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Working Group on Arbitrary Detention

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No. 52/2014 (Australia and Papua New Guinea)

Communication addressed to the Government on 26 June 2014

concerning Reza Raeesi

The Government of Australia replied to the communication on 21 November 2014. The Government of Papua New Guinea has not replied to the communication.

The States are parties to the International Covenant on Civil and Political Rights.*

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed the mandate in its decision 2006/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. The mandate was extended for a further three years in resolution 24/7 of 26 September 2013. In accordance with its methods of work (A/HRC/16/47 and Corr.1, annex), the Working Group transmitted the above-mentioned communication to the Government.

2. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to the detainee) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of

* Australia ratified the International Covenant on Civil and Political Rights on 25 September 1991; Papua New Guinea ratified the Covenant on 21 July 2008.

Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights (category V).

Submissions

Communication from the source

3. The case summarized below was reported to the Working Group on Arbitrary Detention.

4. R., born in 1983, is an Iranian national with an Australian Immigration Detention Identification Number. He is currently detained at the Manus Island Regional Processing Centre (RPC) in Papua New Guinea. The RPC was established by the Government of Australia for the purpose of processing protection claims by asylum seekers arriving in Australia by boat. While the RPC is managed on a day-to-day basis by the Papua New Guinea Immigration Department, the Australian Government bears the full cost incurred by the operation of the RPC and manages the contractors who provide services to the RPC. The Australian Government is also responsible for coordinating the transfer of detainees to and from the RPC and for monitoring the welfare, conduct and security of the detainees.

5. On 13 July 2013, R. left the Islamic Republic of Iran on a boat bound for Australia for the purpose of seeking asylum. R. is at risk of persecution in Iran due to his sexual orientation.

6. On or about 23 July 2013, the boat on which R. was travelling was intercepted by the Australian authorities and the passengers were taken to Christmas Island. R. was detained at the Christmas Island Immigration Detention Centre upon arrival. During the interview by an officer of the Australian Department of Immigration and Citizenship (DIAC), he informed the officer that he wished to apply for asylum in Australia. The officer told him that he would be sent to Manus Island in Papua New Guinea where his refugee claim would be processed and that he would be permanently resettled in Papua New Guinea if he was found to be a refugee. The officer also told him that he would never be resettled in Australia. Although R. asked to see a lawyer or a judge, the officer told him that he could not and that he was not entitled to see a lawyer or a judge.

7. On 2 August 2013, the DIAC transferred R. to Manus Island. While R. expressed his wish not to go to Papua New Guinea, two security guards grabbed his arms on each side and dragged him onto the plane. Since his arrival on Manus Island, R. has been detained at the RPC.

8. In August 2013, R. had two interviews concerning his refugee claim, although he wished not to participate because he feared that he would be permanently resettled in Papua New Guinea and he had no access to legal advice or representation. The immigration

agents, who are contracted by the DIAC and who conducted the interviews for the Papua New Guinean Immigration Department, told him that they did not know when his claim would be processed and that it would take a long time. When he told the officers that he was a homosexual, they informed him that homosexuality was a punishable crime in Papua New Guinea, and he could face 12 years' imprisonment if resettled in Papua New Guinea.

9. R. requested to speak to a lawyer in Australia or a lawyer in Papua New Guinea on many occasions. However, the officers always refused his request. The first and only time that he was able to see an Australian lawyer was on 21 March 2014. Since then he has had very limited contact with his lawyer.

10. The source informs the Working Group that the conditions of detention at the RPC are extremely harsh. The detainees, including R., are kept in overcrowded containers and tents, and forced to sleep on stretchers. The weather is extremely hot and humid, and the detainees are bitten by mosquitos and other insects every night. The standard of hygiene at the RPC is very poor and there are not enough toilets and showers for the detainees. The food provided at the RPC is not suitable for consumption, often containing a lot of insects and bugs. R. often suffers from severe diarrhoea, vomiting and gastroenteritis, due to the poor hygiene at the RPC. Furthermore, the detainees do not have access to adequate medical care, as there are only two doctors and three nurses in the general health clinic, and two psychologists and four nurses for mental health, for over 1,300 detainees. Although R. requested to see a doctor on several occasions, he was simply given Paracetamol. R. suffers from depression, anxiety and stress.

