services,<sup>143</sup> among others.

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<sup>133</sup> ISLAND OF DESPAIR, *supra* note 48, at 12.

<sup>134</sup> AT WHAT COST, *supra* note 113.

<sup>135</sup> Matt O’Sullivan & Bianca Hall, *Asylum Seeker Industry’s \$8 billion money spinner*, THE SYDNEY MORNING HERALD, Apr. 21, 2013, <http://www.smh.com.au/national/asylum-seeker-industrys-8-billion-money-spinner-20130420-2i781.html>.

<sup>136</sup> Glob. Det. Project, *Nauru Immigration Detention Profile*, (Mar. 2016), <https://www.globaldetentionproject.org/countries/asia-pacific/nauru> (citation omitted).

<sup>137</sup> Austl. Dep’t of Foreign Affairs and Trade, *Nauru Country Brief*, (Dec. 2016), <http://dfat.gov.au/trade/resources/Documents/naur.pdf>. See also Austl. Dep’t of Foreign Affairs and Trade, *Overview of Australia’s aid program to Nauru*, (2015-16), <http://dfat.gov.au/geo/nauru/development-assistance/pages/development-assistance-in-nauru.aspx>.

<sup>138</sup> Broadpectrum (formerly Transfield Services and, as of 2016, new parent company Ferrovial)-- provides transport services on behalf of the Australian Department and Border Protection, as well as “Garrison and Welfare Support Services.” Glob. Det. Project, *supra* note 136, at 4.

<sup>139</sup> CIA, *supra* note 123.

<sup>140</sup> ISLAND OF DESPAIR, *supra* note 48, at 14. See also Helen Davidson & Ben Doherty, *Nauru Support Workers to Leave before Christmas after Decision not to Retender*, THE GUARDIAN, Sept. 19, 2016, <https://www.theguardian.com/australia-news/2016/sep/19/nauru-support-workers-to-leave-before-christmas-afterdecision-not-to-retender>

<sup>141</sup> *Id.* Connect Settlement Services, which took over for Save the Children Australia in 2015, provides welfare services.

<sup>142</sup> International Health and Medical Services (IHMS) has held successive contracts with Australia’s immigration department to provide health services to refugees held in both onshore and offshore detention camps since 2009. Paul Farrell, *IHMS, the healthcare giant at the heart of Australia’s asylum system – explainer*, THE GUARDIAN, July 20, 2015, <https://www.theguardian.com/australia-news/2015/jul/21/ihms-the-healthcare-giant-at-the-heart-of-australias-asylum-system-explainer>. See also Austl. Gov’t, *Contract Notice View – CN1601611-A1*, AUSTENDER, Feb. 14, 2014, <https://www.tenders.gov.au/?event=public.cn.Amendment.view&CNUUID=C97F786C-DBCA-DEC8-B90B163ADC7C800E> (contract between IHMS and DIBP for IHMS to provide health services for people in

According to the Australian government, as of December 31, 2016, 380 individuals remain living in the Regional Processing Centre on Nauru, including 45 children.<sup>144</sup> However, these numbers belie actual figures, which are opaque and difficult to determine. Given that the Nauruan authorities deemed a number of asylum seekers refugees, they have “settled” them on Nauru, where they are in “open detention.”<sup>145</sup> Consequently, a number of organisations maintain that there are currently approximately 1,150 asylum seekers on Nauru<sup>146</sup> total asylum-seekers on Nauru, including approximately 150 children (around 49 in the RPC and up to 100 living in the Nauruan community).<sup>147</sup> In October 2016, Amnesty International reported 410 asylum seekers residing in the Regional Processing Centre, and 749 living outside the centre.<sup>148</sup> Refugees and asylum seekers, all told, make up more than 10% of the total population on Nauru.<sup>149</sup> The majority of individuals held on Nauru are Iranian and Sri Lankan, though a significant number identify as “stateless.”<sup>150</sup>

The Nauru Files, published by the Guardian in August, 2016, consist of over 2,000 leaked incident reports authored by a combination of security contractors, and teachers and child protection workers on Nauru’s RPC, and provide a look into Nauru’s formal reporting process, reported criminal incidents, and life in detention. These formal incident reports, covering 2013-2015 describe 2,116 accounts of alleged assault, sexual abuse, self-harm attempt, child abuse, and horrific living conditions.<sup>151</sup> Totalling over 8,000 pages, the Nauru Files paint a frightening picture of conditions on Nauru. Of note, over 51% of formally reported incidents involve children, even though children make up only 18% of individuals held.<sup>152</sup> Evidence drawn from

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immigration detention, from Jan. 2009 to Dec. 2014); Austl. Gov’t, *Contract Notice View – CN2334062-A2* AUSTENDER, Oct. 30, 2015, <https://www.tenders.gov.au/?event=public.cn.Amendment.view&CNUUID=199087CE-FCE4-0B62-8010C76A04EA7A95> (contract between IHMS and DIBP for IHMS to provide health services for refugees, from May 2014 to June 2017).

<sup>143</sup> Tubwa Kor, Gov’t of Nauru Minister for Home Affairs, Opening Statement Committee on the Rights of the Child (Sept. 13, 2016), *available at* [http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/NRU/INT\\_CRC\\_STA\\_NRU\\_25175\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/NRU/INT_CRC_STA_NRU_25175_E.pdf).

<sup>144</sup> Austl Gov’t, Department of Immigration and Border Protection, *Immigration Detention and Community Statistics Summary*, Dec. 31, 2016, <https://www.border.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-31-dec-2016.pdf>.

<sup>145</sup> AT WHAT COST, *supra* note 113, at 29.

<sup>146</sup> ISLAND OF DESPAIR, *supra* note 48, at 13.

<sup>147</sup> AT WHAT COST, *supra* note 113, at 21; ISLAND OF DESPAIR, *supra* note , at 13.

<sup>148</sup> ISLAND OF DESPAIR, *supra* note 48.

<sup>149</sup> *Accord CIA*, *supra* note 123 (total population of Nauru: 9,591).

<sup>150</sup> ELIBRITT KARLSEN, AUSTL. PARLIAMENTARY LIBRARY, AUSTRALIA’S OFFSHORE PROCESSING OF ASYLUM SEEKERS IN NAURU AND PNG: A QUICK GUIDE TO STATISTICS AND RESOURCES (June 30, 2016), [http://www.apl.gov.au/About/Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1617/Quick\\_Guides/Offshore](http://www.apl.gov.au/About/Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/Offshore). Additional nationalities represented include Pakistani, Bangladeshi, Afghani, Iraqi, Burmese, Indian, Nepalese, Somali, and Lebanese in descending order of population size.

<sup>151</sup> Paul Farrell, Nick Evershed & Helen Davidson, *The Nauru files, cache of 2,000 leaked reports reveal scale of abuse of children in Australian offshore detention*, THE GUARDIAN, Aug. 10, 2016, <https://www.theguardian.com/australia-news/2016/aug/10/the-nauru-files-2000-leaked-reports-reveal-scale-of-abuse-of-children-in-australian-offshore-detention> [hereinafter *The Nauru files*].

<sup>152</sup> *Id.*

these files peppers this Communiqué, as they provide an unvarnished look into Nauruan detention practices, detailing the atrocities these refugees and asylum seekers face.

### *i. Inadequate, Overcrowded, Unsanitary and Dangerous Detention Centres*

Detention facilities are inadequate on Nauru. The Nauru Regional Processing Centre (RPC) is split into several camps: RPCs 1, 2, and 3, and “fly camps” for “resettled” refugees. All centres are “open,” though, materially, they remain places of detention: they are surrounded by metal fencing, cameras, and guard posts. Refugees and asylum seekers held in detention are not permitted to leave without prior authorisation, and are held in tents that cannot withstand tropical downpours or provide adequate shade. Built on the site of a former phosphate mine, these tents have irregular flooring and sharp rocks; dust from phosphate induces asthma attacks and eye and lung irritation in many. As the UNHCR notes, the centre lacks a “durable solution for refugees” and “does not provide safe and humane conditions of treatment in detention.”<sup>153</sup>

The UN Committee on the Rights of the Child report “overcrowding and [a] lack of proper regulations to ensure that homes meet required legal standards.”<sup>154</sup> Individuals we interviewed confirmed overcrowded housing—sometimes as many as 50 people to a tent.<sup>155</sup> Many recall being forced to sleep on blankets on the ground<sup>156</sup> or on military-style cots, and some report that tents/personal belongings are repeatedly damaged by flooding.<sup>157</sup> Housing structures do not have locks.<sup>158</sup> Those we spoke with universally described inadequate bathroom facilities: some state there were only six toilets to serve 700 people,<sup>159</sup> and others remember approximately 15 toilets and six showers for every 100 people.<sup>160</sup> Showers are often restricted to two minutes; there is a guard posted outside the shower, ready to turn off the water when one’s time has elapsed.<sup>161</sup> Life inside the tents has been described as “unbearable.”<sup>162</sup> Individuals recall 40°C

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<sup>153</sup> ASYLUM SEEKER RES. CTR., NAURU DETENTION CENTRE (Apr. 2015), [https://www.asrc.org.au/wp-content/uploads/2013/07/Nauru-Offshore-Detention-Centre\\_April2015.pdf](https://www.asrc.org.au/wp-content/uploads/2013/07/Nauru-Offshore-Detention-Centre_April2015.pdf).

<sup>154</sup> U.N. Comm. on the Rights of the Child, *supra* note 73.

<sup>155</sup> Stanford Clinic interview with Mohamed\* in Wickham Point, Australia (May 13, 2016) (“I lived in a tent—about 50 people in the tent.”); Stanford Clinic interview with Robert\* in Wickham Point, Australia (May 13, 2016) (reporting living with 48 other men); Stanford Clinic interview with Ralph\* in Australia (May 13, 2016) (reporting living with 40 other men in a tent 15x30 feet); Stanford Clinic interview with Molly\* in Ballarat, Australia (May 13, 2016) (reporting living with 7 other families—23 individuals in total); Stanford Clinic interview with Omar\* in Ballarat, Australia (May 16, 2016) (recalls living in a large tent with 6 smaller tents inside, housing 6 different families); Stanford Clinic interview with Yousuf\* in Melbourne, Australia (May 16, 2016) (recalling living with 40 other people in a tent); Stanford Clinic interview with Anthony\* in Melbourne, Australia (May 16, 2016) (recalling living 40 people Names of confidential sources.

<sup>156</sup> Stanford Clinic interview with Omar\* in Ballarat, Australia (May 16, 2016).

<sup>157</sup> Stanford Clinic interview with Robert\* in Wickham Point, Australia (May 13, 2016).

<sup>158</sup> Stanford Clinic interview with Sophie\* in Melbourne, Australia (May 13, 2016).

<sup>159</sup> Stanford Clinic interview with Molly\* in Ballarat, Australia (May 13, 2016).

<sup>160</sup> Stanford Clinic interview with Sophie\* in Melbourne, Australia (May 13, 2016).

<sup>161</sup> Stanford Clinic interview with Yousuf\* in Melbourne, Australia (May 16, 2016); Stanford Clinic interview with Molly\* in Ballarat, Australia (May 13, 2016) (“some people were watched in the showers.”). Stanford Clinic interview with Omar\* in Ballarat, Australia (May 16, 2016); Stanford Clinic interview with Molly\* in Ballarat,

heat, with 95% humidity.<sup>163</sup> Fans and air-conditioning were not available for many months and, even after being installed, there is often only one fan for every tent.<sup>164</sup>

## *ii. Physical and Sexual Abuse*

Sexual violence, assault, and abuse are common in detention facilities on Nauru. The Moss Report, commissioned by the Australian government in 2014 and released in 2015, investigated allegations of sexual and physical abuse on Nauru; it concluded, based on interviews and its own fact-finding, that a) guards “likely” sexually exploited women, men, and children in exchange for “access to showers and other facilities,” as well as for cigarettes and drugs; b) women were raped; and c) men, women, and children were physically and sexually assaulted.<sup>165</sup> According to the Nauru Files there were 185 formally filed reports of “abusive or aggressive behaviour” against refugees and asylum seekers held in detention, and an additional 48 reports of assault, and 57 reports of assault against minors.<sup>166</sup>

Individuals formerly detained report physical altercations between security staff, local Nauruans, and others held in the detention centres.<sup>167</sup> Many also describe an environment of rape<sup>168</sup> and sexual blackmail, perpetrated by guards, others held in detention, and Nauruan natives.<sup>169</sup> Wilson Security guards have been caught on film calling those refugees and asylum seekers they are tasked with protecting “cunts” and “fuckers.”<sup>170</sup> Due to limited security on the island, some

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Australia (May 13, 2016) (some people were watched in the showers.”); Stanford Clinic interview with Omar\* in Ballarat, Australia (May 16, 2016); Stanford Clinic interview with Robert\* in Wickham Point, Australia (May 13, 2016); Stanford Clinic interview with Omar\* in Ballarat, Australia (May 16, 2016).

<sup>162</sup> Stanford Clinic interview with Molly\* in Ballarat, Australia (May 13, 2016).

<sup>163</sup> Stanford Clinic interview with Yousuf\* in Melbourne, Australia (May 16, 2016).

<sup>164</sup> Stanford Clinic interview with Yousuf\* in Melbourne, Australia (May 16, 2016); Stanford Clinic interview with Shahana\* in Wickham Point, Australia (May 14, 2016); Stanford Clinic interview with Mohamed\* in Wickham Point, Australia (May 13, 2016).

<sup>165</sup> PHILIP MOSS, REVIEW INTO RECENT ALLEGATIONS RELATING TO CONDITIONS AND CIRCUMSTANCES AT THE REGIONAL PROCESSING CENTRE IN NAURU 3-5 (Feb. 6, 2015), <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=0ahUKewiykO3z2ePRAhXhxFQKHW9VAK4QFggaMAA&url=https%3A%2F%2Fwww.border.gov.au%2FReportsandPublications%2FDocuments%2Freviews-and-inquiries%2Freview-conditions-circumstances-nauru.pdf&usg=AFQjCNEXowLwNoLpZfsYBBpQx2GeoRcWMg> [hereinafter The Moss Report].

<sup>166</sup> *The Nauru Files*, *supra* note 151.

<sup>167</sup> Stanford Clinic interview with Peter\* in Melbourne, Australia (May 16, 2016) (reporting seeing fights break out between Wilson Security and detained individuals at least 5 times); Stanford Clinic interview with Mohamed\* in Wickham Point, Australia (May 13, 2016).

<sup>168</sup> Stanford Clinic interview with Yousuf\* in Melbourne, Australia (May 16, 2016).

<sup>169</sup> Stanford Clinic interview with Robert\* in Wickham Point, Australia (May 13, 2016); Stanford Clinic interview with Molly\* in Ballarat, Australia (May 13, 2016); Stanford Clinic interview with Sophie\* in Melbourne, Australia (May 13, 2016) (describes being solicited for sex by both male and female guards).

<sup>170</sup> Calla Wahlquist, *Nauru Detention Centre Guards Joked About Shooting Detainees Before Riot*, THE GUARDIAN, Aug. 13, 2015, <https://www.theguardian.com/world/2015/aug/14/nauru-detention-centre-guards-joked-about-shooting-detainees-before-riot>.

held in detention recall being attacked by local Nauruans.<sup>171</sup> Detained individuals we spoke with informed us that guards requested sexual favours from them in exchange for longer showers: asking to see their naked bodies,<sup>172</sup> asking to be masturbated, and performing other sex acts.<sup>173</sup> This pernicious exploitation extended to other goods; guards reportedly exchanged oral sex for cigarettes.<sup>174</sup> In particular, one man we spoke with and who was held in a detention centre recalled, with brutal detail, his rape by guards wearing Wilson Security uniforms. He had been forced to masturbate a guard in a shower while another guard sodomised him.<sup>175</sup> He stated that he had “no choice,” stating, “I came here to save my life . . . and I got another horrible one.”<sup>176</sup>

These allegations are bolstered by the reports from the Nauru Files, which contain similar allegations. In all, the files reveal seven reports of sexual assault on children and 59 reports of assault on children.<sup>177</sup> A September 14, 2014 incident report recounts a classroom assistant requesting a 4-minute shower, as opposed to a 2-minute one, only to have her request “accepted on condition of sexual favours.”<sup>178</sup> According to the report, the security officer “wants to view a boy or a girl having a shower.”<sup>179</sup> Another report describes a child under the age of 10 molested by a group of adults, who inserted their fingers into her vagina.<sup>180</sup> A third describes a young woman reporting genital mutilation at the hands of another individual in detention.<sup>181</sup>

Children are particularly at risk for sexual and physical abuse on Nauru.<sup>182</sup> According to the Physical and Mental Health Subcommittee of the Joint Advisory Committee for Nauru Regional Processing Arrangements, the Nauru detention centre presents a “significant and ongoing risk of

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<sup>171</sup> Stanford Clinic interview with Shahana\* in Wickham Point, Australia (May 14, 2016) (describing an incident where Nauruan men crept into her tent in the middle of the night and attacked a number of females held in detention. The guards ignored their cries for help and, after the men cut generator lines, abandoned the women in fright); Stanford Clinic interview with Yousuf\* in Melbourne, Australia (May 16, 2016) (describing the gang rape of a Somali woman held in open detention by Nauruans).

<sup>172</sup> Stanford Clinic interview with Molly\* in Ballarat, Australia (May 13, 2016) (“some people were watched in the showers.”); Stanford Clinic interview with Omar\* in Ballarat, Australia (May 16, 2016). See also Paul Farrell, Nick Evershed & Helen Davidson *The Nauru files: cache of 2,000 leaked reports reveal scale of abuse of children in Australian offshore detention*, THE GUARDIAN, Aug. 10, 2016, <https://www.theguardian.com/australia-news/2016/aug/10/the-nauru-files-2000-leaked-reports-reveal-scale-of-abuse-of-children-in-australian-offshore-detention>.

<sup>173</sup> Stanford Clinic interview with Robert\* in Wickham Point, Australia (May 13, 2016); Stanford Clinic interview with Omar\* in Ballarat, Australia (May 16, 2016).

<sup>174</sup> Stanford Clinic interview with Yousuf\* in Melbourne, Australia (May 16, 2016).

<sup>175</sup> Stanford Clinic interview with Robert\* in Wickham Point, Australia (May 13, 2016).

<sup>176</sup> Stanford Clinic interview with Robert\* in Wickham Point, Australia (May 13, 2016).

<sup>177</sup> *The Nauru files*, *supra* note 151.

<sup>178</sup> Information Report, unnamed teacher, Save the Children, report taken by Transfield Services (Sept. 28, 2014) (part of the Nauru files), <https://interactive.guim.co.uk/2016/08/nu-files/pdf/sca140808.pdf>.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *The Nauru files*, *supra* note 151.

<sup>182</sup> U.N. Comm. on the Rights of the Child, *supra* note 68.

child abuse, including physical and sexual abuse.”<sup>183</sup> Indeed, the Moss Report found credible allegations of physical and sexual assault, rape, exploitation, and harassment conducted by contracted service providers.<sup>184</sup> The 2015 Senate Select Committee Inquiry into the Nauru detention centre agreed with these claims, stating that children not only experienced a lack of personal safety, but were continuously exposed to acts of violence on Nauru.<sup>185</sup> The UN Committee on the Rights of the Child reported that 30% of girls have been victims of sexual abuse before the age of 15.<sup>186</sup>

The Nauru Files register 168 formal reports of “concern for a minor.”<sup>187</sup> These incident reports are illuminating, ranging from accounts of guards allegedly grabbing children and threatening to kill them,<sup>188</sup> to guards slapping children across the face.<sup>189</sup>

Despite the difficulties of reporting and investigating sexual and physical abuse, Broadspectrum (operating as Transfield Services at the time) provided evidence that it received 67 allegations of child abuse as of May 2015, with 30 of these allegations involving staff at the detention centres.<sup>190</sup> The Nauru Files revealed seven reports of sexual assault of children, with 59 reports of assault on children over two years.<sup>191</sup>

Moreover, detention centre staff allege that the Australian government was made aware of these claims, yet chose not to respond adequately and kept children in detention centres despite the risk of future harm.<sup>192</sup> The UN Committee on the Rights of the Child has expressed alarm at the failure of the Nauruan government to respond effectively to reports of sexual assault throughout Nauru.<sup>193</sup> It has noted a) sentences in cases of rape and other sexual assaults are well below maximum sentences allowed by legislation; b) there is little coordination of mechanisms used to address sexual assault; c) insufficient counseling services and accommodation for abused children; and d) “[p]revailing societal attitudes that perceive domestic abuse to be a

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<sup>183</sup> PHYSICAL AND MENTAL HEALTH SUBCOMM. OF THE JOINT ADVISORY COMM. FOR NAURU REG’L PROCESSING ARRANGEMENTS, NAURU FAMILY HEALTH RISKS (May 29, 2014), <https://www.theguardian.com/world/interactive/2014/may/29/nauru-family-health-risks-report-in-full>.

<sup>184</sup> The Moss Report, *supra* note 165.

<sup>185</sup> TAKING RESPONSIBILITY, *supra* note 6.

<sup>186</sup> U.N. Comm. on the Rights of the Child, *supra* note 7373. Compare this to Australian penetrative sexual abuse of women at 7.9% by age 16. CASA Forum Ctrs. Against Sexual Assault, *Fact Sheet: Statistics about sexual assault*, (2017), [http://www.casa.org.au/casa\\_pdf.php?document=statistics](http://www.casa.org.au/casa_pdf.php?document=statistics).

<sup>187</sup> *The Nauru files*, *supra* note 151.

<sup>188</sup> Information Report Form, unnamed individual, Save the Children, report taken by Transfield Services (Jan. 26 2015) (part of the Nauru files), <https://interactive.guim.co.uk/2016/08/nu-files/pdf/sca150091.pdf>.

<sup>189</sup> *Id.*

<sup>190</sup> Jane Norman, *Transfield: Nauru detention centre operator receives dozens of sexual and other abuse allegations*, ABC NEWS, July 16, 2015, <http://www.abc.net.au/news/2015-07-16/nauru-detention-centre-operator-transfield-abuse-allegations/6626110>.

<sup>191</sup> *The Nauru files*, *supra* note 151.

<sup>192</sup> Jason Om, *Immigration Department aware of sexual abuse allegations against children for 17 months but failed to act, say former Nauru workers*, ABC NEWS, Apr. 7, 2015, <http://www.abc.net.au/news/2015-04-07/nauru-letter-of-concern-demands-royal-commission/6374680>.

<sup>193</sup> U.N. Comm. on the Rights of the Child, *supra* note 73.

‘private/family’ matter.”<sup>194</sup> Indeed, “many cases involving child abuse and sexual assault” are withdrawn by victims and witnesses due to “fear of financial hardship as well as risk to family reputation.”<sup>195</sup>

Detention centre workers and UN investigators indicated a “lack of qualified specialists especially child psychiatrists and psychologists” on Nauru from its inception through at least 2015.<sup>196</sup>

### *iii. Inadequate Medical Care*

Medical treatment available to refugees and asylum seekers held in detention on Nauru remains fundamentally inadequate. In one incident, six young boys held on Nauru attempted to kill themselves, were found bleeding, but were initially refused any medical assistance.<sup>197</sup> According to Amnesty International, through at least 2016 individuals held in detention “had to wait for months to see a visiting specialist or undergo a necessary test, even when, according to the doctors, their condition was serious, such as suspected cancer.”<sup>198</sup> Accordingly, “all of the people interviewed by Amnesty International on Nauru expressed concern about inadequate physical and mental care.”<sup>199</sup> In order to receive medical treatment, individuals are required to fill out a written request to be taken to a Nauruan hospital, where there are no medical specialists and where conditions are unsanitary.<sup>200</sup> Many medical requests go ignored for months.<sup>201</sup> Formerly detained refugees report losing significant weight while in detention.<sup>202</sup> Many complain of continuous genital discomfort: bleeding from the penis, vagina, and/or anus,<sup>203</sup> as well as recurrent infections.<sup>204</sup>

Inadequate medical treatment both causes and exacerbates physical problems facing refugees and asylum seekers held in Nauru’s detention facilities. Children have “developed chronic conditions as a result of living in overcrowded and unsanitary conditions, and the main medical provider in

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<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 15.

<sup>196</sup> *Id.* See also AT WHAT COST, *supra* note 113, at 25.

<sup>197</sup> Ben Doherty & David Marr, *The worst I’ve seen – trauma expert lifts lid on ‘atrocities’ of Australia’s detention regime*, THE GUARDIAN, June 19, 2016, <https://www.theguardian.com/australia-news/2016/jun/20/the-worst-ive-seen-trauma-expert-lifts-lid-on-atrocities-of-australias-detention-regime>.

<sup>198</sup> ISLAND OF DESPAIR, *supra* note 48, at 5.

<sup>199</sup> *Id.* at 24.

<sup>200</sup> Interview with Sophie\* in Melbourne, Australia (May 13, 2016); Interview with Omar\* in Ballarat, Australia (May 16, 2016) (recalling his wife getting an infection while pregnant with their child).

<sup>201</sup> Interview with Yousuf\* in Melbourne, Australia (May 16, 2016); Interview with Mohamed\* in Wickham Point, Australia (May 13, 2016) (describing not getting a necessary operation for almost two years on Nauru, both because he was ignored and because there wasn’t a medical specialist).

<sup>202</sup> Interview with Robert\* in Wickham Point, Australia (May 13, 2016) (reporting going from 92 kilos to 30 something kilos).

<sup>203</sup> Interview with Robert\* in Wickham Point, Australia (May 13, 2016).

<sup>204</sup> John-Paul Sanggaran & Deborah Zion, *Is Australia Engaged in Torturing Asylum Seekers? A Cautionary Tale for Europe*, 10 J. GLOB. MED. ETHICS 1, 1 (2016).



the Regional Processing Centres ha[s] no paediatrician.”<sup>205</sup> An individual held in detention described to us a hand condition he suffered that, for 10 months on Nauru from 2014-2015, went untreated; his “muscles began to disappear” and he was eventually unable to use his hand.<sup>206</sup> He also reported severe dental problems.<sup>207</sup> Amnesty International exhaustively catalogued numerous health-related complaints, including a) a woman who had been genitally mutilated in her home country and refused treatment; b) a man who “would have survived” his self-immolation had he been properly treated; and c) untreated broken bones and damaged internal organs.<sup>208</sup> Additionally, some report being denied medical necessities: glasses;<sup>209</sup> diabetic-friendly diets; and insulin pens.<sup>210</sup> The UN Committee on the Rights of the Child reported that, through at least 2016 and since the nascent stages of detention, there have been “limited availability of immediate postnatal care for newborns and mothers.”<sup>211</sup> Finally, various reports show significant delays in access to medical evacuation for life-threatening injuries, and general dismissals of clients reporting serious health concerns.<sup>212</sup>

Individuals with disabilities are rarely accommodated effectively or adequately. As the UN Committee on the Rights of the Child noted, there were no legal mandates requiring the provision of services to persons with disabilities on Nauru through at least 2016.<sup>213</sup>

#### *iv. Mental Health and Extreme Rates of Self Harm*

Depression and self-harm on Manus and Nauru has been characterised by experts as “epidemic.”<sup>214</sup> The Nauru Files show that there were 335 formal reports of threatened self-harm, with an additional 45 reports of “accident” or “injury” in 2013-2015.

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<sup>205</sup> U.N. Comm. on the Rights of the Child, *supra* note 73, at 11.

<sup>206</sup> Interview with Yousuf\* in Melbourne, Australia (May 16, 2016).

<sup>207</sup> Interview with Yousuf\* in Melbourne, Australia (May 16, 2016) (“Almost everyone lost their teeth.”).

<sup>208</sup> ISLAND OF DESPAIR, *supra* note 48, at 25-28.

<sup>209</sup> Interview with Sophie\* in Melbourne, Australia (May 13, 2016).

<sup>210</sup> See ISLAND OF DESPAIR, *supra* note 48, at 63; FORGOTTEN CHILDREN, *supra* note 6, at 188-190 (citations omitted). See also Helen Davidson & Ben Doherty, *Wife of man who died after setting fire to himself in Nauru slams delay in care*, THE GUARDIAN, Apr. 29, 2016, <http://www.theguardian.com/world/2016/apr/29/wife-of-man-who-died-after-setting-fire-to-himself-in-nauru-slams-delay-in-care>.

<sup>211</sup> U.N. Comm. on the Rights of the Child, *supra* note 73.

<sup>212</sup> See ISLAND OF DESPAIR, *supra* note 48, at 63; FORGOTTEN CHILDREN, *supra* note 6, at 188-90 (citations omitted). See also Davidson & Doherty, *supra* note 210.

<sup>213</sup> U.N. Comm. on the Rights of the Child, *supra* note 7373.

<sup>214</sup> ISLAND OF DESPAIR, *supra* note 48. See SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE INQUIRY, CONDITIONS AND TREATMENT OF ASYLUM SEEKERS AND REFUGEES AT THE REGIONAL PROCESSING CENTRES IN THE REPUBLIC OF NAURU AND PAPUA NEW GUINEA (May 5, 2016), [http://www.apf.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Offshore\\_RP-Cs;\\_TAKEN\\_ON\\_NOTICE\\_BY\\_TRANSFIELD\\_SERVICES\\_19\\_\(May\\_19,\\_2015\),\\_http://www.apf.gov.au/DocumentStore.ashx?id=56c605b3-8d28-4737-850f-23b09dddbe90\\_\[hereinafter\\_TRANSFIELD\\_CONTRACT\].](http://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Offshore_RP-Cs;_TAKEN_ON_NOTICE_BY_TRANSFIELD_SERVICES_19_(May_19,_2015),_http://www.apf.gov.au/DocumentStore.ashx?id=56c605b3-8d28-4737-850f-23b09dddbe90_[hereinafter_TRANSFIELD_CONTRACT].) See also Ben Doherty & Nick Evershed, *Immigration Detainees 400 Percent More Likely to Suffer Severe Mental Distress*, THE GUARDIAN, Jan. 18, 2016, <https://www.theguardian.com/australia->

Amnesty International spoke with 58 refugees on Nauru, recording tales of self-harm, mental anguish, and suffering.<sup>215</sup> Many individuals held in detention reported to the authors of Amnesty’s Report attempts at suicide and self-harm.<sup>216</sup> Described as “everyday business,” refugees held in detention reportedly drank shampoo, swallowed razor blades, overdosed, or hung themselves.<sup>217</sup> Several detained individuals recall watching fellow prisoners self-immolate, both in protest and in desperation.<sup>218</sup> Many of these events have received significant media attention. Omid Masoumali, a male refugee in Nauru, killed himself through self-immolation in April 2016.<sup>219</sup> A few days later, Hodan Yasin also set herself alight; she suffered serious burns to over 70% of her body.<sup>220</sup> One individual held in detention described attempting to kill himself on seven different occasions, revealing the large scars on his stomach where he had slit himself open.<sup>221</sup> Depression is a constant battle<sup>222</sup>—refugees and asylum seekers routinely describe their experience in the camps as “hell”<sup>223</sup> and that now, they are left with a sensation of “emptiness.”<sup>224</sup> For some, it is as though they are “burning” inside; it is both “terrible to tell this story” and to live it.<sup>225</sup>

Children’s lives are particularly at risk on Nauru.<sup>226</sup> The Nauru Files reveal 30 incidents of self-harm among children and 159 threats of self-harm.<sup>227</sup> The UN Committee on the Rights of the Child, in particular, expresses “concern[] at the high rate of under-5 mortality for non-Nauruan” children, and were “further concerned at reports that asylum seeking and refugee children face significant physical and developmental risks as a result of living in cramped, humid, and life-

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news/2016/jan/19/immigration-detainees-400-percent-more-likely-to-suffer-severe-mental-distress; Michael Koziol & Nicole Hasham, *Self-Harm in Detention Centres at Epidemic Levels, Internal Documents Show*, SYDNEY MORNING HERALD, January 16, 2016, <http://www.smh.com.au/federal-politics/political-news/selfharm-in-detention-centres-at-epidemic-levels-internaldocuments-show-20160115-gm74q3.html#ixzz4DAvN8H5e>.

<sup>215</sup> ISLAND OF DESPAIR, *supra* note 48, at 19.

<sup>216</sup> Interview with Sophie\* in Melbourne, Australia (May 13, 2016) (describing witnessing self-harm with regularity); Interview with Omar\* in Ballarat, Australia (May 16, 2016) (Describing his wife’s suicide attempts: 23 in total); Interview with Yousuf\* in Melbourne, Australia (May 16, 2016).

<sup>217</sup> Interview with Yousuf\* in Melbourne, Australia (May 16, 2016).

<sup>218</sup> Interview with Omar\* in Ballarat, Australia (May 16, 2016).

<sup>219</sup> Nicole Hasham, *Horrible video emerges showing Nauru refugee setting himself on fire*, THE AGE, Apr. 27, 2016, <http://www.theage.com.au/federal-politics/political-news/horrifying-video-emerges-showing-nauru-refugee-setting-himself-on-fire-20160427-gog0gx>.

<sup>220</sup> Joshua Robertson, *Nauru Refugee who Set Herself Alight Denied Basic Social Support in Brisbane Hospital*, THE GUARDIAN, Sept. 22, 2016, <https://www.theguardian.com/australia-news/2016/sep/22/nauru-refugee-who-set-herself-alight-denied-basic-socialsupport-in-brisbane-hospital>.

<sup>221</sup> Interview with Robert\* in Wickham Point, Australia (May 13, 2016).

<sup>222</sup> See Interview with Omar\* in Ballarat, Australia (May 16, 2016) (describing letters written by doctors about her mental health conditions and how much living in detention has aggravated them); Interview with Mohamed\* in Wickham Point, Australia (May 13, 2016). See also Sanggaran & Zion, *supra* note 204.

<sup>223</sup> Interview with Sophie\* in Melbourne, Australia (May 13, 2016); Interview with Omar\* in Ballarat, Australia (May 16, 2016).

<sup>224</sup> Interview with Sophie\* in Melbourne, Australia (May 13, 2016).

<sup>225</sup> Interview with Omar\* in Ballarat, Australia (May 16, 2016).

<sup>226</sup> FORGOTTEN CHILDREN, *supra* note 6, at ch. 6; ISLAND OF DESPAIR, *supra* note 48, at 19.

<sup>227</sup> *The Nauru files*, *supra* note 151.

threatening conditions in the Regional Processing Centres.”<sup>228</sup> Of note, the Committee concluded that “spending prolonged periods in such conditions is detrimental to the mental and physical well-being of these children,” and that “some as young as 11 years attempt[] suicide and engag[e] in other forms of self-harm.”<sup>229</sup> Deplorable living conditions, coupled with “pervasive reports of hostility and hate speech” from local Nauruans, leads to “feelings of hopelessness and often suicidal ideation.”<sup>230</sup> Moreover, the *Elliot and Gunasekera Report to AHRC (2016)* observed, through empirical evaluation of general detention practices and their effects on children, that detention “is harmful to the health and mental health of young children” and that such “harm increases with increasing duration of detention.”<sup>231</sup> The Australian Human Rights Commission (AHRC)’s 2014 report, *The Forgotten Children: National Inquiry into Children in Immigration Detention*, indicated that 34% of children in offshore detention suffer from serious mental health disorders, as compared to less than 2% of the Australian population.<sup>232</sup>

Indefinite detention compounds these harms for children and parents. Because parents are unable to protect their children—by “avoiding” abusive individuals or being able “to remove their children from people who they believe to be unsafe”—they experience “severe mental distress . . . as a result.”<sup>233</sup> As the AHRC noted, “children detained indefinitely on Nauru are suffering from extreme levels of physical, emotional, psychological and developmental distress.”<sup>234</sup> Refugees and asylum seekers speak of the effect of detention on children with pain and anger; they recall that children are always crying, without toys or areas to play.<sup>235</sup>

#### ***v. Access to Food and Water Barely Meets Needs***

Food and water supplies on Nauru are inadequate to meet the needs of the refugees and asylum seekers held there.<sup>236</sup> There are “reported daily restrictions on individual water intake.”<sup>237</sup> Individuals formerly held in detention report that water shortages last anywhere from two days<sup>238</sup> to one week, curtailing showers, inhibiting hygiene, and causing water rationing.<sup>239</sup> At

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<sup>228</sup> U.N. Comm. on the Rights of the Child, *supra* note 73.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 14.

<sup>231</sup> See ELIZABETH ELLIOT & HASANTHA GUNASEKERA, THE HEALTH AND WELL-BEING OF CHILDREN IN IMMIGRATION DETENTION 3 (2016),

<https://www.humanrights.gov.au/sites/default/files/document/publication/Health%20and%20well-being%20of%20children%20in%20immigration%20detention%20report.pdf>.

<sup>232</sup> FORGOTTEN CHILDREN, *supra* note 6, at 29-30.

<sup>233</sup> TAKING RESPONSIBILITY, *supra* note 6.

<sup>234</sup> FORGOTTEN CHILDREN, *supra* note 6, at 12-18.

<sup>235</sup> Interview with Omar\* in Ballarat, Australia (May 16, 2016).

<sup>236</sup> U.N. Comm. on the Rights of the Child, *supra* note 73, at 12 (“Limited access to basic services including clean and safe drinking water and sanitation.”).

<sup>237</sup> *Id.* at 13.

<sup>238</sup> Interview with Omar\* in Ballarat, Australia (May 16, 2016).

<sup>239</sup> Interview with Peter\* in Melbourne, Australia (May 16, 2016); Interview with Robert\* in Wickham Point, Australia (May 13, 2016); Interview with Shahana\* in Wickham Point, Australia (May 14, 2016); Interview with Mohamed\* in Wickham Point, Australia (May 13, 2016).

times, corporate employees running the detention facilities replaced fresh water in showers with salt-water.<sup>240</sup> Due to extreme temperatures, food spoils quickly and interviewees recalled continuous gastrointestinal discomfort from rotting produce.<sup>241</sup>

Children are particularly affected by water shortages, which leave them and their families “vulnerable to dehydration and other serious health problems.”<sup>242</sup>

## B. Manus Island, Papua New Guinea

On September 8, 2012 —and later updated by two additional Memoranda in 2013<sup>243</sup>—Australia and Papua New Guinea formally entered into an agreement orchestrating the contemporary transfer and detention of asylum seekers on Manus Island, a small dot of land about 800 km north of Port Moresby, the capital of Papua New Guinea.<sup>244</sup> Yet Papua New Guinea has been complicit in Australia’s border policies since at least 2001.

