



association pour la prévention de la torture
asociación para la prevención de la tortura
association for the prevention of torture

UN Committee Against Torture 53rd Session (3-28 November 2014)

APT submission on Australia

17 October 2014

Alternative report from the Association for the Prevention of Torture (APT) to the Committee against Torture providing background information and suggested questions and recommendations on torture prevention and the Optional Protocol to the Convention against Torture (OPCAT) for **Australia**, whose fourth and fifth periodic report will be considered by the Committee during its 53rd session in Geneva.

The Association for the Prevention of Torture (APT) is an independent NGO based in Geneva, working for a world free from torture, where the rights and dignity of all persons deprived of liberty are respected.

To achieve this vision we:

- *Promote transparency and monitoring of places of detention*
- *Advocate for legal and policy frameworks*
- *Strengthen capacities of torture prevention actors and facilitate exchanges*
- *Contribute to informed public policy debates*

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1. Key facts

- Australia ratified the UN Convention against Torture (UNCAT) on 8 August 1989.
- Australia signed the Optional Protocol (OPCAT) on 19 May 2009, but has yet to ratify the instrument.

2. Summary

This submission focuses on Australia's policies in relation to asylum seekers and refugees, and the conditions of detention in onshore and offshore immigration detention. These issues are of particular concern given the significant deterioration in the situation since the last review by the Committee, and the broader impact that Australia's policies have on detention practices and human rights protection in the Asia Pacific region.

This submission also covers the recent criminalisation of torture offences. It further examines the progress towards ratification of the Optional Protocol to the UN Convention against Torture (OPCAT), which the APT has been following closely in Australia for the last 7 years.

3. Absolute prohibition and criminalisation of torture

Since the review of Australia's third periodic report in May 2008,¹ Australia has comprehensively criminalised torture in the Federal Criminal Code in 2010.² It is welcome that, amongst other things, the definition of torture in the Criminal Code closely follows the definition in Article 1 of the UN Convention Against Torture (UNCAT)³, a significant penalty of up to 20 years in prison applies to those found guilty of torture, different modes of liability are captured by the offence, and the offence includes extra-territorial liability.⁴

The offence would be further strengthened with the removal of the requirement for written consent from the Attorney General for prosecutions of torture offences alleged to have occurred outside Australia to proceed, as requiring such consent could lead to perceptions that there is political interference in prosecutorial decisions.

There is important symbolic benefit in strong laws criminalising torture, but it is the application of laws in practice that will have a greater impact in the fight against torture. To the best of APT's knowledge there have not yet been any prosecutions

¹ (CAT/C/67/Add.7)

² The *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth) introduced a new Division 274 (Torture) to the *Criminal Code Act 1995* (Cth).

³ The most notable difference is that the definition of torture in cl 274.2 is divided into two parts: cl 274.2(1) which sets out three purposive elements required to constitute torture (obtaining a confession, punishing the victim, or intimidating / coercing the victim). The fourth purposive element of engaging in conduct 'for any reason based on discrimination of any kind' is contained separately in cl 274.2(2).

⁴ See Division 274 (Torture), *Criminal Code Act 1995* (Cth). For further discussion of the offences, see Greg Carne (2012) 'Is Near Enough Good Enough? – Implementing Australia's International Human Rights Torture Criminalisation and Prohibition Obligations in the *Criminal Code 1995*(Cth)' 33 *Adelaide Law Review* 229, at 257-267.

under the torture provisions of the *Criminal Code*, and it remains to be seen in coming years how these laws are utilised in Australia.

This development of a robust legal framework against torture in Australia could be shared in the Asia Pacific region, for example, as part of Australia's overseas development assistance programme. In particular, the Pacific region has one of the lowest rates of UNCAT ratification in the world, with just 2 States parties⁵. The experience of ensuring domestic laws conform with the convention could be particularly interesting for Pacific islands countries considering UNCAT ratification, and the APT encourages Australia to consider sharing experience and good practices in regards to legal frameworks to prohibit torture with neighbours in the region.

In addition to the importance of laws criminalizing torture, the words and actions of political leaders are vital in sending a clear and unambiguous message that torture must never be tolerated. A comment by Australian Prime Minister, Tony Abbott, on 15 November 2013 suggesting that in some situations torture is acceptable, is extremely disappointing.⁶ This is particularly so given that the statement was made in relation to the human rights situation in Sri Lanka, a country that has on-going and well-documented human rights violations,⁷ and where Australia is seeking to return asylum seekers with few procedural safeguards in place to uphold Australia's non refoulement obligations under Article 3 of the UNCAT.

It is, however, pleasing to observe a recent example that seems to indicate that the Australian public do not support torture as a tool to fight terrorism. In September 2014, the Australia government released draft anti-terror laws that would give Australian Security and Intelligence Organization (ASIO) officers very wide powers in the course of carrying out their duties. There was significant public backlash that this would empower government officials to commit torture with impunity. As a result, the draft bill was amended to include an explicit prohibition of torture,⁸ with the Attorney General making public statements that ASIO officers will never be empowered to or need to engage in torture.⁹

Suggested Question: Has Australia initiated any prosecution or investigated any cases of torture?

⁵ Vanuatu and Nauru. For further analysis, see APT, 'Why should small island states in the Pacific ratify UNCAT?'

⁶ Mr Abbott was asked during a press conference in Sri Lanka about the issue of torture in that country. He stated "(o)bviously the Australian Government deplores any use of torture ... But we accept that sometimes in difficult circumstances, difficult things happen." Tony Abbott, 'CHOGM; Operation Sovereign Borders' (Press Conference at Colombo, Sri Lanka, 15 November 2013) www.pm.gov.au/media/2013-11-15/press-conference (accessed 9 October 2014).

⁷ See for example, Human Rights Watch (2014) 'World Report 2014: Sri Lanka'. Online at: <http://www.hrw.org/world-report/2014/country-chapters/sri-lanka> (accessed 12 October 2014).

⁸ 'George Brandis rules out torture under new national security legislation', *Sydney Morning Herald*, September 22, 2014. Available online at <http://www.smh.com.au/federal-politics/political-news/george-brandis-rules-out-torture-under-new-national-security-legislation-20140922-10k8wg.html> (accessed 9 October 2014).

