

AN ATTEMPT TO EVADE LIABILITY: AUSTRALIA’S ROLE IN
DETENTION CENTER ABUSE AND THE REFOULEMENT OF SRI
LANKAN ASYLUM SEEKERS IN THE CONTEXT OF THE
CONVENTION AGAINST TORTURE

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I. INTRODUCTION

On February 17, 2014, several riots in the Manus Islands detention center left a twenty-three year old Iranian refugee, Reza Barati, dead.¹ Eyewitness reports suggest that Barati had been beaten, he had been hit with a nail embedded stick. A rock was also lifted and thrown down on his head,² and he eventually succumbed to these injuries. This horrific incident is not the only tragedy to emerge from Australia's policy of mandatory offshore detention in a camp on a small Pacific settlement miles from the mainland. On this day, not only Barati suffered; witnesses to his murder have since been forced into solitary confinement, threatened, and tortured.³ Additionally, thousands of refugees and asylum seekers have been returned to countries from which they initially fled. Members of the Tamil minority of Sri Lanka, specifically, have been returned to their island state to face ongoing persecution and human rights abuses.⁴

This Note analyzes whether Australia's asylum procedures concerning non-refoulement⁵ and the offshore detention facilities located on Nauru and the Manus Islands in Papua New Guinea violate the 1987 U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention or CAT). Part II of this Note will lay the foundation and background information concerning the specific incidents to be analyzed. Part III of this Note will focus on the relevant jurisprudence regarding the various interpretations of the CAT. This Part will specifically analyze two issues; first, what exactly constitutes "cruel, inhuman or degrading treatment or punishment"⁶ which is barred by the Convention, and second what is the role

¹ Oliver Laughland, *Manus Violence: Dead Asylum Seeker Named as Iranian Reza Barati*, 23, THE GUARDIAN (Feb. 21, 2014), <http://www.theguardian.com/world/2014/feb/21/manus-dead-asylum-seeker-iranian-reza-berati>.

² Kerry Brewster & Deb Richards, *Manus Island Riot: Asylum Seeker Speaks of Witnessing Reza Barati's Death*, AUSTRALIAN BROADCASTING CORP (Apr. 5, 2014), <http://www.abc.net.au/news/2014-04-04/manus-island-asylum-seekers-witness-statements-reza-berati-death/5367118>.

³ Juan E. Méndez (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, ¶¶ 23–26, U.N. Doc. A/HRC/28/Add. 1 (Mar. 5, 2015) [hereinafter *Report of the Special Rapporteur*].

⁴ *Id.* ¶¶ 20–22.

⁵ According to *non-refoulement*, a state may not return or extradite an individual to another state when there is a substantial risk that the individual may face persecution or the violation of human rights. Am. Soc'y Int'l L., *Human Rights*, BENCHMARK ON INTERNATIONAL LAW 50, at III.E-50 (Diane Marie Amann ed., 2014), <http://www.asil.org/benchmark/humanrights.pdf>.

⁶ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, arts. 1, 16 [hereinafter *Convention Against Torture*].

of the Convention in preventing non-refoulement.⁷ Part IV of this Note will apply the relevant jurisprudence in an effort to determine whether Australia violates the Convention either through the conditions of its offshore detention facilities or through the practice of returning Sri Lankan asylum seekers. As an aside, this Note acknowledges that several other treaties, mainly the United Nations Charter,⁸ the Universal Declaration of Human Rights,⁹ the 1951 Refugee Convention¹⁰ and the International Covenant on Civil and Political Rights,¹¹ are pertinent to this issue, but will not be analyzed in relation to the incidents discussed in this Note.

II. THE PROBLEMS AND INSTANCES

There are many factors that contribute to the ill treatment and refoulement of refugees. Further, numerous reported instances of human rights abuses exist. The most pertinent problem is Australia's lack of a Bill of Rights in its Constitution. The murder of Reza Berati, as well as the return of Sri Lankan asylum seekers to Sri Lanka are two of the most highly publicized depictions of the ill treatment of refugees.

A. *Australia's Lack of a Bill of Rights or a Charter of Rights*

Australia has no Bill of Rights to ensure basic liberties of Australian citizens and individuals within Australian territory.¹² One State in this federally organized country, the State of Victoria, has passed a Charter of Rights; however, only Victoria is bound by its terms.¹³ Australia's rules of construction concerning legislation are statutory in nature; "statutes are to be read consistently with the rules of international law, but not where the clear words of the statute are inconsistent with that implication."¹⁴ Australian legislation and statutes are automatically assumed to be in compliance with international law and Australia's international obligations. Despite this rule

⁷ *Id.* art. 3.

⁸ U.N. Charter.

⁹ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 71 (Dec. 10, 1948).

¹⁰ United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 [hereinafter Convention on Refugees].

¹¹ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

¹² Jim Kennan S.C., *The Role of International Human Rights Law in Australian Law*, 44 VAL. U. L. REV. 895, 895 (2010).

¹³ *Id.*

¹⁴ *Id.*

of construction, Australian courts have not readily adopted the principles of international law in their common law.¹⁵

B. The Road to Offshore Detention Centers

Australia first began the policy of mandatory offshore detention facilities with the Migration Amendment Act of 1992. The Act was implemented by the Keating government¹⁶ and called for the mandatory detention of all immigrants who tried to enter Australia without authorization.¹⁷ In 2001, the Howard government took matters further after the so-called “Tampa Affair”¹⁸ by implementing the “Pacific Solution.”¹⁹ The Pacific Solution encompassed at least seven new bills pertaining to refugees, including the: Border Protections (Validation and Enforcement Powers) Act of 2001; Migration Amendment (Excision from Migration Zone) Act of 2001; Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act of 2001; Migration Legislation Amendment (Judicial Review) Act of 1998, passed in 2001; the Migration Legislation Amendment Act (No. 1) of 2001; Migration Legislation Amendment Act (No. 5) of 2001; and the Migration Legislation Amendment Act (No. 6) of 2001.²⁰ These new

¹⁵ *Id.* See also Mary Crock, *Shadow Plays, Shifting Sands and International Refugee Law Convergences in the Asia-Pacific*, 63 INT'L COMP. L.Q. 247 (2014).

¹⁶ *Migration Amendment Act 1992* (Cth) (Austl.); Kaitlyn Pennington-Hill, *Australia Makes a U-Turn With the Revival of the Pacific Solution: Should Asylum Seekers Find a New Destination?*, 13 WASH. U. GLOBAL STUD. L. REV. 585, 589 (2014).

¹⁷ *Migration Amendment Act 1992* (Cth) (Austl.).

¹⁸ The MV *Tampa* was a Norwegian cargo ship that rescued 443 asylum seekers in distress just 140 kilometers off the coast of Christmas Island at the request of the Rescue Coordination Centre of the Australian Maritime Safety Authority. The Australian government subsequently denied the *Tampa* authority to enter Australian waters. Concerned about the severe overcrowding on the ship, horrible sanitary conditions, and asylum seekers in need of medical care, the Captain of the *Tampa* entered Australian waters regardless. The Australian Special Air Services subsequently boarded the ship and prohibited passengers from disembarking. The incident concluded with 134 refugees being granted asylum by the government of New Zealand and the rest of the refugees being forcibly removed to Nauru while their asylum claims were being processed. See William Kirtley, *The Tampa Incident: The Legality of Ruddock v. Vadarlis Under International Law and the Implications of Australia's New Asylum Policy*, 41 COLUM. J. TRANSNAT'L L. 251, 253–59 (2002) for a more detailed account of the facts pertaining to the Tampa Affair and its repercussions.

¹⁹ Alexander J. Wood, *The “Pacific Solution”: Refugees Unwelcome in Australia*, 9 No. 3 HUM. RTS. BRIEF 22, 22 (2002).

²⁰ *Border Protections (Validation and Enforcement Powers) Act of 2001* (Cth) (Austl.); *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth) (Austl.); *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth) (Austl.); *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth) (Austl.); *Migration Legislation Amendment Act (No. 1) 2001* (Cth) (Austl.); *Migration Legislation Amendment Act (No. 5) 2001* (Cth) (Austl.); *Migration Legislation Amendment Act (No. 6)*

bills were a “calculated attempt to discourage and punish refugees who followed an indirect route from their country of origin to Australia and who had access to protection in their regions of origin prior to embarking for Australia.”²¹

Perhaps the most important of these acts was the Migration Amendment (Excision From Migration Zone) Act, because it essentially established that “Christmas, Ashmore, Cartier, and Cocos (Keeling) Islands were excised from Australia’s migration zone,”²² meaning that migrants who reach these designated areas were deemed outside of Australia’s territory and thus owed no duty of care by Australia. Previously, these islands were deemed to be Australian territory. Therefore, migrants reaching these islands were afforded the same rights they would have received if they had arrived to the Australian mainland.²³ Migrants unlawfully entering these areas were unable to apply for visas to enter Australia except at the discretion of the Minister.²⁴ In 2008, the Pacific Solution formally ended²⁵ but resurfaced in 2012.²⁶

Before reenacting the Pacific Solution, the Australian government unsuccessfully attempted to procure the so-called ‘Malaysian Solution’²⁷ in 2011. This arrangement purported to transfer 800 Australian irregular maritime arrivals (IMA) to Malaysia in exchange for the resettlement of 4,000 refugees from Malaysia.²⁸ This non-binding arrangement was successfully challenged as a violation of the *Migration Act* of 1958 in *Plaintiff M70 v Minister for Immigration and Citizenship*.²⁹ In its 2011 decision, the Australian High Court emphasized the fact that Malaysia was “not a party to the U.N. Convention relating to the Status of Refugees or to any of the core human rights treaties,” as reasoning for striking down the agreement.³⁰ Essentially, the 800 Australian IMAs could have been subject to inhumane treatment and not afforded the rights they would have received

2001 (Cth) (Austl.). See also Catherine Skulan, *Australia’s Mandatory Detention of “Unauthorized” Asylum Seekers: History, Politics, and Analysis Under International Law*, 21 GEO. IMMIGR. L.J. 61, 73–74 (2006).