Indeed, starting in 2001, Manus Island had housed asylum seekers as a part of Australia’s Pacific Solution, although Papua New Guinea Constitution contains various safeguards against arbitrary detention, including the requirement for detainees to be informed of the reasons for the detention, the right to consult a lawyer of their own choice, and the right to seek a court decision on the lawfulness of their detention.<sup>245</sup> Detention on Manus ended in February 2008 when the Rudd government announced that all future “unauthorised boat arrivals” would be processed on Christmas Island.<sup>246</sup> In 2012, the Gillard government reversed course and announced that Manus —and Nauru— would again be used as “offshore processing centres,”<sup>247</sup> this time coupling their detention policy with “a campaign warning asylum seekers that they would be transferred to Nauru or Manus Island if they arrived in Australia by boat.”<sup>248</sup> Australian border force agents

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<sup>240</sup> Interview with Mohamed\* in Wickham Point, Australia (May 13, 2016).

<sup>241</sup> Interview with Shahana\* in Wickham Point, Australia (May 14, 2016).

<sup>242</sup> U.N. Comm. on the Rights of the Child, *supra* note 73, at 13.

<sup>243</sup> The last of which was signed on August 6, 2013, *Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the transfer to, and assessment and settlement in, Papua New Guinea of certain persons, and related issues*, Aug. 6, 2013, <http://dfat.gov.au/geo/papua-new-guinea/Pages/memorandum-of-understanding-between-the-government-of-the-independent-state-of-papua-new-guinea-and-the-government-of-austr.aspx>. *See generally*, SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMM., INCIDENT AT THE MANUS ISLAND DETENTION CENTRE FROM 16 FEBRUARY TO 18 FEBRUARY 2014, § 1.36-1.43 (Dec. 11, 2014), [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Manus\\_Island/d/~media/Committees/Senate/committee/legcon\\_ctte/Manus\\_Island/Report/report.pdf](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Manus_Island/d/~media/Committees/Senate/committee/legcon_ctte/Manus_Island/Report/report.pdf) [hereinafter INCIDENT AT THE MANUS ISLAND DETENTION CENTRE].

<sup>244</sup> *Id.* 235, § 1.32.

<sup>245</sup> The Constitution of the Independent State of Papua New Guinea, §§ 42 (2) and (5). The constitution also empowers the courts to determine whether a complainant may be unreasonably detained. *See* AMNESTY INTERNATIONAL, AUSTRALIA-PACIFIC OFFENDING HUMAN DIGNITY - THE “PACIFIC SOLUTION” 17 (Aug. 26, 2002).

<sup>246</sup> *Id.* § 1.28.

<sup>247</sup> *Id.* § 1.29.

<sup>248</sup> *Id.* § 1.30.

first transferred asylum seekers (a group of seven Sri Lankan and Iranian families) from Christmas Island to Manus on November 21, 2012.<sup>249</sup> However, by 15 June 2013, the Gillard government had decided to make Manus Island a “single adult male (SAM) only facility,”<sup>250</sup> which it remains to the present.

The Manus Island detention regime has two primary facilities: the Manus Regional Processing Centre (RPC) at Lombrum naval base, and the newer East Lorengau Refugee Transit Centre (ELRTC) at Lorengau, the largest city on the island.<sup>251</sup> The RPC was established in 2012 as a “temporary facility”<sup>252</sup> with a “capacity of [...] about 500 persons.”<sup>253</sup> However, after the July 2013 Regional Resettlement Agreement, the Manus RPC was transformed “into a centre which was going to have a longer lifespan and a significant increase in its capacity.”<sup>254</sup> At the height of detention in January 2014, the Manus RPC held 1,353 asylum seekers.<sup>255</sup>

Since the second phase of Operation Sovereign Borders, more than 13000 people were sent to Manus Island.<sup>256</sup> As of January 2017, the Australian government report counts that 866 men were held at Manus Island’s RPC,<sup>257</sup> with the remaining men either living in a transit centre near the town of Lorengau on Manus Island, or living in the community elsewhere in Papua New Guinea.<sup>258</sup> As of January 31 2017, out of the 1015 Refugee Status Initial Assessment Notifications, 689 men have been granted refugee status, and 225 have been given a negative final determination.<sup>259</sup>

In order to operate the Manus RPC, Australia contracted with IHMS to provide medical support services and the Salvation Army to provide welfare services.<sup>260</sup> Until 2013, G4S was the

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<sup>249</sup> *Id.* § 1.34.

<sup>250</sup> *Id.* § 1.35.

<sup>251</sup> PNG minister says ‘refugee transit centre’ on Manus Island will remain open, ABC NEWS, Oct. 4, 2016, <http://www.abc.net.au/news/2016-10-04/png-to-keep-refugee-facility-on-manus-island-open/7903020>.

<sup>252</sup> INCIDENT AT THE MANUS ISLAND DETENTION CENTRE, *supra* note 235, § 1.53.

<sup>253</sup> *Id.* § 1.54 (citing Kenneth Douglas, First Assistant Sec’y, Dep’t of Immigration and Border Prot., *Committee Hansard*, at 27 (July 11, 2014)).

<sup>254</sup> *Id.*

<sup>255</sup> *Fact Sheet: Operational Update 31 January 2014*, AUSTL. GOV’T. DEPT. OF IMMIGRATION & BORDER PROTECTION (Jan. 31, 2014, 9:00 AM), <http://newsroom.border.gov.au/releases/operational-update-31-january>.

<sup>256</sup> OFFSHORE PROCESSING, *supra* note 99.

<sup>257</sup> Department of Immigration and Border Protection, Operation Sovereign Borders Monthly Update, December 2016 (Jan. 9, 2017), <http://newsroom.border.gov.au/channels/Operation-Sovereign-Borders/releases/operation-sovereign-borders-monthly-update-december-2>

<sup>258</sup> OFFSHORE PROCESSING, *supra* note 99.

<sup>259</sup> Department of Immigration and Border Protection, Operation Sovereign Borders Monthly Update, January 2017 (Feb. 6, 2017), <http://newsroom.border.gov.au/channels/media-releases/releases/operation-sovereign-borders-monthly-update-january-3>

<sup>260</sup> G4S, Submission by G4S for the Senate Committee Inquiry into the Events of 16 to 18 February 2014 At the Manus Island Regional Processing Centre (May 14, 2014), [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regional\\_processing\\_Nauru/Regional\\_processing](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing)

primary security contractor at Manus.<sup>261</sup> Australian government officials replaced these contractors with Broadspectrum, formerly known as Transfield Services Ltd., whose contract formally began March 24, 2014.<sup>262</sup> Broadspectrum subcontracts their security work to Wilson Security.<sup>263</sup> In 2016, Ferrovial purchased Broadspectrum.<sup>264</sup> Additionally, Australia has also contracted with Playfair Visa Migration Services to provide “advocacy” services and legal counsel to detained refugees and asylum seekers.<sup>265</sup>

In April 2016, the Supreme Court of Papua New Guinea ruled that the forceful detention of asylum seekers at the Manus Island Regional Processing Centre (RPC) was “unconstitutional and illegal.”<sup>266</sup> However, Papua New Guinea’s Foreign Minister, Rimbink Pato, has said that the government would interpret the ruling as only applying to the facilities where initial processing was conducted —the Manus Island RPC— and not to the East Lorengau Refugee Transit Centre.<sup>267</sup> In line with this, in August 2016, Australian Immigration Minister Peter Dutton confirmed that the Manus RPC would be closed “as quickly as possible,”<sup>268</sup> while —as of September 2016— more than 100 affirmed (“positive”) refugees have been transferred to the ELRTC.<sup>269</sup>

In October 2016, Papua New Guinea and the Australian Border Force announced plans to begin transferring men from the Manus Island RPC by the end of the month, once all refugee claims were processed.<sup>270</sup> A Communication Guide given to individuals held in detention explaining the RPC closure process states that they will have three options: (1) settlement in Papua New Guinea for those determined to qualify for refugee status, (2) voluntary departure from Papua New

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[ng Nauru/Submissions http://www.aph.gov.au/DocumentStore.ashx?id=d451e92d-f02c-4bb9-bcde-b2b5f55b0089&subId=252729.](http://www.aph.gov.au/DocumentStore.ashx?id=d451e92d-f02c-4bb9-bcde-b2b5f55b0089&subId=252729)

<sup>261</sup> *Id.*

<sup>262</sup> Austl. Gov’t Submission Senate Inquiry, *infra* note 429.

<sup>263</sup> *Nauru and Manus Island Fact Sheet*, WILSON SECURITY,

[https://www.wilsonsecurity.com.au/ourexperience/Documents/Nauru%20and%20Manus%20Island%20Fact%20Sheet.pdf.](https://www.wilsonsecurity.com.au/ourexperience/Documents/Nauru%20and%20Manus%20Island%20Fact%20Sheet.pdf)

<sup>264</sup> *Ferrovial completes acquisition of Broadspectrum*, BROADSPECTRUM (June 30, 2016),

[http://www.broadspectrum.com/news/ferrovial-completes-acquisition-of-broadspectrum.](http://www.broadspectrum.com/news/ferrovial-completes-acquisition-of-broadspectrum)

<sup>265</sup> See PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA, IMMIGRATION DETENTION IN AUSTRALIA 76 (2009), <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Fcommsen%2Fb1e4a0da-9e9f-4a52-9bc0-bbe7f82bcf4d%2F0003%22>

<sup>266</sup> *Namah v. Pato*, *supra* note 101.

<sup>267</sup> *Manus Island will remain open*, *supra* note 251.

<sup>268</sup> Stephanie Anderson, *Manus Island detention centre to close, Peter Dutton and PNG Prime Minister confirm*, ABC NEWS, Aug. 17, 2016, [http://www.abc.net.au/news/2016-08-17/manus-island-to-close-png-prime-minister-confirms/7759810.](http://www.abc.net.au/news/2016-08-17/manus-island-to-close-png-prime-minister-confirms/7759810)

<sup>269</sup> Ben Doherty & Matthew Abbott, *Inside Manus: life in detention – a photo essay*, THE GUARDIAN, Sept. 9, 2016, [https://www.theguardian.com/australia-news/ng-interactive/2016/sep/10/inside-manus-life-in-detention-a-photo-essay.](https://www.theguardian.com/australia-news/ng-interactive/2016/sep/10/inside-manus-life-in-detention-a-photo-essay)

<sup>270</sup> Ben Doherty, *Manus Island staff told deportations will begin this month*, THE GUARDIAN, Oct. 5, 2016, <https://www.theguardian.com/australia-news/2016/oct/06/manus-island-staff-told-deportations-will-begin-this-month> [hereinafter *Deportations will begin this month*].

Guinea, or (3) involuntary removal of non-refugees.<sup>271</sup> Papua New Guinea has stated that those with rejected asylum claims (i.e., “negative” assessments) will be deemed “illegal overstayers” and will be “obliged to return home.”<sup>272</sup> In October 2016, Papua New Guinea and the Australian Citizenship Advisory Service announced that a transfer centre would be constructed near Port Moresby to temporarily house men with rejected asylum claims.<sup>273</sup> Australia’s Department of Immigration and Border Protection estimated that Australia would pay \$20 million AUS for the centre’s construction, with Papua New Guinea agreeing to pay for operational costs.<sup>274</sup>

The October 2016 Communication Guide also confirms that those with valid refugee claims will “not be permitted to settle in Australia,” and that Papua New Guinea has no “settlement agreements for refugees from this centre” with any other third country.<sup>275</sup> However, Papua New Guinea has said that it cannot resettle more than 800 men who remain on Manus,<sup>276</sup> and Papua New Guinea immigration officials have stated that the Manus governor agreed to host the Manus Island RPC on the condition that “asylum seekers would be detained and processed on the island but integrated elsewhere.”<sup>277</sup> Amnesty International questioned the suitability of Papua New Guinea for refugee resettlement in 2013, given that Papua New Guinea is an “impoverished country with high rates of unemployment, serious problems with violence . . . and a general intolerance for outsiders,” as well as a “poor track record of protecting the limited numbers of refugees it has received to date.”<sup>278</sup>

Logham Sawari, an Iranian man who was mistakenly sent to Manus as a minor in 2013, was a part of the first group of six refugees to be resettled in Papua New Guinea.<sup>279</sup> Within months of his resettlement, Sawari was found living on the streets of Lae following a pay dispute with the employer that was arranged for him by Papua New Guinea immigration.<sup>280</sup> After both visits to the Manus Island RPC—in November 2013 and March 2014—Amnesty International highlighted the concern that asylum seekers feel “about security for themselves and their families

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<sup>271</sup> Ben Doherty (@BenDohertyCorro), Twitter (Sept. 27, 2016, 12:15 AM), <https://twitter.com/BenDohertyCorro/status/780667205570527233> (second image) (“Question: What if I refuse to move? Answer: The police may direct the movement of those who refuse to cooperate.”).

<sup>272</sup> *Deportations will begin this month*, *supra* note 261.

<sup>273</sup> Eric Tlozek, *New transfer centre for detained asylum seekers set for construction, PNG Government says*, ABC NEWS, Oct. 17, 2016, <http://www.abc.net.au/news/2016-10-18/new-detention-centre-set-for-construction-says-png-government/7943842>.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Deportations will begin this month*, *supra* note 261.

<sup>277</sup> *Australia/Papua New Guinea: The Pacific Non-Solution*, HUMAN RIGHTS WATCH (2015), <https://www.hrw.org/news/2015/07/15/australia/papua-new-guinea-pacific-non-solution>.

<sup>278</sup> AMNESTY INT’L, THIS IS BREAKING PEOPLE: HUMAN RIGHTS VIOLATIONS AT AUSTRALIA’S ASYLUM SEEKER PROCESSING CENTRE ON MANUS ISLAND, PAPUA NEW GUINEA, AI Index ASA 12/002/2013, at 3 (Dec. 2013), <https://www.amnesty.org/en/documents/ASA12/002/2013/en/> [hereinafter THIS IS BREAKING PEOPLE].

<sup>279</sup> Ben Doherty, *Refugee left homeless in Papua New Guinea after being resettled from Australian-run detention*, THE GUARDIAN, Feb. 18, 2016, <https://www.theguardian.com/world/2016/feb/19/refugee-left-homeless-in-papua-new-guinea-after-being-resettled-from-australian-run-detention>.

<sup>280</sup> *Id.*

if they were to be resettled in Papua New Guinea, particularly given incidents with local police and the military in and outside the centre.”<sup>281</sup>

Homosexual individuals in particular “expressed considerable fear” over the prospect of resettlement in Papua New Guinea, “where same-sex sexual conduct is criminalised and police abuse against gay and transgender people is common.”<sup>282</sup> Some refugees described being “apprehensive about disclosing their sexual orientation during their Refugee Status Determination interviews,” even when it was the basis for their refugee claim, because they had been warned by Manus Island RPC staff that “any consensual sexual conduct between detainees will be reported to [Papua New Guinea] police for prosecution.”<sup>283</sup>

### *i. Inadequate, Overcrowded, Unsanitary, and Dangerous Detention Centres*

François Crépeau, UN Special Rapporteur on the Human Rights of Migrants, asserts that asylum seekers detained at Manus Island RPC are held in conditions that constitute “cruel, inhumane, and degrading” treatment or punishment.<sup>284</sup> Nicole Judge, a former Salvation Army employee — which had been contracted to provide “welfare services at the Manus Island RPC”<sup>285</sup> — described the conditions at the facility in testimony to the Australian Senate Standing Committee on Legal and Constitutional Affairs:<sup>286</sup>

*“When I arrived on Manus Island during September 2013, I had previously worked on Nauru for one year. I thought I had seen it all: suicide attempts, people jumping off buildings, people stabbing themselves, people screaming for freedom whilst beating their heads on concrete. Unfortunately I was wrong; I had not seen it all. Manus Island shocked me to my core. I saw sick and defeated men crammed behind fences and being denied their basic human rights, padlocked inside small areas in rooms often with no windows and being mistreated by those who were employed to care for their safety.”<sup>287</sup>*

Conditions at Manus Island RPC have been routinely described as extremely poor. In testimony to the Australian Senate Standing Committee on Legal and Constitutional Affairs, the Manus RPC was described as “harsh, inadequate and inhumane,” with former RPC staff expressing “shock, about the poor living conditions including cramped and over-heated sleeping

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<sup>281</sup> INCIDENT AT THE MANUS ISLAND DETENTION CENTRE, *supra* note 235, § 4.80.

<sup>282</sup> THIS IS BREAKING PEOPLE, *supra* note 278, at 7.

<sup>283</sup> *Id.*

<sup>284</sup> *Australia asylum: UN criticises ‘cruel’ conditions on Nauru*, BBC, Nov. 18, 2016, <http://www.bbc.com/news/world-australia-38022204>.

<sup>285</sup> INCIDENT AT THE MANUS ISLAND DETENTION CENTRE, *supra* note 235, § 2.14.

<sup>286</sup> *Id.* § 3.1.

<sup>287</sup> *Committee Hansard*, *supra* note 253, at 31.



quarters.”<sup>288</sup> Refugees and asylum seekers are detained behind razor wire,<sup>289</sup> and staff crowd 50 people to a tent, with the majority of men sleeping in bunk-beds.<sup>290</sup> The top bunks press against the ceiling of the tent; one individual recalls it being so hot that people “could not sleep there” and instead slept on the floor.<sup>291</sup>

Martin Appleby, a former G4S employee, describes the facility’s accommodations as “inhumane” and “primitive . . . particularly by Australian standards,” which “got worse later on as the number of transferees rose significantly.”<sup>292</sup> Steven Kilburn, another former G4S officer and firefighter, told a Senate inquiry that “one particular area in Foxtrot compound . . . breached every fire safety . . . regulation. It was a death trap and a hazard to everyone who lived there. It was concrete; there was no air. It was just an appalling place to put people.”<sup>293</sup> He also noted that refugees “were not allowed to even put a sheet around their bed to get any privacy, so they never got any privacy at all. The whole time they are there, they are sleeping next to strangers.”<sup>294</sup> G4S representatives described the security infrastructure at Manus Island RPC as important for protecting those detained from “external threats” as well as for crowd control, preventing “the congregation of large groups of transferees into unmanageable numbers.”<sup>295</sup>

Individuals held in RPC are routinely “exposed to the elements” in a tropical environment which averages between 27 and 30 degrees Celsius.<sup>296</sup> A former G4S employee stated that “there was virtually no shade in any of the compounds and despite the intense heat the guys weren’t given any hats and very limited sunscreen.”<sup>297</sup> During a 2013 visit, Amnesty International noted similar conditions, finding that “there is almost no shade to protect people from the sun, heat or rain.”<sup>298</sup>

Former RPC employees describe “poor sanitation and sewage blockages.”<sup>299</sup> A former Salvation Army employee stated that “the toilets and showers were highly unhygienic and in poor condition” with “moss and fungi growing on the walls and floors.”<sup>300</sup> In 2014, a spokesman for the Refugee Action Coalition noted that in the Manus camps, “[s]kin and fungal infections are endemic. The toilets are often blocked and have to be hosed out, so sewage gets on the floor. If the tide is high, the raw sewage also comes back up”<sup>301</sup> “the floors in all the facilities were

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<sup>288</sup> INCIDENT AT THE MANUS ISLAND DETENTION CENTRE, *supra* note 235, § 3.9.

<sup>289</sup> Annexure A.

<sup>290</sup> Interview with Kareem\* in Brisbane, Australia (May 17, 2016); Interview with Peter\* in Melbourne, Australia (May 16, 2016).

<sup>291</sup> Interview with Peter\* in Melbourne, Australia (May 16, 2016).

<sup>292</sup> INCIDENT AT THE MANUS ISLAND DETENTION CENTRE, *supra* note 235, § 3.11.

<sup>293</sup> *Id.* § 3.12.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* § 3.36.

<sup>296</sup> *Id.* § 1.49.

<sup>297</sup> *Id.* § 3.13.

<sup>298</sup> *Id.* § 3.14.

<sup>299</sup> *Id.* § 3.9.

<sup>300</sup> *Id.* § 3.16.

<sup>301</sup> *Australia asylum seeker ‘brain dead’ after infection – activists*, BBC, Sept. 3, 2014, <http://www.bbc.com/news/world-asia-29041853>.

constantly wet and there was a strong smell of sewage around the centre at all times.”<sup>302</sup> One individual recalled the constant flooding at Manus, where water—which rose past one’s shins—mixed with the effluvia of toilets and showers.<sup>303</sup>

Bathroom facilities at Manus are insufficiently equipped to deal with the number of people held there; it is reported that a) facilities are rarely cleaned and mould grows on most surfaces,<sup>304</sup> b) soap is not provided to individuals held in detention,<sup>305</sup> and c) they are given, at most, six squares of toilet paper upon request.<sup>306</sup> A former G4S employee echoed these shortages, stating that “we were only allowed to dole out very limited amounts of shampoo and soap to them, and even the toilet paper was given to them in individual sheets . . . so the detainees had to come and ask for toilet paper whenever they wanted it, which I found really demeaning and embarrassing . . . they were treated as less than children.”<sup>307</sup> A former Salvation Army employee states that “many times soap ran out in the centre.”<sup>308</sup>

Individuals detained on Manus describe the food as inedible, and former RPC employees report observing “unhygienic meals and poorly managed service of meals.”<sup>309</sup> One man held in detention felt he could only safely eat breakfast food — non-perishable items like cereal, that do not rot as quickly.<sup>310</sup> Another stated that there were only “five or six types of food,” and that it was perpetually dotted with mosquitos and other insects.<sup>311</sup> Nicole Judge, a former Salvation Army employee, stated that she had “personally found small worms and flies baked into bread and also in meat being offered to staff and transferees.”<sup>312</sup> The delivery of food was also troubled, as “often the line was 200 meters long and people had to queue for hours to get each meal. . . every day there were tensions and arguments about the queue and whether someone had taken someone else’s place.”<sup>313</sup>

Access to safe drinking water has also been problematic; “[t]he 500 men in the ‘Oscar’ compound each receive only 500mls of water per day, though the recommended quantity is five

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<sup>302</sup> INCIDENT AT THE MANUS ISLAND DETENTION CENTRE, *supra* note 235, § 3.16.

<sup>303</sup> Interview with Kareem\* in Brisbane, Australia (May 17, 2016).

<sup>304</sup> Annexure A.

<sup>305</sup> Annexure A.

<sup>306</sup> Annexure A.

<sup>307</sup> INCIDENT AT THE MANUS ISLAND DETENTION CENTRE, *supra* note 235, § 3.17.

<sup>308</sup> *Id.* § 3.16.

<sup>309</sup> *Id.* § 3.9.

<sup>310</sup> Interview with Peter\* in Melbourne, Australia (May 16, 2016).

<sup>311</sup> Interview with Kareem\* in Brisbane, Australia (May 17, 2016).

<sup>312</sup> INCIDENT AT THE MANUS ISLAND DETENTION CENTRE, *supra* note 235, § 3.20.

<sup>313</sup> *Id.* § 3.21.

litres each.”<sup>314</sup> According to the Secretariat of the Pacific Community, just over ten percent of Manus Province residents have access to safe water and adequate sanitation.<sup>315</sup>

Additionally, the detention centre on Manus reportedly limits refugees’ access to information, including blocking websites that offer attorney services.<sup>316</sup> Salvation Army employees have stated that the rapid increase in population and shift away from family housing has “put an incredible strain on existing infrastructure,” resulting in insufficient telephone, computer, and internet access for asylum seekers.<sup>317</sup> Amnesty International noted that “access to the website of the UNHCR was blocked until detainees complained during UNHCR’s last visit to the centre” and that “phone calls to the UNHCR office were still blocked” when Amnesty International visited in November 2013.<sup>318</sup> Additionally, “after the [mid-February 2014 violence], access to the internet was turned off . . . reventing the asylum seekers from contacting the outside world” possibly until 3 March 2014.<sup>319</sup>

Of additional concern to Manus Island’s practices of restricting communication and information access, the detention centre tries to block refugees and asylum seekers’ access to counsel. Those who are fortunate enough to successfully contact an attorney reportedly face discrimination and bullying as a result. An individual held in detention recalls his friend being harassed after finding a lawyer through social media.<sup>320</sup>

Moreover, a Salvation Army employee recalled “there were insufficient dedicated interview rooms for case management . . . and in some cases, no interpreters at all for certain cultural groups.”<sup>321</sup> Amnesty International noted similar issues during its November 2013 visit to the Manus Island RPC, when it found that of the 1,100 men at the facility “only 55 asylum seekers have had an initial assessment interview” and only “160 asylum seekers have been able to submit asylum applications” after a full year of operation.<sup>322</sup>

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<sup>314</sup> Graeme McGregor, *Broken toilets, no shoes, limited water: the daily humiliations of life on Manus*, THE GUARDIAN, Dec. 15, 2013, <https://www.theguardian.com/commentisfree/2013/dec/16/broken-toilets-no-shoes-limited-water-the-daily-humiliations-of-life-on-manus>.

<sup>315</sup> *The World’s ‘Third Worst’ Firm Runs Manus*, NEW MATILDA, Mar. 6, 2013, <https://newmatilda.com/2013/03/06/worlds-third-worst-firm-runs-manus/>.

<sup>316</sup> Interview with Peter\* in Melbourne, Australia (May 16, 2016).

<sup>317</sup> INCIDENT AT THE MANUS ISLAND DETENTION CENTRE, *supra* note 235, § 3.8.

<sup>318</sup> THIS IS BREAKING PEOPLE, *supra* note 278, at 7.

<sup>319</sup> INCIDENT AT THE MANUS ISLAND DETENTION CENTRE, *supra* note 235, § 6.6.

<sup>320</sup> Interview with Peter\* in Melbourne, Australia (May 16, 2016) (“The lawyers can’t help you.”).

<sup>321</sup> INCIDENT AT THE MANUS ISLAND DETENTION CENTRE, *supra* note 235, § 3.8.

<sup>322</sup> THIS IS BREAKING PEOPLE, *supra* note 278, at 8.

*ii. Endemic Violence and Tensions on Manus Island, Culminating in Large-Scale Riot in 2014*<sup>323</sup>

On 17 February 17, 2014, “police, guards and local people”<sup>324</sup> raided the Manus compound, injuring scores of detained individuals and resulting in the death of 23 year-old Iranian asylum seeker Reza Barati.<sup>325</sup> Guards and native Papuan New Guineans attacked refugees for more than 48 hours<sup>326</sup> -- an event presaged in the past year by a climate of “animosity,”<sup>327</sup> a 2013 non-fatal shooting,<sup>328</sup> and an attempted raid on the Manus Island RPC by a machete-wielding mob.<sup>329</sup> A former Salvation Army employee recalled that “the attacks on asylum seekers [in February 2014] were not unpredictable and unforeseen,” but rather, “were due to the entire system.”<sup>330</sup> Corporate and government officials were directly responsible for the lack of care for refugees’ safety and well-being: staff at Papua New Guinea’s detention facilities accepted that Manus is “just a dangerous place and that there was nothing we could do to change that.”<sup>331</sup> A former G4S officer echoed this attitude in testimony to the Senate Standing Committee on Legal and Constitutional Affairs, when he stated that they “knew this was going to end in violence, and furthermore “warned that asylum seekers re-settled in [Papua New Guinea] ‘would never be safe.’”<sup>332</sup>

Prior to the facilities being raided, refugees and asylum seekers held in detention had been “on strike asking for freedom” and questioning the delays in their asylum claims processing.<sup>333</sup> Border force agents and government immigration officials did not update asylum seekers about refugee status determination (RSD) processes and procedures and refugees were not given “approximate timeframe in relation to the process, causing distress and a deep sense of helplessness.”<sup>334</sup> An official G4S incident report disclosed to The Guardian Australia stated that

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<sup>323</sup> See INCIDENT AT THE MANUS ISLAND DETENTION CENTRE, *supra* note 235, at ch. 5 (a more detailed account of the 2014 riots at Manus Island RPC.). See also Review Into the Events of 16 – 19 February 2014 at the Manus Regional Processing Centre (aka Cornall Report, 23 May 2014) (available at <https://www.border.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/review-robert-cornall.pdf>).

<sup>324</sup> Doherty & Abbott, *supra* note 269.

<sup>325</sup> Simon Cullen, *Video emerges of aftermath of deadly violence at Manus Island detention*, ABC NEWS, Mar. 17, 2014, <http://www.abc.net.au/news/2014-03-01/video-emerges-of-aftermath-at-manus-island-detention/5292664>.

<sup>326</sup> Ben Doherty, *Manus Island video footage emerges of guards rushing protest compound*, THE GUARDIAN, Jan. 19, 2015, <https://www.theguardian.com/australia-news/2015/jan/20/manus-island-video-footage-emerges-of-riot-police-rushing-protest-compound>.

<sup>327</sup> INCIDENT AT THE MANUS ISLAND DETENTION CENTRE, *supra* note 235, § 3.48.

<sup>328</sup> *Id.* § 3.49.

<sup>329</sup> *Id.* § 3.50.

<sup>330</sup> *Id.* § 3.51.

<sup>331</sup> *Id.* § 3.52.

<sup>332</sup> *Id.*

<sup>333</sup> Paul Farrell, *Asylum seeker Reza Barati died from ‘multiple head injuries,’ PNG police say*, THE GUARDIAN, Feb. 26, 2014, <https://www.theguardian.com/world/2014/feb/26/asylum-seeker-reza-barati-died-from-multiple-head-injuries-png-police-say>.

<sup>334</sup> INCIDENT AT THE MANUS ISLAND DETENTION CENTRE, *supra* note 235, § 4.61.

the violence may have been triggered by the presence of a Papua New Guinea “police dog squad” which had been invited into the Manus RPC by a “senior G4S guard” during these protests.<sup>335</sup>

“[U]p to 15 men” murdered Reza Barati, a 23 year-old Iranian asylum seeker, by attacking him “with a nail-studded plank of wood, kick[ing] him, and dropp[ing] a rock on his head.”<sup>336</sup> Another man “was shot by police and another had his throat slit by an unknown assailant with a machete”, both survived.<sup>337</sup> One detained individual recalled, in shocking detail, his treatment during and after the riot; G4S guards kicked him repeatedly, fracturing disks in his spine.<sup>338</sup> After the riots, he and his fellow detained refugees were transported to Australian navy ships; while being moved, G4S guards continued to beat them up, allegedly stating “if you don’t go back to your country, I promise you I kill you.”<sup>339</sup> Another remembers being beaten by a guard with a shield, injuring his arm and “breaking [his] bicep muscle.”<sup>340</sup> Two doctors we interviewed described the story of a man with a broken cheekbone: he was refused medical treatment for days, resulting in the loss of his eye, something that could have been easily prevented.<sup>341</sup> A Somali refugee—who would later become the victim of an October 2016 assault—recalled how his “room was like a scene of slaughter” after he had been beaten during the riots.<sup>342</sup>

### *iii. Physical and Sexual Abuse*

Detained refugees are subject to severe abuse. Detainee Emergency Response teams in the RPC stand formally accused, before Australian Parliamentary Inquiry, of waterboarding, “zipping,”<sup>343</sup> and using cable ties on refugees in Bravo Compound of the Manus detention centre.<sup>344</sup> The UN special rapporteur on torture found Australian border officials to be in breach of the *Convention Against Torture* for tying refugees to chairs and threatening “physical violence, rape, and

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<sup>335</sup> Oliver Laughland, *Revealed: G4S guard says he invited in PNG police dog squad before Manus riot*, THE GUARDIAN, Feb. 24, 2014, <https://www.theguardian.com/world/2014/feb/25/revealed-g4s-guard-says-he-invited-in-png-police-dog-squad-before-manus-riot>.

<sup>336</sup> Doherty & Abbott, *supra* note 269.

<sup>337</sup> *Id.*

<sup>338</sup> Interview with Peter\* in Melbourne, Australia (May 16, 2016).

<sup>339</sup> Interview with Peter\* in Melbourne, Australia (May 16, 2016).

<sup>340</sup> Interview with Kareem\* in Brisbane, Australia (May 17, 2016).

<sup>341</sup> Interview with Dr. Barri Phatarfod and Dr. Steven Faux, Sydney, Australia (May 21, 2016).

<sup>342</sup> Michael Gordon, *Get me off Manus Island: Assaulted Somali refugee and aid worker’s plea for medical treatment*, THE SYDNEY MORNING HERALD, Oct. 10, 2016, <http://www.smh.com.au/federal-politics/political-news/get-me-off-manus-island-assaulted-somali-refugee-and-aid-workers-plea-for-medical-treatment-20161010-gryno8.html>.

<sup>343</sup> Described as tying someone to a metal bed frame, then throwing it in the air, causing injury to the person bound to the frame. See Sanggaran & Zion, *supra* note 204.

<sup>344</sup> Select Committee on the Recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru, 140 (Aug. 2015), <http://www.ruralaustraliansforrefugees.org.au/wp-content/uploads/2015/08/2015-Senate-report-1.pdf>.

prosecution for ‘becoming aggressive’” if they refused to retract statements made about riots on Manus.<sup>345</sup>

Reports and our own interviews confirm that abuse and sexual violence are common on Manus. Guards punch and hit refugees and asylum seekers held in detention, without repercussions.<sup>346</sup> Logham Sawari, an Iranian man who was mistakenly sent to Manus as a minor, described a guard punching him after requesting more washing powder: “he came up to me and said, ‘if you don’t think it’s enough, go back to your country. If you don’t like it here, go back.’ [...] then he punched me. He punched me hard. I cry, and I fall down.”<sup>347</sup> In July 2014, two individuals were taken to the Chauka compound, a series of shipping containers for storing “‘misbehaving’ asylum seekers.” There they were “cable-tied to chairs and beaten . . . [and] threatened with rape and murder if they did not retract their statements to police” relating to the death of Reza Barati.<sup>348</sup>

After the Papua New Guinea Supreme Court, in April 2016, ruled the Manus RPC to be unconstitutional, the facility underwent a superficial restructuring and began to permit refugees held there to take scheduled buses into the town of Lorengau.<sup>349</sup> However, tensions between them and Manus locals have led to altercations and violence on a “daily basis.”<sup>350</sup> In early October, a Somali refugee named Masoud Ali Shiekhi had been volunteering to help persons with disabilities in town<sup>351</sup> and was “set upon by a group of locals with rocks in an unprovoked attack near the transit centre at East Lorengau.”<sup>352</sup> In October 2016, Daniel Webb, director of legal advocacy at the Human Rights Law Centre in Melbourne, witnessed two Afghan Hazara

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<sup>345</sup> Méndez JE, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Addendum: observations on communications transmitted to governments and replies received. Office of the United Nations High Commissioner for Human Rights, March 6, 2015, <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/28/68/Add.1&Lang=E> (last visited Nov. 2015); Ben Doherty and Daniel Hurst, *UN accuses Australia of systematically violating torture convention*, THE GUARDIAN, 10 March 2015, <https://www.theguardian.com/australia-news/2015/mar/09/un-reports-australias-immigration-detention-breaches-torture-convention>.

<sup>346</sup> Stanford Clinic interview with Kareem\* in Brisbane, Australia (May 17, 2016).

<sup>347</sup> *Refugee left homeless*, *supra* note 279.

<sup>348</sup> Michael Gordon, *Secret isolation unit used for ‘misbehaving’ asylum seekers on Manus Island*, THE SYDNEY MORNING HERALD, Sept. 4, 2014, <http://www.smh.com.au/federal-politics/political-news/secret-isolation-unit-used-for-misbehaving-asylum-seekers-on-manus-island-20140903-10bwol.html>.

<sup>349</sup> *Deportations will begin this month*, *supra* note 261.

<sup>350</sup> *Manus assault underlines need for resettlement*, RADIO N.Z., Oct. 13, 2016, <http://www.radionz.co.nz/international/pacific-news/315548/manus-assault-underlines-need-for-resettlement>.

<sup>351</sup> Michael Gordon, *Get me off Manus Island: Assaulted Somali refugee and aid worker’s plea for medical treatment*, THE SYDNEY MORNING HERALD, Oct. 10, 2016, <http://www.smh.com.au/federal-politics/political-news/get-me-off-manus-island-assaulted-somali-refugee-and-aid-workers-plea-for-medical-treatment-20161010-gryno8.html>.

<sup>352</sup> *Further calls for Manus centre closure after attack*, RADIO N.Z., Oct. 11, 2016, <http://www.radionz.co.nz/international/pacific-news/315356/further-calls-for-manus-centre-closure-after-attack>.

refugees be “beaten with an iron bar and robbed” by “a group of seven locals.”<sup>353</sup> Behrouz Boochani, a Kurdish-Iranian journalist who is detained on Manus, states that the tensions between detained refugees and Manus locals are economic and cultural:

*“They are scared from us that we take their jobs. There is not any jobs there but they scared from us because we are 900 men and this island has a small community and the people are scared of cultural problems because their community is based on tribal system. I’m sure that if they settle us by force in [Papua New Guinea] it will be a big tragedy for us and local people. I think that the local people are victims.”*<sup>354</sup>

On 23 July 2013, SBS *Dateline* aired allegations by a former G4S employee of unaddressed sexual assaults between individuals held in detention centres,<sup>355</sup> accusing Australian immigration officials and Manus Island RPC staff of ignoring abuses.<sup>356</sup> In response to the negative media attention, the Department of Immigration and Border Protection requested an inquiry into the allegations, finding the “major allegation . . . involved the sexual assault of a young man known as Mr. A . . . on two occasions.”<sup>357</sup> “Mr A’s allegations of assault were reported to the [Papua New Guinea] local police [but] Mr A refused to speak to the police.”<sup>358</sup> However, given that “same-sex sexual conduct is criminalised and police abuse against gay and transgender people is common” in Papua New Guinea,<sup>359</sup> fear of cooperating with a highly-publicised police investigation into a same-sex sexual assault is understandable.