⁹ 'Brandis : ASIO agents will not engage in torture' (video of press conference), *The Australian*, <http://www.theaustralian.com.au/video/id-9mZndscDpY2QtI4S8UrMGYSAarvv9Ndj> (accessed 9 October 2014).

Suggested recommendation: That the requirement for written consent from the Attorney General to prosecute allegations of torture outside Australia be removed from the Federal Criminal Code.

4. Slow progress towards ratification of OPCAT

There is a pressing need in Australia for a comprehensive system of preventive detention monitoring, in order to assess risk factors and prevent ill-treatment. Whilst there are various oversight mechanisms in place at both State/Territory and Federal level, they do not constitute an effective system as many adopt a reactive rather than preventive approach. Furthermore, there are many gaps that leave places of detention where no human-rights based oversight occurs (for example, many locked aged care facilities).

There is also overlap in responsibilities both at a horizontal level (between agencies within a jurisdiction) and vertically (between Federal and State/Territory agencies). This can result in lack of coordination, and confusion around roles and responsibilities.¹⁰ A national preventive monitoring system would be able to contribute to constructive solutions to many of the issues raised in Australia's LOIPR including prison overcrowding, access to health services in detention, and safeguards such as right to access a lawyer and doctor.

The Committee against Torture recommended OPCAT ratification after Australia's last review in 2008.¹¹ The Australian government signed the OPCAT in 2009 and committed to ratification 'as a priority' during its Universal Periodic Review before the UN Human Rights Council in 2011.¹²

In 2012, the bipartisan Australian Federal Parliamentary Joint Standing Committee on Treaties recommended ratification, subject to a declaration under Article 24 delaying the obligation to establish a National Preventive Mechanism (NPM) for three years.¹³

The Australian government has indicated that the necessary domestic legal and policy arrangements must be in place prior to ratification of OPCAT. This means that ratification is unlikely to occur until all States and Territories and the Federal government have passed mirror legislation that would enable the UN Subcommittee on Prevention of Torture (SPT) to visit. Legislation must be enacted at both a State/Territory and Federal level because of shared responsibility for places of detention: the Federal government is responsible for immigration detention and places of military detention, and the State/Territory governments are responsible for all other

¹⁰ Bronwyn Naylor and Lisa Harrison (2014) 'Monitoring Closed Environments : The Role of Oversight Bodies', *Working Paper No. 3*, Monash University Australian Research Council Linkage Grant, Applying Human Rights in Closed Environments, at 18.

¹¹ UN Committee Against Torture, *Concluding Observations: Australia*, UN Doc. CAT/C/AUS/CO/3, 22 May 2008, at 34.

¹² UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Australia, 24 March 2011 UN Doc. A/HRC/17/10 at 31.

¹³ Joint Standing Committee on Treaties, Parliament of Australia, Review into Treaties tabled on 7 and 28 February 2012 (2012), ch 6.

types of detention. This approach, of seeking to achieve consensus and consistency of legal frameworks across jurisdictions prior to ratification is to be expected and consistent with the Australian model of 'cooperative federalism'.

Within this federalist framework, there were promising developments towards OPCAT ratification in 2012 and 2013, including three jurisdictions¹⁴ releasing draft laws that would enable the SPT to visit places of detention. However, in the latter part of 2013 and throughout 2014, this momentum has stalled. The Liberal National government has not yet released any policy position on OPCAT ratification, and it appears that it has not been a priority of the Attorney General to date.

Whilst recognising the unique challenges posed by federalism in Australia, there is a serious need for the Federal government to prioritize OPCAT ratification. The APT urges Australia to put the issue of OPCAT ratification back on the agenda at meetings between the Attorney General and his State/Territory counterparts, and instigate a broad and inclusive consultation on possible NPM options. Revived discussion on NPM options would mean Australia would be well-placed to have a functioning NPM within 3 years of ratification as would be required under the treaty if an Article 24 Declaration is made deferring NPM obligations.

Suggested recommendation: The Australian government prioritize engagement with States and Territories on the issue of OPCAT, with a view to ratifying OPCAT at the earliest possible opportunity.

Suggested recommendation: The Australian government initiate a national broad based, inclusive and inter-jurisdictional consultation on a comprehensive, OPCAT-compliant detention monitoring framework.

5. Immigration detention

5.1. Detention policy approach

5.1.1. Turning back boats

It is Australian government policy to intercept boats carrying asylum seekers that have entered Australian territorial waters, or are in international waters but are attempting to enter Australian waters, and forcibly turn them back to where they have come from. In the first year of operations, the Australian government provided almost no public information on the nature of these practices, stating that it would assist people smugglers to do so. However, the Minister's office recently released information

¹⁴ These states are Tasmania: *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2013* (Tas); the Northern Territory: *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) (National Uniform Legislation) Bill 2013* (NT); and the Australian Capital Territory: *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Bill 2013* (ACT).

stating that as of 18 September 2014, 383 asylum seekers on 12 boats were turned back from Australian waters.¹⁵

This practice amounts to forced deportation.¹⁶ It is of grave concern due to the risk that asylum seekers could face torture or cruel, inhuman and degrading treatment or punishment (CIDT) either as part of the removal process or on their return, and thus is in breach of Australia's non-refoulement obligations. The European Court of Human Rights has confirmed that these non-refoulement obligations apply where the turn-back takes place on high seas, not just in a State's territorial waters or on land,¹⁷ and if it has not done so already, the APT strongly encourages the Committee to make a similar declaration.

If forced deportation is necessary it should be a last resort, and people should only be deported following a fair and efficient process to assess their asylum claim, which guarantees that all necessary legal safeguards have been applied. Furthermore, the manner in which Australia has engaged in forced deportation, by putting people in small orange lifeboats with limited supplies of food and water and leaving them to fend for themselves is at great risk to the personal safety and inherently degrading to the dignity of these asylum seekers.

5.1.2. Mandatory and indefinite detention

Any non-citizen to arrive in Australia's migration zone without a valid visa faces mandatory detention. Detention is prolonged: as at 30 April 2014, the average period of time for people held in detention facilities was 305 days and steadily increasing.¹⁸ Some categories of detainees face indefinite detention, for example, stateless people whose asylum claim have been refused and are not likely to be accepted by other countries, or refugees that have an adverse security assessment. The underlying purpose of mandatory and prolonged detention is to deter future asylum seekers from making the journey to Australia.¹⁹ The impact of the policy on the physical and mental health of detainees is severe and has been well-documented²⁰.