²¹ Skulan, *supra* note 20, at 73–74.

²² Pennington-Hill, *supra* note 16, at 594.

²³ *Id.*

²⁴ *Id.* Additionally, this legislation was challenged as being unconstitutional in *Plaintiff M61/2010E v Commonwealth* [2010] HCA 41 (Austl.). The High Court of Australia affirmed the constitutionality of the Act.

²⁵ Pennington-Hill, *supra* note 16, at 585.

²⁶ Crock, *supra* note 15, at 256–66.

²⁷ *Id.* at 264–65.

²⁸ *Id.*

²⁹ *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 (Austl.).

³⁰ Crock, *supra* note 15, at 265.

in Australia because Australia is a signatory to several human rights treaties of which Malaysia is not.³¹

After the failure of the Malaysia Solution, the Migration Legislation Amendment (Regional Processing and Other Measures) Act of 2012 established a regional processing scheme once more.³² The purpose of this 2012 Act was to distance the Australian courts from refugee claims made by illegal maritime arrivals.³³ The Department of Immigration and Border Protection of the Australian government defines “illegal maritime arrivals” as any individual who arrived to Australia illegally by boat.³⁴ The Migration Amendment (Unauthorised Maritime Arrivals) Act of 2013 further denied any unauthorized maritime arrivals the “right to seek asylum or to apply for any form of visa in Australia.”³⁵ Yet another statute, the Maritime Powers Act of 2013,³⁶ expanded the power of Australian authorities to intercept boats at sea and board, seize, search, and detain all individuals and vessels. Authorities are also permitted to “board vessels, and require the person in charge to stop, manoeuvre or adopt a specified course.”³⁷

Following the return of the Pacific Solution, the Australian government began the process of entering into several ‘Regional Resettlement Arrangements’ and ‘Memoranda of Understandings’ with various states.³⁸ The regional resettlement agreements imply that irregular maritime arrivals arriving to Australia by boat will essentially never have the opportunity to settle in Australia because they will be immediately transferred to an offshore detention facility and will be unable to apply for a protection visa in Australia.³⁹ Australia’s memoranda of understanding with Nauru, a sovereign state in the South Pacific, states that the government of Nauru will settle individuals who are found to be in need of international protection.⁴⁰

³¹ *Id.*

³² *Id.* at 265–67.

³³ *Id.*

³⁴ *Illegal Maritime Arrivals*, <http://www.ima.border.gov.au/en/illegal-maritime-arrivals>.

³⁵ Crock, *supra* note 15, at 249.

³⁶ *Maritime Powers Act 2013* (Cth) (Austl.).

³⁷ Natalie Klein, *Assessing Australia’s Push Back the Boats Policy under International Law: Legality and Accountability for Maritime Interceptions of Irregular Migrants*, 15 MELB. J. INT’L L. 414, 439–40; *Maritime Powers Act 2013* (Cth) (Austl.).

³⁸ Crock, *supra* note 15.

³⁹ As of August 2015, over 1,000 men are still being detained at the Manus Island facility. Many of these individuals have been detained for over two years and are genuine refugees by United Nations’ standards. *Transfer of Asylum Seekers to Third Countries*, <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/projects/transfer-asylum-seekers-third-countries> [hereinafter *Transfer of Asylum Seekers*]; see also Liam Cochrane, *Goodbye, Manus: A Beautiful Island in the Shadow of a Detention Centre*, <http://www.abc.net.au/am/content/2015/s4302534.htm>.

⁴⁰ *Transfer of Asylum Seekers*, *supra* note 39; see also Crock, *supra* note 15, at 3.

In Nauru, irregular maritime arrivals are given “an Australian Regional Processing Visa valid for an initial period of three months, renewable indefinitely as long as the Australian government continues to pay the \$1000 monthly visa charge.”⁴¹ Likewise, the memoranda of understanding with Papua New Guinea establishes that irregular maritime arrivals who arrive after July 19, 2013, will be transferred and have their asylum claims processed in and under the laws of Papua New Guinea.⁴² However, there is “no visa equivalent to the Australian Regional Processing Visa,”⁴³ in Papua New Guinea. This means that refugees on Papua New Guinea, “remain without status, and are simply tolerated by the government in fulfilment of its diplomatic promises to Australia.”⁴⁴ One problem with these agreements is that they were written in non-binding language and contain little to no human rights provisions.⁴⁵

Additionally in 2013, the Australian government engaged in efforts to essentially push back boats en route to Australia with the initiation of the Operation Sovereign Borders.⁴⁶ As Natalie Klein explains, “[t]his policy involves Australian officials preventing the passage of vessels carrying irregular migrants so they are unable to reach Australian territory.”⁴⁷ Under these various agreements and government acts, any unauthorized refugee or asylum seeker arriving to Australia by boat will be removed to one of these offshore detention facilities and will never be given the chance to resettle in Australia.

As of August 31, 2015, 1,589 individuals were being detained at the Manus Island and the Nauru detention centers.⁴⁸ The average detainment time for these individuals was 412 days.⁴⁹ To date “Australia defends its

⁴¹ Crock, *supra* note 15, at 272.

⁴² *Transfer of Asylum Seekers*, *supra* note 39 (this arrangement has also been referred to as the “PNG Solution”); see also Azadeh Dastyari, *Detention of Australia’s Asylum Seekers in Nauru: Is Deprivation of Liberty by Any Other Name Just as Unlawful?*, 38 U. N.S.W. L.J. 669, 672 (2015) (explaining that individuals who will be transferred to Nauru consist of those “who a) have travelled irregularly by sea to Australia; or b) have been intercepted by Australian authorities in the course of trying to reach Australia by irregular maritime means; and c) are authorised by Australian law to be transferred to Nauru; and d) have undergone short health, security and identity checks in Australia”).

⁴³ Crock, *supra* note 15, at 272.

⁴⁴ *Id.*

⁴⁵ *Id.* at 276.

⁴⁶ Klein, *supra* note 37, at 415.

⁴⁷ *Id.*

⁴⁸ *Detention and Refugee Statistics*, ASYLUM SEEKER RESOURCE CTR., <http://www.asrc.org.au/resources/statistics/detention-and-refugee-statistics/>.

⁴⁹ *Id.*

policy of mandatory detention of unauthorized asylum seekers pursuant to its sovereign power to enact laws to protect its borders.”⁵⁰

C. *The Murder of Reza Barati*

Reza Barati was a twenty-three year-old Iranian immigrant who arrived in Australia on July 24, 2013; only five days shy of obtaining the opportunity to be resettled in Australia.⁵¹ Because Barati arrived after July 19, 2013, he was unable to request asylum in Australia due to Australia’s memorandum of understanding with Papua New Guinea, and was subsequently transferred to the Manus Island detention center in Papua New Guinea.⁵² The two-day riots in February 2014 that plagued the Manus Island detention center can be attributed to several factors: “increasing tension in the centre and the transferees’ frustration and anxiety caused by anger at being [brought] to Papua New Guinea,” delays in processing times of refugee status, and the lack of information concerning the transferees’ length stay at the detention center.⁵³ Additionally, the increasingly militarized conditions in the detention centers did not aid the escalating tensions.⁵⁴

Along with the injuries Barati obtained during the riots, several other detainees were shot or beaten, and one man had his throat cut with a knife.⁵⁵ Joshua Kaluvia and Louie Efi, local workers at the detention center, were the only two people charged in the murder of Reza Barati, though eyewitnesses reported that several Australian expatriates participated in Reza’s beatings as well.⁵⁶

⁵⁰ Pennington-Hill, *supra* note 16, at 596.

⁵¹ Laughland, *supra* note 1.

⁵² *Id.*

⁵³ *Morrison Releases Manus Island Riot Report*, SBS (June 3, 2014), <http://www.sbs.com.au/news/article/2014/05/27/morrison-releases-manus-island-riot-report>.

⁵⁴ The Manus Island detention facility is a former WWII military base surrounded by locked gates and armed guards. Locked fences and armed security guards also surround each living compound inside the facility. Amnesty International, *This is Breaking People: Human Rights Violations At Australia’s Asylum Seeker Processing Centre on Manus Island, Papua New Guinea*, 36–38 (2013), <https://www.amnesty.org/en/documents/ASA12/002/2013/en/>. See also Skulan, *supra* note 20, at 91–92 (restating a description by a Human Rights and Equal Opportunities Commission Report that Australian detention centers impose “unreasonable restrictions on the movement of detainees; limited recreational and educational opportunities; over-crowding and lack of privacy; inadequate . . . lighting and ventilation . . . and a lack of health care services”).

⁵⁵ Brewster & Richards, *supra* note 2.

⁵⁶ Ben Doherty, *Men Accused of Reza Barati’s Death in Manus Detention Centre Stand Trial*, THE GUARDIAN (Sept. 20, 2015), <http://www.theguardian.com/australia-news/2015/sep/21/men-accused-of-reza-baratis-death-in-manus-detention-centre-stand-trial>.

