



Accountability and remedy for victims of human rights abuses

Submission to the UN Working Group on the use of mercenaries

*Panel on private military and security companies in places of deprivation of liberty,
including prisons and immigrant detention facilities*

Geneva 27 April 2017

Rights and Accountability in Development (RAID) promotes responsible conduct and respect for human rights by companies in Africa and around the world. Since its foundation in 1998, RAID has been at the forefront of efforts to strengthen mechanisms that can bring corporate misconduct to light, hold companies to account and achieve justice for victims of human rights abuses. Over the past 10 years RAID has interviewed numerous victims of PSC-related human rights violations; expatriate employees of PSCs; senior managers in the extractive industry companies that employ PSCs; and government officials who have had contractual arrangements with PSCs.

International law places legal obligations on states in areas under their jurisdiction or control to provide effective legal remedies for persons who have suffered violations of their fundamental rights. This includes state responsibility to investigate and prosecute serious human rights violations, including abuses committed by corporate actors. RAID's field experience is mainly in Africa and includes post-conflict countries, such as the Democratic Republic of the Congo, where it has investigated human rights abuses arising from the operations of private security guards responsible for protecting mine sites, who often work in conjunction with local police.¹ In many jurisdictions around the world, laws do exist that could help to limit human rights abuses by companies, but all too often they are not applied. The Office of the High Commission for Human Rights (OHCHR) stated in a report published in May 2016 that accountability and remedy when business corporations were involved in human rights abuses is 'often elusive.'² Far too often, the victims fail to receive their right to an effective remedy for harm suffered, a core tenet of international human rights law.

RAID's report *Principles without justice: the corporate takeover of human rights* (2016) presented a detailed critique of aspects of the UN Guiding Principles and the Voluntary Principles on Security and Human Rights which promote the use of operational-level grievance mechanisms. RAID argued that this process appears less about achieving justice for victims, and rather more about minimising damage to a company's reputation.

¹ See for example, RAID and MiningWatch Canada 'Adding Insult to Injury at the North Mara Mine' September 2016

² OHCHR 'Improving accountability and access to remedy for victims of business-related human rights abuse' May 2016 A/HRC/32/19; paragraphs 2 and 6

Irrespective of one's views on the use of private contractors to run prisons or immigrant detention facilities, it is an incontrovertible fact that government oversight and transparency are particularly crucial where private companies are hired to provide such services. The absence of that oversight has given rise to serious allegations of abusive practices. Enormous responsibility, discretion and coercive power are delegated by the State to private security companies when they are in control of closed places of detention. And, as the G4S Manus Island case study shows, there is little prospect of accountability when companies benefit from the abuse and are complicit with governments in undermining fundamental human rights.

According to the UN Guiding Principles on Business and Human Rights (GPs):

Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. [GP Principle 11]

The commentary to Principle 11 makes clear that: “responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States’ abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.” [GP Commentary to Principle 11]

Case Study: G4S and the Manus Island Offshore Detention Centre, Papua New Guinea

*Australia's whole underlying strategy ... is to make conditions in offshore detention so difficult that people will give up. It is a deliberate tactic to wear people down, to break them down, so they just give up and go home.*³

In the absence of any prospect of obtaining judicial remedy, RAID has filed many complaints under the OECD Guidelines for Multinational Enterprises as a means of raising awareness about corporate-related abuses and building consensus for action to improve victims’ access to an effective remedy. The 2014 complaint that RAID and the Human Rights Law Centre filed against G4S was an attempt to clarify the human rights responsibilities of a private contractor operating an Australian offshore immigration detention facility.⁴ The Australian Government describes Manus Island as a Regional Processing Centre (MIRPC) - a remote

³ Charlotte Chomppf, a former worker at Manus Island, interview in The Guardian 28 September 2016 'It's simply coercion': Manus Island, immigration policy and the men with no future' Available at: <https://www.theguardian.com/australia-news/2016/sep/29/its-simply-coercion-manus-island-immigration-policy-and-the-men-with-no-future>

⁴ In 2005 RAID and Australian civil society organisations had filed an OECD complaint against Global Solutions Limited (GSL), with respect to the arbitrary detention of asylum seekers, particularly children, in Australian on-shore and off-shore detention facilities. In 2008 GSL was acquired by G4S plc

facility in Papua New Guinea about 800km north of Port Moresby. But a more accurate description is offshore detention centre (ODC). In this paper MIRPC is used when quoting from official documents or reports, otherwise the term ODC or Centre is used.