While no individual held in detention on Manus Island has been criminally charged based on their sexual identity, several men have reported that they feel at risk or unable to report instances of sexual abuse either at the RPC or at the ELTPC.<sup>360</sup> Several homosexual individuals held in detention at Manus Island RPC allege that sexual assaults took place on Manus, but they remain reluctant to formally report these events due to the stigma and criminality of homosexual acts in

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<sup>353</sup> Doherty & Abbott, *supra* note 269; *Offshore detention blamed for violence on Manus*, RADIO N.Z., Oct. 13, 2016, <http://www.radionz.co.nz/international/programmes/datelinepacific/audio/201819729/offshore-detention-blamed-for-violence-on-manus>.

<sup>354</sup> *Offshore detention blamed for violence on Manus*, RADIO N.Z., Oct. 13, 2016, <http://www.radionz.co.nz/international/programmes/datelinepacific/audio/201819729/offshore-detention-blamed-for-violence-on-manus>.

<sup>355</sup> Cornall, Robert. Report to the Secretary Department of Immigration and Border Protection, Review Into Allegations of Sexual and Other Serious Assaults at the Manus Regional Processing Centre, at 2 (Sept. 2013), <http://www.kaldorcentre.unsw.edu.au/sites/default/files/cornall-report-sexual-assault-manus.pdf>.

<sup>356</sup> THIS IS BREAKING PEOPLE, *supra* note 278, at 49-50.

<sup>357</sup> Cornall, *supra* note 355, at 5.

<sup>358</sup> *Id.* at 6.

<sup>359</sup> THIS IS BREAKING PEOPLE, *supra* note 278, at 7.

<sup>360</sup> J. Lester Feder & Soudeh Rad, *These are the Queer Refugees Australia has Locked up on a Remote Pacific Island*, BUZZFEED, Feb. 8, 2016, [https://www.buzzfeed.com/lesterfeder/these-are-the-queer-refugees-australia-has-locked-up-on-a-re?utm\\_term=.xma0xKyqQ#.qakWm01Yn](https://www.buzzfeed.com/lesterfeder/these-are-the-queer-refugees-australia-has-locked-up-on-a-re?utm_term=.xma0xKyqQ#.qakWm01Yn).

Papua New Guinea.<sup>361</sup> As a result, they “often take a ‘buddy’ with them” to the showers to protect against “assaults by other asylum seekers or staff members.”<sup>362</sup> Chillingly and in sum, detained individuals and Salvation Army workers describe a certain shower as a “rape dungeon.”<sup>363</sup>

#### *iv. Mental Health and Extreme Rates of Self-Harm*

Mental health problems are widespread and refugees and asylum seekers held in detention “often self harm and attempt suicide.”<sup>364</sup> In October 2016, an asylum seeker “tried to self-immolate, dousing himself in flammable liquid and attempting to set himself alight with a lighter,” but “other detainees intervened to save him.”<sup>365</sup> IHMS mental health screenings conducted between April to June 2014 found that 27% of the detained refugee population at the Manus Island RPC reported high or very high levels of psychological distress.<sup>366</sup> Amnesty International notes that many in detention “related horrific accounts of torture and other ill-treatment suffered prior to undertaking their long journey to Australia” and that many had fled “conflict or other situations of general unrest in fear of their lives.”<sup>367</sup> Humanitarian Research Partners found that “about 60 per cent of asylum seekers have a history of trauma before they arrive in Australia.”<sup>368</sup>

The Senate inquiry into the incident at the Manus Island Detention Centre from 16 February to 18 February 2014 found that the violence had ‘retraumatised’ a significant portion of the detained refugee population.<sup>369</sup> This “is a huge problem at Manus Island,” with individuals in detention feeling “a profound sense that nothing they can do can make them safe.”<sup>370</sup> Masoud Ali Shiekh, a Somali refugee attacked by a group of men on the street in Lorengau, described his mental state at Manus Island RPC: “I cannot differentiate between a nightmare, a dream and awakesness. I have difficulty talking about yesterday, today and tomorrow. It feels like one day from when I arrived till now.”<sup>371</sup>

Fearing assaults outside of the detention centres —like that which Mr. Shiekh experienced— some of those refugees and asylum seekers refrain from leaving the compound, despite the April 2016 restructuring of detention practices. An individual held in detention, named Imran, stated

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<sup>361</sup> *Id.*

<sup>362</sup> INCIDENT AT THE MANUS ISLAND DETENTION CENTRE, *supra* note 235.

<sup>363</sup> *Id.*

<sup>364</sup> INCIDENT AT THE MANUS ISLAND DETENTION CENTRE, *supra* note 235, § 3.29.

<sup>365</sup> *Deportations will begin this month*, *supra* note 261.

<sup>366</sup> INCIDENT AT THE MANUS ISLAND DETENTION CENTRE, *supra* note 235, § 3.30.

<sup>367</sup> THIS IS BREAKING PEOPLE, *supra* note 278, at 7.

<sup>368</sup> INCIDENT AT THE MANUS ISLAND DETENTION CENTRE, *supra* note 235, § 6.73.

<sup>369</sup> *Id.*

<sup>370</sup> *Id.*

<sup>371</sup> Michael Gordon, *Get me off Manus Island: Assaulted Somali refugee and aid worker’s plea for medical treatment*, THE SYDNEY MORNING HERALD, Oct. 10, 2016, <http://www.smh.com.au/federal-politics/political-news/get-me-off-manus-island-assaulted-somali-refugee-and-aid-workers-plea-for-medical-treatment-20161010-gryno8.html>.



that “even though it’s now an open centre, I have only left the detention centre twice: once to meet my lawyer and once to do this interview [with The Guardian Australia] . . . I have suffered before but I’ve never felt so alone. I was looking for safety but have been locked up somewhere and almost beaten to death.”<sup>372</sup> One detained individual recalls the “stress” of Manus inducing a heart attack.<sup>373</sup> A former Salvation Army employee recalled how G4S workers had used “the threat posed by the [Papua New Guinea] nationals” as a “source of intimidation . . . against asylum seekers. Stories of cannibalism . . . high levels of criminal activity especially towards foreigners, as well as the high level of HIV in the [Papua New Guinea] population were told to asylum seekers constantly.”<sup>374</sup>

With such anxieties about leaving the facility, and with memories of the 2014 violence still fresh in the minds of many men,<sup>375</sup> “most stay up most of the night, talking and smoking, and sleep during the day. Many say they feel safer staying up at night.”<sup>376</sup> In comments to the Senate, Ben Pynt from Humanitarian Research Partners noted that “people are still keeping guard at night. There is somebody in each of the hard-shell tents and somebody in each of the rooms who stays awake at all times, because they are petrified of being attacked again.”<sup>377</sup> Many refugees, already with a “history of trauma and torture”, cannot sleep without the aid of “strong sedatives” or marijuana, for which there is a “steady black market trade . . . inside the centre.”<sup>378</sup>

Asylum seekers who are deemed “misbehaving” for non-compliance are placed on the Behavioural Management Program and often transferred to the “Chauka compound”, a “series of converted shipping containers” that are “each containing a single bed and no windows.”<sup>379</sup> Former director of mental health services for IHMS, Peter Young, noted that “many of those placed in solitary confinement [in Chauka] were expected to already be suffering mental health problems . . . [a]nd they are put in a situation that is making their conditions worse.”<sup>380</sup> Additionally, detained refugees and asylum seekers who are deemed mentally ill are held in “Delta 9,” a cramped housing unit with “no recreational facilities, poor lighting” and “no windows” in rooms.<sup>381</sup> Moreover, the gate outside of Delta 9 “is boarded up so transferees cannot see outside this area.”<sup>382</sup> A former Salvation Army employee recalled how they had “heard transferees screaming inside this area, and shaking the fence as [they] walked past.”<sup>383</sup>

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<sup>372</sup> Doherty & Abbott, *supra* note 269.

<sup>373</sup> Stanford Clinic interview with Kareem\* in Brisbane, Australia (May 17, 2016).

<sup>374</sup> INCIDENT AT THE MANUS ISLAND DETENTION CENTRE, *supra* note 235, § 3.48.

<sup>375</sup> *Id.* § 6.3.

<sup>376</sup> Doherty & Abbott, *supra* note 269.

<sup>377</sup> INCIDENT AT THE MANUS ISLAND DETENTION CENTRE, *supra* note 235, § 6.74.

<sup>378</sup> Doherty & Abbott, *supra* note 269.

<sup>379</sup> Gordon, *supra* note 371.

<sup>380</sup> Ben Doherty & Nick Evershed, *Manus Island asylum seekers put in solitary confinement at a rate of three a week*, THE GUARDIAN, Dec. 11, 2014, <https://www.theguardian.com/australia-news/2014/dec/12/three-asylum-seekers-a-week-are-locked-in-solitary-confinement-on-manus-island>.

<sup>381</sup> INCIDENT AT THE MANUS ISLAND DETENTION CENTRE, *supra* note 235, § 3.29.

<sup>382</sup> *Id.*

<sup>383</sup> *Id.*

In November 2013, Amnesty International recorded seven mental health staff at the Manus Island RPC.<sup>384</sup> After the violence in 2014, IHMS deployed nine additional mental health practitioners to Manus Island RPC to address “an increase in the number of people suffering from post-traumatic stress disorder”; however, a case worker who worked at the Manus Island RPC in the weeks following the violence reports that “there was only one psychologist or mental health nurse available to the 1300 detainees and one STTARS (torture and trauma) counsellor.”<sup>385</sup>

#### *v. Inadequate Medical Care*

Detention on Manus has had disastrous consequences for many refugees and asylum seekers; they report depression, physical degradation, weight-loss, and constant pain.<sup>386</sup> Moreover, access to medical care is limited on Manus, with “waiting times for IHMS appointments” taking “a minimum of three days at one point.”<sup>387</sup> IHMS is contracted to provide primary healthcare appointments “within 72 hours for all people,” but this does not happen in practice; additionally, there are no specialist practitioners on the island<sup>388</sup> as the government *only* contracts for the provision of primary healthcare.<sup>389</sup>

After the riots of 2014, a detained individual reported severe spinal injuries that impacted the use of his hands, forever limiting his mobility and career prospects.<sup>390</sup> Another recalled contracting malaria, receiving belated treatment, as opposed to prophylactic care.<sup>391</sup> Many refugees in detention report only receiving “panadol and water” in response to even extreme pain.<sup>392</sup> Former Salvation Army employee Nicole Judge echoed this common response from medical staff, stating that “often medical provisions is panadol and water. Transferees may have to wait several days to receive Panadol for an ailment” but non-medical staff—with quicker access to detained individuals—“are threatened that they will lose their job for offering transferees Panadol or hydralyte medication for dehydration.”<sup>393</sup> The waiting time for dental care at Manus Island RPC

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<sup>384</sup> INCIDENT AT THE MANUS ISLAND DETENTION CENTRE, *supra* note 235, § 3.31.

<sup>385</sup> *Id.* § 6.3.

<sup>386</sup> Stanford Clinic interview with Peter\* in Melbourne, Australia (May 16, 2016); Interview with Kareem\* in Brisbane, Australia (May 17, 2016).

<sup>387</sup> INCIDENT AT THE MANUS ISLAND DETENTION CENTRE, *supra* note 235, § 3.25.

<sup>388</sup> Stanford Clinic interview with Peter\* in Melbourne, Australia (May 16, 2016).

<sup>389</sup> REBECCA DE BOER, AUSTL. PARLIAMENTARY LIBRARY, HEALTH CARE FOR ASYLUM SEEKERS ON NAURU AND MANUS ISLAND 3 (June 28, 2013), [http://www.aph.gov.au/About/Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BN/2012-2013/AsylumSeekersHealthCare](http://www.aph.gov.au/About/Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/AsylumSeekersHealthCare).

<sup>390</sup> Stanford Clinic interview with Peter\* in Melbourne, Australia (May 16, 2016)

<sup>391</sup> Stanford Clinic interview with Kareem\* in Brisbane, Australia (May 17, 2016).

<sup>392</sup> Doherty & Abbott, *supra* note 269.

<sup>393</sup> INCIDENT AT THE MANUS ISLAND DETENTION CENTRE, *supra* note 235, § 3.26.

has been excruciatingly long; “it took two years for a dentist and optometrist to come to Manus. By this time, many had lost their teeth.”<sup>394</sup>

Masoud Ali Shiekh, a Somali refugee who was assaulted by a group of Manus locals in Lorengau in October 2016 was unable to receive proper medical imaging after being struck by a rock in the head, because the only X-ray machine on Manus was broken.<sup>395</sup> Mr. Ali Shiekh states that “there is no anything. The injury is deep in the head and I can’t open my eyes . . . when I stand up I feel like I would fall . . . I wish I could find treatment. There is no treatment here.”<sup>396</sup> Mr. Ali Shiekh also shared his fears about sanitary conditions at the hospital, worrying that his open head wound will become infected.<sup>397</sup>

This is a well-founded fear, given the death of fellow detained individual, 24 year-old Hamid Kehazaei, who died of septicemia from a minor shin blister.<sup>398</sup> The medical facilities on Manus had ran out of the antibiotics needed to treat Kehazaei’s infection, and significant bureaucratic delays in arranging a medical visa—in the face of IHMS recommendations for “urgent transfer”—led to his death when removed from life support in a Brisbane hospital on 5 September 2014.<sup>399</sup> Following Kehazaei’s death, Australian immigration minister Scott Morrison issued a statement assuring that the level of medical care provided to asylum seekers on Manus is “outstanding.”<sup>400</sup>

Conditions at the facilities—particularly in regard to hygiene, food safety and exposure—contribute to refugees’ and asylum seekers’ medical issues. Amnesty International noted in 2013 that “IHMS staff reported the lack of shade [for those in detention] has led to numerous health issues, including people collapsing from heat stroke.”<sup>401</sup> Many “had skin conditions caused by the constant wetness, humidity and . . . unhygienic cleaning facilities,”<sup>402</sup> leading detained refugees and staff to “suffer regularly from foot infections.”<sup>403</sup> A former G4S employee states that the quality of the food caused many illnesses, and that “cases of diarrhoea and food

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<sup>394</sup> See Behrouz Boochani, *Manus Island’s appalling health care record*, THE SATURDAY PAPER, Apr. 16, 2016, <https://www.thesaturdaypaper.com.au/news/politics/2016/04/16/manus-islands-appalling-health-care-record/14607288003132>. See also Stanford Clinic interview with Peter\* in Melbourne, Australia (May 16, 2016).

<sup>395</sup> Michael Gordon, *Get me off Manus Island: Assaulted Somali refugee and aid worker’s plea for medical treatment*, THE SYDNEY MORNING HERALD, Oct. 10, 2016, <http://www.smh.com.au/federal-politics/political-news/get-me-off-manus-island-assaulted-somali-refugee-and-aid-workers-plea-for-medical-treatment-20161010-gryno8.html>.

<sup>396</sup> *Id.*

<sup>397</sup> *Id.*

<sup>398</sup> Ben Doherty, *Hamid Kehazaei death: visa delays stalled transfer of gravely ill asylum seeker*, THE GUARDIAN, Dec. 8, 2014, <https://www.theguardian.com/australia-news/2014/dec/09/hamid-kehazaei-death-visa-delays-stalled-transfer-asylum-seeker>.

<sup>399</sup> *Id.*

<sup>400</sup> Oliver Laughland, Donya Nissi, & Paul Farrell, *Hamid Kehazaei dies after family give permission to switch off life support*, THE GUARDIAN, Sept. 6, 2014, <https://www.theguardian.com/world/2014/sep/05/hamid-kehazaeis-family-give-doctors-permission-to-switch-off-his-life-support>.

<sup>401</sup> INCIDENT AT THE MANUS ISLAND DETENTION CENTRE, *supra* note 235, § 3.14.

<sup>402</sup> *Id.* § 3.25.

<sup>403</sup> *Id.*

poisoning were rampant . . . we had an isolation bay both for staff and for the detainees and both were constantly in use.”<sup>404</sup> Outbreaks of gastroenteritis are common due to poor sanitation and poor quality of food.<sup>405</sup> A former RPC worker recalled witnessing “cases of scabies, typhoid, regular gastroenteritis, rashes and skin infections” over the course of five months.<sup>406</sup>

Tropical diseases are common. Malaria is present at a rate of 94% in the area near the Manus Island RPC,<sup>407</sup> and other diseases, such as Barmah Forest virus, Murray River virus and dengue fever are endemic.<sup>408</sup> Cases of malaria are frequent among asylum seekers.<sup>409</sup> However, a former Salvation Army employee noted that anti-malarial drugs were exhausted “numerous times” over a 5-month period.<sup>410</sup>

#### **4. Evidence of Australian Government Officials’ Knowledge of and Effective Control over Conditions on Nauru and Manus Island**

The Australian, Nauruan, and Papua New Guinean government officials are aware of the harsh conditions and treatment refugees and asylum seekers face in the offshore detention centres, and effectively control those conditions. Australia’s refugee processing system has been intentionally and explicitly designed to be punitive and harsh, its policies developed with a consistently directed plan of deterrence.<sup>411</sup> Since its inception the Australian government has been on notice that abuses within the centres are widespread. Rather than investigating incidents and reforming practices to comply with international law and UN recommendations,<sup>412</sup> the Australian government has continued to surround its detention program with increasingly secretive and severe policies to insulate it from scrutiny.<sup>413</sup> As noted above, domestic institutions organised by the Australian government properly and publicly notified Australian government officials and their agents of both the factual circumstances surrounding the detention of refugees and their legal implications.<sup>414</sup> Multitudes of parliamentary inquiries also indicate the severity of this

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<sup>404</sup> *Id.* § 3.21.

<sup>405</sup> *Id.* § 3.25; *See also* THIS IS BREAKING PEOPLE, *supra* note 278, at 43.

<sup>406</sup> INCIDENT AT THE MANUS ISLAND DETENTION CENTRE, *supra* note 235, § 3.25.

<sup>407</sup> World Health Organization, World Malaria Report 2014, Country Profile: Papua New Guinea, WHO: Geneva, 2015, [http://www.who.int/malaria/publications/country-profiles/profile\\_png\\_en.pdf](http://www.who.int/malaria/publications/country-profiles/profile_png_en.pdf)

<sup>408</sup> Kevin Kline, et. al., *Neglected Tropical Diseases of Oceania: Review of Their Prevalence, Distribution, and Opportunities for Control*, 7 PLOS NEGLECTED TROPICAL DISEASES 1, 5 (Jan. 2013).

<sup>409</sup> BOER, *supra* note 389, at 8.

<sup>410</sup> INCIDENT AT THE MANUS ISLAND DETENTION CENTRE, *supra* note 235243, § 3.25.

<sup>411</sup> *See supra* Part II, Section 1.

<sup>412</sup> United Nations General Assembly, Report of the Working Group on the Universal Periodic Review: Australia, 13 January 2016 (A/HRC/31/14), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/004/89/PDF/G1600489.pdf?OpenElement>; Office of the UN High Commissioner for Human Rights, Australia and Nauru must end offshore detention; investigate claims of abuse – UN rights office (Aug. 12, 2016), <http://www.un.org/apps/news/story.asp?NewsID=54669#.WI-f6pE76hA>.

<sup>413</sup> Australian Border Force Act 2015 (Act No. 40, 2015) (Austl.).

<sup>414</sup> *See, e.g.*, Australian Human Rights Commission, *National Inquiry into Children in Immigration Detention 2014*,

arbitrary detention to Australian government officials and their agents.<sup>415</sup> Domestic and international organisations,<sup>416</sup> commissions,<sup>417</sup> institutions,<sup>418</sup> academic bodies,<sup>419</sup> individuals, citizen-led grassroots organisations,<sup>420</sup> and documentarians<sup>421</sup> notified Australian officials and their agents of the legal and factual circumstances surrounding detention. The government of Australia—including its attorney general and various parliamentary leaders—were also notified of this arbitrary detention through court proceedings.<sup>422</sup> Indeed, concerns of rights violations in the offshore detention centres have been “regularly and persistently brought [] to the attention of the government of Nauru and Australia” by the OHCHR.<sup>423</sup>

Not only are officials aware of the harsh treatment of refugees and asylum seekers held in detention, but the deterrence framework and their own public statements suggest that they have approved these intolerable conditions to promote hopelessness and deter additional migration.<sup>424</sup> In May 2014, Malcolm Turnbull, acting in his capacity as Communications Minister, stated “[w]e have harsh measures [and] some would say cruel measures . . . [but] the fact is if you want to stop the people-smuggling business you have to be very, very tough.”<sup>425</sup> In September 2015, Turnbull, now serving as Prime Minister, underscored the intentional nature of this cruel

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<https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/national-inquiry-children-immigration-detention-2014>.

<sup>415</sup> See, e.g., Australian Parliament, *An inquiry into the recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru* (2015)

[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regional\\_processing\\_Nauru/Regional\\_processing\\_Nauru](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru).

<sup>416</sup> ISLAND OF DESPAIR, *supra* note 48.

<sup>417</sup> Australian Human Rights Commission, *Asylum seekers, refugees and human rights*, Oct. 2, 2013, [http://www.humanrights.gov.au/sites/default/files/document/publication/snapshot\\_report\\_2013.pdf](http://www.humanrights.gov.au/sites/default/files/document/publication/snapshot_report_2013.pdf).

<sup>418</sup> UNHCR, *UNHCR Calls for Immediate Movement of Refugees and Asylum-Seekers to Humane Conditions*, May 2, 2016,

<http://unhcr.org.au/news/unhcr-calls-immediate-movement-refugees-asylum-seekers-humane-conditions/>.

<sup>419</sup> OFFSHORE PROCESSING, *supra* note 99.

<sup>420</sup> See, e.g., Asylum Seekers’ Resource Centre, #BringThemHere campaign at <http://asrccampaigns.nationbuilder.com/bringthemhere>; “Mums For Refugees”, <http://www.mums4refugees.org/>;

<sup>421</sup> Amelia Hill, *Film about abuse in Australia’s refugee camps screened on London embassy*, THE GUARDIAN, Oct. 5, 2016, <https://www.theguardian.com/world/2016/oct/05/film-about-australian-refugee-detention-centres-screened-on-london-embassy>.

<sup>422</sup> Al Jazeera Staff, *Australia court: Imprisoning refugees offshore is legal*, AL-JAZEERA, Feb. 3, 2016, <http://www.aljazeera.com/news/2016/02/australia-court-imprisoning-refugees-offshore-legal-160203033632383.html>.

<sup>423</sup> U.N. News Centre, *Australia and Nauru must end offshore detention; investigative claims of abuse*, at [www.un.org/apps/news/story.asp?NewsID=54669#.WlZSa\\_krLIU](http://www.un.org/apps/news/story.asp?NewsID=54669#.WlZSa_krLIU) (Aug. 2016).

<sup>424</sup> See *supra* Part II, Section 1; Interview by Stanford Law School with Greg Lake; Mark Isaacs, *The Intolerable Cruelty of Australia’s Refugee Deterrence Strategy*, FOREIGN POLICY (May 2, 2016), <http://foreignpolicy.com/2016/05/02/australia-papua-new-guinea-refugee-manus-nauru/>.

<sup>425</sup> AAP, *Malcolm Turnbull Admits Coalition Border Policies Harsh*, THE AUSTRALIAN, May 7, 2014, <http://www.theaustralian.com.au/national-affairs/immigration/malcolm-turnbull-admits-coalition-border-policies-harsh/story-fn9hm1gu-1226908408949?sv=b58f593c81a0a88da97155ba13a55f91>.

treatment, remarking “we do have a tough border policy, you could say it’s a harsh policy, but it has worked.”<sup>426</sup>

Government officials’ knowledge and awareness is further evidenced by what they communicate to the refugees and asylum seekers on Manus Island and Nauru. In September 2014, Australian Minister for Immigration Minister Scott Morrison personally told asylum seekers that they will never go to Australia.<sup>427</sup> This mirrored a video that was screened to refugees as part of their orientation, which delivered the same message, which left those we spoke with feeling disappointed, depressed, and afraid.<sup>428</sup> In September 2016, the Government of Papua New Guinea distributed a four page document informing refugees of the common position of Papua New Guinea and Australia that they will never be settled in Australia, and that no third countries will accept their resettlement.<sup>429</sup> Several of the individuals we spoke with noted that they believed their abuse was intentional. One individual formerly held on Nauru summarised his experience: the “processing centre is using the human like a political weapon; we don’t want to be political weapons.”<sup>430</sup>

As concern over and attention to Australia’s detention regime increased, the government, exercising effective control over the daily running of the camps, the government tightened its control over information going both in and out of the detention centres. These heightened secrecy policies further signal official knowledge of the conditions in the detention facilities. The *Australian Border Force Act*, for example, criminalises the recording and disclosure of facts and information observed by any government employee or subcontractor working in the centres, and imposes harsh sanctions on offenders.<sup>431</sup> Moreover, ASIO agents are afforded legal immunity for a range of otherwise illegal conduct.<sup>432</sup> Evidence shows that they are in control of the system of eligibility interviews and Refugee Status Determination processing.<sup>433</sup>

The daily logs revealed in the Nauru Files indicate that Australian government officials, border patrol agents, and private security contractors knew of, and actively covered up, many of the

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<sup>426</sup> Francis Keany, *Malcolm Turnbull ‘Concerned’ about Conditions on Manus and Nauru; Rules out Offshore Detention Centre Refugees in Australia*, ABC, Sept. 23, 2015, <http://www.abc.net.au/news/2015-09-23/turnbull-says-changes-to-asylum-seeker-policy-will-be-considered/6799162>.

<sup>427</sup> Sarah Whyte, *Immigration Minister Scott Morrison Tells Asylum Seekers to go Home in “Orientation Video.”* THE SYDNEY MORNING HERALD, June 26, 2014.

<sup>428</sup> *Id.* Individuals we interviewed formerly held on Nauru recounted being shown this video. Stanford Clinic interview with Shahana\* in Wickham Point, Australia (May 14, 2016).

<sup>429</sup> Ben Doherty, *‘No future for you here’: Australia and PNG push to clear out Manus detainees*, THE GUARDIAN, Sept. 27, 2016, <https://www.theguardian.com/australia-news/2016/sep/27/no-future-for-you-here-australia-and-png-push-to-clear-out-manus-detainees>.

<sup>430</sup> Stanford Clinic interview with Mohamed\* in Wickham Point, Australia (May 13, 2016).

<sup>431</sup> Australian Border Force Act 2015 (Austl.) (Act No. 40, 2015).

<sup>432</sup> SAFEGUARDING DEMOCRACY, *supra* note 62, at 25.

<sup>433</sup> U.N. HIGH COMM’N ON REFUGEES, UNHCR MONITORING VISIT TO THE REPUBLIC OF NAURU: 7 TO 9 OCTOBER 2013, at 2 (2013), <http://www.refworld.org/docid/5294a6534.html> [hereinafter VISIT TO THE REPUBLIC OF NAURU] (“eligibility interviews and RSD processing have been undertaken by Australian decision makers seconded to Nauru.”).

abuses occurring on Nauru.<sup>434</sup> Information contained in the Nauru Files is consistent with testimony from detention centre staff members and OHCHR’s own findings.<sup>435</sup> Twenty-four current and former employees from the Nauru detention facility insist that “the government and the Department of Immigration and Border Protection (DIBP) has been aware of the sexual and physical assault of women and children on Nauru” for a year and half prior to formal reports of sexual abuse allegations,<sup>436</sup> yet “failed to act to protect these children from harm.”<sup>437</sup>

Department of Immigration and Border Protection officials have reporting mechanisms in place showing effective control over contracted operators, service providers, and local authorities. The DIBP requires all service providers to “report and record all alleged incidents” of abuse, sexual violence, and self harm, and receive all such reports.<sup>438</sup> Individuals seeking transfer for medical reasons still need permission from DIBP officers – a fact that has resulted in the tragic death of Mr. Hamid Kehazaei in 2014.<sup>439</sup> Managers at the DIBP also participate in daily and weekly meetings on Nauru,<sup>440</sup> and Australian government officials make all major decisions pertaining to the detention of refugees.<sup>441</sup> While local law enforcement authorities in Papua New Guinea and Nauru have access to the detention centres, operational decision-making and control remain with Australian officials - the Australian government deployed Australian Federal Police officers to Nauru to assist Nauruan police with investigating crimes in detention;<sup>442</sup> Corey Caleb, Nauru’s Police Commissioner, stated that their local forces have “Australian Federal Police advisors who have day-to-day input into investigations and they know the facts.”<sup>443</sup> Finally, evidence shows that they are in control of the system of eligibility interviews and Refugee Status Determination processing.<sup>444</sup>

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<sup>434</sup> See *supra* Part II, Section 3.a.

<sup>435</sup> *The Nauru Files*, *supra* note 151; UN News Centre, *Australia and Nauru must end offshore detention; investigative claims of abuse*, at [www.un.org/apps/news/story.asp?NewsID=54669#.WlzSa\\_krLIU](http://www.un.org/apps/news/story.asp?NewsID=54669#.WlzSa_krLIU) (August 2016).

<sup>436</sup> See The Moss Report, *supra* note 165.

<sup>437</sup> Jason Om, *Immigration Department aware of sexual abuse allegations against children for 17 months but failed to act, saw former Nauru workers*, ABC NEWS, Apr. 7, 2015, <http://www.abc.net.au/news/2015-04-07/nauru-letter-of-concern-demands-royal-commission/6374680#letter>.

<sup>438</sup> DIBP *Submission: Senate Inquiry into the Conditions and Treatment*, *supra* note 6, at 31.

<sup>439</sup> Ben Doherty, *Hamid Kehazaei left critically ill on Manus because Australia delayed transfer, inquest told*, THE GUARDIAN, Nov. 30, 2016, <https://www.theguardian.com/australia-news/2016/nov/30/hamid-kehazaei-left-critically-ill-on-manus-because-australia-blocked-transfer>.

<sup>440</sup> Amnesty International interview with IHMS, Sydney, 30 August 2016 (Amnesty Report 45).

<sup>441</sup> TRANSFIELD CONTRACT, at 24.

<sup>442</sup> TAKING RESPONSIBILITY, *supra* note 6, at ¶ 5.84.

<sup>443</sup> Government of the Republic of Nauru, *'We Won't Cop it Anymore' – Nauru Police*, Feb. 2, 2016, <http://www.nauru-news.com/#!We-wont-cop-it-anymore-Nauru-Police/cjds/56b938030cf2dc1600ea69e6>.

<sup>444</sup> VISIT TO THE REPUBLIC OF NAURU, *supra* note 433, at 2. (“[E]ligibility interviews and RSD processing have been undertaken by Australian decision makers seconded to Nauru.”).

## 5. Evidence of Corporate Officers' Knowledge of and Effective Control over Conditions on Nauru and Manus Island

Corporate officers, like their governmental counterparts, are aware of the same multitude of reports and publicly available documents regarding the conditions,<sup>445</sup> yet allow them to persist. Organisations and individuals also notified private contractors associated with running the detention centres of the arbitrary detention and its legal implications, including Ferrovial.<sup>446</sup> Corporate officers have failed to respond to concerns that have been brought to them, such as overcrowding, inadequate maintenance, and supply shortages; others have directly contributed to creating the harsh conditions, participating in abuses and their obfuscation.<sup>447</sup> The major corporations involved in Australia's detention regime, namely Ferrovial, Wilson Security, and IHMS, have well-established hierarchical control structures in place.<sup>448</sup>

The Australian government is transparent in its intention for its offshore detention centres to serve a deterrent function. Companies contracted to operate these centres, namely Ferrovial, Wilson Security, and IHMS, are aware that their conditions are punitive and harsh - they are this way by design. As discussed above,<sup>449</sup> former departmental officials at a processing centre state that cruelty, including specifically targeting young children,<sup>450</sup> and dehumanising treatment is "exactly the point" of Australia's deterrence-focused immigration and border protection strategy.<sup>451</sup> The former head of IHMS, the company responsible for providing health care services to the detention centres, characterises the treatment of refugees and asylum seekers held on Nauru as being "akin to torture."<sup>452</sup> These corporations knowingly contribute a vital component to the implementation of Australia's deterrence policy, in operating detention facilities that impose treatment and conditions of life so inhumane that future refugees will not attempt the journey.

The Nauru Files demonstrate corporate officers' knowledge of the situation on offshore detention centres. The reports show that various officials and personnel were aware of conditions and problems on Nauru, but they ignored formal reports, dealt with them perfunctorily, or even downgraded them. In 2015 alone Wilson Security officers "downgraded" 128 formal reports of

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<sup>445</sup> See *supra* Part II, Section 4.

<sup>446</sup> Ben Doherty & Patrick Kingsley, *Refugee camp company in Australia 'liable for crimes against humanity,'* THE GUARDIAN, July 24, 2016, <https://www.theguardian.com/australia-news/2016/jul/25/ferrovial-staff-risk-prosecution-for-managing-australian-detention-camps>.

<sup>447</sup> *The Nauru files*, *supra* note 151.

<sup>448</sup> See Ferrovial, *About Us*, <http://www.ferrovial.com/en/company/about-us/>; International SOS, *Facts and Figures*, <https://www.internationalsos.com/about-us/facts-and-figures>; Wilson, *People who know the business*, <http://www.wilsongroupau.com/Pages/default.aspx>.

<sup>449</sup> See *supra*, Part II, Section 1.

<sup>450</sup> Interview by Stanford Law School with Greg Lake in Sydney, Australia (May 11, 2016).

<sup>451</sup> Mark Isaacs, "The Intolerable Cruelty of Australia's Refugee Strategy," *Foreign Policy*, May 2, 2016, <http://foreignpolicy.com/2016/05/02/Australia-papua-new-guinea-refugee-manus-Nauru/>.

<sup>452</sup> See Lexi Metherell, *Immigration detention psychiatrist Dr Peter Young says treatment of asylum seekers akin to torture*, ABC NEWS, Aug. 5, 2014, <http://www.abc.net.au/news/2014-08-05/psychiatrist-says-treatment-of-asylum-seekers-akin-to-torture/5650992>.



assault, self-harm, rape, and abuse without justification,<sup>453</sup> 48 of which had been determined to be “major” or “critical” risks.<sup>454</sup> On January 18, 2015, Wilson Security officers actively downgraded an attack on a child that required medical attention, even after it had been reported.<sup>455</sup> Some reports document security officers efforts to silence victims of rape and sexual assault, for instance, informing them that “rape in Australia is very common and people don’t get punished,” “as common as going to the bathroom or eating food,” and asking “if this happened to you why didn’t you scream at the time?”<sup>456</sup> This coordination further reflects the effective structures of vertical control linking the corporations’ directors to the employees on the ground.

Not only do the Nauru Files reveal corporate knowledge of detention conditions, they contain many examples of corporate officers on the ground committing acts of abuse and sexual violence. For example, in January 15, 2015, Wilson Security received a report of sexual assault of a four year old boy perpetrated by its own security officers, and knowingly downgraded the matter, even after this incident had been reported to immigration officers and Child Protection and Support workers.<sup>457</sup> On April 26, 2015, a guard attacked a child, which resulted in a formal report; Wilson Security, again, downgraded the incident.<sup>458</sup> This pattern of downgrading reports containing allegations of such serious criminal conduct indicates Wilson Security is (a) effectively controlling the information and the actions of its employees on the ground, (b) not taking adequate steps to investigate and punish individuals responsible, and (c) actively attempting to minimise the perceived severity of abuses.

Corporate officers were also aware of food and water shortages, actively restricting water intake, curtailing and strictly monitoring showers, and replacing fresh water in showers with salt-water.<sup>459</sup>

In a chilling example of the degrading and hostile environment created by security personnel in a centre on Nauru, one report details guards laughing at a young girl who had “sewn her lips together.”<sup>460</sup> The girl’s father later sought out a guard for an apology but was informed the

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<sup>453</sup> *The Nauru files*, *supra* note 151.

<sup>454</sup> *Id.*

<sup>455</sup> Incidence or Information Report (Rating changed by Wilsons), Jan. 18, 2015, <https://interactive.guim.co.uk/2016/08/nu-files/pdf/sca150057.pdf>.

<sup>456</sup> Information Report, Nov. 26, 2014, <https://interactive.guim.co.uk/2016/08/nu-files/pdf/sca141111.pdf>.

<sup>457</sup> Incidence or Information Report (Rating changed by Wilsons), Jan. 15, 2015, <https://interactive.guim.co.uk/2016/08/nu-files/pdf/sca150051.pdf>.

<sup>458</sup> Incidence or Information Report (Incidence type and risk rating amended), Apr. 26, 2015, <https://interactive.guim.co.uk/2016/08/nu-files/pdf/sca150304.pdf>.

<sup>459</sup> Committee on the Rights of the Child, *Concluding observations on the initial report of Nauru*, CRC/C/NRU/CO/1, Sept. 30, 2016, [http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/NRU/INT\\_CRC\\_COC\\_NRU\\_25458\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/NRU/INT_CRC_COC_NRU_25458_E.pdf) (13); Stanford Clinic interview with Robert\* in Wickham Point, Australia (May 13, 2016); Stanford Clinic interview with Shahana\* in Wickham Point, Australia (May 14, 2016); Stanford Clinic interview with Mohamed\* in Wickham Point, Australia (May 13, 2016).

<sup>460</sup> Information Report, Sept. 27, 2014, <https://interactive.guim.co.uk/2016/08/nu-files/pdf/sca140787.pdf>.

officer was at the airport, which reportedly induced the father to “significantly self-harm[.]”<sup>461</sup> Amnesty International has documented three cases of individuals reporting mental and physical anguish to medical professionals, only to be ignored.<sup>462</sup>

All operators contracted to run the offshore detention centres have publicly withdrawn their support, since their exposure to widespread criticism and condemnation for their involvement in Australia’s detention regime from rights groups, the United Nations, and other governments.<sup>463</sup> Wilson Security announced it will not provide further detention services once the government contract ends.<sup>464</sup> Ferrovial has also committed itself to ending its involvement.<sup>465</sup> However, to date, both corporations remain involved and possible withdrawal does not expunge liability for current and past involvement. Corporations’ plans to withdraw do, however, reflect increasing awareness of the reputational and potential legal consequences of their officers’ and directors’ actions.