In March 2015, the U.N. Human Rights Council condemned the Australian government, asserting that the government's response to an inquiry by the Special Rapporteur concerning the ill treatment and torture of two detainees who witnessed the violent events that occurred at the Manus Island detention facility on February 16 to 18 in 2014, was insufficient.⁵⁷ In its November 2014 inquiry, the Special Rapporteur addressed pressing concerns about the status of two detainees who had been "tied . . . to chairs and threatened . . . with physical violence, rape and criminal prosecution . . . if they refused to retract the statements that they had made to the Royal Papua New Guinea Constabulary and to G4S regarding the violent attacks," that occurred at the Manus Island detention center in February 2014.⁵⁸ Furthermore, these two unnamed refugees were reported to have repeatedly been forced to sleep on the floor with only bread and water to eat.⁵⁹ These witnesses received multiple death threats and were consistently targeted by guards at the Manus Island detention center for abuse.⁶⁰ One eyewitness, Barait's roommate and a Kurdish refugee by the name of Benham Satah, was forcibly taken to testify against Joshua Kaluvia and Louie Efi, who were charged with the murder of Reza Barati.⁶¹ Satah initially refused, but later agreed, to testify only under the promise by a judge of enhanced protection.⁶² No action was brought against any of the Australian expatriates who were employed at the Manus Island detention center at the time of the attack.⁶³

At the time of the February 2014 riots, both the Manus Island and the Nauru detention centers were operated by a private security firm, G4S.⁶⁴ Previously known as 'GSL,' the firm had a history of detention center abuse

⁵⁷ *Report of the Special Rapporteur, supra* note 3.

⁵⁸ Office of the High Commissioner for Human Rights, *Mandates of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression; the Special Rapporteur on the Situation of Human Rights Defenders; the Chair-Rapporteur of the Working Group on the Use of Mercenaries; the Special Rapporteur on the Human Rights of Migrants; and the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (Nov. 17, 2014), [https://spdb.ohchr.org/hrdb/28th/public_-_ua_australia_17.11.14_\(4.2014\)_pro.pdf](https://spdb.ohchr.org/hrdb/28th/public_-_ua_australia_17.11.14_(4.2014)_pro.pdf).

⁵⁹ *Id.*

⁶⁰ Ben Doherty, *Witness in Reza Barati Murder Trial Says He is Dogged by Death Threats*, THE GUARDIAN (Oct. 22, 2015), <http://www.theguardian.com/australia-news/2015/oct/23/witness-in-reza-barati-trial-says-he-is-dogged-by-death-threats>.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Jamie Smyth & Gill Plimmer, *G4S to Hand Over Australia Asylum Centre Contract to Transfield*, FIN. TIMES (Feb. 24, 2014), <https://www.ft.com/content/ef5bf766-9d24-11e3-a599-001144feab7de>.

at the time it contracted with the Australian government in 2012.⁶⁵ In 2013, G4S declined to comply with a Freedom of Information request put forth by *Guardian Australia*, an online version of the British-print newspaper *The Guardian*.⁶⁶ The reports requested by *Guardian Australia* were mandated by the Australian Department of Immigration to be submitted at the close of every month in order to assess and oversee the operations of the detention center.⁶⁷ *Guardian Australia* reported that the reports in question did not actually exist and that G4S was failing in its obligation to report the conditions of the detention centers.⁶⁸ Following the Manus Island riots, Australia's contract with G4S was terminated, and the Nauru and Manus Island detention centers have since been run by Transfield Services under a contract for \$1.2 billion lasting twenty months.⁶⁹

D. *The Return of the Tamil Population to Sri Lanka*

In July 2014, the Special Rapporteur on the human rights of migrants and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment voiced their concerns about Australia's policy and decisions regarding two sets of Sri Lankan asylum seekers.⁷⁰ The first set of people were members of the Tamil population from Sri Lanka and were

⁶⁵ Jay Fletcher, *Notorious Firm G4S to Run Refugee Prison Camp on Manus Island*, GREEN LEFT WKLY. (Oct. 16, 2012), <https://www.greenleft.org.au/content/notorious-firm-g4s-run-refugee-prison-camp-manus-island>. A 2005 inquiry into the firm uncovered that GSL did not provide psychiatric care to mentally ill detainees and detained a three-year old for her entire life. The company was also faulted with multiple reports of abuse and the deaths of numerous individuals under its care.

⁶⁶ Paul Farrell & Oliver Laughland, *G4S and Serco Fail to Report on Australia's Asylum Centre Conditions*, THE GUARDIAN (Sept. 16, 2013), <http://www.theguardian.com/world/2013/sep/16/g4s-serco-australia-asylum-centre>.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Ben Doherty, *Transfield Named Coalition's 'Preferred Tenderer' for Manus and Nauru Centers*, THE GUARDIAN (Aug. 31, 2015), <http://www.theguardian.com/world/2015/aug/31/transfield-named-coalitions-preferred-tenderer-for-manus-and-nauru-centres>. Transfield Services is not without its fair share of discomfoting allegations. The staff of Transfield Services has been accused of rape and sexual assault on detainees, and Transfield Services' bosses refused to answer detailed questions concerning the conditions at the detention centers during a Senate hearing. Additionally, subcontractors of Transfield Services have been accused of "handcuffing children . . . assaulting asylum seekers who were handcuffed, and running a secret solitary confinement facility on Manus."

⁷⁰ Office of the High Commissioner for Human Rights, *Mandates of the Special Rapporteur on the Human Rights of Migrants and the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (July 8, 2014), [https://spdb.ohchr.org/hrdb/28th/public_-_ua_australia_08.07.14_\(2.2014\).pdf](https://spdb.ohchr.org/hrdb/28th/public_-_ua_australia_08.07.14_(2.2014).pdf) [hereinafter *Mandates of the Special Rapporteur on Torture*]. See also Klein, *supra* note 37, at 415.

traveling to Christmas Island, an island territory of Australia,⁷¹ when they were intercepted on June 29, 2014, by Australian authorities.⁷² It was not until legal action was brought against the Australian government on July 7, 2014, in a case entitled *CPCF v Minister for Immigration and Border Protection*⁷³ that the government finally admitted to detaining the refugees at sea.⁷⁴ The anonymous plaintiff in the case was a Sri Lankan of the Tamil minority who had originally fled to India to escape persecution due to his political involvements while living in Sri Lanka.⁷⁵ Detained at sea for roughly a month, these asylum seekers were housed in a windowless room with roughly eighty other people for twenty-two hours.⁷⁶ They were finally brought to the Australian mainland via the Cocos Islands, and “with the legal team urgently requesting permission to visit them, they were secretly taken with no warning to Australia’s detention centre on Nauru in an overnight flight.”⁷⁷

The second boat of asylum seekers was no luckier than the first. This boat, containing fifty Sri Lankan asylum seekers, was intercepted by Australian vessels. These asylum seekers were subjected to an expedited screening process “involving a single, four-question interview conducted on the high seas without any legal assistance.”⁷⁸ Although 50% to 90%⁷⁹ of people leaving Sri Lanka for Australia are in genuine need of protection, forty-one out of the fifty on this boat were handed over to “Sri Lankan authorities during a transfer at sea.”⁸⁰ Since 2012,⁸¹ Sri Lankans are the only

⁷¹ *Id.*

⁷² Human Rights Law Centre, *High Court Finds High Seas Detention of 157 Asylum Seekers Did Not Breach Australian Domestic Law* (Jan. 28, 2015), <https://www.hrlc.org.au/human-rights-case-summaries/high-court-finds-high-seas-detention-of-157-asylum-seekers-did-not-breach-australian-domestic-law> [hereinafter *High Court Finds High Seas Detention of 157 Asylum Seekers Did Not Breach Australian Domestic Law*].

⁷³ *CPCF v Immigration for Minister and Border Protection* [2015] HCA 1 (Austl.).

⁷⁴ *High Court Finds High Seas Detention of 157 Asylum Seekers Did Not Breach Australian Domestic Law*, *supra* note 72.

⁷⁵ *Id.*

⁷⁶ Ben Doherty & Paul Farrell, *Detention of 157 Tamil asylum seekers on board ship ruled lawful*, THE GUARDIAN (Jan. 27, 2015), <http://www.theguardian.com/world/2014/jul/07/australia-returns-asylum-seekers-to-sri-lanka-what-happens-next>.

⁷⁷ *Id.*

⁷⁸ *Mandates of the Special Rapporteur on Torture*, *supra* note 70.

⁷⁹ *Can't Flee, Can't Stay: Australia's Interception and Return of Sri Lankan Asylum Seekers*, HUMAN RIGHTS LAW CENTRE (Mar. 2014), http://www.australianchurchesrefugee taskforce.com.au/wp-content/uploads/2014/03/HRLC_SriLanka_Report_11March2014.pdf [hereinafter *Can't Flee, Can't Stay*].