The Manus Island Centre was established as part of a series of border control measures introduced by the Australian government to try to deter asylum seekers from trying to reach Australia by boat. By agreement with Papua New Guinea, asylum seekers intercepted by the Australian navy were forcibly transferred to Manus Island where they were mandatorily detained for lengthy periods pending consideration of their refugee status. This policy has been held by expert bodies such as the United Nations High Commissioner on Refugees (UNHCR) and the Australian Human Rights Commission to breach fundamental principles of international human rights law. The UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Juan Méndez, concluded that Australia's offshore processing regime in Papua New Guinea violated the right of asylum-seekers – including children – to be free from torture or cruel, inhuman or degrading treatment.⁵

1. OECD Complaint

In September 2014 RAID and the Human Rights Law Centre (HRLC) submitted an OECD complaint against G4S Australia after a serious incident at the Manus Island Centre in Papua New Guinea (PNG). In February 2014, in three days of rioting, 69 detainees were injured, some of them seriously, and an Iranian asylum seeker, Reza Barati, was killed.⁶ The complaint alleged that G4S Australia Pty Ltd (“G4S”) was responsible for significant breaches of the OECD Guidelines in relation to conditions and alleged abuse of detainees at the Manus Island Centre, a remote facility in Papua New Guinea about 800km north of Port Moresby where over 1,000 asylum seekers were at that time detained. Between October 2012 and March 2014 G4S was contracted to oversee management and security at the centre. G4S Australia Pty Ltd is a wholly owned subsidiary of the global security group, G4S plc. In 2013 G4S Global Risk Services became a founder member of the International Code of Conduct for Private Security Service Providers' Association (ICoCA), the compliance and oversight body for private security contractors.

G4S's contract for the provision of operational and maintenance services at the Manus Island ODC between 10 October 2012 and 28 March 2014 was worth Australia AUD \$244 million (\$200 million USD).⁷ Under the terms of the contract G4S was required to:⁸

⁵ Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez, 6 March 2015, UN Doc. A/HRC/28/68/Add.1,

⁶ *RAID and HRLC v. G4S Australia Pty Ltd*, complaint submitted to the Australian and United Kingdom National Contact Points for the OECD Guidelines for Multinational Enterprises, September 2014. For details of the injuries sustained by other detainees see Third Amended Statement of Claim, Slater and Gordon; Breach - external (perimeter) security paragraph, 99, 13 (hereinafter Statement of Claim). Available at: [http://www.raid-uk.org/documents?search_api_views_fulltext=OECD%20Complaint&f\[0\]=field_featured_categories%253Aname%3Acasework](http://www.raid-uk.org/documents?search_api_views_fulltext=OECD%20Complaint&f[0]=field_featured_categories%253Aname%3Acasework)

⁷ <https://www.tenders.gov.au/?event=public.CN.view&CNUUID=5CDC5474-DC41-8318-8DD2F5A5317284AA>. Accessed 17.04.2017

- Provide and maintain a safe and secure environment for Transferees and other people at the site, ensuring that their human rights, dignity and well-being are preserved;⁹
- Ensure that the needs of Transferees are identified and responded to openly and with integrity;¹⁰
- Maintain assets and infrastructure to provide a safe, secure and healthy environment at the site;¹¹
- Ensure that all G4S personnel are and remain of good character and conduct, comply with G4S Group Ethical Policies and are appropriately skilled, trained and qualified to provide the services under the Contract;¹²
- Establish processes to prevent Transferees being subjected to illegal and anti-social behaviour;¹³
- Implement management strategies to defuse tensions and conflicts before they escalate or become serious or violent;¹⁴

At its re-establishment in November 2012, the Manus Island ODC was intended to be temporary and had the capacity to house somewhere around 500 people, including families with children. At the time of the February 2014 incident the Centre held 1100 detainees, all single adult males.¹⁵ G4S appears to have taken no steps to use its leverage with the Australian Department of Immigration and Border Protection (DIBP) to mitigate the additional problems created by severe overcrowding as the number of asylum seekers transferred to the Centre rose over time, such as by seeking to impose under its contract an upper limit on the number of asylum seekers that could be transferred to the Centre.