¹⁵ 'Immigration Minister Scott Morrison confirms 12 asylum seeker boats turned back since start of Operation Sovereign Borders', ABC News, 18 September 2014. Online at <http://www.abc.net.au/news/2014-09-18/immigration-minister-confirms-12-asylum-seeker-boats-turned-back/5752262> (accessed 12 October 2014).

¹⁶ See Andrew and Renata Center for International Refugee Law, *Factsheet: Turning Back Boats*, Last updated August 4 2014. Available online at: http://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/turning_back_boats_factsheet_04.08.14.pdf (accessed 5 September 2014).

¹⁷ *Hirsi Jamaa and Others v Italy*, App. No. 27765/09, European Court of Human Rights, 23 February 2012 <<http://www.refworld.org/docid/4f4507942.html>> (accessed 17 October 2014).

¹⁸ Australian Government, Department of Immigration and Border Protection, *Immigration Detention and Community Statistics Summary*, 30 April 2014. Online a: http://www.immi.gov.au/managing-australias-borders/detention/_pdf/immigration-detention-statistics-apr2014.pdf (accessed 12 October 2014).

¹⁹ See for example, Australian Government, 'Government Response to Recommendations by Joint Select Committee on Australia's Immigration Detention Network, November 2012 <<https://www.immi.gov.au/media/publications/pdf/2012/response-recommendations-joint-select-committee-aust-immi-detention.pdf>> at 2 (accessed 15 October 2014); Australian Department of Foreign Affairs and Trade, 'Regional resettlement arrangements between Australia and Papua New Guinea', 19 July 2013 <<https://www.dfat.gov.au/geo/png/regional-resettlement-arrangement->

Suggested recommendation: That detention of asylum seekers is a last resort, for the shortest possible time.

5.1.3. Offshore detention

Australia has an obligation to prevent torture and other ill-treatment not only in its sovereign territory but also “in any territory under its jurisdiction”. The Committee considers that the scope of “territory” under Article 2 must also include situations where a State party exercises, directly or indirectly, *de facto* or *de jure* control over persons in detention.²¹ This interpretation has been supported in the comments of other treaty bodies, UN Special Procedures, and the jurisprudence of the International Court of Justice²².

All asylum seekers that arrived in Australia after 19 July 2013 are taken to a ‘regional processing facility’ – offshore detention, on Manus Island in Papua New Guinea (PNG) or Nauru and even if they are found to be genuine refugees, will not be resettled in Australia.²³ Although these places of detention are located on sovereign territory of Nauru and PNG, clear indicia that these places are under the *de facto* or *effective* control of the Australian government include:

- The Australian government, through the Australian Customs and Border Protection service intercepts asylum seeker boats and transports them to the third country;
- The Australian Department of Immigration and Border Protection engages and pays private contractors to build and run the centres (see further below);
- It is Australian government policy that determines the circumstances surrounding detention, assessment of claims, and resettlement – for example, the arrangements around resettlement of those who arrived by boat after 19 July 2013;²⁴ and

20130719.html> at para 3 (accessed 16 October 2014). See also Gary Cox, ‘Refugees angered by Government’s graphic novel campaign’, *SBS*, 13 February 2014 <<http://www.sbs.com.au/news/article/2014/02/13/refugees-angered-governments-graphic-novel-campaign>> (accessed 15 October 2014).

²⁰ See for example, Gillian Triggs (2013) ‘Mental Health and immigration detention’, *Medical Journal of Australia* 2013 199 (11), 721-722.

²¹ para 16, GC2

²² ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p.136, at §109.

²³ Australian Department of Foreign Affairs and Trade, ‘Regional resettlement arrangements between Australia and Papua New Guinea’, 19 July 2013 <<https://www.dfat.gov.au/geo/png/regional-resettlement-arrangement-20130719.html>> at para 3 (accessed 16 October 2014).

²⁴ See, for example, Memorandums of Agreement between Australia and Papua New Guinea and Cambodia on these issues: *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*, 6 August 2013 <<https://www.dfat.gov.au/geo/png/joint-mou-20130806.pdf>> (accessed 16 October 2014); *Memorandum of Understanding between the Government of the Kingdom of Cambodia and the Government of Australia, Relating to the Resettlement of Refugees in Cambodia*, 26 September 2014

- Australian government officials work closely with counterparts from PNG/Nauru on the day to day running of the centre, and dealing with particular issues – for example, the Parliamentary Inquiry into the ‘Incident at the Manus Island Detention Centre from 16 February to 18 February 2014’ (the riot that resulted in the death of one asylum seeker) revealed constant and on-going communication between the Australian government and the Papua New Guinea government and the G4S staff on issues including security situation within the camp.²⁵

Suggested recommendation: That Australia recognizes regional processing centres on Nauru and Manus Island, Papua New Guinea come within Australia’s ‘effective control’ for the purposes of the Convention and take measures to ensure that Convention rights are upheld for all individuals under Australia’s control.

It is our considered view 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. This assessment is based on the deliberate provision of only extremely basic conditions as part of a systematic policy in order to deter others, and the severity of suffering caused to detainees (described in section 5.2 below). The suffering is aggravated by the mental anguish that asylum seekers face caused by lengthy delays in processing and assessing claims, and uncertainty as to their status or future prospects, including where they will be settled if their claims are successful. For those with family members that already legally reside in Australia, they have been told they will never be able to permanently live with these family members in Australia even if they are found to be genuine refugees.

Off-shore immigration detainees also have to face severe challenges of an extreme tropical climate and the consequences of the remoteness of the camps, including lack of access to appropriate or specialist medical care, lack of access to lawyers and other support services.

The impact of lack of access to appropriate medical care had tragic consequences for Hamid Kehazaei, a 24-year-old Iranian asylum seeker. Mr Kehazaei had been detained on Manus Island since September 2013 died from septicaemia developed from a cut in his foot. He was not given appropriate and timely medical treatment.²⁶ This incident involved gross negligence on the part of the Australian government, that a small cut on the foot resulted in the death of someone in Australia’s care.