⁸⁰ *Mandates of the Special Rapporteur on Torture*, *supra* note 70; see Oliver Laughland, Paul Farrell & Melissa Davey, *Australia Returns Asylum Seekers to Sri Lanka: What Happens Next?*, THE GUARDIAN (July 7, 2014), <http://www.theguardian.com/world/2014/jul/07/australia-returns-asylum-seekers-to-sri-lanka-what-happens-next>.

group to be exposed to this so-called 'enhanced screening'⁸² without a lawyer. Enhanced screening consists of a four-question interview by two officers from the Department of Immigration and Citizenship⁸³ and is not subject to review by any other authorities.⁸⁴ Screened individuals are immediately returned to Sri Lanka if they are not determined to be at risk of being tortured or subjected to other cruel, inhuman or degrading treatment or punishment in Sri Lanka.⁸⁵ Additionally, "three Sri Lankan Tamil asylum seekers on temporary visas in Australia, facing the prospect of being returned to Sri Lanka, have set themselves on fire, [and] two of them died."⁸⁶

Though the thirty-year civil war between the Liberation Tigers of Tamil Eelam (LTTE) separatists and the Sri Lankan government ended in 2009, the Tamil minority still faces serious human rights abuses and persecution.⁸⁷ The LTTE was an organization with the goal of obtaining a "Tamil homeland in the Tamil-majority areas in the north and east of the country."⁸⁸ During the end of the civil war in 2009, over 40,000 civilians lost their lives, with atrocities committed by both sides of the conflict.⁸⁹ The LTTE allegedly used human shields, recruited children for combat, and reportedly killed civilians who attempted to leave areas controlled by the LTTE.⁹⁰ The United Nations reported that Sri Lankan government forces "deliberately targeted and shelled thousands of civilians, persecuted the population and intimidated journalists seeking to cover the war."⁹¹ President Mahinda Rajapaksa of Sri Lanka and his brothers control roughly 45% to 70% of the Sri Lankan economy, according to the Sri Lanka Campaign for Peace and Justice.⁹²

Even though the civil war has ended, Navi Pillay, the United Nations High Commissioner for Human Rights, said after a visit to Sri Lanka in 2013 that she was "deeply concerned that Sri Lanka, despite the opportunity

⁸¹ Australian Human Rights Commission, *Tell Me About It: The 'Enhanced Screening Process'* (June 13, 2013), <https://www.humanrights.gov.au/sites/default/files/document/publication/enhanced-screening.pdf> [hereinafter *Tell Me About It: The Enhanced Screening Process*].

⁸² This enhanced screening includes interviewing Sri Lankan refugees without legal representation or "access to legal advice or information about their rights." Additionally this process disallows Sri Lankan asylum seekers the proper avenue to put forth a claim for asylum. *Can't Flee, Can't Stay*, *supra* note 79, at 5.

⁸³ *Tell Me About It: The Enhanced Screening Process*, *supra* note 81, at 1.

⁸⁴ *Id.* at 2.

⁸⁵ *Id.* at 1.

⁸⁶ *Mandates of the Special Rapporteur on Torture*, *supra* note 70.

⁸⁷ *Id.*

⁸⁸ *Can't Flee, Can't Stay*, *supra* note 79, at 14.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* (citing Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka (Mar. 31, 2011), http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf).

⁹² *Id.* at 15.

provided by the end of the war to construct a new vibrant all-embracing state, is showing signs of heading in an increasingly authoritarian direction.”⁹³ Pillay also reported widespread harassment of lawyers and intimidation geared towards journalists and human rights defenders.⁹⁴ In January 2013, for example, the Sri Lankan Chief Justice had been ousted after handing down judicial decisions that “did not favour the central Government.”⁹⁵ To make matters worse, lawmakers passed the Eighteenth Amendment to the Sri Lankan Constitution, which removed presidential term limits and granted the president further powers to “appoint judges and senior appointees to independent bodies such as the Police Commission, Human Rights Commission, and the Elections Commission.”⁹⁶

In Sri Lanka, it is illegal to leave the country without departing from an authorized port.⁹⁷ Sri Lankan law enforcement continuously monitors and intercepts people attempting to leave, while the Sri Lankan Navy “conducts on-water interception of boats and takes the passengers to a nearby base.”⁹⁸ Australia has aided in Sri Lanka’s efforts to stop asylum seekers from leaving the country by providing millions of dollars to the Sri Lankan Navy, as well as a “\$2 million gift of two patrol boats to the Sri Lankan Navy, ostensibly to be used for ‘humanitarian purposes’ to ‘ensure the safety of life at sea.’”⁹⁹ This aid has come pursuant to a 2009 Memorandum of Understanding aimed at “preventing and responding to migrant smuggling and related activity.”¹⁰⁰

⁹³ Navi Pillay, U.N. High Commissioner for Human Rights, Opening remarks at a press conference during her mission to Sri Lanka Colombo (Aug. 31, 2013), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13673>; see also Sri Lanka Campaign for Peace and Justice, *The Rajapaksas: keeping it in the family*, INFOGRAPHIC, http://1.bp.blogspot.com/-llj21DHtNvY/UoiIjldpOI/AAAAAAAAAWY/4GeUkUYXzOM/s1600/sri+figure_20.03.13.jpg.

⁹⁴ *Id.*

⁹⁵ *Can’t Flee, Can’t Stay*, *supra* note 79, at 15.

⁹⁶ PARLIAMENT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA: EIGHTEENTH AMENDMENT TO THE CONSTITUTION (Sept. 2010), http://www.parliament.lk/files/pdf/constitution/18th_amendment_act.pdf (citing Oral update of the High Commissioner for Human Rights on promoting reconciliation and accountability in Sri Lanka’, UN Doc. A/HRC/24/CRP.3/Rev.1, 23 Sept. 2013, ¶ 26, http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session24/Documents/A-HRC-24-CRP-3-Rev1_en.doc).

⁹⁷ *Can’t Flee, Can’t Stay*, *supra* note 79, at 34.

⁹⁸ *Id.*

⁹⁹ *Id.* at 25.

¹⁰⁰ Memorandum of Understanding between the Government of Australia and the Government of Sri Lanka concerning Legal Cooperation against the Smuggling of Migrants (Nov. 9, 2009) (on file with the HRLC).

As of August 2014, over 1,000 Sri Lankan Tamils who sought asylum in Australia have been returned to Sri Lanka.¹⁰¹ With the increasing number of irregular maritime arrivals, this number will most likely increase rather than decrease, which may lead to an increase in refoulement.

III. APPLICABLE LAW AND JURISPRUDENCE

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment entered into force on June 26, 1987. The overt purpose of the Convention is “to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world.”¹⁰² By joining the Convention, state parties obligated themselves to impose “formal and non-formal arrangements at the domestic level to prevent torture from occurring within the state and its territories.”¹⁰³ Territorial waters, excised migration zones, exclusive economic zones, as well as flag-flying ships and aircraft are all deemed to be “territories” for purposes of the CAT.¹⁰⁴ As a state party since 1989, Australia is bound by the provisions of the CAT.¹⁰⁵

The Committee Against Torture (The Committee), created by Article 17 of the Convention, oversees state adherence.¹⁰⁶ The Committee is permitted “to hear complaints by individuals of alleged violations of the treaty by states parties that have recognized the Committee’s competence to consider these disputes.”¹⁰⁷ If the Committee Against Torture reliably learns of possible

¹⁰¹ Muditha Dias, *How Bad is the Situation for Tamil Asylum Seekers in Sri Lanka?*, AUSTRALIAN BROADCASTING CORPORATION (Aug. 6, 2014), <http://www.abc.net.au/radionational/programs/latenightlive/how-bad-is-the-situation-for-tamil-asylum-seekers-in-sri-lanka/5650338>.

¹⁰² Convention Against Torture, *supra* note 6.

¹⁰³ Edwin Odhiambo-Abuya, *Reinforcing Refugee Protection in the Wake of the War of Terror*, 30 B.C. INT'L & COMP. L. REV. 277, 295 (2007). The General Comment states that these domestic laws must be designed to protect all individuals, “regardless of race, colour, ethnicity, age, religious belief . . . including persons accused of political offences or terrorist acts, asylum-seekers, refugees or others under international protection, or any other status or adverse distinction.” U.N. Office of the High Comm’n on Human Rights, Comm. Against Torture, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No. 2: Implementation of article 2 by States parties*, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008).

¹⁰⁴ Odhiambo-Abuya, *supra* note 103.

¹⁰⁵ Skulan, *supra* note 20, at 102.

¹⁰⁶ Convention Against Torture, *supra* note 6, art. 17.1. See also Samuel L. David, *A Foul Immigration Policy: U.S. Misinterpretation of the Non-Refoulement Obligation Under the Convention Against Torture*, 19 N.Y.L. SCH. J. HUM. RTS. 769, 773 (2003).

¹⁰⁷ David, *supra* note 106, at 773. See also Julia Hall, *The Convention’s Nonrefoulement Obligation in the Context of the “War on Terror,”* 17 HUM. RTS. BRIEF 46, 47 (2010)

violations of the CAT, the Committee will ask for the cooperation of the State in question “to submit observations with regard to the information concerned.”¹⁰⁸ The Committee is composed of ten experts “elected by secret ballot from a list of persons submitted by Member States,”¹⁰⁹ who serve for four years¹¹⁰ and must “possess ‘high moral standing’ and ‘recognized competence’ in the area of human rights.”¹¹¹

It is also worth noting that pursuant to the CAT’s definition of torture, the acts in question must have been “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”¹¹² Edwin Odhiambo-Abuya in *Reinforcing Refugee Protection in the Wake of the War of Terror*, pointed out that it would be irrational to believe that “acts committed by State-controlled or State-supported vigilante, death squads, or paramilitary groups will be prosecuted domestically.”¹¹³ A state is said to acquiesce in torture or other cruel, inhuman or degrading treatment or punishment when the state “willingly fails to take action to prevent its commission.”¹¹⁴

In a case before the Committee Against Torture in 1998, entitled *G.R.B. v. Sweden*,¹¹⁵ the complainant claimed that refoulement to Peru would violate

(explaining that “forms of evidence that can be submitted include . . . mass violations of human rights, the past torture of a person, medical evidence of that past torture or ill treatment, changes on the ground since the person had been mistreated that indicate at this point the person would be safer elsewhere”).

