

Messrs Anand Grover and Juan Méndez
UN Special Rapporteur on the Right to Health
UN Special Rapporteur on Torture
Special Procedures – Urgent Appeals Section
Office of the High Commissioner for Human Rights
Palais Wilson
CH-1211 Geneva
Switzerland

17 September 2012

Dear Messrs Grover and Méndez,

Re: Urgent Appeal regarding the Commonwealth Government of Australia's proposed offshore processing of asylum seekers on Manus Island

1. Introduction

1.1 The Australian government has recently signalled its intention to start processing asylum seekers who travel to Australia by boat in immigration detention facilities to be established at Nauru and Manus Island (a remote island belonging to Papua New Guinea). It has done this by passing the Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 (Cth). This Act gives the government the power to process asylum seekers in *immigration detention facilities*¹ in designated countries.² It will designate Papua New Guinea and Nauru forthwith.³ Australia already has an agreement in place to process asylum seekers in Papua New Guinea.⁴ The government has signalled its intention to start processing asylum seekers in those places before the end of September.⁵

1.2 Manus Island is home to the deadliest strain of malaria, *Plasmodium falciparum*, which is endemic to Papua New Guinea and resistant to artemisinin (anti-malarial) treatments.⁶ In the *World Malaria Report 2011* the World Health Organisation concluded that 94% of Papua New Guinea's

¹ s5, *Migration Act 1958* (Cth).

² s198AD, *Migration Act 1958* (Cth): a declaration can be made by the Minister and presented to the House of Representatives.

³ Australian Immigration Minister Scott Morrison's second reading speech to the House of Representatives, 14 August 2012, available online at: <http://www.scottmorrison.com.au/info/speech.aspx?id=473>

⁴ Daniel Flitton, 'Labor strikes deal over PNG asylum centre,' *The Age*, 8 September 2012, available online at: <http://m.theage.com.au/opinion/political-news/labor-strikes-deal-over-png-asylum-centre-20120908-25krj.html>

⁵ ABC News, *Senate Passes Offshore Processing Bill*, 17 August 2012, available online at: <http://www.abc.net.au/news/2012-08-16/senate-passes-offshore-processing-bill/4203842>

⁶ World Health Organisation, *World Malaria Report 2011*, WHO: Geneva 2012. See also Alexandra Phelan, 'Malaria on Manus Island; a threat to human rights?' *The Drum Online*, 20 August 2012, available online at: <http://www.abc.net.au/unleashed/4209230.html>

population was at high risk of malaria infection,⁷ where transmission is described as ‘intense’.⁸ Eighty percent of the infected population suffered from malaria due to the *P. falciparum* strain.⁹ Manus Island has the highest number of suspected and reported cases of malaria in the country.¹⁰

2. The right to health

- 2.1 The right to the highest attainable standard of physical and mental health, as defined by article 12 of the International Convention on Economic, Social and Cultural Rights, requires states to take steps to prevent, treat and control epidemic, endemic, occupational and other diseases.¹¹
- 2.2 The Committee on Economic, Social and Cultural Rights’ General Comment 14 (GC14) clarifies the normative content of the right to health. Under GC14 states to the ICESCR have an obligation to ensure access to the underlying determinants of societal health including ‘healthy occupational and environmental conditions.’¹² Further, states are required to ensure vulnerable or marginalised groups in particular are afforded access to safe living conditions.¹³
- 2.3 The Australian government has actual knowledge of the risk to asylum seekers of contracting deadly, non-treatable malaria on Manus Island. In 2001 the Australian government established an offshore processing centre on the Island, however it remained at low occupancy until it was closed in 2004 in favour of exclusive processing on Nauru.¹⁴ At least 15 people contracted malaria during the time it was open,¹⁵ and in 2002 the Royal Australasian College of Physicians called for its immediate closure due to malaria risk.¹⁶
- 2.4 By processing asylum seekers in such an environment – where they face such great risk of contracting a deadly and non-treatable strain of malaria – the Australian government is violating the asylum seekers’ right to the highest attainable standard of health. It is a violation of the government’s obligation to take steps to treat and control endemic viruses.