11. The RPC is a closed detention facility and the detainees are not permitted to leave the premises. The RPC is bounded by fences, checkpoints, gatekeepers and boom gates, and guarded by security personnel all the time. The detainees have no freedom of movement within the RPC; they are watched all the time and escorted everywhere by security guards. In addition, the security guards allegedly humiliate the detainees and use excessive force against them. The security guards pushed R. several times and on one occasion, punched R.'s friend, rendering him unconscious.

12. The source submits that the detention of R. is arbitrary, as it is not based on an individual assessment establishing that his detention is necessary, reasonable and proportionate. The source argues that his detention at the RPC goes beyond a reasonable amount of time necessary to conduct identity and security checks as well as refugee status interviews. The Australian Government has reportedly stated that it would take five or more years to process refugee claims through the RPC, in accordance with the "No Advantage Principle" to ensure that no benefit is gained through circumventing regular migration arrangements. In that regard, the source points out that there is no time limit on the length of detention and the detention could be potentially indefinite, in the light of the significant delays in processing refugee claims at the RPC. So far, R. has been detained for 11 months without any information as to whether his refugee claim is being processed or any indication as to how long his detention would last. Furthermore, the asylum seekers at the RPC do not have access to judicial review to challenge the lawfulness of their detention, contrary to article 9 of the International Covenant on Civil and Political Rights.

Responses from the Governments

13. The Working Group addressed communications to both the Government of Australia and the Government of Papua New Guinea, on 26 June 2014, requesting detailed information about the current situation of R., and the legal provisions justifying his continued detention and its compliance with international law. On 26 August 2014, the Government of Australia applied for an extension of one month, which was granted. The Working Group regrets that the Government of Papua New Guinea has not responded to the allegations transmitted to it.

14. The Australian Government responded on 21 November 2014. The Australian Government advises that certain matters raised in the communication are factually in dispute and subject to domestic legal proceedings currently before the High Court of Australia. It adds that it is unable to respond to the Working Group while that litigation remains ongoing. It also notes that the Manus Island Regional Processing Centre is administered by Papua New Guinea under Papua New Guinea Law. Insofar as the Working Group's request for information relates to arrangements administered under Papua New Guinea law, it would be more appropriate to direct such request to the Government of Papua New Guinea. The Australian Government will consider any further request from the Working Group for information on this matter after the resolution of the litigation currently under way.

15. Despite the absence of any further information from the two Governments, the Working Group considers that it is in a position to render its opinion on the detention of R., in conformity with paragraph 16 of its methods of work.

Discussion

16. Neither the Government of Australia nor the Government of Papua New Guinea has rebutted the prima facie reliable allegations submitted by the source.[1]

17. The Working Group will consider R.'s case under category IV of the arbitrary detention categories that it refers to when considering cases submitted to it.

18. Category IV applies to asylum seekers, immigrants or refugees subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy. The Governments of Australia and of Papua New Guinea are bound by international human rights law with regard to the detention of R. In the *Case concerning Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo),* the International Court of Justice in its judgment of 30 November 2010 stated that article 9, paragraphs 1 and 2, of the Covenant applied in principle to any form of detention carried out by a public authority, whatever its legal basis and the objective being pursued.[2]

Reference documents

19. The Working Group dedicated a section of its 2010 annual report (A/HRC/13/30) to the detention of asylum seekers and migrants (paras. 54–65).