## 6. Widespread Condemnation and Thorough Documentation of Crimes on Nauru and Manus Island

Australia’s policy of transfer and detention of migrants has drawn widespread scrutiny and condemnation from Australian and international organisations. There is no shortage of documentation. The UNHCR has repeatedly delivered reports condemning Australia’s treatment of asylum seekers held on Nauru and Manus.<sup>466</sup> Amnesty International has issued several reports equally critical of Australia’s policies,<sup>467</sup> The Australian Human Rights Commission presented two major reports, one in 2004<sup>468</sup> and one in 2014,<sup>469</sup> on Australia’s imprisonment of asylum seekers, specifically focusing on children in detention. They concluded that Australia was in

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<sup>461</sup> *Id.*

<sup>462</sup> *ISLAND OF DESPAIR*, *supra* note 48, at 20.

<sup>463</sup> Ben Doherty, *Wilson Security to withdraw from Australia's offshore detention centres*, THE GUARDIAN, Sept. 1, 2016, <http://www.theguardian.com/australia-news/2016/sep/01/wilson-security-to-withdraw-from-australias-offshore-detention-centres>.

<sup>464</sup> *Id.*

<sup>465</sup> *Id.* However, the Australian government has unilaterally extended the term of its contract with Ferrovial, notwithstanding its owner’s expressed desire to withdraw. Jenny Wiggins, *Ferrovial forced to run Nauru, Manus detention centres until late 2017*, FINANCIAL REVIEW, Aug 7, 2016, <http://www.afr.com/business/ferrovial-forced-fo-run-nauru-manus-detention-centres-until-late-2017-20160805-gqlr2i>.

<sup>466</sup> *See for example*, Office of the United Nations High Commissioner for Refugees, Submission on the Serious Allegations of Abuse, Self-Harm, and Neglect of Asylum Seekers in Relation to the Nauru Regional Processing Centre, and Any Like Allegations In Relation to the Manus Regional Processing Centre, Referred to the Senate Legal and Constitutional Affairs Committee, Nov. 15, 2016, <http://www.unhcr.org/58362da34.pdf>; UNHCR Calls for Immediate Movement of Refugees and Asylum-Seekers to Humane Conditions (May 2, 2016) <http://unhcr.org.au/news/unhcr-calls-immediate-movement-refugees-asylum-seekers-humane-conditions/>.

<sup>467</sup> Amnesty Int’l, Nauru 2015/2016, <https://www.amnesty.org/en/countries/asia-and-the-pacific/nauru/report-nauru/>.

<sup>468</sup> Australian Human Rights Commission, *A last resort?* April 2004, [https://www.humanrights.gov.au/sites/default/files/content/human\\_rights/children\\_detention\\_report/report/PDF/alr\\_complete.pdf](https://www.humanrights.gov.au/sites/default/files/content/human_rights/children_detention_report/report/PDF/alr_complete.pdf).

<sup>469</sup> FORGOTTEN CHILDREN, *supra* note 6.

breach of several articles of the *Convention on the Rights of the Child*. The United Nations High Commissioner for Refugees claimed, in a formal submission to the Australian government, that Australia's transfer policy "raises serious concerns about Australia's fulfilment of its obligations under international refugee law, human rights law and the terms of the MOU."<sup>470</sup> The Association for the Prevention of Torture believes that "Australia's offshore detention of asylum seekers is likely to constitute a *prima facie* regime of cruel, inhuman or degrading treatment, and may even constitute torture."<sup>471</sup>

### **Part III: Alleged Offences**

#### **1. Australian Government Officials and Their Agents Knowingly Committed Prohibited Acts as Part of a Widespread or Systematic Attack Against Refugees and Asylum Seekers**

In accordance with Article 7(1) of the *Rome Statute*,<sup>472</sup> individuals commit a crime against humanity if they knowingly commit a specified act "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." In the present section we will set out these contextual elements before identifying the prohibited acts entailing individual criminal liability.

##### **A. The Acts Are Part of an Attack That Is Directed at Civilian Populations**

Australia's immigration detention policies constitute an attack within the meaning of Article 7 of the *Rome Statute*. An attack is a "course of conduct involving the multiple commission of acts referred to in paragraph 1."<sup>473</sup> In other words, it involves the multiple commission of imprisonment, torture, *etc.*" As clarified in the Elements of Crimes and confirmed in *Prosecutor v. Bemba*, an attack "does not necessarily equate with 'military attack'" but, instead, "refers to a campaign or operation carried out against the civilian population."<sup>474</sup> According to the

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<sup>470</sup> Submission by UNHCR to the Senate Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, <http://www.apf.gov.au/DocumentStore.ashx?id=a517538c-57ff-4fcc-8137-8d3e71529b66&subId=351257> (1).

<sup>471</sup> Association for the Prevention of Torture, "APT Submission on Australia - UN Committee Against Torture 53rd Session (3-28 November 2014)," 17 October 2014, [http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/AUS/INT\\_CAT\\_NGO\\_AUS\\_18683\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/AUS/INT_CAT_NGO_AUS_18683_E.pdf), p. 9.

<sup>472</sup> *Rome Statute* of the International Criminal Court, art. 7(1), 2187 UNTS 90, U.N. Doc. A/CONF.183/9 (July 17, 1998) [hereinafter *Rome Statute*].

*Rome Statute*, art. 7(2).

<sup>474</sup> ICC Elements of Crimes, Introduction to article 7; *Prosecutor v Bemba* (ICC) PTC-II Case No. ICC-01/05-01/08, 15 June 2009, ¶ 85. See also, on what the course of conduct may entail, *Prosecutor v. Gbagbo (Decision on the Confirmation of Charges against Laurent Gbagbo)* (ICC) PTC Case No. ICC-02/11-01/11, 12 June 2014, ¶¶ 208–221.

International Tribunal for the Former Yugoslavia (ICTY) in *Prosecutor v. Kunarac*, “[i]t is sufficient to show that the act took place in the context of an accumulation of acts of violence which, individually, may vary greatly in nature and gravity.”<sup>475</sup> This course of conduct can even be “nonviolent in nature.”<sup>476</sup> Indeed, certain prohibited acts constituting an attack, such as apartheid or persecution, are often committed through legislative or executive acts.<sup>477</sup> For instance, the Nuremberg Laws were acknowledged as part of the policy of the persecution of Jews in the Nuremberg International Military Tribunal, the source of the concept of crimes against humanity.<sup>478</sup> While legislative acts and executive decrees may constitute prohibited acts, they may also facilitate prohibited acts. Professor deGuzman has argued that the Rome Statute leaves “open the possibility of an attack comprised entirely of non-violent acts.”<sup>479</sup> Ultimately, what is required is ‘the multiple commission of acts referred to in Article 7, paragraph 1,’<sup>480</sup> which will be discussed further below,<sup>481</sup> as part of the overall attack.

In the present case, the course of conduct constituting the attack contains acts of both legislative, administrative and physical violence. Through legislative, judicial, and executive schema,<sup>482</sup> individuals associated with the Australian government developed and implemented a policy against refugees and asylum seekers. This policy is further implemented through a series of actions that vary in their violence: Australian patrols and military vessels deprive them of freedom,<sup>483</sup> detention security staff rape and abuse them,<sup>484</sup> doctors fail to give them needed medical treatment,<sup>485</sup> and inhumane detention conditions drive them to suicide, self-harm, and clinical depression.<sup>486</sup> As an accumulation of bureaucratic and administrative procedures, implemented with sanctioned cruelty, the Australian government and its agents attacked a

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<sup>475</sup> *Prosecutor v Kunarac* (ICTY) TC, Case No. IT-96-23-T, 22 February 2001, ¶ 419 (‘*Kunarac* TC’)

<sup>476</sup> *Prosecutor v Jean-Paul Akayesu* TC, Case No. ICTR-96-4-T, Judgement, 2 September 1998, ¶ 581. (‘*Akayesu* TC’).

<sup>477</sup> *Id.* (“An attack may also be non violent in nature, like imposing a system of apartheid, which is declared a crime against humanity in article 1 of the Apartheid Convention of 1973, or exerting pressure on the population to act in a particular manner, may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner.”). See also *Kunarac* TC, ¶ 416.

<sup>478</sup> International Military Tribunal of Nuremberg, Judgment. See also OTTO TRIFFTERER & KAI AMBOS, *ROME STATE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* fn. 90 (3rd ed. 2016).

<sup>479</sup> M. deGuzman, ‘Crimes Against Humanity’ in W. Schabas and N. Bernaz (ed.), *The Routledge Handbook of International Criminal Law* (Routledge, 2011), 131.

<sup>480</sup> *Report of the Preparatory Commission for the International Criminal Court: Addendum 2*, UN Doc PCNICC/2000/1/Add.2 (2 November 2000) 9 (‘*ICC Elements of Crimes*’). See also ¶ 3 of the Introduction and note 6 which clarifies that “[s]uch a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action . . . .”

<sup>481</sup> See *Bemba* ¶ 75 (“[T]he commission of the acts referred to in Article 7(1) of the *Rome Statute* constitute the “attack” itself and, beside the commission of the acts, no additional requirement for the existence of an “attack” should be proven.”).

<sup>482</sup> On the role that these play in constituting an attack see further WILLIAM A SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* (Oxford University Press, 2010), 153.

<sup>483</sup> See *supra* Part II: Factual Allegations.

<sup>484</sup> See *supra* Part II: Factual Allegations.

<sup>485</sup> See *supra* Part II: Factual Allegations.

<sup>486</sup> See *supra* Part II: Factual Allegations.

civilian population within the meaning of the *Rome Statute*. Finally, these acts all have a sufficient link to and are part of the overall attack. Geographically and administratively they form part of the policy of deportation, detention and mistreatment of refugees and asylum seekers instituted and enforced by Australian officials and their agents. It is this overall policy that is being served through prohibited acts and, as Professor Triffterer writes “of particular significance [for recognising such a link], will be the manner in which the accused’s acts are associated with, or further the policy underlying the attack.”<sup>487</sup>

This policy targets a vulnerable “civilian population.” The drafters of the Statute purposefully left this category open-ended, affording protection to “any civilian population” regardless of their ethnicity, religion, or national origin.<sup>488</sup> According to the ICTY, “[i]t is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way ... that the attack was in fact directed against a civilian “population”, rather than against a limited and randomly selected number of individuals.”<sup>489</sup> Australian officials’ policy of targeting all refugees and asylum seekers who reach its shores by sea is neither limited nor random. It is directed against anyone arriving by boat to seek asylum.<sup>490</sup> Moreover, those attacked form a specifically identified population of refugees and asylum seekers. Characterised by their very vulnerability,<sup>491</sup> they are distinct from the officials and agents attacking them; as a group, they sought refuge on Australia’s shores and are, en masse, interned offshore. Equally, they incontrovertibly satisfy the category of ‘civilian’ under the Statute. These refugees are neither members of armed forces nor other combatants, which remain excluded from this

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<sup>487</sup> OTTO TRIFFTERER & KAI AMBOS, *ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* (Ambos), marginal note 17, with reference to the Seventh Report on the Draft Code of Crimes against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur, U.N. Doc. A/CN.4/419 and Add.1 (in 1989 YbILC, Vol. II, Part One), ¶ 93: ‘what counted was not the mass aspect, but the link between the act and the cruel and barbarous political system.’

<sup>488</sup> R.S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Evidence*, 78 (New York: Transnational Publishers, 2001); *Situation in the Central African Republic, in the case of the Prosecutor v Jean-Pierre Bemba Gombo*, Decision on the Confirmation of Charges, Case No. ICC-01/04-01/07, 30 Sept. 2008, ¶ 399; *Situation in the Republic of Kenya in the case of the Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Confirmation of Charges pursuant to Article 61(7)(a) and (b) of the *Rome Statute*, Case No. ICC-01/09-02/11, 23 Jan. 2012, ¶ 110; *Prosecutor v Tadić* (ICTY) TC, Case No. IT-94-1, 7 May 1997, ¶ 635 (*Tadić* TC).

<sup>489</sup> *Kunarac et al.*, AC, ¶ 90. See further, *Bemba*, ¶¶ 76-77; G. METTRAUX, *INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS* 156 (Oxford: Oxford University Press, 2005).

<sup>490</sup> Refugees and asylum seekers were told that “you will never come to Australia.” Stanford Clinic interview with Shahana\* in Wickham Point, Australia (May 14, 2016).

<sup>491</sup> See M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION* (Cambridge University Press, 2011) ch 1. See a challenge to this understanding in: *Prosecutor v Katanga* (ICC), TC-II, Case No. ICC-01/04-01/07, 7 March 2014 ¶¶ 1117-22; and criticism in Judge Van den Wyngaert’s dissenting opinion: *Katanga* ¶ 269 (Judge Van den Wyngaert); Press Release, UNHCR, *UNHCR Calls for Immediate Movement of Refugees and Asylum-Seekers to Humane Conditions*, May 2, 2016, <http://unhcr.org.au/news/unhcr-calls-immediate-movement-refugees-asylum-seekers-humane-conditions/> (describing refugees as “very vulnerable”).

designation.<sup>492</sup> They are, instead, a deliberately selected group of individuals, defined by their lack of power or political authority, exploited by the Australian government to pursue a policy of immigration deterrence.

## B. The Attack Is Widespread or Systematic

Australian government officials and their agents' policy of knowingly and indefinitely detaining refugees and asylum seekers offshore constitutes a widespread and systematic attack directed against a civilian population. Importantly, not each prohibited act discussed below, for example torture or persecution, needs to be widespread or systematic, although in many cases they will be. It is the overall attack of which these acts form part which needs to be widespread or systematic. Although the Statute requires the conduct to be either widespread or systematic, a disjunctive test,<sup>493</sup> the policy we are examining satisfies both requirements.

The attack against the civilian population of refugees and asylum seekers is widespread. The term 'widespread', refers to the 'multiplicity of victims',<sup>494</sup> and 'the large-scale nature of the attack and the number of victims.'<sup>495</sup> Indeed, the attack against refugees and asylum seekers is longstanding and on a massive scale.<sup>496</sup> Australia patrols roughly one third of its 25,760 kilometres of coastline for refugees and asylum seekers arriving by boat, where it captures them and either deposits them in another country or imprisons them indefinitely in a detention centre. These interceptions and consequent internments are frequent. The numbers fluctuate, but are high: in 2013 and 2014, the Australian Border Forces detained 17,204 to 20,587 individuals who arrived by boat, respectively.<sup>497</sup> This number excludes those returned from where they came from, or "pushed back."<sup>498</sup> The number of refugees and asylum seekers held in detention ranges in the thousands.<sup>499</sup> The policies that constitute and facilitate the commission of prohibited acts are enshrined in legislation and therefore have an open-ended applicability, potentially affecting many more thousands of victims. Detention policies have already cost the Australian government over \$7.3 billion.<sup>500</sup> Finally, they remain at the heart of major party platforms.<sup>501</sup>

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<sup>492</sup> *Situation in the Republic of Kenya*, Decision pursuant to Article 15 of the *Rome Statute* on the Authorization of an Investigation into the Situation in the Republic of Kenya, Case No. ICC-01/09, 31 March 2010, ¶ 82. *See also Blaškić*, AC, ¶¶ 110–16.

<sup>493</sup> *See Kunarac et al.*, AC, ¶¶ 93, 97.

<sup>494</sup> *Kayishema & Ruzindana* TC, ¶ 123.

<sup>495</sup> *Kunarac et al.*, AC, ¶ 94; *See also* Situation in Kenya (Authorisation Decision), ¶ 95.

<sup>496</sup> AMNESTY INT'L, ANNUAL REPORT: NAURU, POL 10/2552/2016 (2016),

<https://www.amnesty.org/en/countries/asia-and-the-pacific/nauru/report-nauru/>.

<sup>497</sup> Janet Phillips, *Boat arrivals to Australia: a quick guide to the statistics* (Jan. 23, 2014)

[http://www.aph.gov.au/about\\_parliament/parliamentary\\_departments/parliamentary\\_library/pubs/rp/rp1314/QG/BoatArrivals](http://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/rp/rp1314/QG/BoatArrivals). It is indicative that the interception of just less than a thousand asylum seekers per month was celebrated by the Australian government as a success in its policy of deterrence. *See* Patrick Lion, *Coalition claims victory as asylum seeker boat arrivals fall*, DAILY TELEGRAPH, Dec. 30, 2013, <http://www.news.com.au/coalition-claims-victory-as-asylum-seeker-boat-arrivals-fall/news-story/42f4d92be52d5b6803deb77c986de3c3>

<sup>498</sup> *Id.*

<sup>499</sup> *See supra* Part II: Factual Allegations.

<sup>500</sup> *Id.*

The attack directed against refugees and asylum seekers is also systematic. Case law has interpreted this condition to require “a pattern or methodical plan.”<sup>502</sup> The term “systematic” refers to “the organised nature of the acts of violence and the improbability of their random occurrence.”<sup>503</sup> The Court’s Pre-Trial Chamber has held that the existence of a pattern goes towards a finding of a systematic attack.<sup>504</sup> In the present case, the policy entailing the prohibited acts discussed below is “thoroughly organised and follow[s] a regular pattern on the basis of a common policy involving substantial public and private resources.”<sup>505</sup> Orchestrated at the highest levels of government and requiring the devotion of considerable funding,<sup>506</sup> the attack discussed is part of the state’s official, sanctioned, and planned policy. Moreover, the prohibited acts discussed below are not isolated or random; they are part of the state’s immigration policy. This policy serves a particular policy purpose: the deterrence of further migration flows. To quote the Australian Liberal Party, now in government, Australia suffers from a “border protection crisis” at the level of a “national emergency,” requiring “the discipline and focus of a targeted military operation, placed under a single operational and ministerial command” that “draw[s] together all the necessary resources and deployments of government agencies.”<sup>507</sup> The Operation is led by a major general involved in Afghan military operations.<sup>508</sup>

The systematic nature of the attack reflects, illustrates and entails the existence of an underlying “State or organizational policy”, as required by article 7(2)(a). Jurisprudence has clarified that “[a] systematic attack means an attack carried out pursuant to a preconceived policy or plan.”<sup>509</sup> In this case, the plan is official state policy, which is established, detailed, and thoroughly enforced in order to produce its desired deterrent effect.

## **2. Australian Officials and Their Agents Knowingly Imprisoned a Civilian Population in Contravention of the Fundamental Rules of International Law, within the meaning of Article 7(1)(e) of the *Rome Statute***

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<sup>501</sup> Even the Labor party has insisted on maintaining the offshore processing regime. Australian Labor Party, *A Humane and Compassionate Approach to Asylum Seekers*, <http://www.alp.org.au/asylumseekers> (“Labor will stand firm on maintaining a policy of offshore processing.”) (last visited Feb. 10, 2017).

<sup>502</sup> *Tadić* TC, ¶ 648.

<sup>503</sup> *Kordić* AC, ¶ 94; *Blaškić* AC, ¶ 101; Situation in Kenya (Authorisation Decision), ¶ 96; *Gbagbo* (Confirmation Decision), ¶ 223.

<sup>504</sup> *Ntaganda* (Confirmation Decision), ¶ 24.

<sup>505</sup> *Akayesu*, TC, September 2, 1998, ¶ 580.

<sup>506</sup> See *supra* Part II: Factual Allegations.

<sup>507</sup> Liberal Party of Australia, THE COALITION’S OPERATION SOVEREIGN BORDERS POLICY, at 2 (July 2013), <http://sievx.com/articles/OSB/201307xxTheCoalitionsOSBPolicy.pdf>.

<sup>508</sup> Press Release, Minister for Immigration and Border Protection, *New commander named for Operation Sovereign Borders*, Mar. 30 2015, <http://www.minister.border.gov.au/peterdutton/2015/Pages/new-commander-named-for-osb.aspx>.

<sup>509</sup> *Kayishema & Ruzindana*, TC, May 21, 1999, ¶ 123.

Australian government officials, in association with corporate officers, as well as government officials and agents in Nauru and Papua New Guinea, committed the act referred to in Article 7(1)(e), namely “imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law,” which, in the context set out above, constitutes a crime against humanity. The *Rome Statute* Elements of Crimes isolate five elements of this crime:

1. “The perpetrator imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty;”
2. “The gravity of the conduct was such that it was in violation of fundamental rules of international law;”
3. “The perpetrator was aware of the factual circumstances that established the gravity of the conduct;”
4. “The conduct was committed as part of a widespread or systemic attack directed against a civilian population;” and
5. “The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systemic attack directed against a civilian population.”

#### **A. Element One: Imprisonment or Other Severe Deprivation of Liberty**

Australian government officials and their agents imprison or deprive asylum seekers and refugees of their physical liberty. The first element of Article 7(1)(e) has two alternative limbs: the perpetrator has a) imprisoned one or more persons, or b) otherwise severely deprived one or more persons of physical liberty. Together, these limbs cover a host of detentions. While the Court has yet to develop extensive jurisprudence on this prohibited act, the *ad hoc* Tribunals have done so. While the reference in the ICTY and ICTR Statutes is solely to ‘imprisonment’, jurisprudence on imprisonment has included ‘other severe deprivations of liberty’ “such as detention in ghettos or concentration camps.”<sup>510</sup> The ICTY held that “any form of arbitrary physical deprivation of liberty of an individual may constitute imprisonment under Article 5(e) of the Statute [of the ICTY] as long as the other requirements of the crime are fulfilled.”<sup>511</sup> The ICTY determined that a deprivation of liberty is “arbitrary” when it occurs “without due process of law”<sup>512</sup> and when prisoners are deprived “access to the procedural safeguards regulating their confinement.”<sup>513</sup> Detention is considered arbitrary also when the conditions of detention amount to torture or cruel, inhuman or degrading treatment.<sup>514</sup> Likewise, in construing “deprivation of liberty,” the ICTY employed the term “otherwise,” indicating that it should arise to the level of “imprisonment.” In determining whether an imprisonment or deprivation of liberty is “severe,”

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<sup>510</sup> Triffterer (Christopher K. Hall/Carsten Stahn), marginal note 48.

<sup>511</sup> *Prosecutor v Milorad Krnojelac*, (ICTY) TC, Case No. IT-97-25-T, Judgement, 15 March 2002 ¶ 112. Though arising under a different authorising statute, the ICTY’s interpretation also relied on the term “imprisonment;” its jurisprudence on imprisonment has been widely followed, including by the ICC.

<sup>512</sup> *Kordić & Cerkez*, (ICTY) TC, Case No. IT-95-14/2-T, 26 February 2001.

<sup>513</sup> *Id.*, ¶ 279.

<sup>514</sup> Triffterer (Christopher K. Hall/Carsten Stahn), marginal note 49; N. Rodley with M. Pollard, *The Treatment of Prisoners under International Law* (OUP, 2009) 465-468.



the ICC implies that it would consider evidence concerning the length of detention, the conditions of detention, evidence that victims were cut off from the outside world, and evidence that detention was part of a series of repeated detentions.<sup>515</sup>

Detention need not occur in a detention facility or include mistreatment: the ICTY found “a block of offices” and a cinema constituted unlawful imprisonment facilities, despite the fact that the “rules of detention were liberal;” there was “evidence that medical care was provided”; and “[o]nly one witness stated the he was physically attacked by an VO soldier while interned in the Cinema complex and this was an isolated incident not reflecting a pattern of treatment.”<sup>516</sup> Imprisonment, therefore, enjoys a broad definition in international criminal law.

### *i. Imprisonment*

Australian government officials, acting through their private and public agents, imprison refugees and asylum seekers under element 1 of Article 7(e)(1). International Criminal Tribunals have made it clear that detention, even in open spaces, amounts to imprisonment if those held cannot leave. For example, in *Prosecutor v. Dario Kordić and Mario Čerkez*, the ICTY Trial Chamber found that the whole village of Rotilj within the Kiseljak municipality was turned into “a detention camp for Muslims from the other villages in the municipality, together with the surviving Muslims from Rotilj itself.”<sup>517</sup> The trial Chamber noted that the Muslims detained in Rotilj “were surrounded and could not leave, being controlled by HVO soldiers and snipers stationed on the surrounding hillsides.”<sup>518</sup> In addition, a wide range of conditions and types of detention can constitute imprisonment. The trial chamber in *Prosecutor v. Dario Kordić and Mario Čerkez*, determined that internees were detained at the Kaonik camp, a prison-like camp with “poor conditions,” including “small and over-crowded” cells and “inadequate accommodations,” which evidenced “mistreatment of prisoners.”<sup>519</sup>

Accordingly, what is crucial is that the “detention facilities are of a strictly speaking carceral nature, rendering the deprivation of liberty as comprehensive as that experienced in prison facilities.”<sup>520</sup> Agents of Wilson Security, Transfield, Broadspectrum, and others, at the direction of Australian government officials as well as their Papua New Guinean and Nauruan

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<sup>515</sup> Case Matrix Network, ‘ICC Case Matrix: Article 7(1)(e) Deprivation of Liberty’ (Online Resource, International Criminal Court, 2013). <[https://www.cmn.cx/cms/index.php?folder=668&id=5930#\\_Toc320868669](https://www.cmn.cx/cms/index.php?folder=668&id=5930#_Toc320868669)>. *Prosecutor v. Mladen Naletilić & Vinko Martinović*, TC, Case No. IT-98-34-T, 31 March 2003, ¶ 642.

<sup>516</sup> *Kordić & Čerkez*, (ICTY) TC, Case No. IT-95-14/2-T, 26 February 2001, ¶¶ 781-82, 800-01, *aff’d* *Prosecutor v. Dario Kordić & Mario Čerkez*, (ICTY) AC, Case No. IT-95-14/2-A 17 December 2004, ¶¶ 610, 623.

<sup>517</sup> *Kordić & Čerkez*, (ICTY) TC, ¶¶ 790-92, 800-01, *aff’d* *Prosecutor v. Dario Kordić and Mario Čerkez*, AC Case No. IT-95-14/2-A, 17 December 2004, ¶¶ 634, 637, 640 (“The Appeals Chamber concludes that a reasonable trier of fact could have found that cordoning off Rotilj, preventing civilians from leaving the village, when the civilians were not detained in the village for their own safety, constitute imprisonment and unlawful confinement of civilians.”).

<sup>518</sup> *Kordić & Čerkez*, (ICTY) TC, ¶ 792.

<sup>519</sup> *Id.* ¶¶ 774-76, 800-01, *aff’d* *Kordić & Mario Čerkez*, ¶ 625.

<sup>520</sup> Kalpouzos & Mann, *infra* note 683.

counterparts, imprison asylum seekers and refugees in tents, barrack-style buildings, and small, hastily constructed dwellings. These camps include high and un-scalable walls and fences, as well as guards. An Australian Department of Immigration and Border Protection spokesman stated in September 2016 that “no one is detained on Manus — the RPC has been an open centre since April 2016.”<sup>521</sup> However, all of the men who remain at the Manus RPC “are not free to leave of their own volition,” are security screened, and are required to live behind “three-meter metal fencing” which is patrolled by armed guards.<sup>522</sup> After visiting the facilities in December 2013, Amnesty International described the centre as “resembling a combination of a prison and a military camp.”<sup>523</sup>

The deprivation of liberty is reinforced by surveillance. Refugees and asylum seekers are under constant monitoring and surveillance.<sup>524</sup> Some reported being watched when they showered, or used the bathroom.<sup>525</sup> Isolated in the jungles of Papua New Guinea or in the rock quarries of Nauru, these tents crowd dozens of refugees together. While the Australian government and Papua New Guinean/Nauruan governments claim they are now in “open detention,” asylum seekers and refugees cannot leave the islands, or even the detention centres.<sup>526</sup> The conditions of this “open detention,” combined with remoteness of the islands and the reasons that first motivated asylum seekers to embark on their journey, guarantee a complete deprivation of liberty. Those held on Manus Island and Nauru “are in a cul-de-sac from which, as they have no safe country to go to, there is no escape.”<sup>527</sup> One service provider on Nauru noted “the island is a prison—and nowhere is safe for them.”<sup>528</sup> This complete carceral effect is further established by the fact that Australian government officials limit legal aid assistance<sup>529</sup> and threatened to

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<sup>521</sup> Ben Doherty, ‘*It’s simply coercion*’: *Manus island, immigration policy and the men with no future*, THE GUARDIAN, Sept. 28, 2016, <https://www.theguardian.com/australia-news/2016/sep/29/its-simply-coercion-manus-island-immigration-policy-and-the-men-with-no-future>.

<sup>522</sup> *Id.*

<sup>523</sup> THIS IS BREAKING PEOPLE, *supra* note 278, at 36.

<sup>524</sup> Ben Doherty & David Marr, *The worst I’ve seen – trauma expert lifts lid on ‘atrocities’ of Australia’s detention regime*, THE GUARDIAN, June 19, 2016, <https://www.theguardian.com/australia-news/2016/jun/20/the-worst-ive-seen-trauma-expert-lifts-lid-on-atrocities-of-australias-detention-regime> (describing constant physical and technological surveillance).

<sup>525</sup> Stanford Clinic interview with Molly\* in Ballarat, Australia (May 13, 2016).

<sup>526</sup> See *supra* Part II, Section 3.B.iii. (describing bus lines to the local towns and ‘daily’ instances of tensions and violence with locals and specific attacks by local gangs). See *Deportations will begin this month*, *supra* note 261; *Manus assault underlines need for resettlement*, RADIO N.Z., Oct. 13, 2016, <http://www.radionz.co.nz/international/pacific-news/315548/manus-assault-underlines-need-for-resettlement>; *Further calls for Manus centre closure after attack*, RADIO N.Z., Oct. 11, 2016, <http://www.radionz.co.nz/international/pacific-news/315356/further-calls-for-manus-centre-closure-after-attack>; Doherty & Abbott, *supra* note 269; *Offshore detention blamed for violence on Manus*, Radio N.Z., Oct. 13, 2016, <http://www.radionz.co.nz/international/programmes/datelinepacific/audio/201819729/offshore-detention-blamed-for-violence-on-manus>.

<sup>527</sup> As put in the *Belmarsh* case by Lord Irvine. See *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* [2004] UKHL 56, 16 December 2004, ¶ 123.

<sup>528</sup> ISLAND OF DESPAIR, *supra* note 48 **Error! Bookmark not defined.**, at 47.

<sup>529</sup> Tom Nightingale, *Coalition vows to stop funding legal advice for asylum seekers*, ABC NEWS, Aug. 31, 2013, <http://www.abc.net.au/news/2013-08-31/coalition-would-stop-funding-immigration-advice-for-asylum-seek/4926666>.

remove appeal rights within the Refugee Review Tribunal, cutting off access to appeal of administrative asylum decisions.<sup>530</sup>

## *ii. Or Other Severe Deprivation of Physical Liberty*

Australia and its agents also severely deprive refugees and asylum seekers of their physical liberty under element 1 of Article 7(1)(e). The deprivation of liberty of asylum seekers and refugees is severe, both in terms of the duration and the conditions of detention. The combination of indefinite detention, inhumane conditions and the inability of the detainees to leave, render the deprivation of liberty severe.

Inhumane conditions accentuate the severity of the deprivation of liberty. For example, in considering crimes related to the deprivation of freedom of Muslim detainees, the court in *Prosecutor v. Tihomir Blaškić* stated that prisoners “lacked medicines and there was insufficient water and food,” as well “murders and acts of physical violence, including rape, [...] occurred in the village.”<sup>531</sup> Likewise, the ICTY weighed similar factors when considering the deprivation of liberty in *Simić*, stating: “[t]he Trial Chamber is satisfied that during detention in the detention centres in Crkvina and Bijeljina, the prisoners did not have sufficient space and sufficient food and water supply.”<sup>532</sup> Moreover, the prisoners were “kept in unhygienic conditions and did not have access to sufficient medical care.”<sup>533</sup> Finally, that court underscored the “mistreatment of prisoners,” noting that “cells were small and over-crowded, hygiene was very poor and the food was inadequate.”<sup>534</sup> The *Blaškić* court also noted “cramped or overcrowded facilities” as a significant indicator of severity.<sup>535</sup>

As of August 2016, Australian government officials and their agents imprison between 1,233<sup>536</sup> - 2,500<sup>537</sup> refugees and asylum seekers on Nauru and Manus; they spend, on average, 454 days in detention.<sup>538</sup> Australian, Nauruan, and Papua New Guinean government agents, in cooperation

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<sup>530</sup> Will Ockenden, *Legal experts say courts would be swamped if appeal rights removed*, ABC RADIO AM, Aug. 16, 2013, <http://www.abc.net.au/am/content/2013/s3826976.htm>; Samantha Hawley, *Coalition has reservations about refugee convention*, ABC RADIO AM, July 18, 2013, <http://www.abc.net.au/am/content/2013/s3805470.htm>.

<sup>531</sup> *Prosecutor v Tihomir Blaškić* (ICTY) TC, Case No. IT-95-14-T, 3 March 2000 ¶¶ 679, 692.

<sup>532</sup> *The Prosecutor v Blagoje Simić* (ICTY) TC, Case No. IT-95-9-T, 17 October 2003, ¶ 775 (Simić TC).

<sup>533</sup> *Id.*

<sup>534</sup> *Kordić & Čerkez*, ¶¶ 774, 777, 790, 795.

<sup>535</sup> *Prosecutor v Tihomir Blaškić*, TC, Case No. IT-95-14-T, 3 March 2000, ¶¶ 681, 693.

<sup>536</sup> Australian Government Department of Immigration and Border Protection, *Immigration Detention and Community Statistics Summary*, Aug. 31, 2016, <https://www.border.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-31-aug-2016.pdf>.

<sup>537</sup> AT WHAT COST *supra* note 116.

<sup>538</sup> End mission Statement by the U.N. Special Rapporteur on the human rights of migrants on his official visit to Australia (1-18 November 2016), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20885&LangID=E#sthash.inqfs0Le.dpuf> (last visited Feb. 10, 2017).

with companies they have contracted to run these camps, crowd dozens of refugees and asylum seekers into tents. They sleep on cots, forty to a room, or in bunk beds, their noses brushing the canvas ceilings.<sup>539</sup> Mould allegedly grows on tent walls and pools of fetid water accumulate after storms. Bathroom facilities are woefully inadequate and water shortages dictate that showers last mere minutes. Medical services are more than limited, they are entirely insufficient; asylum seekers and refugees rarely receive needed treatment and are often subject to mediocre palliative care. Water shortages and poor food supplies leave refugees hungry, their illnesses and injuries exacerbated by inadequate diets. Moreover, and as articulated above, Wilson Security guards, other detained individuals, and natives of Nauru and Papua New Guinea rape and physically abuse refugees and asylum seekers. Reports and incidents of sexual assault outpace average statistics in Australia by worrying margins—particularly of children.

Overall, the combination of the length of detention, the carceral aspects and the inhumane conditions, contribute to the extreme severity of the deprivation of liberty, as required by the Statute.

## **B. Element Two: In Violation of the Fundamental Rules of International Law**

Australian government officials and their agents' arbitrary imprisonment/severe deprivation of refugees' liberty violates fundamental rules of international law.<sup>540</sup> "Fundamental" rules are well established legal norms, including norms contained in treaties or custom. They constitute the basic, elementary and essential rules governing the deprivation of liberty. As a threshold matter, unlawful imprisonment "should be understood as arbitrary imprisonment,"<sup>541</sup> in contravention to fundamental rules of fairness and procedure. In addition, the "rules of international law" referred to should be understood to extend to the fundamental rules concerning the rights of detainees.<sup>542</sup> Indeed, Australian officials' and their agents' actions violate a number of treaty and customary law rules that qualify as fundamental in the treatment of detainees. These include both rules in relation to the fairness of the procedure and rules relating to the conditions of imprisonment.<sup>543</sup>

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<sup>539</sup> *Australia: Appalling abuse, neglect of refugees on Nauru*, AMNESTY INT'L, Aug. 2, 2016, <https://www.amnesty.org/en/latICTYest/news/2016/08/australia-abuse-neglect-of-refugees-on-nauru/>.

<sup>540</sup> Noting over 150 violations of international law. See Ockenden, *supra* note 530; Hawley, *supra* note 530.

<sup>541</sup> *Kordić & Mario Čerkez*, AC, Case No. IT-95-14/2-A 17 December 2004, <http://www.haguejusticeportal.net/Docs/Court%20Documents/ICTY/Kordic%20and%20Cerkez-Appeal%20judgment%20En.pdf>, ¶ 116.

<sup>542</sup> See OTTO TRIFFTERER & KAI AMBOS, *ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY*, marginal note 51, referring to the UN Standard Minimum Rules for the Treatment of Prisoners of 1955 and the European Prison Rules, adopted by the Committee of Ministers of the Council of Europe in Recommendation Rec (2006) 2 on 11 January 2006 (amending the 1987 version), the 1988 UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the 1990 UN Basic Principles on the Independence of the Judiciary and other documents.