¹⁰⁸ Convention Against Torture, *supra* note 6, art. 20.1.

¹⁰⁹ Odhiambo-Abuya, *supra* note 103, at 282.

¹¹⁰ *Id.*

¹¹¹ Convention Against Torture, *supra* note 6, art. 17.1.

¹¹² *Id.* art. 1.1. *But see* David, *supra* note 106, at 774–79 for a discussion of three separate cases explaining the various interpretations of what constitutes a person acting in an official capacity. *See also* Patricia J. Freshwater, *The Obligation of Non-Refoulement Under the Convention Against Torture: When Has a Foreign Government Acquiesced in the Torture of Its Citizens?*, 19 GEO. IMMIGR. L.J. 585, 603 (2005) (explaining, “the involvement of any level of government official is strong evidence that the government has acquiesced in the torture. Evidence of government officials’ participation in acts of torture should give rise to a strong presumption that the government has acquiesced, regardless of the rank of the government official”); *see also* David, *supra* note 106, at 804–05 (concluding that the non-refoulement obligation under Article 3 of the CAT necessarily includes some non-state actors that operate “outside of state control”).

¹¹³ Odhiambo-Ayuba, *supra* note 103, at 288.

¹¹⁴ *Id.* at 289. *See also* Hajrizi Dzemajl v. Yugoslavia, Communication No. 161/2000, Decision, U.N. Comm. Against Torture, ¶ 9.2 (finding that Yugoslavia acquiesced in the torture of people of Romani origin because the police, “had been informed of the immediate risk that the complainants were facing and had been present at the scene of the events [and] did not take any appropriate steps in order to protect the complainants”).

¹¹⁵ *G.R.B. v. Sweden*, Communication No. 83/1997, Decision, U.N. Comm. Against Torture, ¶ 2.1 (1998).

Article 3 of the CAT on the basis that her and her family were part of the Communist Party in Peru.¹¹⁶ The complainant claimed her parents had been imprisoned by Peruvian authorities, that her father had been tortured, and that she had been imprisoned and raped by “members of the Sendero Luminoso, a guerilla group opposing the Peruvian government.”¹¹⁷ The Committee Against Torture found for Sweden and reasoned that, “the issue whether the State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope [of] article 3 of the Convention.”¹¹⁸

The Committee moved away from its decision in *G.R.B. v. Sweden* in 1999 in the landmark case of *Elmi v. Australia*,¹¹⁹ in which the Committee ruled that it would be a violation of Article 3 to return the complainant to Somalia because, in the Committee’s words, he was at a substantial risk of being tortured by “certain Somali clans rather than an actual government.”¹²⁰ In this case, several warring factions in Somalia had established “quasi-governmental institutions.”¹²¹ The Committee wrote that “when private persons exercise government functions they can be considered ‘public officials or other persons acting in an official capacity.’”¹²² In 2001, the Committee failed to follow its own decision in *S.V. v. Canada*¹²³ when it ruled that refoulement of Sri Lankans who claimed to be at risk of torture or persecution by the Sri Lankan authorities and members of the Liberation Tigers of Tamil Eelam would not violate Article 3.¹²⁴

Samuel L. David argues that travaux préparatoires of the Convention Against Torture pointed to a broad interpretation of Article 3.¹²⁵ Though the main focus of the drafters of the CAT was torture carried out by states, various working groups voiced their concerns and were “troubled by the

¹¹⁶ *Id.* See also David, *supra* note 106, at 774–75.

¹¹⁷ David, *supra* note 106, at 775; *G.R.B. v. Sweden*, Communication No. 83/1997, Decision, U.N. Comm. Against Torture, ¶ 2.3 (1998).

¹¹⁸ David, *supra* note 106, at 775; *G.R.B. v. Sweden*, Communication No. 83/1997, Decision, U.N. Comm. Against Torture, ¶ 6.5 (1998).

¹¹⁹ *Elmi v. Australia*, Communication No. 120/1998, Decision, U.N. Comm. Against Torture (1999).

¹²⁰ David, *supra* note 106, at 775.

¹²¹ *Id.* at 776.

¹²² Convention Against Torture, *supra* note 6, art. 1.

¹²³ *S.V. v. Canada*, Communication No. 1827/2008, Decision, U.N. ICCPR Human Rights Comm. (July, 23 2012).

¹²⁴ David, *supra* note 106, at 777.

¹²⁵ *Id.* at 785. Furthermore, the CAT was initially modeled after the Declaration on the Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Declaration on Torture).

omission of non-state actors from the original draft.”¹²⁶ The final compromise led to the current provision that includes “other person[s] acting in an official capacity.”¹²⁷

A. What Exactly Constitutes “Other Cruel, Inhuman or Degrading Treatment or Punishment”

When most people think of torture, the first thought that may come to mind is torture in the traditional sense. This may include “being whipped or beaten to secure a confession,” or other forms of “exotic” physical abuse.¹²⁸ Although torture is defined in the CAT as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person,”¹²⁹ the precise definition of what constitutes cruel, inhuman or degrading treatment or punishment remains unclear. Torture can include acts used to obtain a confession from a third person, “punishing him for an act he or a third person has committed or is suspected of having committed,”¹³⁰ or intimidation.¹³¹ However, pain and suffering deriving from lawful acts or sanctions cannot be considered torture under the CAT.¹³²

Regarding inhuman treatment, the International Committee of the Red Cross defined inhuman treatment as the infliction of “severe physical or mental pain or suffering.”¹³³ Mental suffering can include “keeping a strong light on in a jail cell, playing loud music 24 hours a day, or constantly awakening a person during the night.”¹³⁴

Additionally, two decisions of the International Criminal Tribunal for the former Yugoslavia regarded inhuman treatment as any act “which ‘causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.’”¹³⁵ For individuals in detention centers, lack of water, food, and medical treatment as well as other poor conditions have all been deemed to be inhuman treatment. This line of reasoning is consistent with the 2014 decision of the Committee Against Torture in *Kirsanov v. Russian*

¹²⁶ *Id.* at 786.

¹²⁷ *Id.* at 788.

¹²⁸ Marcy Strauss, *Torture*, 48 N.Y.L. SCH. L. REV. 201, 210 (2003).

¹²⁹ Convention Against Torture, *supra* note 6, art. 1.1.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ Int’l Comm. of the Red Cross, *Rule 90. Torture and Cruel, Inhuman or Degrading Treatment*, https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule90 (citing Elements of Crimes for the ICC, Definition of Inhuman Treatment as a War Crime (ICC Statute, Article 8(2)(a)(ii))) [hereinafter *Rule 90*].

¹³⁴ Strauss, *supra* note 128, at 211.

¹³⁵ *Rule 90*, *supra* note 133.

Federation.¹³⁶ In that case, the Committee Against Torture found the Russian Federation in violation of Article 16 of the CAT, along with several other articles, due to the conditions that the complainant had endured in detention. The Committee credited his allegations that he had been exposed to other detainees who routinely smoked, that he was not allowed to leave his cell to exercise, and that he was not given bedding or toiletry items during his detention.¹³⁷ The Committee further reported that although the respondent state had detained the complainant for a prolonged period of time, the conditions in which he was detained did not amount to “severe pain and suffering”¹³⁸ under the definition of Article 1 of the CAT concerning torture. The Committee did find, however, that the detainment conditions violated Article 16 of the CAT and amounted to cruel, inhuman or degrading treatment.¹³⁹

Furthermore, in a 2012 case, *Fatou Sonko v. Spain*, the Committee found that by subjugating the complainant “to physical and mental suffering prior to his death, aggravated by his particular vulnerability as a migrant,” the state’s actions did “exceed the threshold of cruel, inhuman or degrading treatment or punishment, under the terms of Article 16 of the Convention.”¹⁴⁰ The complainant was a Senegalese migrant attempting to reach Spain by “swimming along the coast between Belionex and Benzu”¹⁴¹ with only a wetsuit and a dinghy. He had been intercepted by Spanish Civil Guard officers and was forced to jump into Moroccan territorial waters.¹⁴² While hanging onto the rail of the vessel, the complainant repeatedly told the Civil Guard officers that he could not swim.¹⁴³ The officers forced him to let go of the vessel, and he subsequently drowned.¹⁴⁴ Although the Civil Guard officers’ actions did not amount to torture under Article 1, the Committee ruled and concluded that their actions were in violation of Article 16.¹⁴⁵

Additionally, the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment wrote that

¹³⁶ *Kirsanov v. Russian Federation*, Communication No. 478/2011, Decision, U.N. CAT Comm. Against Torture (May 14, 2014).

¹³⁷ *Id.* ¶ 2.3.

¹³⁸ *Id.* ¶ 11.2.

¹³⁹ *Id.*

¹⁴⁰ Fernando M. Marino Menendez, *Recent Jurisprudence of the United Nations Committee against Torture and the International Protection of Refugees*, 34 REFUGEE SURVEY Q. 61, 69 (2015).

¹⁴¹ *Sonko v. Spain*, Communication No. 368/2008, Decision, U.N. CAT Comm. Against Torture, ¶ 10.4 (Nov. 25, 2011).