[1] See the Working Group constant jurisprudence, for example, in its opinion No. 41/2013 (Libya), adopted on 14 November 2013, in which it recalls that where it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he was entitled, the burden to prove the negative fact asserted by the applicant is on the public authority, because the latter is generally able to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law ... by producing documentary evidence of the actions that were carried out (para. 27); as well as International Court of Justice, *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)*, judgment of 30 November 2010, para. 55. A similar approach has been adopted by Human Rights Committee, according to which the burden of proof cannot rest on the author of the communication alone, especially considering that the author and the State party do not always have equal access to the evidence and frequently the State party alone has the relevant information. See, for instance, Human Rights Committee, communications No. 1412/2005, *Butovenko* v. *Ukraine*, para. 7.3; No. 1297/2004, *Medjnoune* v. *Algeria,* para. 8.3; No. 139/1983, *Conteris* v. *Uruguay*, para. 7.2 and No. 30/1978, *Bleier* v. *Uruguay*, para. 13.3.

[2] See International Court of Justice, case concerning *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo),* judgment of 30 November 2010, Merits, Judgment, I.C.J. Reports 2010, para. 77.

20. Indeed, since 1997, the Working Group has devoted particular attention to the situation of detained migrants, identified challenges and best practices, explored ways to promote and protect their right not to be deprived arbitrarily of their liberty, and tried to advocate for remedies to redress their plight.

21. The Working Group's experience during its missions and the information received in communications from various stakeholders throughout the years prompted the Working Group to include a more in-depth analysis of the issue of immigration detention in its annual reports for 1998, 2003, 2005 and 2008. In 1999, the Working Group adopted Deliberation No. 5 on the human rights guarantees that asylum seekers and immigrants in detention should enjoy, noting with concern the tightened restrictions, including deprivation of liberty, applied to asylum seekers, refugees and immigrants in an irregular situation, even to the extent of making the irregular entry into a State a criminal offence or qualifying the irregular stay in the country as an aggravating circumstance for any criminal offence.

22. The Working Group has also publicly expressed its concern regarding a law-making initiative by a regional organization, mainly comprising receiving countries, which would allow concerned States to detain immigrants in an irregular situation for a period of up to 18 months pending removal. While it considers that administrative detention as such of migrants in an irregular situation is not in contravention of international human rights instruments and that it is the sovereign right of States to regulate migration, the Working Group considers that the principle of proportionality requires such detention to be the last resort. The Working Group further considers that immigration detention should be gradually abolished. Migrants in an irregular situation have not committed any crime. The criminalization of irregular migration exceeds the legitimate interests of States in protecting its territories and regulating irregular migration flows.

23. Further guarantees include a maximum period of detention established by law and, upon expiry of that period, the detainee must be automatically released; detention must be ordered or approved by a judge and there should be automatic, regular and judicial, not only administrative, review of detention in each individual case; review should extend to the lawfulness of the detention, in accordance with article 9, paragraph 4, of the International Covenant on Civil and Political Rights and not merely to its reasonableness or other lower standards of review; detainees must be informed of the reasons for their detention and of their rights, including the right to challenge its legality, in a language they understand and they must have access to lawyers.

24. During country missions, the Working Group has sometimes witnessed unacceptable substandard conditions of detention in overcrowded facilities that affect the health, including the mental health, of irregular migrants, asylum-seekers and refugees. The Working Group advocates alternatives to detention, which can take various forms: reporting at regular intervals to the authorities; release on bail; or stay in open centres or at a designated place. Such measures are already successfully applied in a number of countries. They must, however, not become alternatives to release.

25. In 2002, the Working Group visited Australia at the invitation of the Government and as a part of the international system of human rights supervision. In its mission report (E/CN.4/2003/8/Add.2), the Working Group raised several concerns about the detention of unauthorized arrivals in Australia, in particular, its mandatory, automatic and indiscriminate character; its potentially indefinite duration and the absence of juridical control of the legality of detention; the psychological impact of detention on asylum seekers, who suffer "collective depression syndrome"; the denial of family unity in several cases; children in detention; and the recent amendments to the Migration Act 1958 that restrict judicial review. The Working Group was particularly concerned about the detention of vulnerable persons, particularly children; the whole legal process governing the detention of asylum seekers; and the fact that detainees were not provided with adequate information. Other

matters of concern were the lack of a proper complaint mechanism and the fact that detention centres were managed by a private company.