In the alternative, if it may not be shown that places of offshore detention are under Australian control, Australia still has an obligation of non-refoulement. This means the

²⁵ See generally, Parliament of Australia, Senate Standing Committee on Legal and Constitutional Affairs, ‘Incident at the Manus Island Detention Centre from 16 February to 18 February 2014’ t <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Manus_Island> (accessed 17 October 2014). See in particular, the submission by former G4S staff member Martin Appleby, and Human Rights Law Centre.

²⁶ Special Broadcasting Service, ‘Asylum seeker brain dead after cut turned to septicaemia in ‘shocking’ detention conditions’ SBS News (online), September 3, 2014 <<http://www.sbs.com.au/news/article/2014/09/03/asylum-seeker-brain-dead-after-cut-turned-septicaemia-shocking-detention>> (accessed 9 October 2014).

Australian government has a positive obligation to ensure those sent to offshore detention beyond its jurisdiction are not subject to torture or CIDT. There is a real risk that this is happening. For example, there is discussion of resettling asylum seekers, which could include those fleeing persecution due to their status as LGBTI, in Papua New Guinea where homosexuality remains a criminal offence²⁷, or returning failed asylum seekers from minority groups to Afghanistan where they face discrimination and physical threats.

5.1.4. Detention of children

All children who arrived in Australia by boat subsequent to 19 July 2013 will continue to be held in immigration detention until their claims are assessed and once assessed they will be sent to a third country for resettlement, or repatriated if their refugee claims are not sustained. These children and their families are being held indefinitely in the harsh detention conditions on Christmas Island and Nauru.²⁸ Mandatory and indefinite detention of children in immigration detention facilities violates international law and must end.²⁹ All children and their families should be removed from immigration detention as a matter of urgency. In addition, unaccompanied or separated children ought not, as a general rule, to be detained.³⁰ Given the alternatives to detention, it is difficult to conceive of a situation in which the detention of an unaccompanied child would be justified.³¹

Suggested recommendation: That Australia end the practice of detaining children in immigration detention as a matter of urgency.

5.1.5. Privatisation of immigration detention

The management, functioning and provision of services in all places of immigration detention in Australia and offshore is outsourced to private contractors. Most of the

²⁷ Section 210 of the Criminal Code Act 1974 (PNG) criminalizes ‘unnatural offences’. See Senthoran Raj, ‘What will happen to gay asylum seekers in Papua New Guinea?’ *The Guardian*, 23 July 2013 <<http://www.theguardian.com/commentisfree/2013/jul/23/gay-asylum-seekers-papua-new-guinea>> (accessed 17 October 2014).

²⁸ See United Nations High Commissioner for Refugees, ‘UNHCR monitoring visit to the Republic of Nauru - 7 to 9 October 2013’, 26 November 2013 <<http://unhcr.org.au/unhcr/images/2013-11-26%20Report%20of%20UNHCR%20Visit%20to%20Nauru%20of%207-9%20October%202013.pdf>> (accessed 17 October 2014).

²⁹ Convention on the Rights of the Child (CRC), Article 37 (b); United Nations Rules for the Protection of Juveniles Deprived of their liberty (RPJD) 1, 2; See also United Nations High Commission for Refugees, EXCOM *Conclusion on Children at Risk*, 5 October 2007, No. 107(LVIII) – 2007, available at: <<http://refworld.org/docid/471897232.html>>.

³⁰ Committee on the Rights of the Child, *General Comment No 6: Treatment of unaccompanied and separated children outside their country of origin*, UN Doc CRC/GC/2005/6 (1 December 2005) [61].

³¹ Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, UN Doc WGAD A/HRC/13/30 (18 January 2010).. these also, Office of the High Commissioner for Human Rights, *Report of the Special Rapporteur on the human rights of migrants, François Crépeau*, UN Doc:A/HRC/20/24 (2 April 2012) <<http://www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/AnnualReports.aspx>>

onshore detention centres are run by British company Serco, whilst the Nauru and Manus Island detention centres are run by Transfield.³² As the Human Rights Committee has noted, States cannot contract out of their human rights obligations.³³ Whilst the service provision contracts do, in a limited sense, refer to the fulfilment of some human rights obligations, it is presented through a commercial contract law framework rather than as non-derogable human rights obligations.³⁴ Furthermore, there needs to be a multifaceted approach including a regime of safeguards which effectively reduce the risks of abuse, the training of all staff (including PNG and Nauru nationals) of their obligations under the UNCAT, combined with independent preventive monitoring that would assess the risk factors leading to torture and ill-treatment and work constructively with the private security contractors and government to address them. The reality on the ground is that for many, if not most detainees, the conditions they face and the way they are treated by detention centre staff and management shows these obligations are not being upheld.

The Australian government must demand more from these private security contractors, in order to uphold its obligations under international law, but also to provide accountability for spending Australian taxpayers money. The Australian government must hold private security companies liable for serious breaches of contract for the many significant failings that have occurred whilst they are managing the contract, and take remedial action to ensure these failings are not repeated.

Suggested recommendation: Ensure all private contractors involved in the management, running or provision of services in immigration detention are contractually bound to uphold international standards, and face serious consequences for breach of this obligation.

Suggested recommendation: Ensure all individuals who play a role in the detention of asylum seekers anywhere within Australia's de facto or de jure control, whether state agents or private contractors, have received appropriate training in obligations under the convention and prevention of ill-treatment.

³² See generally, Cathy Alexander, 'A Serco bet? Australia's immigration detention centres are up for grabs', Crikey.com <<http://www.crikey.com.au/2014/04/11/a-serco-bet-australias-immigration-centres-are-up-for-grabs/>> (accessed 16 October 2014).

³³ *Cabal and Bertran v Australia*, Communication No 1020/2001, UN Doc. CCPR/C/78/D/1020/2001, (2003), para 7.2: 'The Committee considers that the contracting out to the private sector of core State activities which involve the use of force and the detention of persons does not absolve a State party of its obligations under the Covenant, notably under articles 7 and 10. At <http://www.refworld.org/docid/4282279b7.html>

³⁴ See for example, contract between the Commonwealth of Australia and G4S for the Management of the Offshore Detention Facility on Manus Island, Papua New Guinea (undated), released pursuant to the *Freedom of Information Act 1982* (Cth). <<https://www.scribd.com/doc/155097545/Manus-Island-detention-facility-contract>> (accessed 17 October 2014).