<sup>543</sup> "Another category which may constitute arbitrary detention is when the conditions of detention themselves amount to torture or cruel, inhuman or degrading treatment". See Christopher K Hall, 'Article 7 Crimes against Humanity' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (C H Beck, 2nd ed, 2008) 159, 201 [38]. The text of the *Rome Statute* can be seen as

Here, the imprisonment and detention of asylum seekers and refugees violates the fundamental right to be free from arbitrary detention. Leading commentators conclude that the right to be free from arbitrary detention is certainly a fundamental rule of international law,<sup>544</sup> and Australia itself recognises that the International Covenant on Civil and Political Rights (“ICCPR”) Article 9 constitutes a fundamental rule of international law for the purposes of the crime of imprisonment and severe deprivation of physical liberty.<sup>545</sup> The Appeals Chamber of the ICTY recognised that the crime against humanity of imprisonment under the ICTY Statute “should be understood as arbitrary imprisonment.”<sup>546</sup>

Under Article 9 of the ICCPR, detention of asylum seekers beyond “a brief initial period in order to document their entry, record their claims, and determine their identity if it is in doubt” is arbitrary unless the state provides specific and individualised grounds for the asylum seeker’s detention, “such as an individualized likelihood of absconding, danger of crimes against others, or risk of acts against national security.”<sup>547</sup> Further, “in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification.”<sup>548</sup> The detention must also be “reasonable, necessary and proportionate in the light of the circumstances and [must be] reassessed as it extends in time.”<sup>549</sup> The state must also demonstrate that “there were no less invasive means of achieving” the objective furthered by detention “in the light of each [asylum seeker’s] particular circumstances,” and “take into account the mental health condition of those detained.”<sup>550</sup>

The policy of detention has consistently entailed the mandatory and indefinite detention of all asylum-seekers “without an individualized assessment as to the necessity, reasonableness and proportionality of the purpose of such detention.”<sup>551</sup> Moreover, claimants do not have prompt “access to a judicial or other independent authority” to review the assessment.<sup>552</sup> International

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supporting this approach. This would also reflect the concept of ‘arbitrariness’ in human rights law. *See* Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of Person)*, 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014) 4 [14] (*General Comment No. 35*). ‘[D]etention may be arbitrary if the manner in which the detainees are treated does not relate to the purpose for which they are ostensibly being detained’. Nevertheless, the narrower focus of ICL jurisprudence on procedural arbitrariness is followed here, and the inhumanity of conditions is considered further below. *See further* Kalpouzos & Mann, *supra* note 683.

<sup>544</sup> Christopher K. Hall & Carsten Stahn, *Imprisonment or Other Severe Deprivation of Physical Liberty in KAI AMBOS & OTTO TRIFFTERER, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 203 (2016) (“It will be up to the Court to determine what are ‘fundamental’ rules, but surely they would include, at a minimum, all the guarantees of the right to be free from arbitrary detention . . . .”); International Committee of the Red Cross, *Customary International Humanitarian Law, Chap. 32, Rule 99, Deprivation of Liberty*, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter32\\_rule99](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_rule99) (published in 2005).

<sup>545</sup> ICCPR, art. 9.

<sup>546</sup> *Prosecutor v Dario Kordić and Mario Čerkez*, ICTY AC, Case No. IT-95-14/2-A, 17 December 2004, ¶ 116.

<sup>547</sup> *F.J. v Australia*, Case No. CCPR/C/116/D/2233/2013 ¶10.3 (18 April 2016).

<sup>548</sup> *Shams v Australia*, Case No. CCPR/C/90/D/1255,1256,1259, 1260, 1266, 1268, 1270 & 1288/2004 ¶7.2 (2007).

<sup>549</sup> *M.M.M. v Australia*, Case No. CCPR/C/108/D/2136/2012 ¶10.3 (2012).

<sup>550</sup> *Shams*, at ¶ 7.2; *F.J.*, at ¶ 10.3.

<sup>551</sup> U.N. HIGH COMM’N ON REFUGEES, MONITORING VISIT TO THE REPUBLIC OF NAURU: 7-9 OCT. 2013 (2013) <http://www.refworld.org/docid/5294a6534.html>.

<sup>552</sup> VISIT TO THE REPUBLIC OF NAURU, *supra* note 433, at 12.

experts, courts, and organisations, as well as domestic Australian organisations and investigators, repeatedly find that the detention of refugees on Papua New Guinea and Nauru violates the core precept that asylum determination cannot manifest itself as arbitrary detention of large groups. For example, the UNHCR concluded that the detention of asylum seekers on Nauru and Manus Island “constitute[s] arbitrary and mandatory detention under international law” after inspections of both RPCs in 2013.<sup>553</sup> The UNHCR noted that Australia and Nauru’s “policy and practice of detaining all asylum-seekers” at the Nauru RPC was arbitrary and in contravention to human rights law.<sup>554</sup> The absence of “lawful, individualized justification” also led the Human Rights Committee (“HRC”) to repeatedly find detention of asylum seekers and refugees in Australia, Nauru, and Manus as constituting arbitrary detention.<sup>555</sup> Australia’s wide determination of ‘security’ as “an additional, unilateral ground”, has also been found to fall outside the Refugee Convention.<sup>556</sup> Of note, the HRC found in 2013 that Australian detention of asylum seekers, after a brief determination that they may qualify for asylum, violates ICCPR Article 9(1).<sup>557</sup> The UNHCR also found that the Australian government’s treatment of refugees is cruel, inhuman, and degrading.<sup>558</sup> The HRC noted the arbitrary and indefinite nature of detention, the difficult physical and mental conditions, and the Australian government’s failure to provide information and procedural rights as inflicting “serious psychological harm”—violating fundamental

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<sup>553</sup> *Id.*; U.N. HIGH COMM’N ON REFUGEES, UNHCR MONITORING VISIT TO MANUS ISLAND, PAPUA NEW GUINEA: 11-13 JUNE 2013, at 1-2 (2013), <http://www.refworld.org/docid/51f61ed54.html>.

<sup>554</sup> VISIT TO THE REPUBLIC OF NAURU, *supra* note 433, at 2.

<sup>555</sup> Communication No. 2094/2011, 108th sess, U.N. Doc. CCPR/C/108/D/2094/2011 (20 August 2013) (*FKAG v Australia*). As in *F.J.*, HRC found that Australia was arbitrarily detaining the petitioners in violation of CCPR art. 9(1), both when it was mandatorily detaining the petitioners upon arrival and when it detained them as a result of adverse security assessments. HRC also determined that the detention violated CCPR Article 7. *See also* Communication No. 2136/2012, 108th sess, U.N. Doc. CCPR/C/108/D/2136/2012 (20 August 2013) (*MMM v Australia*) (same); Communication No. 1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004, 90th sess, U.N. Doc. CCPR/C/90/D/1255,1256,1259,1260,1266,1268,1270&1288/2004 (11 September 2007) (*Shams et al. v Australia*) (finding mandatory detention of asylum seekers violated ICCPR, art. 9); Communication No. 1324/2004, 88th sess, U.N. Doc. CCPR/C/88/D/1324/2004 (13 November 2006) (*Shafiq v Australia*) (same); Communication No. 1050/2002, 87th sess, U.N. Doc. CCPR/C/87/D/1050/2002 (9 August 2006) (*D & E v Australia*) (same); Communication No. 1069/2002, 79th sess, U.N. Doc. CCPR/C/79/D/1069/2002 (6 November 2003) (*Bakhtiyari v Australia*) (same); Communication No. 1014/2001, 78th sess, U.N. Doc. CCPR/C/78/D/1014/2001 (18 September 2003) (*Baban v Australia*) (same); Communication No. 900/1999, 76th sess, U.N. Doc. CCPR/C/76/D/900/1999 (28 October 2002) (*C v Australia*) (same); Communication No. 560/1993, 59th sess, U.N. Doc. CCPR/C/59/D/560/1993 (30 April 1997) (*A v Australia*) (same).

<sup>556</sup> Communication No. 2094/2011, 108th sess, U.N. Doc. CCPR/C/108/D/2094/2011 (20 August 2013) (*FKAG v Australia*), ¶ 3.7.

<sup>557</sup> Communication No. 2233/2013, 116th sess, U.N. Doc. CCPR/C/116/D/2233/2013 (18 April 2016) (*F.J. v Australia*). In *F.J.*, HRC addressed the prolonged detention of asylum seekers who arrived to Australia via boat in 2009 and 2010 and were detained first because of Australia’s policy of mandatory detention of offshore arrivals and then after they were determined to be refugees because of “adverse security assessments made by the Australian Security Intelligence Organisation.” The HRC found that both the mandatory detention upon arrival and detention resulting from adverse security assessments constituted arbitrary detention in violation of CCPR Article 9(1). HRC further found that the arbitrary and indefinite detention, combined with Australia’s “refusal to provide information and procedural rights to the [refugees] and the difficult conditions of detention” constituted a violation of CCPR art. 7, which grants freedom from torture and cruel, inhuman or degrading treatment or punishment.

<sup>558</sup> Ockenden, *supra* note 530; Hawley, *supra* note 530.

international human rights law.<sup>559</sup> Additionally, the Papua New Guinea Supreme Court indicated that arbitrary detention of refugees violates international law and fundamental human rights protections.<sup>560</sup>

Indeed, the detention of asylum seekers on Nauru and Manus Island goes far beyond the brief period envisioned by the ICCPR for documenting entry, recording claims, and determining identity. First, detention is not designed to address individualised concerns; offshore detention is mandatory for all asylum seekers who arrive by boat, without regard to individualised assessments of whether detention is “reasonable, necessary and proportionate” to the justification for detention.<sup>561</sup> Indeed, as noted previously, refugees spend, on average, more than a year in detention; this is hardly the justified period needed to determine whether a refugee represents a national security risk or is likely to harm others. Equally, refugees themselves are poorly informed of their due process rights; Border Force agents reportedly tell refugees it will take “decades” before they are processed.<sup>562</sup> Moreover, Australian government officials and their agents justify detention of refugees on a group basis, not as individuals. They explicitly wish to deter future asylum seekers from migrating irregularly to Australia.<sup>563</sup> This hardly constitutes a justification for prolonged detention, which international law allows when the state has “a serious and legitimate reason to think that they are members of a subversive organization”<sup>564</sup> or represent a risk of harm to other citizens. Indeed, the mere fact that “a person is a national of the enemy cannot be considered as threatening the security of the country.”<sup>565</sup> Yet, multiple Australian official policies use the logic of national threats and deterring disaster to justify this indefinite and disproportionate detention.<sup>566</sup> Consequently, Australian border agents,

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<sup>559</sup> *FKAG and others v Australia*, U.N. Doc. CCPR/C/108/D/2094/2011 (20 Aug 2013) ¶ 9; *MMM and others v Australia*, U.N. Doc. CCPR/C/108/D/2136/2012 (20 Aug 2013) ¶ 10.

<sup>560</sup> <https://www.scribd.com/doc/310461159/PNG-Supreme-Court-Decision-on-Manus-Island>; Eric Tlozek & Stephanie Anderson, *PNG’s Supreme Court rules detention of asylum seekers on Manus Island is illegal*, ABC NEWS, Apr. 26, 2016, <http://www.abc.net.au/news/2016-04-26/png-court-rules-asylum-seeker-detention-manus-island-illegal/7360078>; Roger Cohen, *Broken Men in Paradise: The world’s refugee crisis knows no more sinister exercise in cruelty than Australia’s island prisons*, N.Y. TIMES, Dec. 9, 2016, [http://www.nytimes.com/2016/12/09/opinion/sunday/australia-refugee-prisons-manus-island.html?\\_r=0](http://www.nytimes.com/2016/12/09/opinion/sunday/australia-refugee-prisons-manus-island.html?_r=0).

<sup>561</sup> See Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012, Explanatory Memorandum, PARLIAMENT OF AUSTRALIA, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr4920\\_ems\\_c72513c1-a5d5-4731-8f57-2ffbd6c444d1%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr4920_ems_c72513c1-a5d5-4731-8f57-2ffbd6c444d1%22). (“The Bill therefore provides that all arrivals in Australia by irregular maritime means will have the same legal status regardless of where they arrive, unless they are an excluded class or otherwise exempted. This means, all arrivals in Australia by irregular maritime means cannot make a valid application for a visa unless the Minister personally thinks it is in the public interest to do so. Those people are also subject to mandatory immigration detention, are to be taken to a designated regional processing country and cannot institute or continue certain legal proceedings.”). See, e.g., *M.M.M. v Australia*, CCPR/C/108/D/2136/2012 ¶10.3 (2012).

<sup>562</sup> Cohen, *supra* note 560.

<sup>563</sup> See *supra* Part II, Section 1.

<sup>564</sup> *Kordić & Čerkez*, (ICTY) TC, ¶ 284.

<sup>565</sup> *Id.*

<sup>566</sup> Liberal Party of Australia, THE COALITION’S OPERATION SOVEREIGN BORDERS POLICY, at 2 (July 2013), <http://sievx.com/articles/OSB/201307xxTheCoalitionsOSBPolicy.pdf>.

government officials, and their associates violate fundamental rules of international law by arbitrarily and indefinitely detaining these asylum seekers.

The Human Rights Committee's inference is worth quoting in full: "In the absence of any substantiation of the need to individually detain each author, it may be inferred that such detention pursues other objectives: a generalized risk of absconding which is not personal to each author; a broader aim of punishing or deterring unlawful arrivals; or the mere bureaucratic convenience of having such persons permanently available. None of these objectives provides a legitimate justification for detention."<sup>567</sup>

### **i. Australian Government Officials and Their Agents' Imprisonment of Children Violates Fundamental Rules of International Law**

Australian government officials and their agents violate fundamental international law by imprisoning children. As ratified by Australia in 1990,<sup>568</sup> the *Convention on the Rights of the Child* states that "[n]o child shall be deprived of his or her liberty unlawfully or arbitrarily." Moreover, the "arrest, detention, or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort for the shortest appropriate period of time."<sup>569</sup> Imprisoned children must be "treated with humanity and respect,"<sup>570</sup> and should have the right to enjoy, to the maximum extent possible, development and recovery from past trauma.<sup>571</sup>

Australian government officials and their agents detain children on Nauru identically to their adult counterparts. The detention of children under such conditions does not constitute a last resort. Nor could their time spent in detention be thought to last for the shortest appropriate time. There are currently 50 children in closed detention on Nauru and 278 children in community detention; they spend, on average, 10,584 hours in detention.<sup>572</sup> Families spend nearly 500 days, on average, in detention. Though the Australian government spent the summer of 2016 claiming children were no longer being detained, official reports indicate they are back.<sup>573</sup> Moreover, children were present on Nauru throughout the period alleged in this Communiqué.

Children share tents with 18-20 people.<sup>574</sup> Parents cannot properly care for their children: 60% of parents report feeling too depressed,<sup>575</sup> many report they cannot feed their children on workable

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<sup>567</sup> 'FKAG v Australia' ¶ 3.4.

<sup>568</sup> Indeed, the CRC remains the most widely ratified convention in the history of the UN; only the United States and Somalia have failed to ratify. See FORGOTTEN CHILDREN, *supra* note 6.

<sup>569</sup> Convention on the Rights of the Child, art. 37.

<sup>570</sup> CRC, art. 37(a), (c).

<sup>571</sup> CRC, art. 6(2), 39.

<sup>572</sup> ChilOut: Children Out of Immigration Detention, *About Us*, <http://www.chilout.org/> (last visited Feb. 12, 2017).

<sup>573</sup> Josh Butler, *There Are Children In Australia's Detention Centres Again*, THE HUFFINGTON POST, June 10, 2016, <http://www.huffingtonpost.com.au/2016/10/05/there-are-children-in-australias-detention-centres-again/>.

<sup>574</sup> ELIZABETH ELLIOTT & HASANTHA GUNASEKERA, THE HEALTH AND WELL-BEING OF CHILDREN IN IMMIGRATION DETENTION: REPORT TO THE AUSTRALIAN HUMAN RIGHTS COMMISSION MONITORING VISIT TO WICKHAM POINT DETENTION CENTRE, DARWIN, NT (Oct. 16-18, 2015),



schedules, as meals are restricted to specific hours in mess halls and cooking facilities are limited;<sup>576</sup> and many children refuse to eat the food.<sup>577</sup> Children are sexually assaulted and physically abused on Nauru.<sup>578</sup> From August 2013 to October 2015, the leaked Nauru files indicate that 70<sup>579</sup> or so detained children reported 59 incidents of assault, 7 reports of sexual assault, 30 incidents of self-harm, and 159 incidents of threatened self-harm.<sup>580</sup> In the first half of 2014, doctors determined that 34% of children in detention, after assessment, suffered from mental health disorders at levels of seriousness comparable to children receiving outpatient mental health services in Australia. Yet, less than 2% received those services in 2014.<sup>581</sup> One child's own account provides the chilling consequence: "I want death, I need death."<sup>582</sup> We conclude that the severe deprivation of liberty of children is unlawful and arbitrary and in violation of fundamental rules of international law with respect to the treatment of children. This includes violations related to the arbitrary and indefinite process of detention and the inhumane conditions and mistreatment of children during detention.

### C. Element Three: Perpetrators have Requisite Knowledge

As discussed previously, Australian officials and agents are aware of the factual circumstances surrounding the arbitrary detention, imprisonment, and severe deprivation of these refugees' liberty.

### D. Elements Four and Five: Part of a Systematic and Widespread Attack

The arbitrary detention, imprisonment, and severe deprivation of refugee and asylum seekers' liberty is part of the overall attack directed against refugees and asylum seekers. The attack constitutes an essential part of the state's immigration policy and the arbitrary detention is at the very centre of this policy.

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<https://www.humanrights.gov.au/sites/default/files/document/publication/Health%20and%20well-being%20of%20children%20in%20immigration%20detention%20report.pdf>.

<sup>575</sup> Georgia Paxton, et. al., *Perspective: 'The forgotten children: National inquiry into children in immigration detention (2014)*, 51 J. PAEDIATRICS & CHILD HEALTH 365, 368 (Feb. 23, 2015),

<http://onlinelibrary.wiley.com/doi/10.1111/jpc.12873/epdf>.

<sup>576</sup> ELLIOTT & GUNASEKERA, *supra* note 574, at 9.

<sup>577</sup> *Id.*

<sup>578</sup> *See supra* Part II, Section 3.A.ii.

<sup>579</sup> Austl. Human Rights Comm'n, *Information about children in immigration detention* (Jan. 6, 2016),

<https://www.humanrights.gov.au/information-about-children-immigration-detention>.

<sup>580</sup> Al Jazeera Staff, *Nauru: Leak reveals children sexually abused at prison*, ALJAZEERA, Aug. 10, 2016,

<http://www.aljazeera.com/news/2016/08/nauru-leak-reveals-children-sexually-abused-prison-160810044154291.html>.

<sup>581</sup> FORGOTTEN CHILDREN, *supra* note 6.

<sup>582</sup> *Id.*

### 3. Australia and Its Agents Tortured Refugees and Asylum Seekers within the meaning of Article 7(1)(f) of the *Rome Statute*

From 2012<sup>583</sup> until the present, officials within successive governments of the Commonwealth of Australia, its Department of Immigration and Border Protection, the Australian Border Force, and its agents<sup>584</sup> have committed the crime against humanity outlined in Article 7(1)(f) of the Rome Statute by torturing refugees and asylum seekers as well as inflicting severe physical and mental pain and suffering through detention, deprivation, abuse, and other acts, upon women, men, and children at the Manus Island RPC and Nauru RPC in violation of Article 7(1)(f) of the Statute.

#### A. Material Elements (*actus reus*)

Article 7(1)(f) of the *Rome Statute* identifies torture as an act which, if part of a widespread or systematic attack directed against any civilian population, will constitute a crime against humanity.<sup>585</sup> Article 7(2)(e) defines torture as “the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused,” with the caveat that “torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.”<sup>586</sup> According to the Elements of Crimes, the crime against humanity of torture has five general elements:<sup>587</sup>

- (a) “the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons;
- (b) such person or persons were in the custody or under the control of the perpetrator;
- (c) such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions;
- (d) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and
- (e) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.”

#### i. The Perpetrator Inflicted Severe Physical Suffering upon One or More Persons

In *The Prosecutor v. Jean-Pierre Bemba Gombo*, the ICC Pre-Trial Chamber determined that the crime against humanity of torture “has no definition of the severity threshold,” but requires “an important degree of pain and suffering . . . in order for a criminal act to amount to an act of torture.”<sup>588</sup> The ICTY Trial Chamber in *Prosecutor v. Milan Simić* echoed this sentiment, stating that “the objective or absolute degree of pain required for an act to constitute torture . . . has not

<sup>583</sup> INCIDENT AT THE MANUS ISLAND DETENTION CENTRE, *supra* note 235, § 1.34.

<sup>584</sup> ISLAND OF DESPAIR, *supra* note 102, at 44.

<sup>585</sup> See analysis of *Rome Statute*, art.7(1).

<sup>586</sup> Elements of Crimes, art. 7(1)(f).

<sup>587</sup> *Id.*

<sup>588</sup> *Prosecutor v Bemba*, ICC PT. Ch. II, Decision Pursuant to art. 61(7)(a) and (b) of the *Rome Statute* on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08-424, 15 June 2009, ¶ 19.

been determined in the Tribunal’s case-law and must be assessed on a case by case basis, taking account of all the specific circumstances of the case.<sup>589</sup> Australian government officials and their agents’ program of indefinitely detaining asylum seekers in adverse conditions at the Nauru and Manus Island detention centres, inflicted physical and mental suffering upon thousands of refugees and asylum seekers between 2012 and the present, severe enough in scope and scale to amount to torture under Article 7(1)(f) of the Statute.

International courts have considered each of the following acts—all of which refugees and asylum seekers on Manus and Nauru experience—as evidence of inflicting severe physical pain or suffering through act or omission: physical violence,<sup>590</sup> such as beating, hitting, or kicking; evidence of throwing or soaking the victim in cold or dirty water;<sup>591</sup> evidence of physical pain or suffering caused by deprivation, such as from food,<sup>592</sup> sleep,<sup>593</sup> denial of medical assistance,<sup>594</sup> denial of sufficient hygiene,<sup>595</sup> and evidence of physical injuries.<sup>596</sup> While “permanent injury is not a requirement for torture”, evidence of a lasting or permanent injury sustained from these acts could also help determining the severity for the purposes of Article 7(1)(f).<sup>597</sup>

Refugees and asylum seekers experience torturous acts and conditions while in detention. Beyond the abuses articulated previously—including, but not limited to, disproportionate sexual and physical assault, inadequate medical supplies, insufficient food and water, crowded conditions, and declining mental and physical health<sup>598</sup>—a number of allegations exist concerning more traditional torture tactics. Detainee Emergency Response teams in the RPC stand formally accused, before Australian Parliamentary Inquiry, of waterboarding, “zipping,”<sup>599</sup> and using cable ties on refugees in Bravo Compound of the Manus detention center.<sup>600</sup> The United Nations special rapporteur on torture found Australian border officials to be in breach of conventions against torture for tying refugees to chairs and threatening “physical violence, rape,

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<sup>589</sup> *Prosecutor v Milan Simić*, TC, Case No. IT-95-9/2-T, 17 October 2002, ¶ 34 (citing *Kunarac et al.*, AC, ¶¶ 149-50); *Krnjelac* ¶ 182.

<sup>590</sup> *Prosecutor v Enver Hadžihasanović & Amir Kubura*, TC, Case No. IT-01-47-T, 15 March 2006, ¶¶ 1180, 1279-280; *PrProsecutor v Mile Mrkšić et al.*, TC, Case No. IT-95-13/1-T, 27 September 2007, ¶ 526-27; *Prosecutor v Idriz Balaj et al.*, TC, Case No. IT-04-84-T, 3 April 2008, ¶¶ 187-88; *Nikolić*, AC, Case No. IT-94-2-A, 4 February 2005, ¶ 40; *Prosecutor v Milorad Krnjelac*, TC, Case No. IT-97-25-T, 15 March 2002, ¶¶ 231, 233, 250, 255; *Prosecutor v Jean-Paul Akayesu*, TC, Case No. ICTR-96-4-T, 2 September 1998, ¶ 411-13, 680.

<sup>591</sup> *Selmouni v France*, Application No. 25803/94, Judgement (Merits) (European Court of Human Rights), 28 July 1999, ¶¶ 11-15, 17-20, 98, 102.

<sup>592</sup> *Prosecutor v Enver Hadžihasanović & Amir Kubura*, Case No. IT-01-47-T, Judgement (TC), 15 March 2006, ¶ 1191, 1681; *Nikolić*, T, ¶¶ 190, 196 – 197.

<sup>593</sup> *Nikolić*, TC, ¶ 198:

<sup>594</sup> *Mrkšić et al.*, TC, ¶ 528; *Nikolić*, TC, ¶ 197.

*Nikolić*, TC, ¶ 199; See also *Amnesty Intn’l et al. v Sudan*, Communication Nos. 48/90, 50/91, 52/91, 89/93, Decision (African Commission on Human and Peoples’ Rights), 1999. ¶ 5.

<sup>596</sup> See *Prosecutor v Miroslav Kvočka et al.*, TC, Case No. IT-98-30/1-T, 2 November 2001, ¶¶ 148, 149.

<sup>597</sup> See *Kvočka et al.* TC, ¶¶ 148, 149.

<sup>598</sup> See *supra* Part II.3.

<sup>599</sup> Described as tying someone to a metal bed frame, then throwing it in the air, causing injury to the person bound to the frame. See Sanggaran & Zion, *supra* note 204,

<sup>600</sup> <http://www.ruralaustraliansforrefugees.org.au/wp-content/uploads/2015/08/2015-Senate-report-1.pdf> (140).

and prosecution for ‘becoming aggressive’” if they refused to retract statements made about riots on Manus.<sup>601</sup>

Deprivation of foodstuffs contributes to a finding of torture. The ICTY’s *Dragan Nikolic* case noted the victim’s weight loss due the “foul and indigestible” food.<sup>602</sup> Many asylum seekers on Manus and Nauru suffered from inadequate food and water. IHMS service providers and welfare agents report that asylum seekers and refugees become skinnier every day, their bodies shutting down as a result of the extreme conditions. There have been reports of the food having insects.<sup>603</sup> In both centres, refugees were subject to severe water restrictions: On Nauru water was available for only 2-4 hours per day,<sup>604</sup> and on Manus, those detained were only given 500ml of drinking water per day.<sup>605</sup>

Medical care is often of poor quality and difficult to access.<sup>606</sup> Where refugees receive serious injuries in the centre, “the infliction of injuries and failure to provide treatment for the injuries caused, is in reality the same behaviour. The deprivation of medical care in such cases is subsumed in the acts of mistreatment themselves.”<sup>607</sup> For example, on Manus Island, Hamid Kehazaei eventually died from septicemia after a cut on his foot developed an infection.<sup>608</sup> Hygienic concerns fall within the ambit of torture: “[a]cts of torture include . . . prohibiting them from washing.”<sup>609</sup>

Solitary confinement or being held incommunicado can also be evidence of physical pain or suffering through deprivation and can constitute torture.<sup>610</sup> On Manus, Wilson security officers and government agents use solitary confinement as a regular punishment. Guards put people into

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<sup>601</sup> Méndez JE. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Addendum: observations on communications transmitted to governments and replies received. Office of the United Nations High Commissioner for Human Rights. 6 March 2015. [http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Documents/A\\_HRC\\_28\\_68\\_Add.1\\_AV.doc](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Documents/A_HRC_28_68_Add.1_AV.doc) (accessed Nov. 2015); Doherty B, Hurst D. UN accuses Australia of systematically violating torture convention. *The Guardian* 10 March 2015 (accessed 16 Mar. 2016).

<sup>602</sup> *Nikolić*, TC, Case No. IT-94-2-T, 18 December 2003 ¶ 197.

<sup>603</sup> Stanford Clinic interview with Kareem\* in Brisbane, Australia (May 17, 2016).

<sup>604</sup> ChilOut, Submission to the Senate, 6, 31 Mar. 2015.

<sup>605</sup> THIS IS BREAKING PEOPLE, *supra* note 278, at 6.

<sup>606</sup> ChilOut, Submission to the Senate, 31 Mar. 2015.

<sup>607</sup> *Mrkšić et al.*, TC, 07 ¶ 528.

<sup>608</sup> Oliver Laughland, *Asylum seeker declared ‘brain dead’ after leaving Manus Island*, *THE GUARDIAN*, Sept. 2 2014, <http://www.theguardian.com/world/2014/sep/03/asylum-seeker-declared-brain-dead-medical-evacuation-manus-island>.

<sup>609</sup> *Amnesty Int’l et al. v Sudan*, Communication Nos. 48/90, 50/91, 52/91, 89/93, Decision (African Commission on Human and Peoples’ Rights, 1999, ¶ 5.

<sup>610</sup> See the Special Rapporteur’s report to the Third Committee of the UN General Assembly, 18 October 2011, at <https://www.un.org/press/en/2011/gashc4014.doc.htm>.

solitary confinement at a rate of nearly three per week, leaving many without means of communication for approximately four days at a time.<sup>611</sup>

In *Krnojelac*, the ICTY found the accused guilty of torturing detainee FWS-73, who was beaten and kicked, leading to long-term pain, then locked in solitary confinement for twelve days. The Chamber also accounted for the denial of medical care and insufficient food in its findings.<sup>612</sup> This combination of deprivation and physical pain was sufficient to constitute a finding of torture. Specific bouts of violence against asylum seekers in Manus Island and Nauru led to jailing as a punishment.<sup>613</sup> Combined with the systematic deprivation of medical care and sufficient food and water, these conditions cause extreme physical suffering. Torture is ultimately judged by the results.

## ii. The Perpetrator Inflicted Severe Mental Pain

Like physical pain, the ICC considers evidence of intimidation or threats, such as verbal intimidation or coercion;<sup>614</sup> evidence of humiliation, such as verbal humiliation;<sup>615</sup> as well as lasting mental injuries upon the victims<sup>616</sup> as possible indicia of severe mental pain or harm.

Prolonged uncertainty can cause the requisite severity of mental suffering. The European Court of Human Rights found that uncertainty and apprehension produced by not knowing the whereabouts of a disappeared relative for a prolonged period was constituted treatment in violation of the *European Conventions* Article 3, which prohibits torture, inhuman or degrading treatment or punishment.<sup>617</sup> In *Kurt v. Turkey*, the Court decided the “uncertainty, doubt, and apprehension caus[ed] severe mental distress” for the mother whose son had been disappeared for five years.<sup>618</sup> This line of cases establishes the right of the applicant for freedom from prolonged mental suffering from profound uncertainty about a situation.

On Manus Island and Nauru, protracted uncertainty remains commonplace. Asylum seekers receive little information surrounding their visa applications or length of detention. Moreover,

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<sup>611</sup> Ben Doherty & Nick Evershed, *Manus Island asylum seekers put in solitary confinement at a rate of three per week*, THE GUARDIAN, Dec. 11, 2014, <http://www.theguardian.com/australia-news/2014/dec/12/three-asylum-seekers-a-week-are-locked-in-solitary-confinement-on-manus-island>.

<sup>612</sup> *Krnojelac* TC, at ¶ 233-34.

<sup>613</sup> For example, the incidents on 16-18 February 2014 led to many serious injuries and one casualty as the guards meted out punishments with firearms, clubs, bricks, and iron rods. Robert Cornall, Independent Review on Manus Island February 2014, 44, <http://www.border.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/review-robert-cornall.pdf> As punishment for starting hunger strikes and protests, guards.

<sup>614</sup> *Prosecutor v Enver Hadžihasanović & Amir Kubura*, TC, Case No. IT-01-47-T, 15 March 2006, ¶ 1185; *Prosecutor v Mladen Naletelić & Vinko Martinović*, AC, Case No. IT-98-34-A, ¶ 300; *Prosecutor v Lukić et al.*, TC, Case No. IT-98-32/1-T, 20 July 2009, ¶ 964.

<sup>615</sup> *Nikolić*, TC, ¶¶ 187 – 188.

<sup>616</sup> See *Kvočka et al.*, TC, Case No. ¶¶ 148, 149.

<sup>617</sup> See, e.g., *Orhan v. Turkey*, Application No. 25656, Judgement, Euro. Ct. H.R., ¶ 369-70, Jun. 18 2002 (finding mental suffering caused by relatives disappeared eight years prior to constitute a violation of art. 3).

<sup>618</sup> *Kurt v. Turkey*, Application No. 24276/94, Euro. Ct. H.R., ¶ 130-132, May 25, 1988.

Border Force Authorities divide families by the transferring of individual members to various centres with little notice.<sup>619</sup> The mental distress among asylum seekers is manifest. IHMS noted a 150% increase in the prescription of anti-depressants, anti-anxiety, and antipsychotic medicines from just 2014 – 2015.<sup>620</sup> Among children, depression remains the most common mental illness present at Nauru detention centre.<sup>621</sup> As the ICTY noted, long-term mental effects are an aggravating factor and the extent of the long-term psychological and emotional suffering of the victims is relevant in assessing the gravity of the offence.<sup>622</sup>

As the processing time stretches,<sup>623</sup> asylum seekers remain for increasingly long periods in the anxiety-inducing conditions of the facilities. Humiliation within the detention centres also evinces proof of mental suffering. The ICTY Trial Chamber found detained individuals had been tortured where the perpetrators had committed acts of beating, interrogations, and acts of humiliation and psychological abuses.<sup>624</sup>

In Manus Island and Nauru detention facilities, those held face a variety of humiliation situations created by Australian officials. The staff often refers to asylum seekers by their six-digit boat ID number instead of by name.<sup>625</sup> On one occasion, a female held in detention was forced to expose herself to gain access to the showers.<sup>626</sup> More routine mistreatment came during shower times when guards would sometimes turn off the water while asylum seekers were mid-bath.<sup>627</sup>

These acts of physical and mental abuse rise to the level of torturous severity.<sup>628</sup>

### **iii. Australian Government Official's Treatment of Refugees is Especially Severe Given That They Are a Vulnerable Population**

Equally, the severity of torture is not merely defined by the perpetrators' objective acts, but by the context of the victims; that is to say, that torturous acts inflicted upon refugees and children

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<sup>619</sup> Footnote? I remember hearing about stuff like this, but didn't have any interview personally that mentioned it

<sup>620</sup> ChilOut, Submission to the Senate, 7, 31 March 2015.

<sup>621</sup> ChilOut, Submission to the Senate, 7, 31 March 2015.

<sup>622</sup> *Nikolic* TC, ¶ 200.

<sup>623</sup> In May 2016, the processing time average hit an all-time high of 450 days, with 23 percent of asylum seekers having remained in detention longer than 750 days. Stephanie Anderson, *Immigration detention times on Nauru and Manus Island blow out to 450-day average under Liberals*, ABC NEWS, Jan. 12, 2016, <http://www.abc.net.au/news/2016-01-13/immigration-detention-times-blow-out-to-almost-450-days/7085264>.

<sup>624</sup> *Kvočka et al.*, TC, ¶ 157.

<sup>625</sup> ChilOut, Submission to the Senate, 8, 31 March 2015.

<sup>626</sup> No Business in Abuse, Transfield's, 56, Nov. 2015.

<sup>627</sup> Stanford Clinic interview with Sophie\* in Melbourne, Australia (May 13, 2016).

<sup>628</sup> See Human Rights Council, Juan E. Mendez, Rep. of the U.N. Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, U.N. Doc. A/HRC/28/68, at ¶ 33 (Mar. 5, 2015). See also Lexi Metherell, *Immigration detention psychiatrist Dr. Peter Young says treatment of asylum seekers akin to torture*, ABC NEWS, Aug. 5, 2014, <http://www.abc.net.au/news/2014-08-05/psychiatrist-says-treatment-of-asylum-seekers-akin-to-torture/5650992>.

should have a lower threshold to qualify as severe.<sup>629</sup> In *Prosecutor v. Miroslav Kvočka* the ICTY Trial Chambers asserted that, while there is no “precise threshold for determining” the degree of suffering sufficient to amount to torture, “factors such as the victim’s age, sex, or state of health will also be relevant in assessing the gravity of the harm.”<sup>630</sup> This is widely recognised with respect to the particular vulnerability of children. As stated by the UN Special Rapporteur on torture: “In children, ill-treatment may cause even greater or irreversible damage than for adults...including higher rates of suicide, suicide attempts and self-harm, mental disorder and developmental problems, including severe attachment disorder.”<sup>631</sup> Moreover, research conducted by Humanitarian Research Partners found that “about 60 per cent of asylum seekers have a history of trauma before they arrive in Australia.”<sup>632</sup> As such, the policy of detaining all asylum seeking boat arrivals in adverse conditions is a policy directed towards a group of peoples that have already been traumatised.<sup>633</sup> Moreover, this very population remains defined by their vulnerability<sup>634</sup> both in respect to the state they have fled and the state they find themselves in. They do not have the protection from their home state – indeed, it is likely that they persecuted by it. In the new state they find themselves, their pre-existing vulnerability is compounded by the fact that, as documented above, they are instrumentally mistreated in order to deter further asylum seekers. The appreciation of the severity of the physical and mental pain and suffering inflicted by Australian officials and agents must take into account the vulnerability of the victims.

#### iv. Such Persons Were in Custody or Under the Control of the Perpetrator

From 2012 until the present, the asylum seekers held on Nauru and Manus Island remain in the custody and control of the Australian state, which exercises *de facto* control over the offshore processing centres and private contractors operating these facilities.<sup>635</sup> In particular, the Department of Immigration and Border Protection (DIBP), as well as the Australian Border Force (ABF) maintain a “significant presence on the island.”<sup>636</sup> According to interviews with Amnesty International, service providers—including psychologists and welfare managers—on Nauru and Manus indicate that the ABF exercises authority over them, while also stating that major decisions are decided in “Canberra”—Australia’s capital.<sup>637</sup>

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<sup>629</sup> See Byrnes, A., “Torture and Other Offences Involving the Violation of the Physical or Mental Integrity of the Human Person,” in G. K. McDonald and O. Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law, Volume 1 Commentary*, at 209.

<sup>630</sup> *Kvočka et al.*, TC, ¶ 143.

<sup>631</sup> Juan E. Mendez, Rep. of the U.N. Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, U.N. Doc. A/HRC/28/68, at ¶ 33 (Mar. 5, 2015).

<sup>632</sup> INCIDENT AT THE MANUS ISLAND DETENTION CENTRE, *supra* note 228, § 6.73.

<sup>633</sup> *Id.*

<sup>634</sup> See on the aspects of the vulnerability of refugees I. Clark, *The Vulnerable in International Society* (OUP, 2013), chapter 4. On the combination of physical risks and socially produced vulnerability see Jane McAdam, *Climate Change, Forced Migration and International Law* (OUP, 2012), 4.

<sup>635</sup> See *supra* Part II, Section 4.

<sup>636</sup> ISLAND OF DESPAIR, *supra* note 102 **Error! Bookmark not defined.**, at 44.