Robert Cornall, a civil servant, was engaged by DIBP to conduct an independent investigation into the events of 16-18th February.¹⁶ The report notes that the violence at the Centre took place following several weeks of protests by detainees at the lack of progress in the processing of refugee status determinations.

At the height of these protests, members of the PNG mobile police squads pushed over the perimeter fence and entered the Mike compound and began firing shots within the accommodation blocks. An unspecified number of G4S local security personnel, local employees of other service-providers at the Centre and several ex-pat

⁸ Contract in relation to the provision of services on Manus Island (PNG) Commonwealth of Australia represented by Department of Immigration and Citizenship and G4S Australia Pty Ltd. Released under an Australian Freedom of Information Request, 15 May 2014. Attached as an appendix to the G4S complaint.

⁹ Clause 14.1.1

¹⁰ Clause 6.1.1(a)

¹¹ Clause 8.4.2

¹² Clauses 5.4.2 (a) & (e) & 5.5.2

¹³ Clause 6.1.1(b)

¹⁴ Clause 6.9

¹⁵ Senate Report §3.3-3.4

¹⁶ Cornall, Robert, *Review into the Events of 16-18 February 2014 at the Manus Regional Processing Centre*, 23 May 2014. https://www.immi.gov.au/about/dept-info/_files/review-robert-cornall.pdf, accessed 3 June 2014.

G4S staff then followed the police into the Mike compound and “started bashing detainees.”¹⁷

Throughout the period of the G4S contract, conditions at the Centre were extremely harsh: detainees had insufficient access to water; medical and mental health facilities at the Centre were insufficient; food was of poor quality and often contaminated by insects. There were also allegations that young men held at the facility were sexually assaulted by other detainees with the full knowledge of other staff at the Centre and the DIBC.¹⁸ According to RAID and HRLC the failures with respect to the conditions at the Centre also represented a failure of due diligence by G4S, as it knew or ought to have known, on entering the contract, that the existing facilities at the Centre did not comply with international standards.¹⁹ In one of its first monitoring reports, the UN Refugee Agency (UNHCR) warned about the inadequacy of the Centre’s installations and facilities:

The remoteness of the location, the nature of the facility (on a naval base) and the difficult living conditions appear to contribute to the all-pervasive sense of frustration and despondency which, if left unresolved for a protracted period, is likely to lead to increased levels of psycho-social and physical harm of those affected.²⁰

Given the responsibility of the Australian Government for the Manus Island Centre and the offshore detention regime, RAID and HRLC had concerns that the OECD complaint would not be dealt with objectively and effectively by the Australian National Contact Point (ANCP), the government body responsible for promoting the Guidelines and implementing the complaints mechanism. The complaint was therefore simultaneously filed in the UK against the parent company, G4S plc, which sets the corporate social responsibility (CSR) policies and human rights standards for the G4S group as a whole. However, the UK NCP declined to proceed and referred the case to the Australian NCP. In its decision the UK NCP showed a lack of consistency, which is one of the hallmarks of non-judicial mechanisms (identified by OECD Watch and Amnesty International): in a complaint brought against G4S in Israel, the UK NCP asserted jurisdiction because “G4S has a controlling interest in Israeli subsidiaries which have contracts with the Government of Israel to supply and maintain security equipment.”²¹

The complaint was based on an abundance of evidence from a range of sources including human rights monitoring reports, media reports and information submitted to the Senate

¹⁷ *Ibid.*, p 7

¹⁸ Mr. Rod St George, former Head of Occupational Health and Safety, interview on Dateline, broadcast on SBS, July 23, 2013 - 21:30

<http://www.sbs.com.au/news/dateline/story/manus-whistleblower>

¹⁹ UNHCR, *UNHCR monitoring visit to Manus Island, Papua New Guinea, 23 to 25 October 2013* concluded that ‘the policies, the current operational approaches, and harsh physical conditions of the MIRPC did not comply with international standards and did “not provide safe and humane conditions of treatment in detention.”