5.2. Conditions and treatment in detention

5.2.1 Conditions and treatment

The physical conditions in immigration detention are severe, and particularly so in offshore detention. The APT refers to the United Nations High Commissioner for Refugees (UNHCR) November 2013 report, which described Australia's offshore detention facilities as overcrowded, oppressive and unhygienic.³⁵ The conditions are made all the more oppressive by the high levels of anxiety amongst detainees, heightened by the uncertainty of their future. Those in offshore detention know they will never be resettled to Australia if they are found to be refugees but the options put on the table so far as alternatives: Nauru and Cambodia are cause for further anxiety.

5.2.2 Detention at sea

Australia's UNCAT obligations apply to anyone detained on an Australian customs or navy vessel, whether in Australian waters or on the high seas. There have been a number of incidents reported in the media that are of particular concern to APT, two of which are highlighted below.

The first incident relates to allegations made by African asylum seekers and an Indonesian police chief that Australian Customs and Border Protection officers deliberately inflicted burns to their hands during a boat tow-back operation, as a punishment for requesting to go to the toilet beyond the allowed once per day.³⁶ The Immigration Minister's response was to dismiss the allegations as 'malicious and unfounded slurs' against the Australian Navy and Customs service.³⁷ The APT understands that there has been an internal investigation into the matter although the outcome has not been made public, but the Minister for Immigration has refused to conduct an external investigation into the incident. Allegations of serious abuse in detention, including detention at sea, should be dealt with through an independent and impartial inquiry or investigation. If the allegations are proven to be unfounded through an independent and impartial investigation, the Australian Navy and Customs service will preserve its reputation, but the asylum seekers have a right to have their claims investigated.

The second is an incident involving a boat with 157 Sri Lankan (mostly Tamil) asylum seekers on board including 50 children that departed from a refugee camp in India on June 13 2014 bound for Australia. The boat was intercepted on the high seas by an Australian Customs and Border Protection vessel. According to documents lodged in the High Court, the asylum seekers were held on the ship behind locked doors in windowless cabins. They had no idea where they were, or where they would be taken.

³⁵ UNHCR Regional Representation, Canberra, UNHCR Monitoring visit to Manus Island, Papua New Guinea 23 to 25 October 2013 (26 November 2013)

³⁶ 'African asylum seekers say Australian Navy inflicted burns, kicked them', Sydney Morning Herald, 22 January 2014. Online at : <http://www.smh.com.au/federal-politics/political-news/african-asylum-seekers-say-australian-navy-inflicted-burns-kicked-them-20140122-317wa.html> (accessed 11 October 2014).

³⁷ Michael Safi, "Scott Morrison calls renewed asylum seeker burning claims 'baseless'", *The Guardian*, 25 March 2014 < <http://www.theguardian.com/world/2014/mar/25/scott-morrison-calls-renewed-asylum-seeker-burning-claims-baseless> > (accessed 17 October 2014).

They were only allowed out of their cabins in for a few hours each day and in the presence of guards. They were stripped of their possessions at the outset of their detention, including their mobile phones, and had little or no access to independent legal advice.³⁸ Ultimately, and after 28 days of being held on the Customs vessel, they were briefly taken ashore to Curtin Detention Center in Western Australia. Embassy officials from India were brought to visit them, with the Australian government hoping that the asylum seekers would voluntarily return to India. However, none chose to do so, and the asylum seekers were all transferred to offshore detention. The circumstances surrounding the detention, and the conditions of detention of Tamil asylum seekers is extremely concerning and likely to amount to CIDT.³⁹ A Federal Senator, Sarah Hanson-Young went to Curtin Detention Center to visit them but was denied access to the detainees,⁴⁰ raising serious concerns about the lack of transparency and oversight in such serious circumstances where the livelihood of so many vulnerable people are at risk.

5.2.3 Lack of transparency and oversight frameworks

A key safeguard to reduce risks of ill-treatment in detention is independent monitoring. The Australian Human Rights Commission, the Commonwealth Ombudsman, and Parliamentarians have a vital role in monitoring, and this role should be enshrined in legislation rather than the current situation, whereby visits are permitted at the discretion of the Minister.

Every person who is deprived of his/her liberty is vulnerable or at risk of ill-treatment. This is particularly so when conditions of detention are extreme and detention is prolonged, indefinite or for an uncertain period. Some immigration detainees are particularly vulnerable and specific measures have to be taken by authorities to address their special needs.

Monitoring bodies have a critical role to play in:

- Highlighting government policies or practices of detaining particularly vulnerable asylum-seekers and migrants who ought not to be detained;
- Ensuring that particularly vulnerable individuals benefit from adequate assistance and protection; and

³⁸ See for example, Jason Om, 'Lawyers for detained asylum seekers say 153 asylum seekers being held "behind locked door"', *ABC News*, 17 July 2014 <<http://www.abc.net.au/news/2014-07-16/lawyers-for-asylum-seekers-say-tamils-held-behind-closed-doors/5603140>> (accessed 16 October 2014); Michael Gordon, 'High seas prison for 150 Tamils', *Sydney Morning Herald*, 17 July 2014 <<http://www.smh.com.au/federal-politics/political-news/highseas-prison-for-150-tamils-20140716-3c1o2.html>> (accessed 11 October 2014).

³⁹ The 157 people including 50 children, spent about 22 hours a day in windowless rooms on an Australian customs boat for almost a month. During this time, they were not able to communicate freely with advocates and faced uncertainty surrounding their status and fate which advocates say caused immense anxiety.

⁴⁰ Karen Barlow, 'Greens Senator Sarah Hanson-Young denied access to Curtin Detention Centre to visit asylum seekers', *ABC News*, 30 July 2014 <<http://www.abc.net.au/news/2014-07-30/sarah-hanson-young-denied-access-to-curtin-detention-centre/5635690>> (accessed 16 October 2014).

- Drawing the authorities' attention to the specific needs of those with particular vulnerabilities.⁴¹

Suggested recommendation: That Australia enshrine the right of the NHRI and Parliamentarians to visit places of immigration detention rather than at the discretion of the Minister.