<sup>637</sup> *Id.*

While the Australian Government's Memorandums of Understanding entered into with Papua New Guinea and Nauru try to indemnify Australia from liability by giving these "host states" full responsibility for processing asylum claims and the conditions of detention, the Australian Senate's Legal and Constitutional Affairs Committee's inquiry into the Incident at the Manus Island Detention Centre found that "the degree of involvement by the Australian Government in the establishment, use, operation, and provision of total funding for the centre clearly satisfies the test of effective control in international law."<sup>638</sup> Similarly, the UNHCR noted that "the transfer of asylum seekers . . . does not extinguish the legal responsibility of the transferring State for the protection of the asylum seekers affected by the arrangements."<sup>639</sup> Moreover, in August 2015, the Papua New Guinea Immigration and Citizenship Authority issued a document to asylum seekers residing at Manus Island who had their claims for refugee status refused, which stated that "you will remain in custody until you are able to obtain a visa to lawfully enter and reside in [Papua New Guinea] or another country."<sup>640</sup>

#### **v. Such Pain or Suffering Did Not Arise Only From, and Was Not Inherent or Incidental To, Lawful Sanctions**

As described above, these torturous acts and conditions violate international law, including treaties to which Australia is a party, as well as a customary international prohibition of the status of *jus cogens*. This illegality cannot be defended by reference to domestic law. According to Article 27 of the *Vienna Convention on the Law of Treaties*, Australia "cannot invoke the provisions of its internal law as justification for its failure to perform a treaty" or its customary law obligations.<sup>641</sup>

A number of the instances of inhumane treatment described above, including waterboarding, beatings and threat of sexual violence, cannot qualify as lawful sanctions under either international or domestic law. Beyond this, the exception of lawful sanctions is relating to the sanctions imposed by domestic criminal law, considering, for example, mental suffering as a consequence of lawful imprisonment as not torture. In this case, however, the seeking of asylum is not an illegal activity to be punished through criminal law. The *de facto* punitive function of detention cannot justify its torturous effects. Refugees and asylum seekers attempting to seek haven on Australia's shores do not violate any international or domestic laws which would justify their torture or arbitrary detention. As a party to the *1951 Convention Relating to the Status of Refugees* and *1967 Protocol Relating to the Status of Refugees* (together, the *Refugee Convention*), Australian government officials must permit entrance of, as well as assist and assess the claims of refugees and those seeking asylum.<sup>642</sup> Yet, Australian government officials

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<sup>638</sup> INCIDENT AT THE MANUS ISLAND DETENTION CENTRE, *supra* note 235, at 151.

<sup>639</sup> See for example UNHCR, UNHCR Monitoring Visit to Manus Island, Papua New Guinea, 11-13 June 2013, at §10, [http://unhcr.org.au/wp-content/uploads/2015/05/11June2013\\_ManusMonitoringVisit.pdf](http://unhcr.org.au/wp-content/uploads/2015/05/11June2013_ManusMonitoringVisit.pdf).

<sup>640</sup> Lisa Martin, *Stateless could be transferred to PNG jail*, THE SYDNEY MORNING HERALD, Aug. 2, 2015, <http://www.smh.com.au/breaking-news-national/stateless-could-be-transferred-to-png-jail-20150802-40bz7.html>.

<sup>641</sup> Art. 27, *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, entered into force 27 January 1980.

<sup>642</sup> *Id.* at art. 33(1).



treat these refugees seeking asylum as though they violate the laws of the nation, seeking sanctuary from a country that has effectively closed its borders. Government officials, consequently, lock them up and use them as an example, convincing other refugees to seek different means of achieving asylum. This behaviour hardly arises from lawful sanctions and, in fact, directly contravenes Australia's obligations under the *Refugee Convention*.

Finally, even in a narrow reading of the detention system as sanctions authorised by domestic law, these remain, as discussed above and below, unlawful under international law, qualifying as inhumane, arbitrary and torturous. As such, whether the detention and severe pain and suffering inflicted upon asylum seekers was authorised under Australia's domestic legislative regime<sup>643</sup> is irrelevant to the Office of the Prosecutor and the Court's definition of "lawful sanctions" under Article 7(1)(f). Similarly, the 1988 Report of the UN Special Rapporteur on Torture echoed this assessment, asserting that "[i]t is international law and not domestic law which ultimately determines whether a certain practice may be regarded as 'lawful.'"<sup>644</sup> The unlawful deprivation of liberty and severe physical and mental abuse suffered by those held in detention is surely not "inherent or incidental to" the lawful treatment of asylum seekers under international law.

## **vi. Part of a Widespread and Systematic Attack**

The torture described above and the physical and mental suffering occurred within the detention facilities and has a clear link to the overall attack against the civilian population of refugees and asylum seekers.

### **B. Mental Elements (*mens rea*)**

#### ***i. The Perpetrator Knew that the Conduct was Part of or Intended the Conduct to be Part of a Widespread or Systematic Attack Directed Against a Civilian Population***

According to the Pre-Trial Chamber in *The Prosecutor v. Jean-Pierre Bemba Gombo* "[t]o prove the mental element of torture, it is therefore sufficient that the perpetrator intended the conduct and that the victim endured severe pain or suffering."<sup>645</sup> There is no special requirement of knowledge, under article 30(3) and therefore "it is not necessary to demonstrate that the

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<sup>643</sup> Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth); Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth) inserted a new Section 197C into the Migration Act 1958 (Cth); Section 75A of the Maritime Powers Act 2013 (Cth).

<sup>644</sup> 1988 Report of the U.N. Special Rapporteur on Torture, U.N. Doc. E/CN.4/1988/17, ¶¶ 42.

<sup>645</sup> *Bemba*, PTC II ¶ 194. See also ¶ 4 of the General Introduction to the Elements of Crimes provides: "With respect to mental elements associated with elements involving value judgment, such as those using the terms . . . 'severe', it is not necessary that the perpetrator personally completed a particular value judgment unless otherwise indicated."

perpetrator knew that the harm was severe.”<sup>646</sup> Moreover, with respect to torture as a crime against humanity, as opposed to torture as a war crime, no ‘specific purpose’ is required.<sup>647</sup> With respect to the overall attack, the perpetrator needs to be aware of the existence of the overall attack against the civilian population. Finally, as per the fifth element of the crime, it is necessary that the perpetrator “knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.”<sup>648</sup>

Both physical acts of torture perpetrated in the camps and the legislative and administrative measures which produced severe pain or suffering were intentional. Knowledge of the produced harm, as mentioned above, is not necessary, even though in this case it is evident. Moreover, both the physical acts and the legislative and executive acts were part of the inhumane detention policy, which qualified above as an overall attack against the civilian population. The perpetrators were aware of this.

The leaked Nauru Files indicate that Australian government officials, border patrol agents, and private security contractors—including Wilson Security and Ferrovial—know of the abuses occurring on Nauru; moreover, evidence indicates these officials attempted to cover up or downgrade such abuses, hoping they could continue.<sup>649</sup> All reports of abuse, sexual violence, and self-harm wend their way to the Australian Department of Immigration and Border Protection, which requires all service providers to “report and record all alleged incidents.”<sup>650</sup> Managers at the Australian Department of Immigration and Border Protection also participate in daily and weekly meetings on Nauru.<sup>651</sup> Moreover, the Australian government deployed Australian Federal Police officers to Nauru to assist Nauruan police with investigating crimes in detention.<sup>652</sup> As the Nauru Police Commissioner Corey Caleb noted, “Australian Federal Police advisors who have day-to-day input into investigations and they know the facts.”<sup>653</sup> Finally, multiple outlets informed Australian government officials and their agents that their actions might be construed as torturous, were they not to reform the system. Of note, the UN Special Rapporteur on Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment concluded that Australia’s offshore processing regimes violated the right of asylum seekers to be free from torture.<sup>654</sup> The Association for the Prevention of Torture feels similarly, concluding

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<sup>646</sup> *Id.*

<sup>647</sup> *Id.* ¶ 195.

<sup>648</sup> See the 2013 Regional Deterrence Framework as a part of Operation Sovereign Borders <http://www.rowanramsey.com.au/Portals/0/PeopleSmuggling.pdf>.

<sup>649</sup> See *supra* Part II, Section 5.

<sup>650</sup> DIBP *Submission: Senate Inquiry into the Conditions and Treatment*, *supra* note 6, at 31.

<sup>651</sup> Amnesty International interview with IHMS, Sydney, 30 August 2016 (Amnesty Report 45).

<sup>652</sup> TAKING RESPONSIBILITY, *supra* note 6, at ¶ 5.84.

<sup>653</sup> Government of the Republic of Nauru, “We Won’t Cop it Anymore’ – Nauru Police,” 2 February 2016, <http://www.nauru-news.com/#!We-wont-cop-it-anymore-Nauru-Police/cjds/56b938030cf2dc1600ea69e6>.

<sup>654</sup> Human Rights Council, Juan E. Mendez, Rep. of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, U.N. Doc. A/HRC/28/68, at ¶ 19 (Mar. 5, 2015).

that Australian officials implemented a detention system that “is likely to constitute a *prima facie* regime of cruel, inhuman or degrading treatment, and may even constitute torture.”<sup>655</sup>

Finally, there is indication that torturous acts and the resulted suffering were *intended* (as per the second option of the fifth element) to be part of the attack. High-level language suggests this: In May 2014, Malcolm Turnbull, acting in his capacity as Communications Minister prior to becoming Prime Minister of Australia, stated “We have harsh measures [and] some would say cruel measures . . . [but] the fact is if you want to stop the people-smuggling business you have to be very, very tough.”<sup>656</sup> Moreover, in September 2015, Turnbull, now serving as Prime Minister, underscored the intentional nature of this cruel treatment, remarking “I know that’s tough, we do have a tough border policy, you could say it’s a harsh policy, but it has worked.”<sup>657</sup>

#### **4. Australian Government Officials and Their Agents Knowingly Committed Other Inhumane Acts, within the meaning of Article 7(1)(k) of the Rome Statute**

Article 7(1)(k) speaks of “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”<sup>658</sup> As the Court has said, the category is not a “catch all provision.”<sup>659</sup> It therefore must be interpreted narrowly and with circumspection. In the present condition, an environment in which inhuman and degrading conditions in detention are systematised, necessarily constitutes the commission of “other inhumane acts.”

##### **A. Material Elements (actus reus)**

###### ***i. “...of a similar character...”***

Establishing an environment in which widespread and systematic cruel, inhuman and degrading treatment reigns, constitutes “other inhumane acts.” This kind of environment conveys an inhumane character analogous and of the same gravity to the inhumane results proscribed by other sub-categories of Article 7 of the Statute.

The prohibition of inhuman and degrading treatment is established in a number of human rights and international humanitarian law instruments, for example under Article 5 of the *Universal*

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<sup>655</sup> Association for the Prevention of Torture, “APT Submission on Australia - UN Committee Against Torture 53rd Session (3-28 November 2014),” 17 October 2014,

[http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/AUS/INT\\_CAT\\_NGO\\_AUS\\_18683\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/AUS/INT_CAT_NGO_AUS_18683_E.pdf), p. 9.

<sup>656</sup> *Malcolm Turnbull Admits Coalition Border Policies Harsh*, *supra* note 425.

<sup>657</sup> Keany, *supra* note 426.

<sup>658</sup> See also *Prosecutor v Germain Katanga & Mathieu Ngudjolo Chui*, (ICC)PTCI, Decision on the Confirmation of Charges, Case No. ICC-01/04-01/07, 30 Sept. 2008, ¶ 446 (*Katanga*, PTCI).

<sup>659</sup> *Id.* ¶ 448-49. See *Prosecutor v Blaškić*, (ICTY) TC, Case No. IT-95-14-T, 3 March 2000, ¶ 239; *Prosecutor v Kupreskić et al.*, (ICTY) TC, Case No. IT-95-16-T, 14 Jan. 2000, ¶ 566.

*Declaration of Human Rights*, Article 7 of the *International Covenant on Civil and Political Rights* (“no one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment”),<sup>660</sup> Article 3 of the *European Convention on Human Rights*,<sup>661</sup> Article 5 of the *Inter-American Convention on Human Rights*,<sup>662</sup> Article 5 of the *African Charter on Human and Peoples’ Rights*,<sup>663</sup> Common Article 3 to the Geneva Conventions,<sup>664</sup> Article 4 of Additional Protocol II to the Geneva Conventions<sup>665</sup> as well as, particularly, in the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*.<sup>666</sup> The prohibition has also been set out in other instruments, such as General Assembly Resolutions<sup>667</sup> and has been recognised as part of general international law. In all of these instruments, such treatment is coupled with the prohibition on torture, signalling their similarly enshrined stature in the international legal system.

Cruel, inhuman and degrading treatment too has been recognised as a peremptory norm of international law, i.e., a *jus cogens* prohibition.<sup>668</sup> Indeed cruel, inhuman and degrading treatment is prohibited *alongside* torture<sup>669</sup> and not often clearly distinguished from it.<sup>670</sup> It is clearly a fundamental human right from which no derogation is permitted.<sup>671</sup> Even if its status of *jus cogens* remains open, the prohibition from cruel, inhuman and degrading treatment is clearly recognised in customary law.<sup>672</sup>

The prohibition of “other inhumane acts” establishes that widespread cruel, inhuman and degrading treatment is internationally criminalised, as long as it is of a similar severity and gravity with other prohibited acts in article 7. The conditions in the asylum seeker processing facilities on Nauru and Manus Islands constitute systematised violations of the prohibition on

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<sup>660</sup> ICCPR, art. 7.

<sup>661</sup> ECHR, art. 3.

<sup>662</sup> IACHR, art. 5.

<sup>663</sup> ACHPR, art. 5.

<sup>664</sup> *Geneva Conventions*, art. 3.

<sup>665</sup> *Geneva Conventions Protocol II*, art. 4.

<sup>666</sup> CAT.

<sup>667</sup> General Assembly resolution 40/144 of 13 December 1985, annex, art. 6.

<sup>668</sup> Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, A/HRC/25/60, 10 April 2014, ¶ 40.

<sup>669</sup> CAT.

<sup>670</sup> N. Rodley with M. Pollard, *The Treatment of Prisoners under International Law* (OUP, 2009) 122-24. See also E. Criddle and E. Fox-Decent, ‘A Fiduciary Theory of Jus Cogens’ (2009) *Yale Journal of International Law* 331 and D. Weissbrodt and C. Heilman, ‘Defining Torture and Cruel, Inhuman, and Degrading Treatment’ (2011) 29 *Law and Inequality* 343: both considering torture and CIDT together as *jus cogens*.

<sup>671</sup> See General Comment adopted by the Human Rights Committee under article 40, ¶ 4, of the ICCPR, No. 24, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (11 Nov. 1994), ¶ 8. setting out the ‘fundamental’ rules of human rights from which no derogation is permitted: ‘... a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, ...’ On non-derogability as an indication of *jus cogens* status see A. Orakhelashvili, *Peremptory Norms in International Law* (OUP), 53 *et seq*, who, while not specifically referring to inhuman and degrading treatment, argues for the peremptory status of most fundamental human rights.

<sup>672</sup> See K. Greenberg and J. Dratel, *The Torture Memos: The Road to Abu Ghraib* (CUP, 2005) 598.

cruel, inhuman, and degrading treatment. Some aspects of this violation are covered under other categories of crimes against humanity, specifically under *imprisonment* or *torture*. But there may also be residue of acts which may not be appropriately covered there, but qualifying as ‘other inhumane acts’ within the meaning of Article 7(1)(k).

While torture requires ‘severe physical or mental pain or suffering’, other inhumane acts require ‘great suffering, or serious injury to body or to mental or physical health.’ The jurisprudence of international criminal courts and tribunals has provided a series of examples which support the finding that the conditions of detention in Manus Island and Nauru as well as the routine inhumane treatment of detainees may qualify as ‘other inhumane acts.’ The particular circumstances are crucial. These include the age of the victims, the special vulnerability of children, their health, and the consequences of inhuman and degrading treatment on their physical and mental well-being.<sup>673</sup> ‘Serious’ and ‘systematic’ inhuman and degrading treatment have expressly been recognised as ‘other inhumane acts.’<sup>674</sup> The overcrowding of cells, the absence of bedding and basic hygiene, leading to diseases, have also influenced such findings. The deprivation of ‘adequate food, shelter, medical assistance, and minimum sanitary conditions’, has also been found to contribute to a finding of ‘other inhumane acts.’<sup>675</sup> Sexual violence, even when not qualifying as rape, has been categorised as ‘other inhumane acts’ in the *ad hoc* Tribunals.<sup>676</sup> Finally, beatings, ‘physical and psychological abuse and intimidation, inhumane treatment, and depriv[ation] of adequate food and water’ have been recognised as constituting other inhumane acts.<sup>677</sup>

Holding asylum seekers in squalid facilities with substandard hygiene conditions, while at the same time repeatedly delaying medical treatment, or providing inadequate treatment, violates the prohibition of other inhumane acts. A context in which individuals held in these facilities are constantly exposed to sexual abuse, or are provided with slight improvements in their conditions in return for sexual favours<sup>678</sup> further highlights the need to investigate the commission of other inhumane acts.

“Other inhumane acts” has been recognised as a “residual category,” which may address inhumane treatment of similar gravity to other crimes discussed above but which doesn’t fall in the above definitions. The extensive depictions of these elements in this communication provide support to the allegation of the commission of ‘other inhumane acts’, and require further

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<sup>673</sup> *Prosecutor v Galić*, (ICTY) TC I, Case No. IT-98-29-T, 153 (Dec. 5, 2003).

<sup>674</sup> *Kupreškić*, (ICTY) TC, Case No. IT-95-16-T, 14 Jan. 2000, ¶ 566. It should be noted that a discriminatory element is identified in this case as adding to the seriousness of the inhuman and degrading treatment.

<sup>675</sup> *Krnjelac*, TC

<sup>676</sup> *Prosecutor v Kajelijeli*, TC, Case No. ICTR-98-44A-T, Judgment and Sentence, ¶ 916 (Dec. 1, 2003) (“[O]ther acts of sexual violence which may fall outside of this specific definition [of rape] may of course be prosecuted ... as other inhumane acts.”).

<sup>677</sup> *Blaškić*, (ICTY) AC, Case No. IT-95-14-A, 154 (July 29, 2004). *Blaškić AC* discusses such treatment in the context of persecution.

<sup>678</sup> See *The Nauru Files*, *supra* note 151.

investigation by the OTP. The appropriate categorisation of the inhumane treatment presented and discussed here may depend on the outcome of this investigation.

**ii. “...causing great suffering, or serious injury to body or to mental or physical health.”**

The material element of other inhumane acts requires not only that individuals be exposed to cruel, inhuman, or degrading treatment, but also an outcome: great suffering or serious injury to body or to mental or physical health. It is certainly true that detention in the Nauru and Manus facilities has resulted in great suffering as well as serious injuries to physical and, especially, mental health. Paul Stevenson, a trauma expert who had previously worked for Wilson Security guards on Manus and Nauru, has provided extensive reports on the extent of trauma on the islands.<sup>679</sup> Noting the dramatic mental health consequences on detained individuals, former IHMS physician Peter Young noted that the Australian Immigration department often encouraged doctors not to report mental health problems.<sup>680</sup> Young also described a reluctance to send people to Australia for treatment because it would undermine the offshore detention policy and migrants could more readily access lawyers. The severe physical and mental consequences on refugees and asylum seekers held in detention have been extensively documented and reflect the systematic nature of the beatings, sexual violence, inhuman and degrading treatment and inhumane detention conditions refugees to which refugees have been exposed.

**B. Mental Elements (*mens rea*)**

The analysis of the mental elements attached to “other inhumane acts” is essentially identical to that of other crimes against humanity, as described above, in terms of the intention or awareness that the acts be part of the overall attack on the civilian population. The requirement that the acts “intentionally caus[e]” suffering should not be interpreted as imposing a higher threshold than the general one of Article 30(2) of the Statute. Awareness of the consequences of the action suffices.<sup>681</sup> While awareness that the consequence “will occur in the ordinary course of events” as per Article 30(2)(b) has been interpreted by the Court to refer to “virtual certainty,”<sup>682</sup> this is satisfied in this instance. The egregiousness of the conditions combined with the widespread reports of the physical and mental suffering clearly suggest the consequences of the inhumanity of the detention.

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<sup>679</sup> Ben Doherty & David Marr, *The worst I’ve seen – trauma expert lifts lid on ‘atrocities’ of Australia’s detention regime*, THE GUARDIAN, June 19, 2016, <https://www.theguardian.com/australia-news/2016/jun/20/the-worst-ive-seen-trauma-expert-lifts-lid-on-atrocities-of-australias-detention-regime>.

<sup>680</sup> Dan Conifer, *Doctor accuses immigration department of medical interference in treatment of people on Nauru*, ABC NEWS, June 8, 2015, <http://www.abc.net.au/news/2015-06-09/doctor-told-not-to-note-mental-harm-in-nauru-reports-inquiry/6532832>.

<sup>681</sup> See also for the application of the law in *Gbagbo PTC* where the reference to awareness of consequences, as a general threshold, seems to suffice as *mens rea* for ‘other inhumane acts’: *Gbagbo, PTC*, Case No. ICC-02/11-01/11, 235-36 (June 12, 2014).

<sup>682</sup> *Prosecutor v Lubanga*, AC, Case No. ICC-01/04-01/06 A 5, 1 December 2014, ¶ 447.

Even if, however, awareness were to be considered insufficient and *dolus directus* required, the function of the inhumanity of the detention system as a punitive deterrent on present and aspiring asylum seekers is crucial.<sup>683</sup> The purpose of the overall attack is to deter, through setting an example and sending a message, future migration, by suggesting that the suffering in detention will be potentially greater than the suffering individuals flee. While this is not the space for divining each perpetrator's intentionality, there is a strong suggestion that this mind-set is present both on the ground and in the centres of crucial authority, one worthy of investigation.

## **5. Australian Officials and Their Agents Committed the Crime of Deportation, within the meaning of Article 7(1)(d) of the Rome Statute**

Article 7(1)(d) of the Statute grants the Court jurisdiction over deportation as a crime against humanity, when committed "as part of a widespread or systematic attack directed against a civilian population, with knowledge of the attack." Article 7(2)(d) of the statute defines deportation: "'Deportation or forcible transfer of population' means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law." The Elements of Crimes set out the following five elements:

1. "The perpetrator deported or forcibly transferred without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts.
2. Such person or persons were lawfully present in the area from which they were so deported or transferred.
3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population."

For analytical purposes, these can be discussed as three cumulative elements: (i) the forcible character of the displacement; (ii) the lawful presence of the deportee; (iii) the absence of a permitted ground under international law.<sup>684</sup>

As described above, Operation Sovereign Borders (OSB) began in late 2013.<sup>685</sup> The mandate of OSB is to prevent boats from landing irregularly in Australia through "pushbacks" conducted by

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<sup>683</sup> A similar argument has been made with respect to Greece in Kalpouzos & Mann, *Banal Crimes against Humanity: The Case of Asylum Seekers in Greece*, 16 MELBOURNE J. INT'L L. 1, 20-21 (2015). The case for Australia is arguably stronger.

<sup>684</sup> Vincent Chetail, *Is There any Blood on My Hands? Deportation as a Crime of International Law*, 29 LEIDEN J. OF INT'L LAW 924.

Australian forces. By institutionalising pushbacks, Australian officials and agents may have committed a crime against humanity, in violation of Article 7(1)(d) of the Statute. Moreover, by transferring asylum seekers intercepted at sea to the facilities in Nauru and Manus Islands, while knowing that they will be exposed to torture, and cruel, inhuman and degrading treatment, Australian agents have once again committed the crime against humanity of deportation.

## A. Material Elements (*actus reus*)

### i. *Forcible Character of Displacement*

OSB is a maritime policing operation, charged with intercepting asylum seekers seeking to reach Australia on boats and diverting their movement so that they do not arrive in Australia. This movement is involuntary. It is “forcible,” in the sense the Statute requires. While the Elements of Crimes confirm that “forcible” “is not restricted to physical force”,<sup>686</sup> in this case the displacement is “forcible” in this narrow sense of the terms, as well as being more widely coerced and involuntary. As explained by the ICTY, “the displacement of persons is only illegal where it is forced, i.e., not voluntary.”<sup>687</sup> By contrast, voluntary return or departure does not amount to an act of deportation. As the ICTY further provides, “an apparent consent induced by force or threat of force should not be considered real consent.”<sup>688</sup> In the context of the practice of pushback and removals to Nauru or Manus Islands, there can be no argument that these transfers are consensual and not forcible.

### ii. *Lawful Presence*

OSB deportations, whether they are pushbacks intended to divert asylum seekers who aim to reach Australia, or transfers to Nauru or Manus Islands, are deportations of people who are lawfully present in their initial locations. First, note that the ICTY has explained that there is no requirement that “presence” should extend to any duration.<sup>689</sup> Consequently the presence of travellers moving through maritime space mustn’t be regarded as different in nature to any other kind of presence.

The transfers at issue have been either transfers from Australian sovereign territory, or transfers from locations on the high seas. Through several legislative acts, Australia has excised large portions of its maritime space from its sovereign territory – “for migration purposes.”<sup>690</sup> Whether these excisions are lawful or not, the presence of the intercepted asylum seekers is lawful under international law as set out below. The question whether one recognises these excisions does

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<sup>685</sup> Austl. Dep’t. of Immigration & Border Prot., Operation Sovereign Borders, <http://www.border.gov.au/about/operation-sovereign-borders>.

<sup>686</sup> Elements of Crimes, art. 7(1)(d), fn. 12.

<sup>687</sup> *Prosecutor v Simić, Tadić, & Zarić*, TC II, Case No. IT-95-9-T, ¶ 125 (Oct. 17, 2003); Chetail, *supra* note 684, at 924.

<sup>688</sup> *Prosecutor v Simić*, ¶ 125. *See also Krnojelac*, TC, ¶ 475, fn. 1435.

<sup>689</sup> *Popovic* ¶¶ 899–900.

<sup>690</sup> It is an open question whether, from the perspective of international law, such excisions are permissible.



however make a difference in terms of determining whether asylum seekers were interdicted on the high seas or in Australian territory. For our own purposes, the most plausible assumption is that both kinds of interdiction have occurred.

In cases where asylum seeker boats were displaced forcefully from locations on the high seas, lawful presence stems from the principle of the freedom of navigation, enshrined both in treaty law and in customary international law. The United Nations *Convention of the Law of the Seas* (UNCLOS), for example, ensures this freedom in its Article 87 1.(a). Freedom of navigation is “the starting principle under international law and domestic law does not extend a sufficient legal basis” to interfere with it.<sup>691</sup> The high seas are beyond the sovereign territory of any state, and Australia has no authority to regulate the movement of asylum seekers on the high seas. The right of coastal states to take appropriate policing measures<sup>692</sup> do not affect this. It is beyond doubt that their presence there is lawful.

In cases where asylum seeker boats were displaced from Australian waters, one might question whether the displaced population was lawfully present in Australia. From the perspective of Australian domestic law the answer may be negative. However, the Prosecutor’s inquiry cannot stop here. The lawfulness of their presence will be determined by international law.<sup>693</sup> Indeed, “[a]ny other reading would make the definition of deportation meaningless as it would permit a government to declare that the people to be deported were not ‘lawfully present’ in the territory of a State or in occupied territory on grounds which were contrary to international law and escape international criminal responsibility.”<sup>694</sup> As international refugee law provides, refugee status is declaratory rather than constitutive. What this means is that those who are *bona-fide* refugees are protected from removal even prior to their submission of an application for asylum. International law thus grants them lawful presence. Furthermore, this is true even about those who may have not suffered from a *well-founded fear of persecution* as defined in Article 1 of the *Refugee Convention*.<sup>695</sup> Such people are still protected by the principle of *non-refoulement* and they have a right to stay in Australia’s territory, if deportation may expose them to torture or cruel, inhuman, and degrading treatment.

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<sup>691</sup> See T. Aalberts & T. Gammeltoft-Hansen, Sovereignty at sea: the law and politics of saving lives in *mare liberum*, 17 J. OF INT’L L. & INT’L REL., 439, 452 (2014). See also *Hirsi Jamaa and Others vs Italy*, European Court of Human Rights, Appl. No. 27765/09, 23 February, 2012, ¶ 95 (“In the Government’s view, the legal system prevailing on the high seas was characterised by the principle of freedom of navigation. In that context, it was not necessary to identify the parties concerned. The Italian authorities had merely provided the necessary humanitarian assistance. Identity checks of the applicants had been kept to a minimum because no maritime police operation on board the ships had been envisaged.”).

<sup>692</sup> See, e.g., art. 8(2) of the Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime (2000).

<sup>693</sup> *Stakic*, AC, ¶ 278 (Mar. 22, 2006). The literature is unanimous. See Cryer et al., *Introduction to International Criminal Law and Procedure* (4th ed.), 148; Werle & Jessberger, *Principles of ICL*, 360 (2014); OTTO TRIFFTERER & KAI AMBOS, *ROME STATE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* note 125 (3rd ed. 2016).

<sup>694</sup> Christopher K Hall in Triffterer, marginal note 125. See also Chetail, *supra* note 684, at 925.

<sup>695</sup> *Refugee Convention*, art. 31(1).

Asylum seekers and refugees benefit from the principle of *non-refoulement* irrespective of their irregular entry or stay. Such lawful presence is reinforced by Article 31(1) of the *Refugee Convention*, which prohibits penalties on account of entry contrary to domestic law. As Professor Chetail has explained, “This provision is precisely aimed at exempting asylum-seekers from the entry requirements generally imposed on immigrants. It accordingly presumes that asylum seekers are lawfully present under international law.”<sup>696</sup>

### *iii. Absence of Permitted Ground*

International law permits the deportation of non-citizens in some circumstances, but where refugees and asylum seekers are concerned there are strict limitations on such legal permission. As the Human Rights Committee has explained, collective expulsions of non-citizens are impermissible under Article 13 of the *International Covenant on Civil and Political Rights*. Article 13 provides that: “An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed . . . .” The requirement of personal decision precludes any measure of collective or mass expulsion.<sup>697</sup>

In addition, even if the expulsion is not deemed to be collective, deportation on an individual basis needs to follow procedural rules set out in article 13 and allowing the individual to “submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority.” This can only be departed from in case of “compelling reasons of national security.” It has been argued that the formulation requires truly exceptional circumstances “when there is no other means for protecting the institutions or the population of a state.”<sup>698</sup>

On both these grounds, the expulsion practiced during OSB does not meet the criteria of lawfulness. Expulsions are effectively collective in nature as all intercepted individuals are summarily deported to the detention centres.<sup>699</sup> In addition, individuals are not permitted to have their case reviewed before a competent authority but are summarily deported.<sup>700</sup> Nor are collective and arbitrary deportations based on exceptional national security grounds. The use of

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<sup>696</sup> Chetail, *supra* note 684, at 926.

<sup>697</sup> Human Rights Committee (HRC), General Comment No. 15: The Position of Aliens Under the Covenant, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (1986), ¶ 10. The same position is reflected in a host of regional and soft-law instruments, which may reflect an emerging norm. *See, e.g.*, art. 22(1) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW); art. 22(9) of the American Convention on Human Rights (ACHR); Article 12(5) of the African Charter on Human and Peoples’ Rights (ACHPR); art. 4 of Protocol No. 4 to the European Convention on Human Rights (ECHR); art. 26(2) of the Arab Charter on Human Rights.

<sup>698</sup> Chetail, *supra* note 684, at 927.

<sup>699</sup> *See* Part II.

<sup>700</sup> *Id.*

general language depicting asylum seekers as a general threat to society should not be understood to support a strong argument of national security. Deportations perpetrated during OSB can therefore not be said to meet the criteria for lawful grounds.

Moreover, the principle of *non-refoulement* prohibits deportation toward a state where there is a real risk of serious violations of human rights. Set out in article 33 of the Refugee Convention, it is a widely accepted and endorsed principle of international law.<sup>701</sup> The principle pertains to refugees within the meaning of Article 1(A)(2) of the Refugee Convention. Article 32 specifies the prohibition of expulsion to a territory where a refugee's "life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Refugees deported to detention facilities may be understood as a social group. In *Prosecutor v. Katanga and Ngudjolo Chui*, the ICC has acknowledged "the customary rule of *non-refoulement*."<sup>702</sup> The principle of *non-refoulement* cannot be derogated from when there is a real risk of torture, inhuman or degrading treatment. In the present context, as has been shown, there is a direct risk for asylum seekers, who may be exposed to torture and inhuman and degrading treatment in Nauru and in Manus Islands.

Finally, there are additional general human rights protections prohibiting the expulsion of any individual, irrespective of refugee status. The Human Rights Committee has established the prohibition of expulsion to a territory where the individual will face torture or cruel, inhuman or degrading treatment.<sup>703</sup>

The facts that, as shown above, the Australian authorities are the architects of the abusive environments on these islands, cannot give them authorisation to deport asylum seekers to such environments.

## **B. Mental Elements (*mens rea*)**

Under the third element of the crime it is necessary that "the perpetrator was aware of the factual circumstances that established the lawfulness of such presence." The circumstances surrounding the interception and deportation of asylum seekers arriving by boat are quite clear and their character as asylum seekers, which establishes the lawfulness of their presence, well known and undisputed even by the officials executing the deportation order. The deportations under OSB

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<sup>701</sup> See also CAT, art. 3.

<sup>702</sup> *Prosecutor v Katanga & Chui*, TC II, Case No. ICC-01/04-01/07-3003, Decision on an Amicus Curiae Application and on the Requete tendant a` obtenir presentations des temoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorites neerlandaises aux fins d'asile, ¶ 64 (June 9, 2011). See also V. Chetail, 'The Transnational Movement of Persons under General International Law – Mapping the Customary Law Foundations of International Migration Law,' in V. Chetail & C. Bauloz (eds.), *Research Handbook on International Law and Migration*, 35-41 (2014); G. Goodwin-Gill & J. McAdam, *The Refugee in International Law*, 345–54 (2007).

<sup>703</sup> *Human Rights Committee, Kindler v Canada*, CCPR/C/48/D/470/1991, 5 Nov. 1993, ¶13.2; *Judge v Canada*, CCPR/C/78/D/1086/2002 4 Aug. 2003; *C. v Australia*, CCPR/C/76/D/990/1999, 28 Oct. 28, 2002.

stem from a well-designed governmental policy, which is the subject of copious public debate and which constitutes an integral part of the state's immigration detention and deterrence policy. Deportations are, accordingly, part of what has been described as the overall attack against the civilian population. Finally, the individuals perpetrating the prohibited act cannot but be aware of the close link between deportations and the overall policy and attack. To the extent that they share the attack's deterrent purpose, one may infer a particular intention in contributing to the overall attack through the prohibited act of deportation.

## **6. Australian Officials and Their Agents Committed the Crime of Persecution within the meaning of Article 7(1)(h) of the *Rome Statute***

The widespread and systematic attack directed against asylum seekers and refugees contains the severe deprivation of a number of fundamental rights, with clear discriminatory intent. It therefore constitutes the crime of persecution, as per Article 7(1)(h) of the *Rome Statute*. Persecution, one of the oldest and most important concepts in articulating such mass and systematic policies of inhumane treatment, is understood to reflect the multiple infringement of fundamental rights,<sup>704</sup> especially of individuals perceived as 'foreign bodies.' It is also a particularly apposite characterisation of Australia's immigration policy as it reflects, and highlights, that the inhumane and arbitrary treatment of refugees and asylum seekers is the consequence of active discrimination, intended as a deterrent of migration flows, rather than an inadequate reaction to such flows.<sup>705</sup>

The following elements must be satisfied: a) there needs to be a severe deprivation, contrary to international law, of fundamental rights; in which b) asylum seekers are targeted by reason of the identity of the group or collectivity or the group or collectivity is targeted as such; c) the targeting of the group is on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognised as impermissible under international law; d) the conduct is committed in connection with other prohibited acts; e) finally, perpetrators knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

### **A. Material Elements (*actus reus*)**

#### *i. Severe Deprivation of Fundamental Rights, Contrary to International Law*

The specific acts constituting persecution may vary. The category is open, aiming to capture the multiplicity of discriminatory and inhumane acts against groups, but the acts must be of a similar gravity to other prohibited acts under the category of crimes against humanity.

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<sup>704</sup> *Prosecutor v Tadić*, Case No. IT-94-1-T, 7 May 1997, ¶ 697.

<sup>705</sup> For this argument in the context of the situation in Greece, see Kalpouzos & Mann, *supra* note 683, at 16.

It is clear that persecutory acts may include administrative acts that create a system of inhumane and discriminatory treatment.<sup>706</sup> It is also settled that physical and mental harm, as well as unlawful detention may constitute severe deprivation of fundamental rights. Torture and cruel, inhuman or degrading treatment constitute deprivation of fundamental human rights according to *Convention against Torture* and Article 7 of the *International Covenant of Civil and Political Rights* (ICCPR).<sup>707</sup> Individual liberty is protected under Article 9(1) of the ICCPR and Article 37(b) of the *Convention on the Rights of the Child*.<sup>708</sup> Australia has ratified the above Conventions and has accepted these obligations, which also reflect customary law.

This Communication has detailed mistreatment, sexual violence and mental anguish suffered by asylum seekers, including children, as well as indefinite detention, in contravention to both substantive and procedural protections in human rights law. Indeed torture,<sup>709</sup> unlawful imprisonment,<sup>710</sup> deportation,<sup>711</sup> and inhumane treatment<sup>712</sup> have all been found to constitute persecution. In addition, non-fundamental and derogable rights, such as the discriminatory

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<sup>706</sup> See generally International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

<sup>707</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976.

<sup>708</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990.

<sup>709</sup> International Military Tribunal (Nuremberg Judgment), Judgment and Sentences (Nuremberg Judgment), 1 October 1946, (1947) 41 AJIL. 172, 247 (beating and torture identified as persecution); *Prosecutor v Kordic*, AC, Case No. IT-95-14/2-A, ¶ 106 (Dec. 17 2004); *Prosecutor v Stakic*, AC, Case No. IT- 97-24-A, Judgment, ¶¶ 105–09. (Mar. 22, 2006) (upholding persecution conviction for torture); *Prosecutor v Blas'kic'*, TC, Case No. IT-95-14, ¶ 226 (Mar. 3, 2000); *Prosecutor v Kupreskic'*, TC, Case No. IT-95-16-T, ¶¶ 600–05 (Jan. 14, 2000); *Prosecutor v Naletilic'*, TC, Case No. IT-98-34-T, ¶ 682. (Mar. 31, 2003); *Prosecutor v Nikolic'*, TC, Case No. IT-94-2-S, ¶ 119 (Dec. 18, 2003) (conviction of persecution for torture).