²⁰ UNHCR, *UNHCR Monitoring Visit to Manus Island, Papua New Guinea, 11-13 June 2013*,

²¹ UK NCP Initial Assessment: Complaint from Lawyers for Palestinian Human Rights (LPHR) against G4S, May 2014

Inquiry, as well as interviews with individuals and organisations that worked with asylum seekers on Manus Island. RAID and HRLC alleged that G4S was responsible for significant breaches of its human rights obligations under the OECD guidelines through: its complicity in the unlawful detention of asylum seekers at the Manus Island ODC; its failure to conduct due diligence and to maintain basic human rights standards at the facility; and its failure to protect asylum seekers from harm. G4S dismissed the complaint saying²²:

G4S is confident it has complied with all of its human rights and legal obligations. . . It should be noted that the Human Rights Law Centre's complaints refer largely to the policy of offshore detention and to matters over which G4S had no direct control.

After nine months of inaction, the case was rejected by the Australian NCP because "aspects of the complaint could be interpreted as commentary on [Australian] government policy."²³ Furthermore, and somewhat contradicting its previous assertion, the ANCP said

[G]iven G4S was not ultimately responsible for the MIRPC facility, it had limited ability to influence the operation of the facility. The facility is maintained and controlled by the PNG Government and the operational standards for the facility ultimately rest with that Government.²⁴

RAID and HRLC maintain nonetheless that G4S Australia and its parent company in the UK had a responsibility under the OECD Guidelines not "to cause or contribute to human rights violations."²⁵ They believed that G4S should not evade responsibility simply because those violations were sanctioned by the Australian Government.

2. Limited Scope of the Australian Senate Inquiry

The Australian Senate inquiry into the events of 16 to 18 February 2014 did not fully address the responsibility of G4S for the violence nor for other human rights abuses that had occurred in the preceding months and which the inquiry identified as contributory factors.²⁶ By the time the inquiry started taking evidence, G4S's contract with DIBC had already ended.

The ANCP's assessment that neither G4S nor the Australian Government had any responsibility for human rights violations at the Centre, was at odds with the conclusions of the Senate inquiry. The Senate found that the violent events were "eminently foreseeable" and might have been prevented if there had not been a massive influx of new transferees²⁷

²² The Guardian 23 September 2014 'Manus security firm, G4S, responsible for February violence, says law centre'

<https://www.theguardian.com/world/2014/sep/23/manus-security-firm-g4s-responsible-for-february-violence-says-law-centre>

²³ Australian National Contact Point's (ANCP) final assessment (decision) on 10 June 2015 to reject the Specific Instance submitted on behalf of Transferees detained at the Manus Island Processing Centre (MIPC).

²⁴ Australian National Contact Point's (ANCP) final assessment (decision) on 10 June 2015 to reject the Specific Instance submitted on behalf of Transferees detained at the Manus Island Processing Centre (MIPC).

²⁵ OECD Guidelines Chapter 4.2

²⁶ The Senate Standing Committee on Legal and Constitutional Affairs inquiring into the incident at the Manus Island Detention Centre from 16 February to 18 February 2014; hereinafter Senate inquiry

²⁷ In seven weeks, from 19 July 2013 to the election on 7 September 2013, the centre's population grew from 130 to 723—an increase of almost 600 per cent. In October 2013, the number of asylum seekers detained at the

into the Centre and if a clear system for determining refugee status and resettlement framework had been established.²⁸ Unlike the ANCP, the Senate concluded that the Australian Government exercised effective control over the Centre:

The committee considers that the degree of involvement by the Australian Government in the establishment, use, operation, and provision of total funding for the centre clearly satisfies the test of effective control in international law, and the government's ongoing refusal to concede this point displays a denial of Australia's international obligations.²⁹

However, as regards the role of G4S the Senate largely commended its action at the time of the incident, but noted that the committee had received “extremely troubling evidence” in relation to the actions of some service provider staff:

It is undeniable that a significant number of local service provider staff, as well as a small minority of expat staff, were involved in the violence against transferees.³⁰

The Senate criticised both G4S and the department for failing to ensure that the centre was sufficiently resourced, in terms of both staffing and security infrastructure, to contain protest activity at the centre and prevent a situation occurring where the police mobile squad would intervene.³¹ G4S raised concerns with the Department about the suitability of the police mobile squad given its propensity to use disproportionate force to maintain order.³²

The Senate avoided discussion of the criminal culpability of particular individuals because it was “mindful of the need to avoid any interference with the investigation and prosecution of the criminal offences associated with these events: these are properly matters for the Royal Papua New Guinea Constabulary (PNG Police) and the Papua New Guinean courts”.