Suggested recommendation: In close cooperation with the governments of Nauru and Papua New Guinea where relevant, Australia establish a system of OPCAT-style detention monitoring, covering all places where asylum seekers are detained – onshore, offshore, and at sea.

5.3. Processing and assessment of asylum claims

5.3.1. Forced deportation

Forced deportation, or the removal of failed asylum seekers to their country of origin or a third country, is a moment where detainees are particularly vulnerable and exposed to the risk of ill-treatment and torture. There is serious ongoing human rights concern worldwide where refoulement, excessive use of force and even loss of life are increasingly common.⁴²

The APT understands that there have been a number of concerning incidents relating to forced deportation flights.⁴³ Of particular concern to the APT is the apparent lack of independent monitoring or oversight of forced deportation. The APT would be interested to hear more from the Australian delegation about this practice and the safeguards, if any, that are in place to reduce the risk of torture or ill-treatment during this inherently difficult process.

Suggested question: To what extent is there any independent human rights based monitoring or oversight of forced deportation flights where asylum seekers are returned to their country of origin or a third country?

⁴¹ See further, APT, OHCHR & IDC (2014) 'Practical Manual on Monitoring Immigration Detention' (available at <http://www.apt.ch/en/resources/monitoring-immigration-detention-practical-manual/?cat=62>), 179.

⁴² See Association for the Prevention of Torture, 'National Preventive Mechanisms: Monitoring the Forced Deportation flights of migrants', OPCAT Briefing, March 2012 <http://www.apt.ch/content/files_res/OPCATBriefing_MonitoringDeportationFlights_en.pdf> (accessed 17 October 2014).

⁴³ See a number of Department of Immigration and Border Protection incident reports obtained under Freedom of Information laws, eg <<https://www.scribd.com/doc/157363311/Incident-Detail-Report-1-5E3CR6>> and <<https://www.scribd.com/doc/157363549/Incident-Detail-Report-1-7AFG2G>>. See generally, Paul Farrell, Lawrence Bull and Luke Bacon, 'Asylum seekers deported with violence' *New Matilda*, 14 August 2013 <<https://www.newmatilda.com/2013/08/14/asylum-seekers-deported-violence>> (accessed 17 October 2014).

5.3.2. Repeal of complimentary protection scheme

Since the last review, Australia took the positive step of enacting a statutory scheme for complimentary protection. Complimentary protection enables those that are fleeing persecution (including the risk of torture and ill-treatment) for a reason not covered by the Refugee Convention, to still benefit from Australia's protection.

Yet there is a real risk that these positive developments will be reversed if a bill⁴⁴ currently before Parliament passes. The bill would remove the statutory basis for complimentary protection and instead rely on the Minister granting his discretion (which can only be reviewed by a court on grounds it was lawfully made (judicial review), not whether it was the correct and preferable decision (merits review). In practice this is likely to mean very few protection visas would be granted on grounds of protection required by the UNCAT (i.e. non Refugee Convention grounds), and the process would be inefficient and arbitrary.

5.3.3. Raising the threshold of harm

The second bill⁴⁵, which will come into effect if the first bill does not pass, would significantly raise the risk threshold for assessing complementary protection claims under section 36 of the *Migration Act 1958* (Cth), from the current standard of 'real chance' to the higher threshold of 'more likely than not'. It is the APT's view that this higher threshold would amount to a violation of Australia's obligations under the UNCAT, as elaborated further in the box below.

Australia would violate the UNCAT if it raised the threshold of risk for non refoulement to 'more likely than not'

The following forms part of a joint submission the APT prepared with the Victoria Center for Victims of Torture to the Australian Senate Legal and Constitutional Affairs Committee review of the *Migration Amendment (Protection and Other Measures) Bill 2014* (Cth).⁴⁶

International Standards

Article 3 of the UNCAT describes the international obligation binding on Australia to determine whether a person must be protected from removal.⁴⁷ The rule is examined in some detail by human rights bodies at international, regional, and national levels, and is aptly summarised by Bethlehem and Lauterpacht:

⁴⁴ *Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2013*

⁴⁵ *Migration Amendment (Protection and Other Measures) Bill 2014* (Cth).

⁴⁶ See <http://www.aph.gov.au/DocumentStore.ashx?id=95ffb182-b01b-44b9-964e-a0f54f149bdf&subId=298694>.

⁴⁷ Article 3 of the UN Convention against Torture provides: No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

"No person shall be rejected, returned, or expelled in any manner whatever where this would compel him or her to remain in or return to a territory *where substantial grounds can be shown for believing that he or she would face a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment* [emphasis added]."⁴⁸

As guardian of the Convention, the UN Committee against Torture consistently reminds States parties that pursuant to their obligations, they must examine whether complainants would face "a foreseeable, real and personal risk" of torture upon return. The risk needs not to be highly probable, but it must be personal and present.

In its authoritative General Comment on article 3, the Committee against Torture offers States parties some further guidance:

"[T]he risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable.

"The author must establish that he/she would be in danger of being tortured and that the grounds for so believing are substantial in the way described, and that such danger is personal and present."⁴⁹

The reference to 'substantial grounds' therefore "does not qualify the ultimate question which is whether a real risk of relevant ill-treatment has been established."⁵⁰ It merely requires there to be a good evidential basis for concluding that a risk exists.

In *E.A. v. Switzerland*,⁵¹ the Committee against Torture examined the threshold for the non-refoulement obligation to be engaged. Switzerland had argued that article 3 implies that the risk of danger "must be concrete, that is directly affecting the applicant, and serious, that is highly likely to occur."⁵² In their examination, the Committee rejected the Swiss interpretation, ruling: "The Committee has noted the State party's argument that the danger to an individual must be serious ("substantial") in the sense of being highly likely to occur. The Committee does not accept this interpretation and is of the view that 'substantial grounds' in article 3 require more than a mere possibility of torture but do not need to be highly likely to occur to satisfy that provision's conditions."⁵³ This formulation is recalled consistently in jurisprudence of the Committee, and stands as the threshold required from States in their implementation of article 3 (non-refoulement) obligations.⁵⁴

⁴⁸ Sir Elihu Lauterpacht & Daniel Bethlehem, "The Scope and Content of the Principle of Non-refoulement: Opinion" in Erika Feller, Volker Türk & Frances Nicholson, eds, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (New York: Cambridge University Press, 2003) ch.2.1 at 252.