⁷ World Health Organisation, *World Malaria Report 2011*, WHO: Geneva, 2012, page 152.

⁸ Ibid at 68.

⁹ Ibid at 152.

¹⁰ Ibid at 152.

¹¹ Article 12(2)(c), *International Covenant on Economic, Social and Cultural Rights*, UNTS Vol. 993, p. 3. Adopted by UN General Assembly Resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976.

¹² CESCR, *General Comment 14 on the Right to the Highest Attainable Standard of Health*, 2000, UN Doc E/C.12/2000/4, paragraph 11.

¹³ Paragraph 12(b) *General Comment 14*.

¹⁴ Alexandra Phelan, *supra* note 6.

¹⁵ Professional Alliance for the Health of Asylum Seekers and their Children, Submission to the Human Rights and Equal Opportunity Commission: Inquiry into Children in Immigration Detention, May 2002.

¹⁶ ‘Health specialists call for immediate removal of asylum seekers at risk of malaria on Manus Island,’ Press release by the Royal Australasian College of Physicians, 18 February 2002.

- 2.5 This policy is not only putting at risk the physical health and safety of the asylum seekers being sent to Manus Island, but the system of offshore detention has long been criticised for being highly detrimental to the mental health of the asylum seekers.¹⁷ Even UNHCR, in their review of Australia's policy changes on 17 August 2012, said it was 'concerned about the psychological impact for those individuals who would be affected.'¹⁸
- 2.6 The Australian government is moving asylum seekers from Christmas Island (predominantly), where no malaria is present, to an environment with a heavy malaria presence and an *intense* risk of disease transfer. No reasonable explanation has been given for this move that could justify the extreme risk to the health and wellbeing of the asylum seekers in question nor the need to utilize detention facilities in an area endemic with treatment resistant malaria.
- 2.7 The processing of asylum seekers on Nauru is due to begin on 12 September and is due to commence on Manus Island on an unspecified date in the very near future (public reports have put the date at anywhere between the end of September and up to at the most two months from today's date). Eyewitness accounts have shown that asylum seekers on Nauru, and by all reports it is also intended Manus Island, will be temporarily housed in tents and 'rusted and run down' facilities, until more permanent accommodations are erected.¹⁹
- 2.8 Tents and other dilapidated buildings that will be used to house asylum seekers are difficult to effectively seal from mosquito infestation, and further raise the risk to an especially vulnerable population. This also violates the obligation to ensure access to the underlying social determinants (such as the right to adequate housing) to fulfilment of the right to health.

¹⁷ Emma Sampson, Heather Gridley, and Julie Morsillo, with expert input by the APS Refugee Reference Group, 'Submission to the Expert Panel on Asylum Seekers', Submitted by Australian Psychological Society, July 2012, available at:

<http://www.psychology.org.au/Assets/Files/2012-APS-Submission-to-the-Expert-Panel-on-Asylum-Seekers-July.pdf>

¹⁸ UN High Commissioner for Refugees, *UNHCR reviewing Australian changes on offshore processing*, 17 August 2012, available at:

<http://www.unhcr.org/refworld/docid/504de0ee2.html>

¹⁹ Gemma Jones and Philippa Hudson, 'Offshore processing of asylum-seekers could begin within months: PM,' *news.com.au*, 15 August 2012, available online at:

<http://www.news.com.au/national/tent-cities-for-new-refugees/story-fndo4eg9-1226449752006>; see also Kerrin McKechnie, 'Kerrin McKechnie Reports from Nauru,' ABC News, September 11 2012, available online at: <http://www.abc.net.au/news/2012-09-11/kerrin-mckechnie-reports-from-nauru/4254082>; and Lauren Wilson and Sid Maher, 'Nauru crush spurs Malaysia talks' *The Australian*, 11 September 2012, available online at: <http://www.theaustralian.com.au/national-affairs/nauru-crush-spurs-malaysia-talks/story-fn59niix-1226471441775>