<sup>710</sup> International Military Tribunal (Nuremberg Judgment), Judgment and Sentences (Nuremberg Judgment). 41 AJIL 172, 244 (Oct. 1, 1946) (citing 'the arrest of prominent Jewish business men'); *Prosecutor v Simic*, AC, Case No. IT-95-9-A, ¶ 106 (Nov. 28 2006) (for persecution based on unlawful arrests and detention); *Prosecutor v Blaskic*, TC, ¶ 234 (Mar. 3, 2000) ("The unlawful detention of civilians, as a form of the crime of persecution, means unlawfully depriving a group of discriminated civilians of their freedom . . . unlawfully depriving a group of discriminated civilians of their freedom' is unlawful detention amounting to persecution."); *Prosecutor v Kupreskic'*, TC, Case No. IT-95-16-T, ¶ 629 (Jan. 14, 2000) ('organised detention'); *Prosecutor v Naletilic'*, TC, Case No. IT-98-34-T, ¶ 642 (Mar. 31, 2003) ('organised detention of civilians'); *Prosecutor v Babic'*, TC, Case No. IT-03-72-S, ¶ 50 (June 29, 2004).

<sup>711</sup> International Military Tribunal (Nuremberg Judgment), Judgment and Sentences (Nuremberg Judgment), 41 AJIL 172, 310 (Oct. 1, 1946) (convicting Von Schirach for deportation of Jews from Vienna as a crime against humanity); *Attorney General v Eichmann, Supreme Court of Israel*, 36 ILR 277 (May 29, 1962); *Prosecutor v Stakic*, AC, Case No. IT-97-24-A ¶ 105 (Mar. 22, 2006) (as a crime against humanity).

<sup>712</sup> *Prosecutor v Simic*, AC, Case No. IT-95-9-A, (Nov. 28 2006); *Blas'kic'* AC, ¶ 155 (July 29, 2004) (inhumane treatment and deprivation of adequate food and water); *Nikolic'* TC, ¶ 119 (Dec. 18, 2003) (conviction of persecution for subjecting victims to inhumane conditions); *Prosecutor v Blagojevic'*, TC, Case No. IT-02-60-T, ¶ 620 (Jan. 17, 2005) (finding that cruel and inhumane treatment constitutes persecution).

limitations of the freedom of movement,<sup>713</sup> may be found to constitute persecution. The following additional conditions need to be met.

*ii. Asylum Seekers Were Targeted by Reason of the Identity of the Group or Collectivity; or the Group or Collectivity was targeted as such*

This criterion reflects the discriminatory intent that is required for the crime of persecution. While persecutory acts may be committed against individuals, this is by virtue of their belonging to a group or collectivity. Either the individuals affected are treated in a discriminatory fashion *because* of their belonging to this group<sup>714</sup> or, as is the case here, the group as such is targeted through discriminatory acts. In this case, there is no doubt that asylum seekers and refugees are objectively ‘identifiable’ as a separate group. They constitute the distinct target of the immigration and detention policy of the state, through its public and corporate agents. This identification may be based either on objective criteria or on the subjective notions of the perpetrators.<sup>715</sup> ‘But for’ their status as refugees or asylum seekers, the group of the individuals detained, mistreated or deported, would not have been the subject of the attack.<sup>716</sup> While they may hold different nationalities, ethnicities and geographical provenance – they share an aspiration to be granted asylum and are perceived as a foreign body – to be detained, deported and deterred – by the practices at issue in this Communication.

*iii. Targeting was on Political, Racial, National, Ethnic, Cultural, Religious, Gender, or Other Grounds that are Universally Recognised as Impermissible under International Law*

The law on persecution is also “cautiously open-ended”<sup>717</sup> with respect to the particular grounds on which the discrimination, and therefore the severe deprivation of fundamental rights, is based. International Criminal Law jurisprudence has accepted that such grounds can be negative, at least specifically in the context of nationality.<sup>718</sup>

Article 31 of the Refugee Convention prohibits the imposition of ‘penalties’ on refugees. The mistreatment described above, ranging from deportation to arbitrary imprisonment and torture can qualify as a penalty.<sup>719</sup> Moreover, although international law provides a distinct legal regime for the identification, processing and treatment of asylum seekers, which is different to the legal regime that applies to citizens or other aliens, this distinction should not entail discrimination. The status of refugee or asylum seeker entails certain protections and does not constitute an

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<sup>713</sup> *Stakic* TC, ¶ 773 (“Persecution can consist of the deprivation of a wide variety of rights, whether fundamental or not, derogable or not.”).

<sup>714</sup> See *Blaskic* TC, ¶ 235 (“[T]he perpetrator of the acts of persecution does not initially target the individual but rather membership in a specific . . . group.”).

<sup>715</sup> OTTO TRIFFTERER & KAI AMBOS, *ROME STATE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* note 73 (3rd ed. 2016).

<sup>716</sup> K. Ambos & S. Wirth, ‘The Current Law of Crimes Against Humanity,’ 13 *CRIM. L. F.* 1, 82 (2002).

<sup>717</sup> *CRYER, ET AL.*, at 257.

<sup>718</sup> *Kvočka* TC, ¶ 195 (Nov. 2, 2001).

<sup>719</sup> See Claire Henderson, ‘Australia’s Treatment of Asylum Seekers: From Human Rights Violations to Crimes Against Humanity’ 12 *J. INT’L CRIM. JUST.* 1180 (2014) (who, however, focuses on the ‘mode of arrival.’).

acceptable ground for discrimination. The clear customary nature of fundamental rules of the protection of refugees and asylum seekers, such as the rule of *non-refoulement* discussed above, reflect the universality of the impermissibility of such grounds of discrimination. International criminal law has not yet addressed this category of persecution, as courts and tribunals have not exercised their jurisdiction on such crimes. The present situation, however, reflects one such situation in which fundamental human rights are intentionally and severely deprived of individuals because of their status as refugees or asylum seekers.

Moreover, and in the alternative, an argument could be made that asylum seekers are perceived as different, and discriminated accordingly, based on racial or ethnic criteria. Indeed, racial grounds of discrimination, it has been argued, must be interpreted broadly, in accordance with the *International Convention on the Elimination of All Forms of Racial Discrimination*, as containing ‘any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin.’<sup>720</sup>

*iv. The Conduct was Committed in Connection with Other Prohibited Acts*

The other allegations in this Communiqué provide ample detail and bases for other prohibited acts. The discriminatory nature of these acts, a crucial element of persecution, co-exists with the inhumane nature of acts constituting torture or other inhumane acts, the arbitrary nature of the deprivation of liberty and the unlawfulness of deportations. Accordingly, the acts of physical and mental harm qualifying as the crime of persecution under article 7(1)(h) are committed in connection with the other prohibited acts alleged in this communication.

**B. Mental Elements (*mens rea*)**

*i. The Perpetrators Knew that the Conduct was Part of or Intended the Conduct to be Part of a Widespread or Systematic Attack Directed Against a Civilian Population*

Persecution requires a dual mental element. On the one what is required is the *mens rea* for the underlying acts that constitute fundamental violations of human rights. Here, the general rule of article 30(1) of intent and knowledge applies and this would cover intentional acts ranging from administrative measures to physical violence in violation of fundamental human rights. Secondly, and to the extent that the various persecutory acts are in the context of the detention and deportation practices of Australia’s immigration policy, it is quite clear to all the actors involved that they are part of the overall attack directed against the civilian population. Some actors might share the animus of imposing inhumane and arbitrary measures, in a discriminatory fashion, in order to deter present and future asylum seekers. However, even individuals not directly intending the deterrent consequences of the attack are fully aware of the overall characteristics of Australia’s immigration policy, which have been qualified here as constituting an attack. The Elements of Crimes, in footnote 22, clarify that It is understood that no additional mental

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<sup>720</sup> International Convention on Elimination of All Forms of Racial Discrimination, adopted in GA Res. 2106 A (XX) of Dec. 21, 1965, entered into force Jan. 4, 1969, art. 1.

element is necessary for this element other than that inherent in” the knowledge or intent that the act is part of the overall attack. This means that no additional discriminatory *mens rea* needs to be shown.

## 7. Criminal Responsibility

The attack against a civilian population, described above, implicates Australian, Nauruan, and Papua New Guinean government officials and representatives, and their corporate partners.<sup>721</sup> These individuals participated in creating and maintaining the detention camps, and therefore in the attack against a civilian population. As this communication has detailed, their actions have been intentional and with knowledge of their consequences and have, at varying degrees, served the overall purpose of the attack: to impose on the detained refugees and asylum seekers conditions of life so inhumane that their example will serve as a deterrent to refugee flows.<sup>722</sup>

Below, the main categories of individuals in positions of authority and responsibility who participated in the criminal acts are provisionally identified. Some have engaged in direct or indirect perpetration, others in direct or indirect co-perpetration, and yet others have superior responsibility or accessory liability. This analysis is provided to assist the Prosecutor both in identifying the relevant aspects of the overall attack against the civilian population and in identifying those most responsible.

### A. Article 25 Liability for Public Officials and Corporate Actors

Under Article 25(3)(a), any “natural person” who commits a crime within the jurisdiction of the court shall be held “criminally responsible and liable” if she (a) “[c]ommits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible.” Consequently, the *Rome Statute* broadly recognises at least three types of liability: direct (individual) perpetration, co-perpetration, and perpetration by means.<sup>723</sup>

The ICC has jurisdiction over public officials ranging from those who orchestrated and developed Australia’s immigration policies, to the individual border force officers and immigration officials who unlawfully detained, tortured, persecuted, or treated inhumanely refugees and asylum seekers. Such individuals may be held liable as direct or indirect perpetrators. In considering who to investigate, the Prosecutor has stated that she will conduct

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<sup>721</sup> See *supra* Part III.

<sup>722</sup> *Id.*

<sup>723</sup> OTTO TRIFFTERER & KAI AMBOS, *ROME STATE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 987 (3rd ed. 2016), <https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-3/>.



investigations to ensure prosecution against those “most responsible” for the crimes.<sup>724</sup> In this instance, it is important for the Prosecutor to investigate the structures of abuse. Their complexity is designed to avoid responsibility. But the modes of liability of international criminal law allow the tracing of such responsibility.

## 1. Direct (individual) perpetration

This is the “first and foremost”<sup>725</sup> form of perpetration, in which the individual “physically carries out all elements of the offence,”<sup>726</sup> that is, she satisfies by herself “the definitional material of the offence.”<sup>727</sup> In the context of the facts and prohibited acts discussed above, an example would include the perpetration of an act of torture, the forcible removal (deportation) of an individual, a persecutory violation of a fundamental human right, and so on. This will most obviously apply to individuals *in situ*, especially guards. These may be public officials or, in fact, employees of corporations such as Ferrovial, if they are found to satisfy the elements of the crimes.

## 2. Co-perpetration

Article 25(3)(a) describes perpetration “jointly with another”, a concept known as co-perpetration. The ICC Pre-Trial Chamber in *Lubanga* clarified that co-perpetration “is originally rooted in the idea that when the sum of the coordinated individual contributions of a plurality of person results in the realisation of all the objective elements of a crime, any person making a contribution can be held vicariously responsible for the contributions of all the others, and as result, can be considered as principal to the whole crime.”<sup>728</sup> In the same trial, the Chamber set out the elements of co-perpetration:

“(i) there was an agreement or common plan between the accused and at least one other co-perpetrator that, once implemented, will result in the commission of the relevant crime in the ordinary course of events; (ii) the accused provided an essential contribution to the common plan that resulted in the commission of the relevant crime; (iii) the accused meant to ...[commit the relevant crime] or he was aware that by implementing the common plan these consequences ‘will occur in the ordinary course of events’; (iv) the accused was aware that he provided an essential contribution to the implementation of the common plan.”<sup>729</sup>

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<sup>724</sup> OFFICE OF THE PROSECUTOR, INTERNATIONAL CRIMINAL COURT, POLICY PAPER ON CASE SELECTION AND PRIORITISATION (Sept. 15, 2016), [https://www.icc-cpi.int/itemsDocuments/20160915\\_OTP-Policy\\_Case-Selection\\_Eng.pdf](https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf).

<sup>725</sup> *Prosecutor v Tadic* (ICTY) AC, Case No. IT-94-1-A, 15 July 1999, ¶ 188 (*Tadic* AC) (“[F]irst and foremost the physical perpetration . . . by the offender himself.”).

<sup>726</sup> CRYER, ET AL., at 355.

<sup>727</sup> O’KEEFE, at 5.13.

<sup>728</sup> *Prosecutor v Lubanga*, PTC, Case No. ICC-01/04-01/06, Judgment, ¶ 326 (Jan. 29, 2007) [*Lubanga* PTC].

<sup>729</sup> *Lubanga* TC, ¶ 1018 (Mar. 14, 2012) [*Lubanga* TC].

Two important points merit clarification. First, the plan need not be expressly spelled out, but may “be inferred from the subsequent concerted action of the co-perpetrators.”<sup>730</sup> Second, the co-perpetrators may initially plan “to achieve a non-criminal goal” but “are aware (a) of the risk that implementing the common plan (which is specifically directed at the achievement of a non-criminal goal) will result in the commission of the crime and (b) accept such an outcome.”<sup>731</sup> The Trial Chamber has referred to this risk as a ‘critical element of criminality’ within the overall plan.<sup>732</sup> While the Appeals Chamber did not use the term ‘risk’, it understood it as reflecting the article 30(2) standard that the consequences will occur in the ordinary course of events, especially in situations where the plan is “implemented over a long period of time”.<sup>733</sup>

All of the facts presented in this communiqué indicate the risk, indeed the ‘virtual certainty’,<sup>734</sup> that crimes will be committed as part of the common plan of offshore detention. The crimes analysed in this submission all refer to the deportation of refugees and asylum seekers to the Manus Island and Nauru detention facilities and their subsequent inhumane treatment. The practice of offshore detention, as a way of managing and deterring migration flows, is central to the state’s migration policy and may be understood as an overall plan. Moreover, the inhumane, and criminal, elements of the detention policy are inherent, essential and critical aspects of the overall plan of deterring others. As a result, the commission of the crimes discussed are at the very heart of the common plan, if not a desirable outcome.

A common plan The development, organisation and maintenance of an immigration detention policy, including the provision of legislative, executive and logistical support constitutes a complex and ongoing common plan. The operation of detention facilities requires systematic cooperation. Public officials, especially those with high positions, as well as corporate officers who are acting as partners in the day to day running of the facilities are participating in the plan. They can qualify as co-perpetrators to the extent that they are making an ‘essential contribution’ to the overall plan.

Essential Contribution. An essential contribution means that the tasks “assigned to and performed by [government officials and corporate directors] in furtherance of the common plan [were] essential to the commission of the crime.”<sup>735</sup> This has been understood by ICC judges to require that the contribution had a causal link to the crime<sup>736</sup> or that it had ‘an immediate impact on the way in which the material elements of the crime were realised.’<sup>737</sup>

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<sup>730</sup> *Lubanga* PTC, ¶ 345.

<sup>731</sup> *Lubanga* PTC, ¶ 344.

<sup>732</sup> *Lubanga* TC, ¶ 984.

<sup>733</sup> *Lubanga* AC, ¶ 450.

<sup>734</sup> *Id.*, ¶ 447.

<sup>735</sup> O’KEEFE, at 179.

<sup>736</sup> *Lubanga* TC, ¶ 16.

<sup>737</sup> *Prosecutor v Ngudjolo Chui*, Case No. ICC-01/04-02/12, ¶ 44-6 (Dec. 18, 2012), [https://www.icc-pi.int/CourtRecords/CR2012\\_10250.PDF](https://www.icc-pi.int/CourtRecords/CR2012_10250.PDF).

The administratively complex organisation of a deterrent detainment system required essential contributions at different levels of government as well as through the involvement of the private sector. Without legislation authorising indefinite detention, prohibiting remedies and enabling the inhumane conditions described above, these crimes could not have been committed. The formulation of the collective expulsion practice, which qualifies as the prohibited act of deportation, has functioned as a starting point for the detention practices. The conclusion of the agreements with Nauru and Papua New Guinea—was essential in the establishment of the detention facilities. Despite the Australian High Court’s 2016 decision deferring responsibility to the Nauruan authorities,<sup>738</sup> the Australian government retains the ability to “take or cause to be taken, any action in relation to the arrangement or the regional processing functions of the country.”<sup>739</sup> Moreover, the day to day running of the facilities and, therefore, the realisation of the common plan has been entrusted to private corporations such as Ferrovial. Evidence supports the conclusion that the Directors of these private corporate actors may have been making and continue to make decisions with “immediate impact on the way in which the material elements of the crime [are] realised.”<sup>740</sup>

To the extent that private actors make essential contributions to the common plan, without which the crimes would not be possible, they may be held liable as co-perpetrators. Indeed, Australia’s reliance on the outsourcing and privatisation of the facilities and practices described above is a crucial element of its offshore detention, and has been implemented to avoid legal scrutiny. In this way, Australian officials have not only privatised the contribution to the crime, but they have also privatised criminal responsibility.

*Intent and awareness of consequences, and of essential contribution.* The subjective element of co-perpetration is “subsumed within the requirement that the co-perpetrator ‘meant’ to commit the crime or was aware that it would occur in the ordinary course of events.”<sup>741</sup> This was discussed above but can be reiterated: Australian government officials either intended the criminal consequences of the common plan or, given the increasing coverage of the suffering of detained refugees, they were fully aware of them.<sup>742</sup> The concerted efforts to ensure these consequences and limit recourse against them—criminalising whistleblowers, limiting prosecution through domestic courts, denying refugees access to Australian courts, and altering legislation to legalise previously unlawful acts—reveals awareness.<sup>743</sup> Similarly, private actors are fully – in fact, on the ground and daily – aware of the criminal elements of the common plan.<sup>744</sup> The existence or not of a deterrent motivation in private actors, in addition to commercial interest, is irrelevant. Continued essential contribution reflects their acceptance of the criminal consequences of the common plan.

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<sup>738</sup> M68-2015 v. Minister for Immigration and Border Prot. [2016] HCA 1 (Austl.).

<sup>739</sup> *Id.*

<sup>740</sup> *Ngudjolo Chui*, ¶ 46.

<sup>741</sup> CRYER, ET AL., at 366.

<sup>742</sup> *Lubanga TC*, ¶¶ 1011, 1013, 1018; *Bemba*, ¶¶ 356-59, 369.

<sup>743</sup> *See supra* Part II, Section 4.

<sup>744</sup> *See supra* Part II, Section 5.

### 3. Indirect (co-)perpetration

Article 25(3)(a), finally, recognises the possibility of perpetration through an agent, whether the agent herself is guilty or not. This type of ‘indirect’ or ‘vertical’ perpetration aims to capture the control exercised over individuals or an organization by people in positions of leadership.<sup>745</sup> The requirement is for an individual to be in sufficient control of a hierarchically organized organisation, while the subordinates being effectively interchangeable. “[C]apacity to hire, train, impose discipline, and provide resources” is crucial.<sup>746</sup>

In addition, control over the organisation may be shared and indirect perpetration may be combined with co-perpetration as the ICC jurisprudence has confirmed. *Ruto et al.*, using established ICC case law, requires an essential contribution to a common plan which includes common control over “an organized and hierarchical apparatus of power” guaranteeing “almost automatic compliance.”<sup>747</sup>

High level officials, insofar as they maintain overall control over the crime, i.e. the inhumane conditions, may be liable through the actions of individuals on the ground. As mentioned, this is particularly relevant to ‘organised and hierarchical’ power structure[s].<sup>748</sup> The standard of hierarchy and organization is strict, but both the conduct of migration and security policy by a government and a well-established multinational corporation specialising in security provision, enjoy efficient and strict hierarchies. Accordingly, prohibited acts of deportation or unlawful imprisonment, even if physically committed by public officials on the ground or corporate employees, are the consequence of orders delivered vertically through the hierarchy of political or corporate power.

Similarly, as stated above, corporations such as Ferrovial and Wilson Security a) participate with public officials in the common plan described above and b) possess strict hierarchical structures which guarantee the vertical transmission of control. As discussed above, the most responsible actors in such corporations, especially the directors, share the horizontal liability of co-perpetrators. In addition, and to the extent that they commit prohibited acts through individuals on the ground, they are indirect co-perpetrators.

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<sup>745</sup> *Katanga* PTCI, ¶¶ 501-03 (“[I]n general, the degree of responsibility increases as we draw further away from the man who uses the fatal instrument with his own hands and reach the higher ranks of command.”) (citing *Attorney General v. Eichmann*, 36 ILR 5-14,40/61, Judgment, ¶ 197 (Jerusalem Dist. Ct., Dec. 12, 1961)).

<sup>746</sup> *Katanga* PTCI, ¶ 513.

<sup>747</sup> *Prosecutor v Ruto et al.*, Case No. ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to art. 61(7)(a) and (b) of the Rome Statute, ¶ 292 (Jan. 23, 2012). *See also Bemba Gombo*, ¶¶ 350-511 (June 15, 2009); *Katanga* PTCI, ¶¶ 500-14.

<sup>748</sup> *Katanga* PTCI, ¶ 511.

#### 4. Aiding and Abetting

In addition to the principal liability of public officials and corporate directors, it is important for the Prosecutor to identify those bearing accessory liability.

Accessory liability, through aiding and abetting, is well established in the jurisprudence of both the ICC and other courts and tribunals. It requires “acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime . . . [with] substantial effect upon the perpetration of the crime.” The law also requires “knowledge that the acts . . . assist the commission . . . by the principal.”<sup>749</sup> Standing near victims armed and preventing them from escaping, for example, has been understood as abetting.<sup>750</sup> So has the allowing of resources under one’s responsibility to be used for the commission of crimes.<sup>751</sup> Importantly “the lending of practical assistance, encouragement, or moral support may occur before, during, or after the crime or underlying offence occurs.”<sup>752</sup> The Rome Statute also requires, in Article 25(3)(c), that the assistance be provided “[f]or the purpose of facilitating the commission of such a crime.”

This Communiqué has described a variety of contributions of both public and private actors. The contribution of private corporations, which have been employed to run the detention facilities with the purpose of establishing the overall deterrent conditions, should however be highlighted here. The most responsible decision makers in these corporations should be understood to bear principal liability, as perpetrators or co-perpetrators. In the alternative, their contribution should be recognised as substantive and significantly serving the purpose of the overall attack on asylum seekers and refugees through the facilitation of the prohibited acts discussed above.

#### B. Superior Responsibility of Public Officials and Corporate Actors

The hierarchical structures in the state policy and corporate organisation necessary in establishing and maintaining detention facilities can also be addressed through the superior-subordinate relationship envisaged in Article 28 of the *Rome Statute*. Australian government officials and representatives are “superior” officers, indirectly liable for crimes “committed by subordinates” under their “effective authority and control,” where a) the “superior either knew, or consciously disregarded information” that indicated “the subordinates were committing” such crimes; b) the “crimes concerned activities within the effective responsibility and control of the superior; and c) the “superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities.”

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<sup>749</sup> *Tadic AC*, ¶ 229.

<sup>750</sup> *Prosecutor v Vasiljevic*, Case No. IT-98-32-A, ¶ 134 (Feb. 25, 2004).

<sup>751</sup> *Prosecutor v Krstic*, Case No. IT-98-33-A, ¶ 137 (Apr. 19, 2004).

<sup>752</sup> *Prosecutor v Milutinovic et al.*, PTCI Case No. IT-05-87-T, ¶ 91 (Feb. 26, 2009).

Effective control is the necessary starting point for both military and civilian superiors. A position of “formal or informal hierarchy to the perpetrator,”<sup>753</sup> suggested by the superior’s *de jure* position,<sup>754</sup> and evidence, for example, by the issuance of orders.<sup>755</sup> The capacity to form and change command structures, including through promotion or removal<sup>756</sup> and the payment of salaries<sup>757</sup> are relevant factors in identifying such control. It is the superior’s “failure to exercise control properly” that leads to the crimes being committed.<sup>758</sup> While the jurisprudence usually focuses on military commanders, a similar understanding of effective control attaches to civilian superiors, if even the way authority is exercised may differ.<sup>759</sup>

Australian government officials’ superior responsibility: Australian government officials and representatives maintain effective control over subordinate activity on Nauru and Manus Island *as a matter of fact*. While detention centres are not located in Australian territory, Australian government officials exercise *de facto* control over the detention centres through their contractors. Ferrovial and Wilson Security control the daily operations of the detention centres, and they report directly to the Australian Department of Immigration and Border Protection.<sup>760</sup> Papua New Guinea and Nauruan authorities have access to the detention centres, but in practice, Australian officials make operational decisions for and control the centres.<sup>761</sup> Such control is also reflected in the contracts between Australia and its contractors. The contracts contain an opt-out provision for the government only.<sup>762</sup> All major decisions relating to the detention of asylum seekers must be made by the Department of Immigration and Border Protection.<sup>763</sup> Medical decisions are passed up and down the chain of authorities within and between IHMS and DIBP.<sup>764</sup> DIBP has the final say.<sup>765</sup> Papua New Guinea and Nauruan medical officers and doctors have no way to intervene with the medical treatment provided to asylum seekers unless Australian authorities allow them to be transferred to local medical facilities on the islands.<sup>766</sup>

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<sup>753</sup> *Prosecutor v Halilovic*, Case No. IT-01-48-A, ¶ 59 (Oct. 16, 2007).

<sup>754</sup> *Prosecutor v Delalić et al.*, Case No. IT-96-21-A, ¶ 197 (Feb. 20, 2001) (*Čelebići case*); *Prosecutor v Hadzihasanovic et al.*, Case No. IT-01-47-A, ¶ 21 (Apr. 22, 2008).

<sup>755</sup> *Prosecutor v Nizeyimana*, Case No. ICTR-2000-55C-T, ¶ 1528 (June 19, 2012).

<sup>756</sup> *Prosecutor v Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, ¶ 417 (June 15, 2009).

<sup>757</sup> *Prosecutor v Perišić*, Case No. IT-04-81-T, ¶ 1672 (Sept. 6, 2011).

<sup>758</sup> *Rome Statute*, art. 28(a)-(b); *Bemba Gombo*, 424.

<sup>759</sup> *Prosecutor v Bagilishema*, Case No. ICTR-95-1A-A, ¶ 52 (July 3, 2002).

<sup>760</sup> *See supra* Part II, Section 5.

<sup>761</sup> *See supra* Part II, Section 4.

<sup>762</sup> TRANSFIELD CONTRACT, at 24.

<sup>763</sup> *Id.* at 10-11.

<sup>764</sup> George Liondis, *Fears for asylum seekers as doctors denied Nauru access*, AUSTRALIAN DOCTOR, Jan. 30, 2004, <http://www.australiandoctor.com.au/news/latest-news/fears-for-asylum-seekers-as-doctors-denied-nauru-a>. *See* Ben Doherty, *Hamid Kehazaei death: visa delays stalled transfer of gravely ill asylum seeker*, THE GUARDIAN, Dec. 8, 2014, <https://www.theguardian.com/australia-news/2014/dec/09/hamid-kehazaei-death-visa-delays-stalled-transfer-asylum-seeker>. *See also* *Australia/Papua New Guinea: The Pacific Non-Solution*, HUMAN RIGHTS WATCH, July 15, 2015, <https://www.hrw.org/news/2015/07/15/australia/papua-new-guinea-pacific-non-solution>.

<sup>765</sup> Interview with Dr. Barri Phatarfod and Dr. Steven Faux, Sydney, Australia (May 21, 2016).

<sup>766</sup> George Liondis, *Fears for asylum seekers as doctors denied Nauru access*, AUSTRALIAN DOCTOR, Jan. 30, 2004, <http://www.australiandoctor.com.au/news/latest-news/fears-for-asylum-seekers-as-doctors-denied-nauru-a>. *See also*

Corporate officers' superior responsibility. Corporations are hierarchical organisations in which superiors have control over the actions of their subordinates. We contend that the evidence supports the conclusion that the major corporations identified above, namely Ferrovial, IHMS, and Wilson Security may have contributed significantly to different aspects of the crimes against humanity, and are appropriate targets for investigation by the Prosecutor. Employees of all three companies have acted as principals directly liable for committing prohibited acts in detention facilities.<sup>767</sup> For example, Ferrovial, IHMS, and Wilson Security well-organised corporations with sophisticated structures of control of their employees.<sup>768</sup> The corporations have full control over the employment status of their employees and the power to terminate such status if they act against their rules and interests.<sup>769</sup> To reiterate, according to the ICTY Appeals Chamber in *Prosecutor v. Bagilishema*, “[a]s long as a superior has effective control over subordinates, to the extent that he can prevent them from committing crimes or punish them after they committed the crimes, he would be held responsible for the commission of the crimes if he failed to exercise such abilities of control.”<sup>770</sup> Moreover, the Prosecutor can presume knowledge on the part of a superior if the superior is “part of an organised structure with established reporting and monitoring systems.”<sup>771</sup> The sophisticated structures of multinational corporations, and of Ferrovial, IHMS, and Wilson in particular, provide both the actual and effective control needed to be able to prevent any criminal acts committed by their employees. They have the necessary reporting structures for full information on such acts, in addition, of course, to the public reports available and that have been directly communicated to them.<sup>772</sup>

Moreover, Article 28(b) requires that civilian superiors “knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit

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*Australia/Papua New Guinea: The Pacific Non-Solution*, HUMAN RIGHTS WATCH, July 15, 2015, <https://www.hrw.org/news/2015/07/15/australia/papua-new-guinea-pacific-non-solution>.

<sup>767</sup> See *supra* Part II, Section 5 and Part III.

<sup>768</sup> Additional information about each of these corporations can be found here at the following links. Ferrovial, *About Us*, <http://www.ferrovial.com/en/company/about-us/> (last visited Feb. 9, 2017); International SOS, *Facts and Figures*, <https://www.internationalsos.com/about-us/facts-and-figures> (last visited Feb. 9, 2017); Wilson Group, *About Us*, <http://www.wilsongroupau.com/Pages/default.aspx> (last visited Feb. 9, 2017).

<sup>769</sup> Sarah Whyte, *Wilson Security guards injured on Nauru, Manus Island not entitled to work cover*, ABC NEWS, May 17, 2016, <http://www.abc.net.au/news/2016-05-17/wilson-security-guards-injured-no-work-cover/7355978>; Martin McKenzie-Murray, *Wilson Security's appalling record on Nauru*, THE SATURDAY PAPER, Apr. 9, 2016, <https://www.thesaturdaypaper.com.au/news/politics/2016/04/09/wilson-securitys-appalling-record-nauru/14601240003105>; Paul Farrell, *Manus Island guard stood down after posts endorsing Reclaim Australia and anti-halal views*, THE GUARDIAN, Apr. 12, 2015, <http://www.theguardian.com/australia-news/2015/apr/13/manus-island-guard-expresses-reclaim-australia-and-anti-halal-sentiment>. See also Martin McKenzie-Murray, *Nauru's systemic dysfunction*, THE SATURDAY PAPER, Aug. 29, 2015, <https://www.thesaturdaypaper.com.au/news/immigration/2015/08/29/naurus-systemic-dysfunction/14407704002306>.

<sup>770</sup> *Prosecutor v Bagilishema*, AC, Case No. ICTR-95-1A-A, § 50 (July 3, 2002).

<sup>771</sup> *Prosecutor v Hadžihasanović*, TC, Case No. IT-01-47-T, § 94 (Mar. 15, 2006).

<sup>772</sup> NO BUSINESS IN ABUSE, TRANSFIELD'S COMPLICITY IN GROSS HUMAN RIGHTS ABUSES WITHIN AUSTRALIA'S OFFSHORE DETENTION REGIME (Nov. 2015), [https://d68ej2dhub09.cloudfront.net/1321-NBIA\\_Report-20Nov2015b.pdf](https://d68ej2dhub09.cloudfront.net/1321-NBIA_Report-20Nov2015b.pdf).

such crimes.” This is a high standard, which is clearly met here for both government and corporate officers, as discussed above. Significantly, for government officials, the contracting out of abuse, firstly to the territorial jurisdiction of Nauru and PNG and secondly through the privatization of the operation of the facilities has not stemmed the flow of information through official channels.

We have also shown that these authorities and corporate officers knew about and clearly disregarded available information reporting the crimes committed.<sup>773</sup> Corporate and government officials have frequently been called to respond to inquiries – by the press, Parliament and non-profits – regarding these abuses.<sup>774</sup> The public record is replete with reports of unsanitary food and water in the camps, sexual assaults, rapes, physical assaults, psychological and mental harm, and inhumane living conditions.<sup>775</sup> There is evidence that these corporate actors actively downgraded, reclassified, or obfuscated reports of violence and abuse in detention to downplay their severity.<sup>776</sup> Corporate executives have a responsibility to report violations to national authorities so the individuals responsible can be prosecuted under domestic law, whether that be Australian, Nauruan, or Papua New Guinean. The consistent failure to punish prohibited acts both constitutes *per se* superior responsibility and may be seen as contributing to the commission of future crimes, thereby violating the superior responsibility to prevent such crimes.

Finally, article 28(b)(iii) requires that “the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress [the offences’] commission or to submit the matter to the competent authorities for investigation and prosecution.” The relevant measures vary and depend on the nature and extent of control and authority wielded, but it has been accepted that measures are necessary for the prevention of the planning and preparation, not just execution, of the crimes.<sup>777</sup> Specifically, ‘turning a blind eye’ is clearly such a failure,<sup>778</sup> while

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<sup>773</sup> See *supra* Part II, Section 4.

<sup>774</sup> For example, Wilson Security and Transfield Services among others responded with submissions for the Senate Committee’s “inquiry into the recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru.” Wilson Security, Submission by Wilson Security (Apr. 27, 2015), [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regional\\_processing\\_Nauru/Regional\\_processing\\_Nauru/Submissions](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru/Submissions); Transfield Services, Schedule 1 of Submission by Transfield Services to Senate Select Committee into recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru (Mar. 2014), [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regional\\_processing\\_Nauru/Regional\\_processing\\_Nauru/Submissions](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru/Submissions). See generally *Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru*, PARLIAMENT OF AUSTRALIA, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regional\\_processing\\_Nauru/Regional\\_processing\\_Nauru](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Regional_processing_Nauru) (last visited Feb. 9, 2017); NO BUSINESS IN ABUSE, TRANSFIELD’S COMPLICITY IN GROSS HUMAN RIGHTS ABUSES WITHIN AUSTRALIA’S OFFSHORE DETENTION REGIME (Nov. 2015).

<sup>775</sup> See *supra* Parts II.3.A, II.3.B. See also NO BUSINESS IN ABUSE, TRANSFIELD’S COMPLICITY IN GROSS HUMAN RIGHTS ABUSES WITHIN AUSTRALIA’S OFFSHORE DETENTION REGIME (Nov. 2015), [https://d68ej2dhhub09.cloudfront.net/1321-NBIA\\_Report-20Nov2015b.pdf](https://d68ej2dhhub09.cloudfront.net/1321-NBIA_Report-20Nov2015b.pdf).

<sup>776</sup> See *supra* Part II, Section 5.

<sup>777</sup> See *Orić* ICTY TC II, Case No. IT-03-68-T, ¶ 329.

<sup>778</sup> ROBERT CRYER, ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 327 (June 14, 2007) (citing *Orić* ICTY TC II, ¶ 331).



‘general statements’ do not suffice.<sup>779</sup> The superior “must at least ensure that the matter is investigated and transmit a report to the competent authorities for further investigation or sanction . . . . [s]ince the duty to punish aims at preventing future crimes of subordinates, a superior’s responsibility may also arise from his or her failure to create or sustain, amongst the persons under his or her control, an environment of discipline and respect for the law.”<sup>780</sup>

Australian officials have failed to take such measures. While in complete *de facto* control of the detention facilities, directly and through their employment of private corporations, they have notably failed at preventing the very preparation and the setting of the conditions of the inhumane detention and treatment of refugees. Despite their knowledge, they have turned a blind eye and never properly investigated or prosecuted the extensive instances of abuse committed in the detention facilities. They have indeed created and are sustaining an environment of lack of discipline and lack of respect for the law.

Similarly, corporate directors’ failure to prevent or to punish is evidenced through hiring practices as well as the responses to reports of abuse. Reports indicate that Wilson security frequently hired former soldiers who have little formal training on handling asylum seeker processing facilities.<sup>781</sup> For example, Wilson Security guards who were at first disciplined for posting anti-Islamic materials were then reinstated.<sup>782</sup> IHMS has deployed staff that have not gone through requisite police background checks,<sup>783</sup> and in one case, who allegedly has a known history of sexual misconduct.<sup>784</sup> By failing to hire competent, trained staff, Ferrovial, IHMS, and Wilson may have created conditions that led to abuse of individuals held in their detention facilities. The OTP should investigate whether the observed inhumane treatment can be said to have occurred ‘as a result’ of such hiring practices combined with the lack of oversight, as Article 28 requires. Such practices need not establish a strict causal link, but they do need to increase the risk that crimes will be committed.<sup>785</sup>

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<sup>779</sup> *Prosecutor v Bagosora & Nsengiyumva*, Case No. ICTR-98-41-A, ¶ 674 (Dec. 14, 2011).

<sup>780</sup> ROBERT CRYER, ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 327 (June 14, 2007) (citing *Oric* ICTY TC. II 30.6.2006 ¶ 336).

<sup>781</sup> Noel Towell & Michael Gordon, *Soldiers on leave act as guards at Manus Island detention centre*, THE SYDNEY MORNING HERALD, Apr. 12, 2014, <http://www.smh.com.au/national/soldiers-on-leave-act-as-guards-at-manus-island-detention-centre-20140411-36il7.html>.