¹⁴² *Id.*

¹⁴³ *Id.* ¶ 2.2.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* ¶ 10.4.

organizations should focus on the “purpose of the conduct and the powerlessness of the victim, rather than the intensity of the pain or suffering inflicted.”¹⁴⁶ The European Court of Human Rights set a minimum threshold for circumstances that might amount to inhuman or degrading treatment in 1976 in *Ireland v. United Kingdom*.¹⁴⁷ These circumstances include the “duration of treatment; physical effects of treatment; mental effects of treatment; and sex, age, and state of health of the victim.”¹⁴⁸

B. What Constitutes “substantial grounds” in Deciding Refoulement

As well as prohibiting torture and cruel, inhuman or degrading treatment or punishment, the CAT prohibits any state party from “return[ing] (‘refouler’) or extradite[ing] a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”¹⁴⁹ The non-refoulement provision also includes situations where an individual is returned to a state and then transferred to another state where the individual is at a substantial risk of torture or other cruel, inhuman or degrading treatment or punishment.¹⁵⁰ Mary Crock pointed out that a “state cannot abdicate its responsibilities by deflecting refugees to a State that will not comply with the terms”¹⁵¹ of human rights treaties. Essentially, “what cannot be done directly cannot be done indirectly.”¹⁵² Furthermore, the non-refoulement provisions of the CAT apply to all individuals regardless of whether they have been deemed

¹⁴⁶ Office of the High Commissioner for Human Rights, *Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies*, 1, 7 (2011), http://www.ohchr.org/Documents/Issues/Torture/UNVFVT/Interpretation_torture_2011_EN.pdf (citing Manfred Nowak, *Report by the Special Rapporteur on the torture and other cruel, inhuman or degrading treatment or punishment*, ¶ 39, U.N. Doc E/CN.4/2006/6 (Dec. 20, 2005)).

¹⁴⁷ *Ireland v. United Kingdom*, 23 Eur. Ct. H.R. (ser. B) at 376–79 (1976).

¹⁴⁸ *Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies*, *supra* note 146, at 7.

¹⁴⁹ Convention Against Torture, *supra* note 6, art. 3.1. See also *Ktiti v. Morocco*, Communication No. 419/2010, Decision, U.N. Comm. Against Torture, ¶ ?? (2011); *Kalinichenko v. Morocco*, Communication No. 428/2010, Decision, U.N. Comm. Against Torture, ¶ ?? (2012).

¹⁵⁰ David Weissbrodt & Isabel Hortreiter, *The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties*, 5 BUFF. HUM. RTS. L. REV. 1, 8 (1999) (citing *Mutumbo v. Switzerland*, Communication No. 13/1993, Decision, U.N. Comm. Against Torture, ¶ 45 (1994)).

¹⁵¹ Crock, *supra* note 15, at 275–76 (citing UNHCR Executive Comm. Conclusion No. 85 (1998); Executive Comm. Conclusion No. 87 (1999)).

¹⁵² Crock, *supra* note 15, at 275.

refugees or asylum seekers,¹⁵³ or whether they have entered a state legally or illegally.¹⁵⁴ The non-refoulement obligation also applies in a case of extradition, although this raises possible conflicts with the commitments states' have made under extradition treaties.¹⁵⁵ However, two key agents in the drafting of the CAT, Herman Burgers and Hans Delenius, asserted that after a state has ratified the CAT, the state "must refrain from assuming obligations contrary to the objectives of the Convention."¹⁵⁶ The drafters contended that the non-refoulement provision was so necessary they went as far as suggesting that "even previously ratified extradition treaties may well be construed to have been supplemented by the non-refoulement exception provided in Article 3."¹⁵⁷ Additionally, "this obligation is considered a norm of customary international law subject neither to limitations for national security reasons nor to derogation in times of public emergency."¹⁵⁸

In 1997, the Committee Against Torture adopted various sets of guidelines to aid in understanding exactly what constitutes "substantial grounds"¹⁵⁹ in deciding whether an individual would be in danger of being subjected to torture.¹⁶⁰ The Committee's guidelines identified several factors that are relevant to this analysis:

- (a) Is the State concerned one in which there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights (see Article 3, paragraph 2)?
- (b) Has the author been tortured or maltreated by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity in the past? If so, was this the recent past?
- (c) Is there medical or other independent evidence to support a claim by the author that he/she has been tortured or maltreated in the past? Has the torture had after-effects?

¹⁵³ *But see* Convention on Refugees, *supra* note 10 (applying non-refoulement provisions only to refugees).

¹⁵⁴ Weissbordt & Hortreiter, *supra* note 150, at 7.

¹⁵⁵ *Id.* at 7–8.

¹⁵⁶ *Id.* at 8.

¹⁵⁷ *Id.*

¹⁵⁸ *Torture and Diplomatic Assurances*, 446, <https://www.justsecurity.org/wp-content/uploads/2013/12/Alston-Goodman-Torture-and-Diplomatic-Assurances-International-Human-Rights-OUP.pdf>; *see also* Menendez, *supra* note 140, at 62.

¹⁵⁹ Convention Against Torture, *supra* note 6, art. 3.1.

¹⁶⁰ Office of the High Commissioner for Human Rights, *CAT General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communication)* (Nov. 21, 1997) [hereinafter *CAT General Comment No. 1*].

- (d) Has the situation referred to in (a) above changed? Has the internal situation in respect of human rights altered?
- (e) Has the author engaged in political or other activity within or outside the State concerned which would appear to make him/her particularly vulnerable to the risk of being placed in danger of torture where he/she to be expelled, returned or extradited to the State in question?
- (f) Is there any evidence as to the credibility of the author?
- (g) Are there factual inconsistencies in the claim of the author? If so, are they relevant?¹⁶¹

The risk of torture must be a personal, real, and foreseeable risk and must be “assessed on grounds that go beyond mere theory or suspicion,” rather than the enhanced burden of “highly probable.”¹⁶² A complainant at risk of being returned to a state is not automatically guaranteed his or her wish of non-refoulement simply because the state has a pattern of human rights violations, including torture or cruel punishment. Likewise, a complainant at risk of refoulement to a state without a history of flagrant human rights violations will not automatically be denied protection. David Weissbrodt and Isabel Hortrieter pointed out that the “substantial grounds” test is evaluated both subjectively and objectively.¹⁶³

There is a lack of jurisprudence as to whether Article 3 of the CAT refers exclusively to refoulement in instances of torture or if it also includes the risk of other cruel, inhuman or degrading treatment or punishment.¹⁶⁴ Article 3.1 of the CAT specifically refers to “substantial grounds” for believing that he would be in danger of being subjected to torture.¹⁶⁵ Fernando M. Marino Menendez argued that the line between torture and other cruel, inhuman or degrading treatment or punishment is slowly dissolving in this context.¹⁶⁶ In assessing the risk of torture suffered by the complainant in *H.K. v. Switzerland*¹⁶⁷ in 2013, the Committee indicated that other cruel, inhuman or

¹⁶¹ *Id.* at 2.

¹⁶² *Id.*

¹⁶³ Weissbrodt & Hortreiter, *supra* note 150, at 12.

¹⁶⁴ Convention Against Torture, *supra* note 6, art. 3.1; Menendez, *supra* note 140, at 68.

¹⁶⁵ Convention Against Torture, *supra* note 6, art. 3.1.

¹⁶⁶ Menendez, *supra* note 140, at 68–69. Likewise, the Committee in General Comment 2 “stressed that because it can be extremely difficult to identify the threshold between ill-treatment and torture, it considers ‘the prohibition of ill-treatment to be likewise non-derogable under the Convention and its prevention to be an effective and non-derogable measure.’” Aoife Duffy, *Expulsion to Face Torture? Non-refoulement in International Law*, 20 INT’L J. REFUGEE L. 373, 380 (2008).

¹⁶⁷ *H.K. v. Switzerland*, Communication No. 432/2010, Decision, U.N. Comm. Against Torture (2013).

degrading treatment or punishment would be substantial grounds for non-refoulement. The Committee concluded, however, that the individual “ha[d] not submitted any evidence supporting her claims of having been severely ill-treated by the Ethiopian military prior to her arrival in Switzerland.”¹⁶⁸ In *Fatou Sonko v. Spain*,¹⁶⁹ the Committee furthered this interpretation by declaring that, “the prohibition of ill-treatment is absolute and . . . [it’s] prevention is an effective and non-derogable measure.”¹⁷⁰

In *E.C. v. Switzerland*¹⁷¹ the Committee considered a claim put forth by a former member of the Gambian National Army who had involuntarily been involved in a coup against the President of Gambia in 2006.¹⁷² The complainant’s superior had ordered him to sever all lines of communication within Gambia.¹⁷³ The complainant contended that he followed the order out of fear “of the potential consequences of refusal.”¹⁷⁴ The coup eventually failed, and the President of Gambia stated that “all those involved would be severely punished.”¹⁷⁵ After the complainant fled Gambia to Switzerland, the complainant’s brother, who still resided in Gambia, was interrogated and beaten in an effort to obtain information about the complainant’s involvement with the coup. The Committee ruled that it would not be a violation of Article 3 of the CAT for Switzerland to refuse asylum to the complainant.¹⁷⁶ The Committee reasoned that the complainant “had failed to substantiate a present and personal risk of being tortured by state authorities if returned,” because eight years had passed since the attempted coup, and the complainant had put forth no evidence that the Gambian authorities were still looking for him.¹⁷⁷ Additionally, the burden of proof was on the complainant, and the complainant offered no evidence or any “satisfactory explanation for the contradictions noted by the authorities of the State party during the asylum proceedings.”¹⁷⁸

¹⁶⁸ Menendez, *supra* note 140, at 68 (citing *H.K. v. Switzerland*, Communication No. 432/2010, Decision, U.N. Comm. Against Torture, ¶ 7.4 (2013)).