Possibly because of the limited scope of the inquiry, the Senate did not examine in depth G4s’s performance nor did it reach adverse findings about alleged failures by G4S to meet its wider contractual obligations. Under its contract with the Australian Department of Immigration and Border Protection (DIBC), G4S was required to recruit 50 per cent of security staff locally. G4S engaged a PNG security firm, Loda Securities, to provide local employees to work as security officers at the centre.³³

G4S confirmed that a “high percentage” of the staff engaged through Loda Security would have had no prior experience doing security work.³⁴

centre reached approximately 1100.3 By February 2014, at the time of the incident, there were 1338 asylum seekers Senate Report §3.3-3.4

²⁸ Senate Inquiry §8.5

²⁹ Senate inquiry; §8.33

³⁰ Senate inquiry §8.15

³¹ Senate inquiry §8.19

³² G4S Submission 1.4

³³ Senate inquiry §2.26

³⁴ Senate inquiry §2.48

Submissions to the Senate Inquiry by former G4S employees provided important evidence with respect to the lack of proper training provided by G4S to its security staff – in particular local staff – and the lack of emergency procedures at the Centre.

The Senate criticised the Minister of Immigration and Border Protection for making untrue assertions in the immediate aftermath of the disturbances at the Centre. The Senate found that the Minister had sought to unfairly apportion blame to the asylum seekers themselves for the violence that was done to them on the night of 17 February 2014.³⁵ In its conclusions the Senate considered that “making reparations to individuals whose rights have been violated in the incident at the Manus Island RPC, and preventing recurrences of human rights violations, is essential from the perspective of Australia's international obligations”.³⁶ However it failed to make explicit recommendations as to how reparations might be made.

3. Limitations of the criminal investigation

In February 2016 the Australian High Court, in a case challenging the constitutionality of the Nauru regional processing centre, upheld Australia’s role in detaining of asylum seekers in foreign countries.³⁷ The main order made clear that Australia is only permitted to participate in an offshore detention regime for as long as it serves the purpose of processing people’s refugee claims. Amnesty International noted the judgement “does not prevent the Government of its officers or agents from being subject to civil or criminal liability for their actions on Nauru under the laws of Australia or any other country.”³⁸ There is scope under Australian domestic law to hold a corporation accountable for human rights abuses. In the State of Victoria (where G4S has its headquarters) the Charter of Human Rights and Responsibilities Act (2006) imposes human rights obligations on public authorities. Section 38 (i) of the Charter makes it unlawful for a public authority to act in a way that is incompatible with human rights. These obligations may apply to corporations when, as was the case with G4S at the Manus ODC, “they perform functions that were traditionally performed by the State or that are delegated by the State by way of contract.”³⁹ In reality though there seems no prospect of a criminal investigation being instigated by the Australian authorities against the company.

There have however been individual criminal prosecutions. In PNG, two local men were prosecuted in connection with the February 2014 events. Both men had been employed at the Centre: one as a G4S guard, the other worked for the Salvation Army, which was contracted to provide welfare services to the detainees. In 2016 a PNG criminal investigation into the death of Reza Barati, resulted in their conviction for his murder.⁴⁰ The PNG nationals were

³⁵ Senate inquiry §8.27 - §8.31

³⁶ Senate inquiry §8.38

³⁷ Plaintiff M68/2015 v. Minister for Immigration and Border Protection & Ors

http://www.hcourt.gov.au/cases/case_m68-2015

³⁸ Amnesty International, *Treasure Island* p. 13

³⁹ Allens Arthur Robinson ‘Corporate Duty and Human Rights under Australian Law’ 2008

⁴⁰ The Sunday Morning Herald, 19 August 2014, ‘Reza Barati: Two men arrested over death of asylum seeker at PNG detention centre’ <http://www.smh.com.au/federal-politics/political-news/reza-barati-two-men-arrested-over-death-of-asylum-seeker-at-png-detention-centre-20140819-3dyf3.html>

sentenced to 10 years in jail, with five years suspended. The men received shorter prison terms because, in the court's opinion, others were also involved in the killing.⁴¹ The PNG Deputy Commissioner told journalists that the police were seeking three additional suspects, including two expatriates G4S employees, whom it was believed had left the country.⁴² G4S said that it had provided information to the PNG authorities but that it was unclear which G4S employees might have been involved in the violence.⁴³ In April 2014 G4S issued a statement strongly denying media allegations that it had failed to cooperate with the PNG police in its investigation into the death of Reza Barati and other events that occurred at the Manus Island RPC on the nights of 16 and 17 February 2014.⁴⁴ The Australian Federal Police said that they had not received a request from their Papua New Guinean counterparts to trace or interview expatriate suspects.⁴⁵ At the time of writing (April 2017), no one else has been charged in connection with the murder.