26. The Working Group considered such deprivation of liberty, effected in order to bring about the goals of Australia's immigration policies, as a form of administrative detention.[3]

27. Another matter of concern to the Working Group was the lack of sufficient judicial review of the detention. It was told that the Immigration Advice and Assistance Scheme did not cover judicial review; asylum seekers, themselves, had to find and pay for advice, assistance or legal representation after a Refugee Review Tribunal decision.[4]

28. A report from the Office of the United Nations High Commissioner for Refugees (UNHCR) Monitoring Visit to Manus Island, Papua New Guinea, in June 2013,[5] expressed deep concern at the ongoing deprivation of freedom of the asylum seekers in the Centre, especially in harsh and crowded conditions.

29. Overall, UNCHR concluded that the arrangement for the housing of asylum seekers at the Manus Island centre constituted detention under applicable international law. UNHCR Detention Guidelines states that detention "refers to the deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities".

30. UNHCR found that most asylum seekers had been detained for protracted periods, without processing or assessment of their claims to international protection, in difficult conditions. There was no adequate domestic regulatory framework for detention; no adequate process by which the necessity of detention of an individual was made or reviewable; no clearly defined process in place to consider claims for refugee status, although such a process is imminent; and no time limit on the duration of detention.

31. It found that the policy and practice of detaining all asylum seekers at the closed centre on Manus Island, on a mandatory and indefinite basis, without any assessment as to the necessity and proportionality of the purpose of such detention in the individual cases, and without being brought promptly before a judicial or other independent authority, amounted to arbitrary detention that was inconsistent with international law.[6]

32. UNHCR was of the view that the legal framework and detention environment at the Manus Island facility fell short of international standards of protection.[7]

33. In its submission to the Senate Legal and Constitutional Affairs Reference Committee in respect of the *Inquiry into the incident at the Manus Island Detention Centre from 16 February to 18 February 2014,* UNHCR reiterated its finding regarding the policy and practice of detaining asylum seekers at the closed centre, citing its Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012).

34. Although it reported some positive developments, UNHCR found that, cumulatively, the harsh and unsatisfactory conditions of asylum seekers at the Centre, the

[3] E/CN.4/2003/8/Add.2, para. 6.
[4] E/CN.4/2003/8/Add.2, paras. 19 and 22.
[5] See Office of the United Nations High Commissioner for Refugees (UNHCR), *UNHCR Monitoring Visit to Manus Island, Papua New Guinea: 11-13 June 2013* (12 July 2013), available from http://www.refworld.org/docid/51f61ed54.html.
[6] Ibid., paras. 57–60.
[7] Ibid., para. 89.

slowness of the process to determine refugee status (RSD), the lack of clarity regarding RSD processes and approximate time frames for durable solutions for refugees were punitive in nature for those affected, and did not provide safe and humane conditions of treatment for asylum seekers in detention, as required under international law.

35. UNHCR considered that, within the policy settings and physical environment at the Centre, the situation of vulnerable people, particularly survivors of torture and trauma, was likely to be an issue of growing concern and that those concerns were heightened due to the uncertainty and delays of RSD processing and the arbitrary and mandatory detention framework. It expressed particular concern about refugees who may be lesbian, gay, bisexual, transgender or intersex individuals, which is relevant in the present case, in particular given that the Papua New Guinea *Criminal Code Act 1974* criminalizes homosexuality, with penalties of up to 14 years' imprisonment. For such refugees, integration in a society which criminalizes homosexuality may give rise to serious protection issues.[8]

36. In its general comment No. 35 (2014) on article 9 (Liberty and security of person), the Human Rights Committee states that detention in the course of proceedings for the control of immigration is not in itself always arbitrary, but the detention must be justified as reasonable, necessary and proportionate in light of the circumstances, and reassessed as it extends in time.[9] It further states that asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims, and determine their identity if it is in doubt.[10] Continued detention while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as the likelihood of his or her absconding, danger of committing crimes against others, or risk of acts against national security.[11] The decision must consider factors relevant to the specific case, and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties, or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.[12] Decisions regarding the detention of migrants must also take into account the effect of the detention on their physical or mental health.[13] Any necessary detention should take place in appropriate, sanitary, non-punitive facilities, and should not take place in prisons. The inability of a State party to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite

[8] Submission available at: http://unhcr.org.au/unhcr/images/2014-05-07%20UNHCR%20submission%20-%20Inquiry%20into%20the%20incident%20at%20.pdf , (paras. 14, 15 and 37).

[9] See Human Rights Committee, communications No. 560/1993, *A* v. *Australia*, Views adopted on 3 April 1997, paras. 9.3 and 9.4; No. 794/1998, *Jalloh* v. *Netherlands*, Views adopted on 26 March 2002, para. 8.2; and No. 1557/2007, *Nystrom* v. *Australia*, paras. 7.2 and 7.3

[10] See communication No. 1069/2002, *Bakhtiyari* v. *Australia*, Views adopted on 25 March 2002, paras. 9.2 and 9.3.

[11] See communications No. 1551/2007, *Tarlue* v. *Canada*, decision adopted on 27 March 2009, paras. 3.3 and 7.6; and No. 1051/2002, *Ahani* v. *Canada*, Views adopted on 29 March 2004, para. 10.2.

[12] See communications No. 1014/2001, *Baban* v. *Australia*, Views adopted on 6 August 2003, para. 7.2; and No. 1069/2002, *Bakhtiyari* v. *Australia*, paras. 9.2 and 9.3; see also UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012), guideline 4.3 and annex A.

[13] See communications No. 1324/2004, *Shafiq* v. *Australia*, Views adopted on 31 October 2006, para. 7.3; and No. 900/1999, *C* v. *Australia*,Views adopted on 28 October 2002, paras. 8.2 and 8.4.

detention.[14] Children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention, and also taking into account the extreme vulnerability and need for care of unaccompanied minors.[15]

37. In its concluding observations on the periodic report of Australia (CAT/C/AUS/CO/4-5), the Committee against Torture addressed the issue of the offshore processing of asylum claims. It was concerned at the State party's policy of transferring asylum seekers to the centres in Papua New Guinea (Manus Island) and Nauru for the processing of their claims, despite reports of the harsh conditions at those centres, such as mandatory detention, including for children; overcrowding; inadequate health care; and even allegations of sexual abuse and ill-treatment. The combination of harsh conditions, protracted periods of closed detention and uncertainty about the future creates serious physical and mental pain and suffering. All persons who are under the effective control of the State party, because, inter alia, they were transferred by the State party to centres run with its financial aid and with the involvement of private contractors of its choice, should enjoy the same protection from torture and ill-treatment under the Convention (arts. 2, 3 and 16).

38. The Committee recommended that the State party adopt the necessary measures to guarantee that all asylum seekers or persons in need of international protection who are under its effective control are afforded the same standards of protection against violations of the Convention regardless of their mode and/or date of arrival. The transfer of asylum seekers to the centres in Papua New Guinea (Manus Island) and Nauru, which, according to UNHCR, do not provide humane conditions of treatment in detention, does not release the State party from its obligations under the Convention, including prompt, thorough and individual examination of the applicability of article 3 in each case, and redress and rehabilitation when appropriate (para. 17).

39. The Working Group commends the work of the Australian Human Rights Commission and its President. It regards their statements on international law and human rights as highly authoritative and their findings reliable, and urges the national authorities to respect the rule of law and the international system for the protection of human rights by according the Commission and its President the respect that the Commission's role as the national human rights institution and the President's personal authority and high reputation require.

Responsibility of Australia and Papua New Guinea

40. The Working Group will now address the responsibility of Australia and Papua New Guinea in relation to the detention of R. and its compliance with international law.