<sup>782</sup> Heath Aston, *Eight Nauru guards suspended over racist posts on social media*, THE SYDNEY MORNING HERALD, Apr. 16, 2015, <http://www.smh.com.au/federal-politics/political-news/eight-nauru-guards-suspended-over-racist-posts-on-social-media-20150415-1mldlh.html>; Paul Farrell, *Nauru detention centre guards return after suspension over Facebook posts*, June 17, 2015, <https://www.theguardian.com/australia-news/2015/jun/18/nauru-detention-centre-guards-return-after-suspension-over-facebook-posts>.

<sup>783</sup> Paul Farrell, Nick Evershed, & Bridie Jabour, *IHMS deployed staff in detention centres without police checks*, THE GUARDIAN, July 21, 2015, <https://www.theguardian.com/australia-news/2015/jul/22/ihms-deployed-staff-in-detention-centres-without-police-checks>.

<sup>784</sup> *Sacked PNG doctor worked in Australia’s detention centres, Rabaul hospital*, PACIFIC BEAT, May 15, 2016, <http://www.abc.net.au/news/2016-05-16/convicted-doctor-worked-in-australia-detention-network/7416792>.

<sup>785</sup> *Prosecutor v Bemba*, Case No. ICC-01/05-01/08-962, Decision on the Admissibility and Abuse of Process Challenges, ¶ 425 (Oct. 19, 2010).

This submission identifies only the main categories of perpetrators, suggesting the means of liability appropriate to identify those “most responsible.” It is however crucial to note the involvement of both (high level) state officials and (high level) corporate officers in the planning, maintenance and prosecution of the common plan which, we have argued, entails an attack against the civilian population through unlawful imprisonment, torture, deportation and other inhumane acts. The collaboration between public and private actors is an important area of modern systematic criminality that the Prosecutor should investigate and that, as demonstrated further below, accentuates the gravity of the situation at hand.

## **Part IV: Elements for Preliminary Assessment by Prosecutor**

### **1. Jurisdiction**

The OTP should be satisfied that the crimes referred to in the communication fall under ICC jurisdiction. First, with respect to jurisdiction *ratione temporis*, the allegations in this Communiqué cover a period from 2001 until the present. Specifically, as per Article 11 of the *Rome Statute*, the matters described occurred after September 1, 2002, after the entry into force of the *Rome Statute* both in general (July 1 2002) and in relation to Australia (September 1 2002)<sup>786</sup> and Nauru (July 1 2002).<sup>787</sup> Second, with respect to jurisdiction *ratione materiae*, the subject matter of this Communiqué concerns crimes against humanity as listed in Article 5, and as set out in Article 7 of the *Rome Statute*. We further refer to the legal analysis in part III above. Third, the crimes described in this Communiqué are alleged to have been committed by nationals of States Parties to the *Rome Statute* as well as on the territory of certain States Parties, namely Australia and Nauru. Both Australia and Nauru, as mentioned above, have signed and ratified the *Rome Statute* and have accepted the jurisdiction of the Court for crimes committed either by their nationals or on their territory. While Papua New Guinea is not a party to the *Rome Statute*, violations of the Statute occurring on Papua New Guinea territory have been committed by Australian nationals, either present on Papua New Guinea territory or through their role in Australian territory. The role of corporate actors operating the detention facilities similarly falls either under the territorial ground for jurisdiction in the case of Nauru or, in the case of Papua New Guinea, under the ground of nationality, to the extent that these are nationals of State Parties. For example, Ferrovial, a company partly responsible for running the facilities, is primarily directed by Spanish nationals.<sup>788</sup>

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<sup>786</sup> Press release, Former Minister for Foreign Affairs Alexander Downer, Australia Ratifies International Criminal Court (July 2, 2002), [http://foreignminister.gov.au/releases/2002/fa095b\\_02.html](http://foreignminister.gov.au/releases/2002/fa095b_02.html).  
[http://foreignminister.gov.au/releases/2002/fa095b\\_02.html](http://foreignminister.gov.au/releases/2002/fa095b_02.html).

<sup>787</sup> *Nauru*, INTERNATIONAL CRIMINAL COURT, (Mar. 11, 2003), [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/asian%20states/Pages/nauru.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/asian%20states/Pages/nauru.aspx).

<sup>788</sup> Spain has been a member State to the *Rome Statute* since October 24, 2000. *Spain*, INTERNATIONAL CRIMINAL COURT, (Sept. 15, 2003), [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/western%20european%20and%20other%20states/Pages/spain.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/western%20european%20and%20other%20states/Pages/spain.aspx).

Jurisdiction can be triggered by the Prosecutor herself, by virtue of her *proprio motu* powers set out in Article 15 of the *Rome Statute*. It is important that the Prosecutor makes use of these powers, especially when the situation under the Court's jurisdiction is unlikely to be referred by a (or the territorial) State Party or the Security Council. In the case of relatively powerful States, which both profess complete control over their territory and are in general good standing in the international community, the Prosecutor's initiative becomes all the more essential.

## 2. Admissibility: Complementarity

The ICC is a residual mechanism, a court of last resort, complementary to national jurisdictions,<sup>789</sup> which only operates when domestic courts have not responded, or have not responded genuinely, to crimes by way of investigating, prosecuting or trying alleged perpetrators. This is the case here.

Articles 53(1)(b) and 17(1)(a-c) of the *Rome Statute* set out the principle of complementarity. As a court of last resort, the ICC works in tandem with states, only investigating criminal claims when states with primary jurisdiction are unwilling or unable to genuinely do so. The assessment is "case-specific" and will determine whether potential case(s) related to the situation are being investigated or prosecuted by states. At the level of preliminary examination this necessarily concerns *potential* cases.<sup>790</sup>

Article 17's test also applies to the preliminary examination level. A case is "inadmissible" in front of the court when: a) "the case is being investigated or prosecuted by the state which has jurisdiction over it,"<sup>791</sup> b) "the case has been investigated by a state which has jurisdiction over it and the State has decided not to prosecute the person concerned,"<sup>792</sup> and c) the person concerned has "already been tried for conduct which is the subject of the complaint."<sup>793</sup> Each of these inadmissibility standards, however, has exceptions. For "a" and "b," the ICC may intervene when "the state is unwilling or unable to genuinely carry out the investigation,"<sup>794</sup> or "the decision resulted"<sup>795</sup> from this inability or unwillingness. And the ICC may intervene under "c" if the earlier proceedings were "for the purpose of shielding the person concerned from criminal responsibility," or were not "conducted independently or impartially in accordance with the norms of due process recognised by international law" and "inconsistent with an intent to bring

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<sup>789</sup> See *Rome Statute*, Preamble ¶ 10 ("[T]he International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.").

<sup>790</sup> INTERNATIONAL CRIMINAL COURT OFFICE OF THE PROSECUTOR, POLICY PAPER ON CASE SELECTION AND PRIORITISATION ¶ 46 (Nov. 2013).

<sup>791</sup> *Rome Statute*, art. 17(1)(a).

<sup>792</sup> *Rome Statute*, art. 17(1)(b).

<sup>793</sup> *Rome Statute*, art. 17(1)(c).

<sup>794</sup> *Rome Statute*, art. 17(1)(a).

<sup>795</sup> *Rome Statute*, art. 17(1)(b).

the person concerned to justice.”<sup>796</sup> Cases with past/current/projected domestic investigation (those under (1)(a) and (1)(b)) are only admissible to the ICC when states with original jurisdiction are unable or unwilling to genuinely carry out investigation or prosecution.

A detailed analysis of the state’s unwillingness is unnecessary at this stage, as there have not been nor are there currently any criminal investigations of the conduct at issue. The Office of the Prosecutor and the Court have been clear: “The absence of national proceedings, i.e. domestic inactivity, is sufficient to make the case admissible. The question of unwillingness or inability does not arise and the Office does not need to consider the other factors set out in article 17.”<sup>797</sup> As Professor O’Keefe puts it clearly: “If the state in question is not currently investigating or prosecuting and has not previously investigated, the case is *ipso facto* admissible. In other words, where the state is and has been inactive, a putative willingness or ability to investigate or prosecute does not render the case inadmissible.”<sup>798</sup> The ICC is precluded from investigation only if “one or more national criminal justice systems are genuinely investigating or prosecuting the crimes in question.”<sup>799</sup> The clear language of this statute requires a criminal investigation.

To date, legal challenges to Australian refugee detention have been civil and constitutional.<sup>800</sup> The Court’s jurisprudence is clear that if the question on the existence of proceedings is not answered in the affirmative it will not be necessary to look in detail into the willingness or ability of the domestic legal system.<sup>801</sup> It is also highly unlikely that Australia will genuinely conduct criminal investigations in the future, despite extensive findings documenting inhumane treatment and torture discussed above by, among others, the United Nations Human Rights Commission,<sup>802</sup> the UN Special Rapporteur for Torture,<sup>803</sup> and the Australian Human Rights Commission.<sup>804</sup> The

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<sup>796</sup> *Rome Statute*, art. 20(3).

<sup>797</sup> INTERNATIONAL CRIMINAL COURT OFFICE OF THE PROSECUTOR, POLICY PAPER ON CASE SELECTION AND PRIORITISATION ¶ 47 (Nov. 2013).

<sup>798</sup> ROGER O’KEEFE, INTERNATIONAL CRIMINAL LAW ¶ 14.64 (Aug. 4, 2015). *See also* *Katanga AC*, ¶¶ 1, 2, 75, 78 (Sept. 25, 2009); *Prosecutor v Bemba*, Case No. ICC-01/05-01/08-962, Decision on the Admissibility and Abuse of Process Challenges, ¶ 107 (Oct. 19, 2010); *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta & Mohammed Hussein Ali*, Case No. ICC-01/09-02/11, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to art. 19(2)(b) of the Statute, ¶ 40 (Aug. 30, 2011); *Ruto, Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey & Joshua Arap Sang*, Case No. ICC-01/09-01/11-307, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to art. 19(2)(b), ¶ 41 (Aug. 30, 2011).

<sup>799</sup> OTTO TRIFFTERER & KAI AMBOS, *ROME STATE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 1372 (3rd ed. 2016).

<sup>800</sup> For an example of a Papua New Guinean case, *see Namah v Pato*, SC1497 (2016), *supra* note 101. For Australian cases, *see* *Plaintiff M68-2015 v Minister for Immigration and Border Protection* [2016] HCA 1 (2016); *Plaintiff S4-2014 v Minister for Immigration and Border Protection* [2014] HCA 34 (2014); *Al-Kateb v Godwin* [2004] HCA 37; *Ruddock v Vadarlis* [2001] FCA 1329.

<sup>801</sup> *Katanga* (ICC) AC, 2 ¶ 78.

<sup>802</sup> UNITED NATIONS HIGH COMM’R FOR REFUGEES, SUBMISSION NO. 133 TO THE JOINT STANDING COMMITTEE ON MIGRATION: INQUIRY INTO IMMIGRATION DETENTION IN AUSTRALIA (Sept. 12, 2008).

<sup>803</sup> Human Rights Council, Juan E. Mendez, Rep. of the U.N. Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, U.N. Doc. A/HRC/28/68, at ¶¶ 16-31 (Mar. 5, 2015).

*Rome Statute* articulates a list of factors that demonstrate unwillingness. Article 17 paragraph 2 provides an “exhaustive”<sup>805</sup> list of factors the court might use to determine if a domestic jurisdiction is unwilling to genuinely prosecute a case: a) the proceedings taken were made with the “purpose of shielding the person concerned from criminal responsibility;” b) there has been an “unjustified delay in the proceedings, which in the circumstances is inconsistent with an intent to bring the person to justice;” or c) the proceedings are not being conducted “independently or impartially,” inconsistent with “an intent to bring the person to justice.”<sup>806</sup> The thrust of this paragraph is to stop impunity; “inconsistent with an intent to bring the person concerned to justice” should be understood as “referring to proceedings which will lead to a suspect evading justice” in the “equivalence of sham proceedings.”<sup>807</sup>

Australia’s a) failure to pursue criminal prosecution in relation to crimes committed on Nauru or Manus Island; b) legislation, in some cases ex post, authorising activity that we argue qualifies as international crimes;<sup>808</sup> c) denial of jurisdiction, as a consequence of ex post legislation, over criminal activity in the Manus and Nauru detention facilities;<sup>809</sup> and d) refusal to investigate serious allegations,<sup>810</sup> all indicate the state’s unwillingness to prosecute these crimes.<sup>811</sup> Moreover, Australia’s *Criminal Code Act 1995* requires the consent of the Attorney General before criminal charges related to imprisonment or the severe deprivation of liberty<sup>812</sup> may be brought before the Australian judiciary.<sup>813</sup> The major political parties of Australia remain united in their support of Australia’s immigration policies, including the severe deprivation of liberty through offshore detention.<sup>814</sup> Equally, the Attorney General (a political appointee), is unlikely

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<sup>804</sup> FORGOTTEN CHILDREN, *supra* note 6.

<sup>805</sup> OTTO TRIFFTERER & KAI AMBOS, *ROME STATE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 817 (3rd ed. 2016).

<sup>806</sup> *Rome Statute*, art. 17(2)(a-c).

<sup>807</sup> *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, AC, Case No. ICC-01/11-01/11-565, ¶¶ 2-3, 230 (Oct. 2013).

<sup>808</sup> Crucial here is Section 198AHA of the Migration Act 1958, available at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/ma1958118/s198aha.html](http://www.austlii.edu.au/au/legis/cth/consol_act/ma1958118/s198aha.html).

<sup>809</sup> See *Plaintiff M68/2015 v Minister for Immigration and Border Protection & Ors [2015] HCATrans 136* available at [http://www.hcourt.gov.au/cases/case\\_m68-2015](http://www.hcourt.gov.au/cases/case_m68-2015) (Austl.). [http://www.hcourt.gov.au/cases/case\\_m68-2015](http://www.hcourt.gov.au/cases/case_m68-2015) (Austl.).

<sup>810</sup> See *U.N. calls for inquiry into Manus Island asylum seekers' beating*, RADIO RNZ, Jan. 18, 2017, <http://www.radionz.co.nz/news/world/322650/un-calls-for-inquiry-into-manus-island-asylum-seekers'-beating>.

<sup>811</sup> See *supra* notes 45, 46, 47, 48, 50, 51.

<sup>812</sup> *Criminal Code Act 1995* (Cth) s 268.12 (Austl.).

<sup>813</sup> *Criminal Code Act 1995* (Cth) s 268.121 (Austl.). (“Bringing proceedings under this Division:

(a) Proceedings for an offence under this Division must not be commenced without the Attorney General’s written consent.

(b) An offence against this Division may only be prosecuted in the name of the Attorney General.”).

<sup>814</sup> The Australian Labor Party and the Liberal/National Coalition approach mandatory and indefinite detention similarly, with each party authoring various aspects of it since 1992. See, e.g., Stephanie Anderson, *Election 2016: Why asylum seeker policy will become a campaign hot topic*, ABC NEWS, May 10, 2016, <http://www.abc.net.au/news/2016-05-11/election-2016:-why-asylum-policy-will-become-campaign-hot-topic/7403512>; *Australia: Where Parties Stand on Human Rights*, HUMAN RIGHTS WATCH, June 21, 2016,

to provide authorisation for criminal charges against senior members of his own political party,<sup>815</sup> particularly when mandatory and indefinite detention are a central part of that party's platform. The absence of criminal investigations, the unlikelihood that the Attorney General will provide consent and the overall entirely unjustified delay despite numerous reports and high level findings thus activate the Court's complementary jurisdiction. If the Prosecutor does not act to initiate an investigation the situation on Nauru and Manus Island will remain without remedy.

### 3. Admissibility: Gravity

The conduct described in Part II and qualified as crimes against humanity in part III is of sufficient gravity, as per Articles 17(1)(d) and 53(1)(c), to justify exercising the Court's jurisdiction and the Prosecutor's initiative. The nature and scale of the crimes at issue are of such severity, in both quantitative and qualitative terms as well as because of their normalising and precedent-setting nature, that they urgently require deterrent action by the Court. In the context of a situation, as opposed to a case, the Prosecutor should consider gravity "against the backdrop of the likely set of cases or 'potential cases,'" that would rise from investigating the situation,<sup>816</sup> evaluating a) the qualitative and quantitative elements of the alleged crimes and b) those who bear the greatest responsibility for the crimes alleged.<sup>817</sup> A flexible test,<sup>818</sup> gravity analysis should not be "overly restrictive" and "hamper the deterrent role of the Court,"<sup>819</sup> but should prevent the court from adjudicating "peripheral cases"<sup>820</sup> and "insignificant"<sup>821</sup> crimes.

The situation at hand is neither peripheral nor insignificant. It is of central, and growing, importance to the international legal system and the principles the Court is serving.

The OTP has summarised the criteria for gravity as "relating to the scale, nature, manner of

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<https://www.hrw.org/news/2016/06/21/australia-where-parties-stand-human-rights> (describing the Coalition government as maintaining offshore processing of refugees and asylum seekers and the liberal democrats as "more comfortable with offshore processing than mass drownings.").

<sup>815</sup> A number of the prospective Administering Authorities are members of the Attorney General's political party.

<sup>816</sup> Pre-trial Chamber II, Case No. ICC-01/09, Decision Pursuant to art. 15 of the *Rome Statute* on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶ 58 (Mar. 31, 2010), [https://www.icc-cpi.int/CourtRecords/CR2010\\_02399.PDF](https://www.icc-cpi.int/CourtRecords/CR2010_02399.PDF).

<sup>817</sup> *Id.*

<sup>818</sup> See, e.g., *Prosecutor v Abu Garda*, Case No. ICC-02/05-02/09, Decision on the Confirmation of Charges, ¶¶ 28-34 (Feb. 8, 2010), [https://www.icc-cpi.int/CourtRecords/CR2010\\_00753.PDF](https://www.icc-cpi.int/CourtRecords/CR2010_00753.PDF); Pre-trial Chamber II, ICC-01/09, Decision Pursuant to art. 15 of the *Rome Statute* on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶¶ 55-62 (Mar. 31, 2010), [https://www.icc-cpi.int/CourtRecords/CR2010\\_02399.PDF](https://www.icc-cpi.int/CourtRecords/CR2010_02399.PDF).

<sup>819</sup> The Appeals Chamber, ICC-01/04, Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, ¶¶ 69-79 (July 13, 2006), [https://www.icc-cpi.int/CourtRecords/CR2006\\_01807.PDF](https://www.icc-cpi.int/CourtRecords/CR2006_01807.PDF).

<sup>820</sup> Pre-trial Chamber II, Case No. ICC-01/09, Decision Pursuant to art. 15 of the *Rome Statute* on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶ 56 (Mar. 31, 2010), [https://www.icc-cpi.int/CourtRecords/CR2010\\_02399.PDF](https://www.icc-cpi.int/CourtRecords/CR2010_02399.PDF).

<sup>821</sup> The Appeals Chamber, Case No. ICC-01/04, Decision on the Prosecutor's Application for Warrants of Arrest, art. 58, ¶ 40 (July 13, 2006), [https://www.icc-cpi.int/CourtRecords/CR2006\\_01807.PDF](https://www.icc-cpi.int/CourtRecords/CR2006_01807.PDF) (Judge Pikis, partly dissenting).

commission and impact of the crimes.”<sup>822</sup> The scale of the crimes committed is extremely broad. The camps have been functioning since 2001 currently function to detain and mistreat approximately between 1,200 and 2,500 people, while thousands of people have been affected throughout the years. The number of victims<sup>823</sup> is, accordingly, in the thousands, where the Court has accepted sufficient gravity in cases of much smaller number of victims.<sup>824</sup> The “extent of the damage”<sup>825</sup> caused by the crimes is particularly severe, as it includes both physical<sup>826</sup> and deep psychological trauma.<sup>827</sup> The scale of the crimes is also of geographic importance as it affects individuals travelling from a number of states, especially in South East Asia. Both the “geographical and temporal intensity”<sup>828</sup> of the crimes is particularly grave. Finally, while in many cases asylum seekers are detained and mistreated *with* their families, the case may be that they have either left their family behind or are travelling to meet them. The suffering, physical and mental harm and, in some cases, death of asylum seekers in detention facilities affects their families as well, highlighting the scale of indirect victims of the attack under consideration.<sup>829</sup> And the potential scale is growing, requiring immediate attention. The number of displaced persons has hit an all-time high within the last decade, according to the United Nations Refugee Agency, with 59.5 million displaced individuals in 2015, compared to 51.2 million only a year earlier.<sup>830</sup> Moreover, over half of the world’s refugees are children.<sup>831</sup> In the Asia region, the number of refugees and internally displaced people was about 3.7 million in mid-2015.<sup>832</sup>

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<sup>822</sup> INTERNATIONAL CRIMINAL COURT OFFICE OF THE PROSECUTOR, POLICY PAPER ON CASE SELECTION AND PRIORITISATION ¶ 32 (Sept. 15, 2016). *See also* INTERNATIONAL CRIMINAL COURT OFFICE OF THE PROSECUTOR, POLICY PAPER ON PRELIMINARY EXAMINATIONS ¶¶ 59-66 (Nov. 2013), [https://www.legal-tools.org/uploads/tx\\_ltpdb/OTP - Policy Paper Preliminary Examinations 2013-2.pdf](https://www.legal-tools.org/uploads/tx_ltpdb/OTP - Policy Paper Preliminary Examinations 2013-2.pdf); Decision on the Prosecutor’s request for authorization of an investigation, PTC I, ICC-01/15, ¶ 51 (Jan. 27, 2016).

<sup>823</sup> Open letter from Luis Moreno-Ocampo, Chief Prosecutor International Criminal Court, Response to Communications Received Concerning Iraq, at 9 (Feb. 9, 2006), [https://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP letter to senders re Iraq 9 February 2006.pdf](https://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP%20letter%20to%20senders%20re%20Iraq%209%20February%202006.pdf).

<sup>824</sup> Ten killings, 50 to 55 physical injuries, and potentially hundreds of outrages upon personal dignity were seen as a “compelling indicator of sufficient, and not of insufficient gravity.” Pre-trial Chamber I, ICC-01/15, Decision on the Prosecutor’s request for authorization of an investigation, ¶ 26 (Jan. 27, 2016), [https://www.icc-cpi.int/CourtRecords/CR2016\\_00608.PDF](https://www.icc-cpi.int/CourtRecords/CR2016_00608.PDF).

<sup>825</sup> INTERNATIONAL CRIMINAL COURT OFFICE OF THE PROSECUTOR, POLICY PAPER ON CASE SELECTION AND PRIORITISATION ¶ 38 (Sept. 15, 2016).

<sup>826</sup> *See supra* Part II, Section 3.A.iii; Part II, Section 3.B.iii.

<sup>827</sup> *See supra* Part II, Section 3.A.iv; Part II, Section 3.B.iv.

<sup>828</sup> Decision Pursuant to art. 15 of the *Rome Statute* on the Authorization of an Investigation into the Situation in the Republic of Kenya, PTC-II, Case No. ICC-01/09, ¶ 62 (Mar. 31, 2010).

<sup>829</sup> INTERNATIONAL CRIMINAL COURT OFFICE OF THE PROSECUTOR, POLICY PAPER ON CASE SELECTION AND PRIORITISATION ¶ 62 (Nov. 2013); Pre-trial Chamber I, Case No. ICC-01/13-34, Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation, ¶¶ 47-48 (July 16, 2015), [https://www.icc-cpi.int/CourtRecords/CR2015\\_13139.PDF](https://www.icc-cpi.int/CourtRecords/CR2015_13139.PDF).

<sup>830</sup> Press Release, *U.N. High Comm’r for Refugees, Worldwide displacement hits all-time high as war and persecution increase*, (June 18, 2015), <http://www.unhcr.org/558193896.html>.

<sup>831</sup> *Id.* <http://www.unhcr.org/558193896.html>.

<sup>832</sup> Ann M. Simmons, *Global Refugee crisis overwhelms humanitarian aid system and exacerbates its shortcomings*, LA TIMES, May 23, 2016, <http://www.latimes.com/world/global-development/la-fg-global-refugee-crisis-20160523-snap-story.html>.

The nature of the criminal acts is egregious. The situation of extreme vulnerability and distinct lack of protection of detained asylum seekers has facilitated the commission of acts of physical and sexual violence.<sup>833</sup> Rape and sexual violence have repeatedly been acknowledged by the Court and the Office of the Prosecutor to be particularly grave.<sup>834</sup> In addition, and as mentioned above, the effects of the crimes on the mental health of the indefinitely, inhumanely and arbitrarily detained asylum seekers are extreme. A recent study shows that the mental illness of refugees on Manus Island are among the highest of any surveyed population.<sup>835</sup> Examples abound and have been discussed above at length. To recall: a psychologist and traumatologist with 43 years of experience—who worked on Manus and Nauru—stated he had “never seen more atrocity than I have seen in the incarcerated situations of Manus Island and Nauru.”<sup>836</sup> Deployed over 14 times to the islands, he describes a) an en masse attempted suicide by 6 children using the same razor blade; b) one woman who attempted to kill herself and her own daughter seven times in five weeks; c) self-mutilation, including carving the names of missing loved ones into body parts and cutting open one’s own stomach.<sup>837</sup> Particular psychological effects on the victims, including self-harm, paranoia, insomnia and self-mutilation, have in the past been appreciated as particularly grave by the OTP.<sup>838</sup> Finally, it is important to point out that camps contain a large number of children, whose vulnerability entails severe suffering,<sup>839</sup> which has been recognised by the Prosecutor as particularly grave.<sup>840</sup>

Finally, the Court and the OTP have found high-level systematic planning as a factor within the gravity analysis.<sup>841</sup> The Australian government’s formulation of its detention policies was calculated and organized, leading to a widespread and systematic attack against the civilian population. The inhumane conditions of detention deliberately serve a particular deterrent purpose.<sup>842</sup> In addition, privatizing the daily management of the camps links the high-level

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<sup>833</sup> See *supra* Part II, Section 3.A.iii; Part II, Section 3.B.iii.

<sup>834</sup> See *supra* Part II, Section 3.A.iii; Part II, Section 3.B.iii.

<sup>835</sup> Michael Gordon, *Offshore detainees’ mental illness among highest of any surveyed population: study*, THE SYDNEY MORNING HERALD, Nov. 21, 2016, <http://www.smh.com.au/federal-politics/political-news/offshore-detention-study-detects-mental-health-rates-amongst-the-highest-recorded-of-any-surveyed-population-20161121-gstw3o.html>.

<sup>836</sup> Ben Doherty & David Marr, *The worst I’ve seen – trauma expert lifts lid on ‘atrocity’ of Australia’s detention regime*, THE GUARDIAN, June 19, 2016, <https://www.theguardian.com/australia-news/2016/jun/20/the-worst-ive-seen-trauma-expert-lifts-lid-on-atrocity-of-australias-detention-regime>.

<sup>837</sup> *Id.* <https://www.theguardian.com/australia-news/2016/jun/20/the-worst-ive-seen-trauma-expert-lifts-lid-on-atrocity-of-australias-detention-regime>.

<sup>838</sup> INTERNATIONAL CRIMINAL COURT OFFICE OF THE PROSECUTOR, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES ¶ 130 (Nov. 12, 2015), <http://reliefweb.int/sites/reliefweb.int/files/resources/OTP-PE-rep-2015-Eng.pdf>.

<sup>839</sup> See Human Rights Council, Juan E. Mendez, Rep. of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, U.N. Doc. A/HRC/28/68, at ¶ 33 (Mar. 5, 2015); INTERNATIONAL CRIMINAL COURT OFFICE OF THE PROSECUTOR, POLICY PAPER ON CASE SELECTION AND PRIORITISATION ¶ 40 (Sept. 15, 2016).

<sup>840</sup> INTERNATIONAL CRIMINAL COURT OFFICE OF THE PROSECUTOR, POLICY PAPER ON CASE SELECTION AND PRIORITISATION ¶ 63 (Nov. 2013); INTERNATIONAL CRIMINAL COURT OFFICE OF THE PROSECUTOR, POLICY PAPER ON CASE SELECTION AND PRIORITISATION ¶¶ 39, 46 (Sept. 15, 2016).

<sup>841</sup> INTERNATIONAL CRIMINAL COURT OFFICE OF THE PROSECUTOR, POLICY PAPER ON CASE SELECTION AND PRIORITISATION ¶ 40 (Sept. 15, 2016).

<sup>842</sup> See *supra* Part II, Section 1.



policy element with the spread and normalisation of the practice, an especially aggravating factor.<sup>843</sup>

The combination of perpetrators at different operational levels also suggests that in terms of the development of case gravity, individuals most responsible for crimes can be identified at such different levels.<sup>844</sup> These may include senior politicians who have organised, led and argued for the establishment of the detention regime and conditions. They may, however, also include individuals working in the context of the privatised management of the crimes. Privatisation and outsourcing can serve as a means of avoidance of responsibility. International Criminal Law, however, has developed the doctrinal tools to trace individual responsibility through complex structures. The role of private actors in core crimes has been increasingly recognised, but still left unaddressed by the Court.<sup>845</sup> It is particularly important for the Prosecutor to investigate the levels of liability of different actors at different stages and aspects of the attack.

The impact of the crimes is severe and widespread. OTP practice and Court precedent has highlighted the importance of the crimes' impact both on the victims themselves and on the wider environment and society. In terms of the victims, impact is understood both with respect to the victims' position of vulnerability,<sup>846</sup> highlighted above, and with respect to the long term consequences of the crimes. Indeed, the prolonged, open-ended, arbitrary and inhumane detention and the identified consequences on the victims' mental, as well as physical, health suggest that for those surviving the camps the impact will persist.<sup>847</sup>

An assessment of the impact of the crimes for the purposes of establishing gravity should look "beyond the suffering of the direct and indirect victims."<sup>848</sup> In this case, the intended deterrent impact on others should be considered. Indeed, there will be significant impact on deterred asylum seekers who will have no option in setting out to avoid their state of persecution. In

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<sup>843</sup> See REBECCA DE BOER, AUSTRALIAN PARLIAMENTARY LIBRARY, HEALTH CARE FOR ASYLUM SEEKERS ON NAURU AND MANUS ISLAND 3 (June 28, 2013), [http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BN/2012-2013/AsylumSeekersHealthCare](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/AsylumSeekersHealthCare); Ben Doherty, *Detention centre operator's contract extended despite new owner's objection*, THE GUARDIAN, Aug. 8, 2016, <https://www.theguardian.com/australia-news/2016/aug/08/detention-centre-operators-contract-extended-despite-owners-objection>.

<sup>844</sup> See *supra* Part II, Section 3.B.7.b.

<sup>845</sup> See MOHAMMAD H. ZAREI & AZAR SAFARI, THE STATUS OF NON-STATE ACTORS UNDER THE INTERNATIONAL RULE OF LAW: A SEARCH FOR GLOBAL JUSTICE, at ch. 13 (2014), [http://www.culturaldiplomacy.org/academy/content/pdf/participant-papers/2014-04-lhrs/Dr\\_Zarei\\_and\\_Azar\\_Safari\\_-\\_The\\_Status\\_of\\_Non-State\\_Actors\\_under\\_the\\_International\\_Rule\\_of\\_Law\\_-\\_A\\_Search\\_for\\_Global\\_Justice.pdf](http://www.culturaldiplomacy.org/academy/content/pdf/participant-papers/2014-04-lhrs/Dr_Zarei_and_Azar_Safari_-_The_Status_of_Non-State_Actors_under_the_International_Rule_of_Law_-_A_Search_for_Global_Justice.pdf).

<sup>846</sup> INTERNATIONAL CRIMINAL COURT OFFICE OF THE PROSECUTOR, POLICY PAPER ON CASE SELECTION AND PRIORITISATION ¶ 65 (Nov. 2013).

<sup>847</sup> See INTERNATIONAL CRIMINAL COURT OFFICE OF THE PROSECUTOR, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 29 (Nov. 12, 2015), <http://reliefweb.int/sites/reliefweb.int/files/resources/OTP-PE-rep-2015-Eng.pdf>.

<sup>848</sup> Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, PTC, Case No. ICC-01/13-34, (July 16, 2015) ¶ 48.

considering the impact on others, the OTP should consider that the crimes are intended to send a message to others – in this case, to other future asylum seekers.<sup>849</sup>

Finally, the situation in Australia is of sufficient gravity because its potential to set a precedent, and to normalise subjecting vulnerable refugee populations to inhumane detention practices in order to deter future refugee flows. To the extent that the policies Australia is adopting are taken up by other states, the Australian situation will result in the normalisation of crimes against humanity;<sup>850</sup> the perception that a widespread and systematic attack against a civilian population may be seen as normal, banal, and potentially acceptable.<sup>851</sup> Australia is no pariah state. It is a relatively wealthy, ‘Western’, democracy. Its actions and policies have an added effect in terms of being influential and being replicated elsewhere, specifically in other states that are receiving refugee flows. Indeed, there have already been indications of the influence of this replication. Denmark recently introduced a bill which would authorise the government to take refugee’s valuables to pay for detention;<sup>852</sup> this bill was remarkably similar to Australia charging asylum seekers for their detention.<sup>853</sup> Danish government officials, after inspecting detention on Nauru, remarked that Australian detention is “an interesting model” and that they “will continuously assess different migration policies by looking at the experiences of other countries – including Australia.”<sup>854</sup> Austria’s Foreign Minister Sebastian Kurz has made similar suggestions, citing the “Australian example,” noting that while the model cannot be fully replicated, “it’s principles” can be applied in Europe.<sup>855</sup> Most recently, in an Executive Order banning the entrance of certain categories of refugees,<sup>856</sup> the President of the United States Donald Trump has attempted to put in place a policy of systematised deportation in violation of the norm of *non-refoulement*.

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<sup>849</sup> *Id.* (asserting that the commission of the identified crimes on the Mavi Marmara, which were highly publicised, would have sent a clear and strong message to the people in Gaza (and beyond) that the blockade of Gaza was in full force and that even the delivery of humanitarian aid would be controlled and supervised by the Israeli authorities).

<sup>850</sup> See Kevin Jon Heller, *Situational Gravity under the Rome Statute*, in *FUTURE DIRECTIONS IN INTERNATIONAL CRIMINAL JUSTICE* 229 (Carsten Stahn & Larissa van den Herik eds., 2009).

<sup>851</sup> Kalpouzos & Mann, *supra* note 683.

<sup>852</sup> Patrick Kingsley, *Denmark to force refugees to give up valuables under proposed asylum law*, THE GUARDIAN, Jan. 12, 2016, <https://www.theguardian.com/world/2016/jan/12/denmark-to-force-refugees-to-give-up-valuables-under-proposed-asylum-law>.

<sup>853</sup> Steve Butcher, *Ex-detainee sues over \$26,000 bill*, THE AGE, Aug. 27, 2002, <http://www.theage.com.au/articles/2002/08/26/1030053033986.html>.

<sup>854</sup> Rachel Eddie, *‘Australia has an interesting model’: Danish MPs to visit Nauru detention centre in the hope it may provide answers to migration crisis in Europe*, DAILY MAIL, Aug. 24, 2016, <http://www.dailymail.co.uk/news/article-3756451/Danish-MPs-visit-Australia-s-detention-centre-Nauru.html>.

<sup>855</sup> *Austrian Minister wants to replicate Australian model for refugees*, EURACTIV.COM, June 6, 2016, <https://www.euractiv.com/section/justice-home-affairs/news/austrian-minister-wants-to-replicate-australian-model-for-migrants/>.

<sup>856</sup> *Annotated: The Trump administration executive order on refugees and immigrants*, THE WASH. POST, Jan. 27, 2017, [https://www.washingtonpost.com/news/post-politics/wp/2017/01/27/annotated-the-trump-administrations-executive-order-on-refugees-and-immigrants/?utm\\_term=.4cc3b133ca55](https://www.washingtonpost.com/news/post-politics/wp/2017/01/27/annotated-the-trump-administrations-executive-order-on-refugees-and-immigrants/?utm_term=.4cc3b133ca55).

Gravity, in the Court’s jurisprudence, aims at “maximiz[ing] the Court’s deterrent effect.”<sup>857</sup> The need for deterrence is even more pronounced when a set of actions that qualify as international crimes, as we have shown, is potentially replicated, normalised and perceived as an acceptable, or at least inevitable, consequence of the current international system. The current docket of the Court is predominantly comprised of what could be characterised as spectacular violence,<sup>858</sup> occurring in some of the poorer and less developed states in the world. Such a concentration has been criticised and is threatening the legitimacy<sup>859</sup> and operational success<sup>860</sup> of the Court. The Office of the Prosecutor has shown that an understanding of the wider implications and impact of crimes, particularly in relation to wider social, economic and environmental damage,<sup>861</sup> should complement a purely quantitative or narrowly and spectacularly qualitative focus on gravity. The crimes committed in offshore detention by Australian officials and agents, while satisfying established quantitative and qualitative criteria, should be understood as especially grave given their widespread impact and potential normalisation. Investigating them is a necessary priority in order for the Court to fulfil its role.

### Conclusion

For the above described reasons, the undersigned urge the Office of the Prosecutor to consider opening a Preliminary Examination into the situation and facts described in this Communiqué.

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<sup>857</sup> *Prosecutor v Dyilo*, Case No. ICC-01-04-01/06, Decision on the confirmation of the charges, ¶ 48 (Jan. 29, 2007), [https://www.icc-cpi.int/CourtRecords/CR2007\\_02360.PDF](https://www.icc-cpi.int/CourtRecords/CR2007_02360.PDF).

<sup>858</sup> For this distinction, see *Kalpouzos & Mann*, *supra* note 683.

<sup>859</sup> *Kalpouzos & Mann*, *supra* note 683, at 24.

<sup>860</sup> *African leaders plan mass withdrawal from international criminal court*, THE GUARDIAN, Jan. 31, 2017, <https://www.theguardian.com/law/2017/jan/31/african-leaders-plan-mass-withdrawal-from-international-criminal-court>.

<sup>861</sup> INTERNATIONAL CRIMINAL COURT OFFICE OF THE PROSECUTOR, POLICY PAPER ON CASE SELECTION AND PRIORITISATION ¶ 41 (Sept. 15, 2016).