There is a common perception in PNG that expatriates working on Manus enjoy immunity from prosecution. In July 2016 for example, three Wilson Security guards (subcontractors working with Broadspectrum, the company which took over the contract for the Manus Island ODC) accused of drugging and raping a local woman were hurriedly flown off the island and out of Papua New Guinea before they could be interviewed. A Spanish company, Ferroviario, acquired Broadspectrum in May 2016. Despite promises the men allegedly involved would be returned to face questioning, they have never been repatriated.⁴⁶

4. Effectiveness of market forces and shareholder activism

The failure under the procedures of the OECD guidelines, a state-backed non-judicial grievance mechanism, to hold G4S, the lead private contractor, accountable, contrasts with the effectiveness of public campaigning and shareholder action. The Australian civil society coalition, No Business in Human Rights (NBIA), and international human rights organisations such as Amnesty International and Human Rights Watch have been critical of the assistance that successive private security providers have given the Australian government which has enabled it to maintain "an inherently cruel and abusive 'offshore processing system'".⁴⁷ In December 2015, despite overwhelming evidence of

⁴¹ The Guardian 19 April 2016 'Reza Barati: men convicted of asylum seeker's murder to be free in less than four years'. <https://www.theguardian.com/australia-news/2016/apr/19/reza-barati-men-convicted-of-asylum-seekers-to-be-free-in-less-than-four-years>

⁴² The Sunday Morning Herald 21 August 2014, 'PNG quiet over expat lead on Manus murder' <http://www.smh.com.au/federal-politics/political-news/png-quiet-over-expat-lead-on-manus-murder-20140820-3e10f.html>

⁴³ G4S Submission, 6.16

⁴⁴ Statement on G4S Cooperation with PNG Police 2 April 2014 <http://www.au.g4s.com/media-centre/Manus/manusislandStatement3.aspx>

⁴⁵ The Sunday Morning Herald, 21 August 2014

⁴⁶ The Guardian 1 September 2016 'Wilson Security to withdraw from Australia's offshore detention centres' <https://www.theguardian.com/australia-news/2016/sep/01/wilson-security-to-withdraw-from-australias-offshore-detention-centres>

⁴⁷ Amnesty International, 'Treasure I\$land: How companies are profiting from Australia's abuse of refugees on Nauru' April 2017

Broadspectrum's complicity in human rights abuses being on the public record, the Spanish company Ferrovial commenced a hostile takeover bid for Broadspectrum. The NBIA campaign, which targeted investors and financiers in order to make them aware of the risks inherent in the role of Broadspectrum and other private contractors in Australia's offshore detention regime, appears to have been instrumental in persuading the Spanish parent company not to renew its contract, which expires in 2017.⁴⁸

5. PNG Supreme Court ruling

The death knell for Manus ODC was the unanimous ruling on 26 April 2016 of the PNG Supreme Court that the detention of asylum seekers on Manus Island was unconstitutional.

Both the Australian and Papua New Guinea government shall forthwith take all steps necessary to cease and prevent the continued unconstitutional and illegal detention of the asylum seekers or transferees at the relocation centre on Manus Island and the continued breach of the asylum seekers or transferees Constitutional and human rights.⁴⁹

Commentators noted that the Court made an order purporting to bind the Australian Government since the Australian Government was not a party to the proceedings.⁵⁰ The Centre is set to close in October 2017 when the current contract with Broadspectrum (formerly Transfield Services), which has provided garrison and welfare services at Manus Island since March 2014, comes to end.⁵¹ Wilson Security, a subcontractor to Broadspectrum since 2012, has also announced that it will leave the Manus Island and Nauru detention centres at the end of its contract.⁵² This leaves the Australian government without a camp manager or security firm for the offshore detention network. More than 800 men are still being held there.⁵³ Most of the men still held on Manus have been there more than three years. The vast majority of those assessed – 669 of 859, or 78% – have been found to be refugees and are legally owed protection.⁵⁴ In November 2016 the US agreed to resettle 1250