41. The Working Group agrees with the conclusion in the report on the UNHCR monitoring visit to Manus Island, Papua New Guinea, in June 2013, that the transfer of asylum seekers from Australia to the centre in Papua New Guinea, as an arrangement agreed by two Convention States, does not extinguish the legal responsibility of the transferring State for the protection of the asylum seekers affected by the arrangements.[16] The Working Group also refers to statements made by the Committee against Torture to the

[14] See communication No. 2094/2011, *F.K.A.G.et al.* v. *Australia*, Views adopted on 26 July 2013, para. 9.3.

[15] See communications No. 1050/2002, *D and E* v. *Australia*, Views adopted on 11 July 2006, para. 7.2; and No. 794/1998, *Jalloh* v. *Netherlands*, paras. 8.2 and 8.3; see also the Convention on the Rights of the Child, arts. 3, para. 1, and 37 (b).

[16] See report at http://www.refworld.org/docid/51f61ed54.html, para. 10.

effect that the transfer of asylum seekers to a processing centre in another country does not release the State party from its obligations under the Convention.[17]

42. The Working Group maintains that Australia is alone responsible for the first period of detention of R., from the interception on or about 23 July 2013 of the boat in which he was travelling and transfer to the Australian territory of Christmas Island, and his transfer on 2 August 2013 to the RPC on Manus Island, Papua New Guinea.

43. The Working Group considers that Australia and Papua New Guinea are jointly responsible for the second period of detention of R., as of his transfer to the centre on Manus Island, Papua New Guinea, on 2 August 2013 to the present.

44. The Regional Processing Centre on Manus Island was established by the Government of Australia for the detention of asylum seekers arriving in Australia by boat and the processing of their claims for protection. It is managed on a day-to-day basis by the Papua New Guinea Immigration Department, although the Australian Government bears the costs of the operation of the Centre and manages the contractors providing services to the RPC. The Australian Government coordinates transfers of asylum seekers to and from the RPC and monitors the welfare, conduct and security of the detainees. The Working Group concludes that Australia retains effective control over the Regional Processing Centre on Manus Island and that it shares full responsibility with Papua New Guinea for all detention at the Centre.

45. With regard to the compliance of the detention of R. with international law, the Working Group notes that he has no access to judicial review to challenge the lawfulness of his detention. The source informed the Working Group that when R. requested to speak to a lawyer in Australia or a lawyer in Papua New Guinea, the officers refused his requests. The first and only time that R. was able to meet with an Australian lawyer was on 21 March 2014 and he has very limited contact with his lawyer.

46. The Working Group notes that the Human Rights Committee has, in several cases concerning Australia, emphasized that in addition to the requirements for lawful detention under article 9, paragraph 1, of the International Covenant on Civil and Political Rights, article 9, paragraph 4, further requires the State to guarantee judicial review of detention, and held that the judicial review generally available to immigration detainees in Australia does not meet that requirement.

47. In the case of *A v. Australia*, the Committee held that judicial review of administrative detention must be "real" and not limited to a "merely formal" assessment of whether a person falls into a specific factual category under domestic law. Article 9, paragraph 4, of the Covenant requires that the court be empowered to order the release of a person.[18] In that case, the Committee observed that the control and power of the Australian courts was limited to a formal assessment of the self-evident fact of whether the individual was a "designated person" under the domestic legislation; the courts had no power to review the detention or to order the individual's release. In other cases, the Committee found similarly in respect of Australia's amended laws concerning whether a person is an "unlawful non-citizen". The Working Group upholds the views of the Human Rights Committee.

48. The Working Group concludes that under article 9, paragraph 4, of the International Covenant on Civil and Political Rights and the peremptory norms of customary international law (*jus cogens*), Australia has a duty to guarantee judicial review of

[17] CAT/C/AUS/CO/4–5, para. 17.

[18] See Human Rights Committee, communication No. 560/1993, *A* v. *Australia,* Views adopted on 3 April 1997, para. 9.5.

detention, and that the judicial review generally available to immigration detainees in Australia does not meet that requirement. The Working Group also concludes that the offshore detention of migrants by Australia is arbitrary and constitutes widespread and systematic violation of international law, and that it is the duty of the State to provide a remedy.