3. The prohibition on cruel, inhuman or degrading treatment or punishment

- 3.1 Article 16(1) of the Convention Against Torture²⁰ prohibits cruel, inhuman or degrading treatment or punishment for any reason, where that treatment is inflicted by, at the instigation of, or with the acquiescence of a public official. That treatment must not be incidental to lawful sanctions.
- 3.2 Article 31(1) of the Refugee Convention prohibits the imposition of penalties on asylum seekers merely for their irregular means of entry or presence in a state's territory.
- 3.3 By detaining asylum seekers for irregular entry into Australian territory and subjecting them to such an imminent threat to their health, the Australian government is proposing a form of cruel, inhuman or degrading treatment or punishment in the form of administrative detention that fails to comply with international legal standards.²¹
- 3.4 *P. falciparum* malarial infection can be fatal, and in recurrent malaria cases can have lifelong health ramifications for the person concerned. Symptoms can include fever, vomiting, arthralgia, jaundice, respiratory distress and renal failure. Symptoms are uniformly physically painful and often life threatening. Presuming a conservative estimate of 94% of the intended asylum seeker population on Manus Island were to contract an untreatable case of malaria, equivalent to known indigenous infection statistics, such a broad coverage, coupled with the prior knowledge of the dangers of sending asylum seekers to Manus Island, demonstrates an intention to subject asylum seekers to a near certain risk of such dangerous and irreversible ill-health. In our view, this constitutes ill-treatment sufficient to be categorized cruel, inhuman and degrading treatment or punishment.
- 3.5 Under the Australian Migration Act, when there are two or more designated offshore processing countries, an asylum seeker's destination will be decided by ministerial direction.²² If the government starts processing asylum seekers jointly on Nauru and Manus Island as planned, removal to Manus Island will become an arbitrary form of cruel, inhuman or degrading treatment or punishment, as an asylum seeker's fate will be decided arbitrarily, based on date of arrival in Australian territory and the relative capacity of each offshore processing facility. Moreover, place of processing will be subject to an unreviewable administrative determination based on no more than convenience and expedience.
- 3.6 Arbitrariness adds an element of despair to the already difficult circumstances faced by Australian immigration detainees. The uncertainty in one's fate, compiled with knowledge of conditions offshore by way of

²⁰ UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, UN Treaty Series, vol. 1465, p. 85 Adopted by General Assembly resolution 39/46 of 10 December 1984, Entry into force 26 June 1987.

²¹ Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention: Visit to Australia*, June 2002, UN Doc. E/CN.4/2003/8/Add.2, paragraphs 23-27.

²² S198AD(5), *Migration Act 1958* (Cth).

stories handed through asylum populations, is ‘disconcert[ing]’ in the words of the Working Group on Arbitrary Detention (WGAD).²³ In our words, it is cruel, inhuman and degrading treatment or punishment in the form of undue mental stress and trauma, i.e. a violation of the right to the highest attainable standard of mental health so severe as to constitute ill-treatment.

- 3.7 The WGAD, on its visit to Australia in 2002, took note of ‘alarming information’ indicating several suicide and self-harm attempts by immigration detainees including lip sewing, corporal laceration and detainees hitting their heads against walls and other objects.²⁴ The WGAD also noted a strong relationship ‘between the legal framework for detention and “collective depressive syndrome.”’²⁵ As described above, the physical environment on Manus Island is even more dangerous, and the arbitrary nature of the offshore processing system even more oppressive and threatening than that which existed at the time of the WGAD’s visit to Australia’s other immigration detention facilities; thus the overall conditions of detention at Manus Island, including the mental and physical health consequences, are such that the those who are arbitrarily exposed will be subjected to cruel, inhuman or degrading treatment or punishment.