¹⁶⁹ Menendez, *supra* note 140, at 69 (citing *Sonko v. Spain*, Communication No. 368/2008, Decision, U.N. Comm. Against Torture, ¶ 10.4 (2012)).

¹⁷⁰ *Id.*

¹⁷¹ *E.C. v. Switzerland*, Communication No. 476/2011, Decision, U.N. Comm. Against Torture (2015).

¹⁷² *Id.* ¶ 2.1.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* ¶ 7.4.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* *But see* *Kisoki v. Sweden*, Communication No. 41/1996, Decision, U.N. Comm. Against Torture, ¶ 10 (1996), in which the Committee forbade Switzerland to return to the complainant to Zaire even though there were “contradictions and inconsistencies” in the

In the context of non-refoulement, one defense often put forth by states is that the individual in question was never technically in or under the control of the state's territory, and therefore, the state's non-refoulement obligations under the Convention were never triggered. Article 2.1 of the CAT charges states with implementing measures to "prevent acts of torture in any territory under its jurisdiction."¹⁷⁹ Theodore Van Boven explained that General Comment 2 of the CAT, when referring to the "scope of the 'territory'", includes situations where a state party exercises, directly or indirectly *de jure* or *de facto* control over a person.¹⁸⁰ This is exemplified in *Sonko v. Spain* in which Spanish Civil Guard Officers brought four swimming migrants aboard their vessel and then forced them to jump into deep waters. In its decision, the Committee "observe[d] that the Civil Guard officers exercised control over the persons on board the vessel and were therefore responsible for their safety."¹⁸¹

Countervailing to the purposes of the CAT, the United States implemented a program during the 1960s and 1970s in which the United States intercepted Haitian boats routed to the United States to undertake "a preliminary screening of individuals to determine if they had credible refugee claims."¹⁸² Furthermore in 1992, the United States issued an executive order stating that its non-refoulement obligations did not extend "outside U.S. land territory."¹⁸³ In the case of *Sale v. Haitian Centers Council Inc.*¹⁸⁴ in 1993, the U.S. Supreme Court upheld the United States' policy of returning vessels carrying Haitian migrants to Haiti "without any consideration of their possible refugee status."¹⁸⁵ This decision was highly criticized in a dissent by Justice Henry Blackmun as well as in the 1997 majority decision in *Haitian Centre for Human Rights v. United States*,

complainant's testimony. The Committee reaffirmed that the risk of being exposed to torture must still meet the burden of foreseeable but that "complete accuracy is seldom to be expected by victims of torture and that such inconsistencies as may exist in the author's presentation of the facts are not material and do not raise doubts about the general veracity of the author's claims." *Kisoki*, Communication No. 41/1996, Decision, U.N. Comm. Against Torture, ¶ 9.3 (1996).

¹⁷⁹ Convention Against Torture, *supra* note 6, at 2.1.

¹⁸⁰ Theodore van Boven, *Remarks on the Convention Against Torture's General Comment No. 2*, 11 N.Y. CITY L. REV. 217, 220 (2008).

¹⁸¹ *Sonko v. Spain*, Communication No. 368/2008, Decision, U.N. Comm. Against Torture, ¶ 10.3 (2012).

¹⁸² Klein, *supra* note 37, at 429. See also *Exchange of Notes Constituting an Agreement Concerning the Interdiction of and Return of Haitian Migrants*, United States America-Haiti, 1537 U.N.T.S. 175 signed and entered into force 23 September 1981.

¹⁸³ Klein, *supra* note 37, at 429.

¹⁸⁴ *Sale v. Haitian Centers Council Inc.*, 509 U.S. 155 (1993).

¹⁸⁵ Klein, *supra* note 37, at 430.

which concluded that the act of bringing migrants on board a U.S. vessel essentially brought the migrants within U.S. jurisdiction.¹⁸⁶

IV. AUSTRALIA VIOLATED THE CONVENTION AGAINST TORTURE

It is evident that Australia has violated Articles 3 and 16 of the Convention Against Torture in regards to non-refoulement and other cruel, inhuman or degrading treatment or punishment by applying the previous jurisprudence.

A. The Murder of Reza Barati and the Subsequent Torture of Eyewitnesses Violated the Convention Against Torture

Though the exact events leading up to the death of Reza Barati and the subsequent torture of eyewitnesses remain unclear, one thing is certain: both events violated Australia's obligations under the Convention Against Torture.

First, it must be determined whether the acts themselves amounted to either torture or other cruel, inhuman or degrading treatment or punishment. The death of Barati may not amount to torture in the traditional sense of the word, but there is something to be said about the poor conditions he endured while at the Manus Island detention center, such as locked fences, armed guards, and inadequate lighting and ventilation services. The Committee Against Torture itself has previously deemed lack of bedding, inability to exercise, and being exposed to smoke as cruel, inhuman or degrading treatment or punishment.¹⁸⁷ Surely, the conditions that Barati repeatedly faced on Manus Island fell into this category.

Additionally, the circumstances surrounding Barati's death constituted cruel, inhuman, degrading treatment, or punishment. Barati was beaten with a stick embedded with nails and had a rock subsequently thrown down on his head by detention center employees. Barati's physical and mental suffering prior to his death and the additional circumstance of his being a migrant are analogous to the Committee's finding against Spain in *Sonko v. Spain*.¹⁸⁸ If

¹⁸⁶ *Id.* at 430–31 (citing *The Haitian Centre for Human Rights v. United States* Case No. 10.675 Inter-Am. Comm'n of H.R., Report No. 51/96, OEA/Ser.L/V/II.95, doc. 7 rev. (March 1997)). See also *European Roma Rights Centre v. Immigration Officer at Prague Airport* [2003] EWCA Civ. 666 (20 May 2003) [34]; *CPFC v. Minister for Immigration and Border Protection* (arguing that “the non-refoulement obligations arising from the CAT and ICCPR are not subject to any relevant territorial limitation”).

¹⁸⁷ *Kirsanov v. Russian Federation*, Communication No. 478/2011 ¶ 11.2, Decision, U.N. CAT Comm. Against Torture, ¶ 11.2 (May 14, 2014).

¹⁸⁸ *Sonko v. Spain*, Communication No. 368/2008, Decision, U.N. Comm. Against Torture, ¶ 2.1 (2012).

this type of behavior does not amount to cruel, inhuman or degrading treatment or punishment, it is difficult to ascertain what exactly would meet these standards.

An even clearer case of torture or other cruel, inhuman or degrading treatment or punishment is the treatment reportedly received by two eyewitnesses of Reza Barati's death. These two individuals were tied to chairs and threatened with rape, violence, and criminal prosecution in an effort to force them to retract their statements concerning the incident. They were threatened further when it was revealed they would be testifying in court against the perpetrators. This is the sort of intimidation and behavior the CAT was specifically aimed at preventing when it was originally drafted. The broadening interpretation of the CAT supports these findings as well.

Second, it is necessary to evaluate whether these incidents were "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."¹⁸⁹ Initially, one might argue the perpetrators at the Manus Island detention center are not public officials or persons acting in an official capacity for purposes of the CAT because the operations of the Manus Island detention center are subcontracted by the Australian government to private security firms. The Australian government has contended that this shields it from liability because these employees are not public officials or acting pursuant to government orders.

The interpretation that negates liability for Australia cannot be allowed. Though the Australian government did not directly participate in these incidents, it was responsible for the health and well-being of these detainees, and an argument can be made that the employees of G4S were acting in an official capacity due to the firm's contract with the Australian government. It has already been established that a government cannot do indirectly what it is prohibited from doing directly.¹⁹⁰

Australia cannot escape liability simply because it chose to subcontract the management of the Manus Island detention center. At the time of contracting with G4S, the Australian government was aware of the numerous complaints against the private security firm, yet allowed the firm to take over operations of the Manus Island detention center. Liability for atrocities committed by its subcontractors would incentivize Australia and other states to continue or even expand the extent to which they subcontract routine operations of the government. Holding the Australian government liable in these specific incidents would encourage the state to be more proactive in its

¹⁸⁹ Convention Against Torture, *supra* note 6, at 1.1.

¹⁹⁰ Crock, *supra* note 15, at 29.

stance on and obligations concerning the Convention Against Torture. It would require the government to take specific action when complaints of abuse and torture are reported.

Furthermore, if the notion that G4S was operating in an official capacity is not readily accepted, an argument can still be made that the Australian government acquiesced in torture or other cruel, inhuman or degrading treatment or punishment by not actively preventing the incidents and abuses from taking place. It would prove extremely difficult for the Australian government to deny it had any knowledge that such abuse and treatment was taking place when the United Nations, Amnesty International, and Human Rights Watch have all published multiple reports recounting the treatment and incidents occurring on Manus Island.

Furthermore, Australia's lack of a bill or charter of rights can be partially blamed for this acquiescence along with the Australian Court's propensity to not integrate Australia's international obligations in the Court's legal opinions. The Australian government has a duty under the Convention Against Torture to impose "formal and non-formal arrangements at the domestic level to prevent torture from occurring within the State and its territories."¹⁹¹ These territories necessarily include the Manus Island detention center, and Australia has failed to implement domestic laws to combat the torture and other cruel, inhuman or degrading treatment or punishment that has consistently occurred there. The Australian government's expansive legislation concerning offshore detention centers and its refusal to allow irregular maritime arrivals the opportunity for asylum in Australia have essentially forced these refugees into this position. Australia has placed these refugees and asylum seekers in the situation to be victims of abuse and torture.