⁴⁹ Committee against Torture ("CAT"), General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (refoulement and Communications), UN Doc. A/53/44, annex IX, 21 November 1997, at 6-7. See also CAT, *Mukerrem Guclu v. Sweden*, Communication No. 349/2008, 16 December 2010, at para. 6.4.

⁵⁰ See *Secretary of State for the Home Department v. Kacaj* [2001] UKIAT 00018, Date of Determination 19 July 2001, at 12.

⁵¹ CAT, *E.A. v. Switzerland*, Communication No.28/1995, 10 November 1997.

⁵² *Ibid.* at 7.7.

⁵³ *Ibid.* at 11.3.

⁵⁴ CAT, *Ke Chun Rong v. Australia*, Communication No. 416/2010, 7 February 2013, at 7.3; *Dadar v. Canada*, Communication No.258/2004, 23 November 2005; *T.A. v. Sweden*, Communication No.226/2003, 8 May 1996, at 11.3; *Abdussamatov et al. v. Kazakhstan*, Communication No.444/2010, 7

The UN Human Rights Committee has also elaborated on the standard of risk applicable to the non-refoulement obligation under articles 6 (right to life) and 7 (freedom from torture and ill-treatment) of the ICCPR.⁵⁵ Significantly, in its General Comment No. 31, the Human Rights Committee stated that the Covenant “entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a *real risk* of irreparable harm [emphasis added].”⁵⁶

The standard of risk applied by the European Court of Human Rights is strikingly similar to that adopted by the UN Human Rights Committee.⁵⁷ The Court has required applicants to the Court to demonstrate a ‘real risk’ of torture or other ill-treatment for the obligation of non-refoulement to be engaged.⁵⁸

It is important to recall that European jurisprudence provided some inspiration for UNCAT. Its caselaw may therefore offer States some instruction on how they should understand their international obligations.⁵⁹ This is certainly the approach of the UN Special Rapporteur on torture, who has restated jurisprudence of the European Court in his recommendations to all States on standards applicable to non-refoulement.⁶⁰

In *Saadi v. Italy*,⁶¹ the Grand Chamber of the European Court of Human Rights rejected outright the attempt to alter the ‘real risk’ standard with a more demanding ‘more likely than not’ test. In the case, the UK had argued that, in cases concerning the threat caused by international terrorism, the ‘real risk’ approach of the Court needed to be altered and clarified. The court ruled that such a move would place a higher burden of proof on the applicant than that which is required under the European Convention’s established jurisprudence, which speaks of a real risk of prohibited treatment.

Both the United State and Canada apply a higher threshold of ‘more likely than not’ for non-refoulement assessments, and have consequently created some confusion as to which standard of proof should be applied. However, as described below, such contrary standards should be treated with extreme caution.

The United States entered an ‘understanding’ on ratification of the UNCAT which declared that the article 3 obligation would apply only where torture was found to be

June 2012, at 13.7; *Eveline Njamba v. Sweden*, Communication No.322/2007, 3 June 2010, at 9.3; *S.T. and K.M. v. Sweden*, Communication No. 279/2005, 17 November 2006, at 7.3; *Balabou Mutombo v. Switzerland*, Communication No. 13/1993, 27 April 1994, at 9.3.

⁵⁵ Human Rights Committee, General Comment No 7, para. 9 (30 May 1982) UN Doc HRI/GEN/1/Rev.6. See also Human Rights Committee, *Kindler v. Canada*, Communication No. 470/1991, 30 July 1993, at 13.2.

⁵⁶ Human Rights Committee, General Comment No 31, adopted 29 March 2004, U.N. Doc. CCPR/C/21/Rev.1/Add.13, at para.12; See also General Comment No 20, adopted 10 March 1992, UN Doc. HRI/Gen/Rev.1, at para.9.

⁵⁷ European Court of Human Rights, *Soering v. UK* (Judgment) paras. 87-88 (7 July 1989) Appl. No. 10126/82; *Chahal v. UK* (Judgment) paras. 73-74 (15 November 1996) Appl. No. 22414/93.

⁵⁸ See ECtHR, *Soering v. UK*, 7 July 1989, at 90-91; and *Saadi v. Italy, sub.*, at 125.

⁵⁹ See ECtHR, *Saadi v. Italy*, Application No. 37201/06, judgment of the Grand Chamber, 28 February 2008, at 122.

⁶⁰ See Report of Special Rapporteur on Torture to the GA (2004), A/60/316, 30 August 2005. See also A/57/173 and A/59/324.

⁶¹ ECtHR, *Saadi v. Italy*, Application No. 37201/06, judgment of the Grand Chamber, 28 February 2008.

'more likely than not'.⁶² The significance of the understanding attached to the instrument of ratification is that, as a matter of public international law, it modifies the effect of the obligation between it and all States that did not object.

Significantly, in its subsequent examination of the US, the Committee against Torture noted that the US test requires a threshold which is higher than that reflected in the consistent jurisprudence of the Committee.⁶³

Australia did not enter any reservations on ratification of the Convention, and therefore may not take advantage of the US interpretation that is not consistent with the obligation provided in the Convention.

Canada also applies a 'more likely than not' standard of proof,⁶⁴ as interpreted from the neutral wording of the Canadian Immigration and Refugee Protection Act 2001.⁶⁵ However, the Human Rights Committee have again expressed their concern at the inconsistent standard. In *Pillai v. Canada*, the Committee ruled that "Article 7 [prohibition against torture] requires attention to the real risk that the situation presents, and not only to what is certain to happen or what will most probably happen. General Comment No. 31, [...] demonstrates this focus. So do the Committee's Views and Decisions of the past decade."⁶⁶

Two further national examples further demonstrate the incompatibility of a 'more likely than not' risk threshold with international standards. In the United Kingdom, the Asylum and Immigration Tribunal has interpreted the test for the non-refoulement obligation to be engaged under both the Refugee Convention and the UNCAT as a 'real risk' standard:

"The use of the words 'real risk' [...] has the advantage of making clear that there must be more than a mere possibility. The adjective 'real' must be given its proper weight. Anxious though the scrutiny must be and serious though the effect of a wrongful return may be, the applicant must establish that the risk of persecution or other violation of his human rights is real. The standard may be a relatively low one, but it is for the applicant to establish his claim to that standard."⁶⁷

⁶² The US understanding states: "The United States understands the phrase, 'where there are substantial grounds for believing that he would be in danger of being subjected to torture,' as used in article 3 of the Convention, to mean 'if it is more likely than not that he would be tortured'." See status of reservations at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en#EndDec

⁶³ CAT, Summary record of the first part (public) of the 424th Meeting, 10 May 2000, 24th Session, UN Doc.CAT/C/SR.424, 9 February 2001, at 17. Available at http://www.un.org/en/ga/search/view_doc.asp?symbol=CAT/C/SR.424 [last accessed 24 July 2014].