4. Australia’s extraterritorial obligations

- 4.1 The Commonwealth Government of Australia has enacted legislation that gives it effective control over a parcel of land on Manus Island, Papua New Guinea. The Australian government will be running the asylum seeker processing centre as an *immigration detention facility* that will be staffed by Australian Department of Immigration and Citizenship officials as well as outside contractors employed by the Australian government. If it is run in accordance with Australian standard practice, this detention facility will be surrounded by a number of high perimeter fences and will be patrolled by armed guards.²⁶
- 4.2 Australia has concurrent international obligations to respect, protect and fulfil human rights extraterritorially.²⁷ Australia’s extraterritorial obligations are triggered in accordance with principle 9(a) of the Maastricht Principles to “...respect, protect and fulfil economic, social and cultural

²³ *Report of the Working Group on Arbitrary Detention: Visit to Australia*, June 2002, UN Doc. E/CN.4/2003/8/Add.2, see generally conclusions.

²⁴ *Ibid*, paragraphs 36-42.

²⁵ *Ibid*, Pt. VB.

²⁶ See for example Australian Human Rights and Equal Opportunity Commission, *Inquiry into Children in Immigration Detention*, May 2002; *Report of the Working Group on Arbitrary Detention: Visit to Australia*, paragraph 30.

²⁷ Principle 1(3), *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Maastricht, January 22-26, 1997. These extraterritorial obligations have more recently been reaffirmed in *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*, Maastricht, September 28, 2011 (“Maastricht Principles”). See also the International Court of Justice’s Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (9 July 2004), paras 109-111.

rights [including the right to health] in... situations over which it exercises authority or effective control”.²⁸ Under the agreement with Papua New Guinea, and in light of the factual circumstances set out above, Australia now exercises both authority and effective control over Manus Island for the purpose of offshore processing.²⁹ There is an overriding obligation to avoid causing harm and risk impairing or breaching these rights extraterritorially where such a risk is foreseeable: State responsibility will attach to Australia in such a circumstance.³⁰

- 4.3 Australia’s prior knowledge of rampant malaria on Manus Island is well established,³¹ and it has more recent notification of problems through submissions made to the government by the Australian Human Rights and Equal Opportunities Commission, Australian Medical Association and other interested parties. Australia is aware of the latest infection rates as notified by the World Health Organisation’s *World Malaria Report 2011*. Thus the risk is foreseeable, and the Australian government’s actions in sending asylum seekers to Manus Island directly interferes with its obligations to respect, protect and fulfil the right to health and the prohibition against cruel, inhuman and degrading treatment or punishment.
- 4.4 States have an obligation to take deliberate, concrete and targeted steps to create an international enabling environment conducive to the universal fulfilment of economic, social and cultural rights, and states must coordinate their efforts to ensure this happens.³² The Australian Migration Act, in authorising offshore asylum seeker processing, simply requires designated countries to *assure* Australia that asylum seekers will be allowed to be processed and will not be subject to refoulement.³³ Such an assurance need not be legally binding under Australian law.³⁴ No other human rights guarantees are required by the government to make an agreement binding. This falls short of the requirement to create an international enabling environment conducive to the universal fulfilment of economic, social and cultural rights.
- 4.5 The Australian government’s manifestly inadequate arrangements to ensure the protection of human rights for the asylum seekers under its authority and direct control, and its failure to create an international enabling environment conducive to fulfilment of human rights when negotiating its agreement with the government of Papua New Guinea, falls short of its extra-territorial obligations under international human rights,

²⁸ Principle 9(a), Maastricht Principles.

²⁹ Daniel Flitton, ‘Labor strikes deal over PNG asylum centre,’ *The Age*, 8 September 2012, available online at: <http://m.theage.com.au/opinion/political-news/labor-strikes-deal-over-png-asylum-centre-20120908-25krj.html>

³⁰ Principle 13, Maastricht Principles: “States must desist from acts and omissions that create a real risk of nullifying or impairing the enjoyment of economic, social and cultural rights extraterritorially. The responsibility of States is engaged where such nullification or impairment is a foreseeable result of their conduct. Uncertainty about potential impacts does not constitute justification for such conduct.”