B. Inadequate Screening and Return of Sri Lankan Asylum Seekers of the Tamil Ethnicity

For Australia to have violated its non-refoulement obligations under the CAT regarding its treatment of Sri Lankan asylum seekers, the asylum seekers must have been in Australian territory, and there must have been substantial grounds for believing the individual in question would be in danger of being subjected to torture if returned to their State of origin. The relevant factors must point to a personal, real, and foreseeable risk that goes "beyond mere theory or suspicion," rather than "highly probable."¹⁹² It

¹⁹¹ Odhiambo-Abuya, *supra* note 103, at 295.

¹⁹² CAT General Comment No. 1, *supra* note 160, ¶ 6.

makes no difference whether Australia has deemed these individuals asylum seekers, because the CAT encompasses the non-refoulement of all individuals, not just refugees.

To begin, it must be determined whether the Sri Lankan asylum seekers in question entered Australian territory, effectively implicating Australia's obligation of non-refoulement. Concerning the first set of Sri Lankan asylum seekers who were intercepted on June 29, 2014, it is evident that these individuals were in Australian territory. If credit is to be given to Theodore Van Boven's interpretation of the Convention Against Torture's General Comment No. 2, then *de jure* or *de facto* control of an individual satisfies the CAT's territorial requirement.¹⁹³ Australia's interception of these individuals and their subsequent transportation to the Australian mainland triggered Australia's obligations under the CAT. Furthermore, pursuant to the Committee's decision in *Sonko v. Spain*, Australian vessels flying the Australian flag essentially "exercised control over the persons on board the vessel and were therefore responsible for their safety."¹⁹⁴

The same analytical process can be used to evaluate whether the second set of Sri Lankan asylum seekers intercepted were within Australian territory for purposes of the CAT. Once again, these individuals were intercepted by Australian vessels. Relying on the Committee's past decisions, including *Fatou Sonko v. Spain*,¹⁹⁵ and Theodore Van Boven's¹⁹⁶ elucidation of the CAT's General Comment No. 2, non-refoulement obligations were initiated the moment these Australian vessels brought the individuals in question on board.

Next, it must be determined whether there were substantial grounds for believing these Sri Lankan asylum seekers were in danger of being subjected to torture or other cruel, inhuman or degrading treatment or punishment. For purposes of this Note, this analysis will only explore if there were substantial grounds for believing the second set of Sri Lankan asylum seekers were in danger of being subjected to torture or other cruel, inhuman or degrading treatment or punishment. This is because the first set of Sri Lankan asylum seekers discussed were transferred to a detention center on Nauru. Thus, many of these individuals' current refoulement status is unknown. In contrast, the second set of Sri Lankan asylum seekers were transferred directly to Sri Lankan authorities.

¹⁹³ Van Boven, *supra* note 180, at 220.

¹⁹⁴ *Sonko v. Spain*, Communication No. 368/2008, Decision, U.N. Comm. Against Torture, ¶ 10.3 (2012).

¹⁹⁵ *Id.*

¹⁹⁶ Van Boven, *supra* note 180, at 220.

When attempting to determine whether the refolement of an individual would constitute a violation of Article 3 of the CAT, General Comment 1¹⁹⁷ provides guidance to clarify and aid States. First, a State should investigate whether there is “evidence of a consistent pattern of gross, flagrant or mass violations of human rights.”¹⁹⁸ In this particular instance, the authoritarian regime in Sri Lanka abuses and persecutes Sri Lankans of Tamil origin because of the long-standing feud between the LTTE and the Sri Lankan government. The Sri Lankan government has a consistent history of killing civilians associated with the LTTE and the Tamil minority. Although a State’s history of flagrant human rights violations is not indicative of a substantial risk of torture or other cruel, inhuman or degrading treatment or punishment for an individual who happens to be returned to the state in question, it is a relevant factor in the present case in favor of non-refoulement.

Importance is also placed on the current human rights situation in the state from which the individual in question hailed.¹⁹⁹ In Sri Lanka, the Tamil minority still faces abuse, persecution, and discrimination by the authoritarian government.²⁰⁰ Individuals with ties to the former LTTE are sought out and abused. Individuals who speak out against these abuses, such as lawyers and human rights advocates, are also persecuted and abused. It is evident that these human rights violations are consistent and ongoing, leading one to conclude that Sri Lanka is continually engaging in “gross, flagrant or mass violations”²⁰¹ of human rights to date.

A third inquiry regards whether the complainant “has been tortured or maltreated by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity in the past.”²⁰² This suggested factor is a bit more difficult to discern in the present case due to the enhanced screening procedures put in place by the Australian government. This screening process, given only to Sri Lankan individuals, consists of a mere four questions and cannot possibly give an accurate depiction of the individual’s current state of affairs. These four questions are inadequate in determining if an individual is a genuine asylum seeker or at risk for torture or other cruel, inhuman or degrading treatment or punishment

¹⁹⁷ *CAT General Comment No. 1*, *supra* note 160, ¶ 8.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Tainted Peace: Torture in Sri Lanka since May 2009*, FREEDOM FROM TORTURE (2015), https://www.freedomfromtorture.org/sites/default/files/documents/sl_report_a4_-_final-f-b-web.pdf.

²⁰¹ *CAT General Comment No. 1*, *supra* note 160, ¶ 8.

²⁰² *Id.*

if returned to Sri Lanka. Furthermore, these questions only seek to determine whether these individuals are genuine refugees under the Refugee Convention.²⁰³ Pursuant to its obligations under the CAT, Australia must not return any individual when there are substantial grounds for believing that individual may face torture or other cruel, inhuman or degrading treatment or punishment if returned. Australia's four-question screening of Sri Lankans arriving by boat more likely than not fails in this regard because the questions are designed to determine refugee status only.

Additionally, a State should look for "medical or other independent evidence to support a claim by the author that he/she has been tortured or maltreated in the past."²⁰⁴ Once again, the enhanced screening process to which Sri Lankan asylum seekers are subjected fails to take this information into account. These individuals arrive with little more than the clothes on their backs, much less folders containing medical records from past abuses and mistreatment. Along with this, General Comment No. 1 puts forth the question as to whether the complainant has "engaged in political or other activity within or outside the State concerned which would appear to make him/her particularly vulnerable to the risk of being placed in danger of torture," if returned to that State.²⁰⁵ The Australian government fails to obtain this sort of information and also has no way to determine the credibility of the author and if their claims—if they make any—are factually consistent.

Although the factors contained in General Comment 1²⁰⁶ are neither exhaustive nor dispositive, they provide a starting point from which to evaluate the grounds of whether to return an individual to the state from which he or she came.

The "substantial grounds" test should be evaluated both subjectively and objectively, but Australia's enhanced screening procedures make this extremely difficult because of the inadequate nature of the questions asked. Furthermore, it has been established that a complainant before the Committee carries the burden of proof in proving there are substantial grounds for believing the complainant would be in danger of torture or other cruel, inhuman or degrading treatment or punishment if returned. This is simply what the Committee has established for complainants who lodge a complaint with the Committee. This is not the recognized burden for when individuals arrive in states seeking protection. It would be extremely burdensome to require individuals who are fleeing from persecution and

²⁰³ Convention on Refugees, *supra* note 10.

²⁰⁴ *CAT General Comment 1*, *supra* note 160, ¶ 8.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

torture to carry documentation with them as evidence of their torture or cruel punishment. Instead, the state arguably has an obligation to adequately investigate whether the individual in question falls within the State's non-refoulement obligations under the CAT.

Australia's policy of "enhanced screening" does not effectively screen Sri Lankan asylum seekers to determine if they are at risk of enduring torture or other cruel, inhuman degrading treatment or torture if returned to the State from which they traveled.

V. CONCLUSION

As individuals flee parts of the Middle East, Africa, Asia, and the Americas to surrounding states that are party to the Convention Against Torture, that state is obligated neither to torture nor to inflict upon that person other cruel, inhuman or degrading treatment or punishment. Nor may States return any individual to another State where there are substantial grounds for believing that individual may be subjected to torture or other cruel, inhuman or degrading treatment or punishment. This obligation is non-derogable, and states party to the CAT may not digress from this obligation for any reason.²⁰⁷

Australia's treatment of Reza Barati, along with the witnesses to his death, is clearly a violation of Articles 1 and 16 of the CAT.²⁰⁸ The fact that Australia contracted the operations of the Manus Island detention center to G4S does not, and should not, absolve Australia of liability under the CAT. While awaiting determination of their asylum status, these individuals were under the protection and control of the Australian government, and the Australian government failed them. Holding states liable in situations such as these will encourage them to take a more proactive approach in monitoring the treatment of detainees.

Though it is not as discernible whether Australia violated its obligations under Article 3 of the CAT regarding the refoulement of Sri Lankan asylum seekers, it is undisputed that the Australian government owed some duty to these individuals in attempting to determine the individual's risk of torture or other cruel, inhuman or degrading treatment or punishment if returned to the State from which they came. Australia's enhanced screening of Sri Lankan asylum seekers is not an effective procedure to determine the risks these individuals possibly face. Though it might be initially burdensome to enact a more thorough screening process, those disadvantages are outweighed by the

²⁰⁷ Convention Against Torture, *supra* note 6.

²⁰⁸ *Id.*

risk of returning individuals to States where there are substantial grounds for believing the individuals will be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

Holding signatories of the CAT to these standards will not only protect individuals at risk, such as refugees and asylum seekers, but will also provide more oversight and compliance with basic human rights.