49. The case of R. falls under category IV of the Working Group's arbitrary detention categories.

50. Notwithstanding the discussion of the present opinion having been directed to the circumstances of the unlawful detention of R., the Working Group addressed the issues of principle raised in the course of the present discussion from the viewpoint of the general application of the law on arbitrary detention. The Working Group has clarified many issues of international law in the jurisprudence on this form of detention, to which the current opinion is the most recent addition. In order to avoid any ambiguity, the Working Group wishes to make it clear that, while, in this opinion, it has specifically discussed the case of R., no *a contrario* argument can be made in respect of any of the findings in the present opinion. The conclusions reached by the Working Group in the present opinion, including those on the remedies (see below), apply to other persons finding themselves in similar situations in centres on Manus Island and other places of detention outside Australian territory.[19]

Remedies

51. Under international law, Australia and Papua New Guinea have a duty to release R. and accord him an enforceable right to compensation, for which they are jointly and severally liable. The duty to comply with international law rests on everyone, including domestic authorities and private individuals, and international and domestic law must provide remedies to make international law effective. States are under a positive obligation to provide an effective remedy for violations of international human rights law. Domestic courts have a particular role to play in granting tort remedies (responsabilité administrative et constitutionnelle). Domestic law cannot erect barriers such as immunities, jurisdictional limitations, procedural hurdles or defences based on an "act of State doctrine" in any form that would limit the effectiveness of international law. One basis for jurisdiction is the exercise of control over individuals; under international law, such control exists whenever an act attributable in the widest sense to a State has an adverse effect on anyone anywhere in the world.

52. With regard to compensation, article 8 of the Universal Declaration of Human Rights states that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law", while article 9, paragraph 5, of the International Covenant on Civil and Political Rights states that "anyone who has been a victim of unlawful arrest or detention shall have an enforceable to compensation". Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires "each State Party [to] ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full

[19] See International Court of Justice, *Case concerning Avena and other Mexican nationals (Mexico v. United States of America),* judgment of 31 March 2004, para. 151; and the Declaration of Gilbert Guillaume, President of the Court, appended to the *LaGrand Case (Germany v. United States of America),* judgment of 27 June 2001.

rehabilitation as possible".[20] The duty to provide such redress is confirmed as customary international law in the jurisprudence of the Working Group. The Working Group points out that the arguments raised and the doctrines proposed in defence against remedies have so far been only too effective. In terms of actual outcomes, international courts and tribunals and domestic courts have not provided effective remedies. It is contrary to the rule of law and the requirements of an effective international legal order to accept new restrictions effectively barring remedies in domestic courts as, under the international law principles of subsidiarity and complementarity, domestic legal orders have the primary responsibility to provide remedies.

Disposition

53. In the light of the foregoing, the Working Group on Arbitrary Detention renders the following opinion:

> The deprivation of liberty of R. is arbitrary, being in contravention of articles 9 and 10 of the Universal Declaration of Human Rights, and articles 9 and 14 of the International Covenant on Civil and Political Rights. It falls within category IV of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

54. Consequent upon the opinion rendered, the Working Group requests the Governments of Australia and Papua New Guinea to take the necessary steps to remedy the situation of R. and to bring it into conformity with the standards and principles set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

55. The Working Group believes that, taking into account all the circumstances of the case, the adequate remedy would be to immediately release R. and to accord him an enforceable right to compensation, in accordance with article 9, paragraph 5, of the International Covenant on Civil and Political Rights. The Working Group underlines that the international law obligations rest on both countries.

[Adopted on 21 November 2014]

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[20] See the opinion of the Court that the prohibition of torture is a peremptory norm of international law (*jus cogens*) in International Court of Justice, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, judgment of 20 July 2012, para. 99. Arbitrary detention is confirmed as a peremptory norm (*jus cogens*) in the constant jurisprudence of the Working Group.