See also Principles 13 and 14, Maastricht Guidelines.

³¹ See para 2.3 on the right to health.

³² Principles 29, Maastricht Principles.

³³ s198AB(3)(a), *Migration Act 1958* (Cth).

³⁴ s198AB(4), *Migration Act 1958* (Cth).

in particular the duties to ensure the right to the highest attainable standard of physical and mental health, the right to respect, protect and fulfil the underlying determinants of the right to health, and the duty to refrain from engaging in cruel, inhuman or degrading treatment or punishment.

5. Papua New Guinea's obligations

- 5.1 Papua New Guinea signed the ICESCR in July 2008, however has not yet ratified the Covenant. Under the Vienna Convention on the Law of Treaties, a signatory to a treaty who has not ratified is nonetheless 'obliged to refrain from acts which would defeat the object and purpose of that treaty.'³⁵
- 5.2 Papua New Guinea has become a Contracting Party to the WHO, and has thus accepted the principle that the 'enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being.'³⁶
- 5.3 By allowing the government of Australia to process asylum seekers in immigration detention facilities on Papua New Guinean territory, the government of Papua New Guinea is defeating the very purpose of the international bill of human rights. Knowing the risks involved in merely being on Manus Island and allowing the Australian government to proceed is an unconscionable act that clearly endangers the lives and safety of an extremely vulnerable portion of society.
- 5.4 Although Australia will have effective control over any immigration detention facility, Papua New Guinea has the sovereign power to prevent Australia from violating its international human rights obligations by denying her access to Papua New Guinean territory.
- 5.5 Papua New Guinea should also be guided by the Maastricht Principles that set out how governments should take targeted steps to create an international enabling environment conducive to the universal fulfilment of economic, social and cultural rights.

6. Conclusion

- 6.1 We make this Urgent Appeal to ask you to intervene on behalf of the asylum seekers very soon to be detained on Manus Island, in order to prevent these expected upcoming violations of the right to health and the prohibition on cruel, inhuman or degrading treatment or punishment by the Australian government, and any complicit violations by the government of Papua New Guinea.

³⁵ United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.

³⁶ Preamble to the *Constitution of the World Health Organization* as adopted by the International Health Conference, New York, 19 June - 22 July 1946, entered into force on 7 April 1948.

Respectfully

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Attached:

Annex I: List of Signatories / Supporters to this Urgent Appeal

Annex II: Identification of Special Procedures' Urgent Appeal Criteria

Annex I: List of Signatories / Supporters to this Urgent Appeal

[To be inserted based on response to email request for sign-ons]

Annex II: Identification of Special Procedures' Urgent Appeal Criteria

1. Potential victims of the offshore processing at Manus Island:

- Individuals attempting to seek asylum in Australia by boat, who are subsequently transferred for processing on Manus Island, Papua New Guinea.

2. The alleged perpetrators include but are not limited to:

- Commonwealth of Australia
 - Has implemented legislation giving government of Australia effective control of an immigration detention facility on Manus Island, a territory of Papua New Guinea.
 - Will process asylum seekers in an Australian immigration detention facility on Manus Island in violation of the right to health and prohibition on cruel, inhuman or degrading treatment or punishment.
 - Is breaching a number of extraterritorial obligations to respect human rights that arise by virtue of this effective control.
- Papua New Guinea
 - Is breaching a number of human rights obligations by knowingly allowing Australia to act in this way on its sovereign territory.