⁶⁴ Canada Federal Court of Appeal, *Li v. Canada (Minister of Citizenship and Immigration)* [2005] FCJ No.1, 2005 FCA 1, at 18-28.

⁶⁵ Immigration and Refugee Protection Act 2001, s97(1): "A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally (a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture;"

⁶⁶ Human Rights Committee, *Pillai v. Canada*, Communication No.1763/2008, 9 May 2011.

⁶⁷ *Secretary of State for the Home Department v. Kacaj* [2001] UKIAT 00018, Date of Determination 19 July 2001. See also England and Wales Court of Appeal, *AS & DD (Libya) v. Secretary of State for the Home Department* [2008] EWCA Civ 289, para. 60.

Finally, in 2004, Switzerland submitted a report to the Committee against Torture noting that a high degree of proof must be shown to engage the obligation not to remove a person. It stated: "the mere possibility of being subjected to ill-treatment is not sufficient. On the contrary, anyone invoking this provision [UNCAT article 3] must satisfactorily demonstrate that there is, beyond all reasonable doubt, a genuine, specific, and serious risk that they would be subjected to torture or inhuman or degrading treatment if returned to their country."⁶⁸ In response, the Committee noted that "the standards of proof required by the State party exceed the standards required by the Convention. The Committee wishes to draw the attention of the State party to its General Comment No.1 (1996) stating that the risk of torture 'must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable'. "⁶⁹

Following the established approach of the Committee against Torture, the level of risk required to engage the non-refoulement obligation is that the risk must 'go beyond mere theory or suspicion', i.e. the risk must be real. The 'real risk' standard of proof is applied consistently at the international level, by both the Committee against Torture and the Human Rights Committee. The 'more likely than not' standard proposed in the draft law finds no support in the wording of any of the treaties to which Australia is bound, and it is striking that whenever a State has applied any standard higher than that required by either human rights treaty, the respective Committee has been very clear to reject it outright.

Conclusion

The government claims it 'remains committed to ensuring it abides by the non-refoulement obligations under the UNCAT and ICCPR'⁷⁰. Further, it argues that the proposed changes that raise the risk threshold from applicants having to show a 'real risk' of harm to having to show that harm is 'more likely than not' to occur are 'an acceptable position which is open to Australia under international law'⁷¹.

The APT strongly disagrees with this assessment. The proposed changes would put Australia in contradiction with international law on this issue.

Suggested recommendation: Australia retain its current complimentary protection framework.

Suggested recommendation: Australia should withdraw the *Migration Amendment (Protection and Other Measures) Bill 2014* that seeks to raise the risk threshold for non-refoulement from 'reach chance' to 'more likely than not', as it is inconsistent with Australia's obligations under article 3 of the UNCAT.

⁶⁸ CAT, Addendum to Fourth Periodic Report of Switzerland, CAT/C/55/Add.9, 2 July 2004, at 38.

⁶⁹ CAT, Concluding Observations on Switzerland, CAT/C/CR/34/CHE, 21 June 2005, at 4(d).

⁷⁰ Op Cit, n 6.

⁷¹ Ibid.

5.4. Regional aspects

5.4.1. Provision of support / equipment to Sri Lanka

Since the election of the Tony Abbott Liberal National government in 2013, Australia has significantly enhanced its support for and cooperation with the Sri Lankan government in an effort to stop asylum boats from making the journey to Australia. This support extends to provision of financial, technical and materiel assistance including the gift of two Navy patrol boats. These boats were given to enable the Sri Lankan Navy to more effectively detect, intercept and turn back boats of Sri Lankan asylum seekers attempting to flee Sri Lanka.

In the APT's view, this support may amount to a violation of Australia's obligations under the Convention, and incur State responsibility.⁷² For example, provision of a naval boat to a refugee source country for the purpose of that government using the boat to intercept and return asylum seekers attempting to flee may amount to the Australian government consenting, encouraging and/or directly supporting practices which clearly violate the Convention. Further, it may amount to a violation of the positive obligation on Australia to prevent torture, given that the Australian government knows or should know that cases of torture and CIDT continue to take place perpetrated by the Sri Lankan government. The CAT considers the prohibition to encompass 'directly committing, instigating, inciting, encouraging, acquiescing in or otherwise participating or being complicit in acts of torture.'⁷³

5.4.2. Regional resettlement arrangements

The Australian government has made resettlement arrangements with Cambodia, Nauru and Papua New Guinea whereby these countries agree to accept refugees in return for development assistance from the Australian Government. The governments of Australia and Cambodia recently announced the signing of a memorandum of understanding whereby Cambodia agreed to accept refugees from Nauru in return for A\$40 million in development assistance from Australia.⁷⁴ Cambodia is one of the poorest nations in South East Asia, and is struggle to meet the basic needs of its own citizens. Refugee will not be able to speak Khmer, and the situation is particularly concerning for any children resettled under this deal given they are in a situation of

⁷² The International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts provide that '[a] State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.' International Law Commission (ILC), Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 16, U.N. Doc. A/RES/56/83 (Aug. 9, 2001).

⁷³ U.N. Committee against Torture, General Comment No. 2: Implementation of article 2 by States parties, para. 17, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008).

⁷⁴ 'Scott Morrison to sign MOU on refugee resettlement deal with Cambodia on Friday', Sydney Morning Herald, September 24 2014. Available online at : <http://www.abc.net.au/news/2014-09-24/scott-morrison-to-head-to-cambodia-to-sign-refugee-resettlement/5766282> (accessed 9 October 2014).

heightened vulnerability. Children should not be transferred to countries that are not able to adequately ensure their protection and care.