3. Identification of the person/ organisation submitting the communication

- The Global Human Rights Clinic is a newly formed international collaborative which aims to provide opportunities for students, recent graduates and new practitioners to gain practical experience in human rights work. Methodologically, it aims to build collaborative teams that include participants from a variety of different universities, to encourage cross-institutional learning and skill-sharing. The initial focuses of the Global Human Rights Clinic are to build on its pre-existing competencies and develop participants' skills and experience in the UN human rights mechanisms, enhance the capacities of law schools' international human rights programs to teach and understand the role of the international human rights system in relation to domestic human rights advocacy and law reform, and work with NGOs and other advocates to facilitate and expand their access to the international system. Through relationships between experienced human rights advocates, international lawyers, UN experts and others, and the students, researchers, and other learners in the Global Human Rights Clinic, the Clinic aims to facilitate connections and networks that will deepen and expand the possibilities for many of the advanced participants to contribute to their field, and open doors and expand opportunities for the newer participants to learn and gain 'hands on' mentoring and practice in their chosen profession.
- The Global Human Rights Law Clinic is particularly well placed to make this Urgent Appeal to the Special Procedures on this issue as its Director and the Lead Researcher involved in drafting this Urgent Appeal are Australian citizens and long-time advocates for asylum

seeker and refugee rights in Australia. They are personally and professionally actively involved in refugee rights issues in Australia and internationally, and have been closely following the issues discussed in this Urgent Appeal. The Director is an expert on the right to health, having been, inter alia, the former Special Advisor to Mrs Mary Robinson during her time as Chair of the Global Alliance on Vaccines and Immunisations, and co-editor of the book *Realizing the Right to Health* (Swiss Human Rights Book Vol. 3, published by Rueffer & Rubb, 2007). The Lead Researcher is the founder of an Australian non-profit humanitarian research organisation on refugee issues.

- This Urgent Appeal is further supported and signed by [x] other human rights advocates, international and human rights lawyers, medical practitioners and specialists, and other related experts, all of whom are well known Australian and/or international experts on issues directly relevant to the legal and factual substance of this urgent appeal.

4. Date and place of the violations occurring:

- The *Migration Legislation Amendment (Regional Processing and other Measures) Act 2012* (Cth) came into effect on 17 August 2012.
 - All asylum seekers who have arrived on Christmas Island since 13 August 2012 will be processed under this new policy.
 - A total of 2000 asylum seekers have arrived since the introduction of this new scheme and are liable to be transferred immediately, as well as all future arrivals.
 - Transfer and offshore processing of asylum seekers from Christmas Island (Australia) to Manus Island (Papua New Guinea) and Nauru is scheduled to begin as early as mid September 2012.
- Offshore processing was previously stopped in 2004 on Manus Island after concerns were expressed about the threat of malaria to asylum seekers being processed at the facility.
- New violations are expected to occur imminently once offshore processing begins and asylum seekers are transferred to Manus Island, which at this stage all reports indicate will begin as of next week (mid-September).
- Given the lack of entrenched human rights in the Australian Constitution, and lack of a federal Bill of Rights, no Constitutional or other such High Court challenge is foreseeable directly on the basis of human rights grounds, and no suitable injunctive remedy clearly exists. This is especially difficult given the policy has not yet been implemented, and no direct victim yet exists, which would be required under Australian law. Previous attempts during the prior so-called 'Malaysian Solution', Australia's previous and since abandoned policy for offshore processing of asylum seekers, was subject to one legal challenge in the High Court of Australia.³⁷ Unfortunately, this has merely led to such an avenue being less likely to be available in the current instance as the legislation adopted on 13 August 2012 and the basis for the adoption of this legislation was more carefully drafted to

³⁷ *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (31 August 2011).

- ensure similar legal challenges would not arise.
- Various attempts are being sought by local NGOs and human rights advocates to encourage policy change and legislative review, however none of these attempts have been successful and given the popular public support for the government's position on this issue, and the strong stance the government is taking in reintroducing offshore processing, no such advocacy measures (lacking legal enforcement) are likely to succeed in the medium term, least of all in the short term.
 - It is for these reasons that assistance is sought from the Special Procedures to intervene to ensure adequate protection to the rights to life, health, personal security and to guard against violations of the prohibition against cruel, inhuman or degrading treatment or punishment of the asylum seekers at risk of transfer to Manus Island.