⁴⁸ Brynn O'Brien, *Business and Human Rights Journal* 1 (2016) pp. 333-340 'Extraterritorial detention contracting in Australia and the UN Guiding Principles on Business and Human Rights'; <https://doi.org/10.1017/bhj.2016.12>

⁴⁹ *Namah v. Pato* [2013] SCA84 (Papua New Guinea), paragraph 72 (6). The full judgment is available at: <https://www.scribd.com/doc/310461159/PNG-Supreme-Court-Decision-on-Manus-Island>

⁵⁰ L. Beck, 'The Constitutionality of Australia's Offshore Detention Regime for Asylum Seekers: Two Very Recent Cases', *U.K. Const. L. Blog* (29th Apr 2016) (available at <https://ukconstitutionallaw.org/>)

⁵¹ For more details about Broadspectrum, see Amnesty International, *Treasure I\$land: How Companies are Profiting from Australia's Abuse of Refugees on Nauru* April 2017; see also No Business in Abuse, *Business in Abuse: Transfield's complicity in gross human rights abuses within Australia's offshore detention regime*, November 2015

⁵² *The Guardian* 1 September 2016, Wilson Security to withdraw from Australia's offshore detention centres ; at <https://www.theguardian.com/australia-news/2016/sep/01/wilson-security-to-withdraw-from-australias-offshore-detention-centres#img-1>

⁵³ <https://www.theguardian.com/australia-news/2015/jun/05/former-asylum-seeker-worker-tells-of-abuse-of-two-year-old-children-on-nauru>

⁵⁴ *The Guardian* 15 February 2017 'Manus Island detention centre to close by year's end, inquest told'

refugees from Australia's offshore detention regime. After some uncertainty,⁵⁵ in April 2017, the US Vice President confirmed that the agreement would be honoured.⁵⁶

There is mounting pressure on detainees at Manus, who have not been granted refugee status, to return to their countries of origin. The Australian Government is offering "substantial assistance packages" to help non-refugees depart voluntarily, return home and re-establish their lives in their home country".⁵⁷ In cases where non-refugees refuse to depart voluntarily, the government of PNG has indicated that it will enforce the removal of those individuals, in accordance with normal international practice. Ben Lomani, a lawyer representing some of the detainees, has expressed concern that their claims may not have been properly assessed. According to reports in the media, one Nepalese asylum seeker was forcibly deported in February 2017. Immigration officials have reportedly told detainees with negative status that they should either agree to return home in exchange for \$20,000 or face forcible deportation.⁵⁸

The wellbeing and safety of the detainees at the Centre continue to be at risk. Following an incident on 14 April 2017 when shots were fired and a crowd of local people tried to storm the compound HRLC called on the Australian Prime Minister to evacuate the camp and bring the men to safety in Australia.⁵⁹

6. Manus Island class action

As far as RAID is aware, to date only one of the detainees injured during the violence of February 2014 has received a settlement. One of the few available options for claimants to secure a remedy remains a civil action in tort. There are however encouraging signs that other detainees who were injured in the February 2014 violence or who have been held for prolonged periods at the Manus ODC may at last obtain compensation for the harms they have suffered. In December 2016 a class action was filed by the Australian law firm Slater and Gordon on behalf of detainees at the Manus Island ODC who suffered injury a result of conduct by the Australian Government, G4S and Transfield (now Broadspectrum). The Statement of Claim alleges that the defendants failed to take reasonable care in relation to food and water, accommodation, healthcare and security arrangements at the Manus Island

<https://www.theguardian.com/australia-news/2017/feb/15/manus-island-detention-centre-to-close-by-years-end-inquest-told>

⁵⁵ Financial Times 21 April 2017 'Australia's hidden refugees fight to tell their stories'

<https://www.ft.com/content/0f9820ac-1b32-11e7-bcac-6d03d067f81f>

⁵⁶ BBC on-line news 22 April 2017 'US to honour 'dumb' Australia migrant deal'. Available at

<http://www.bbc.co.uk/news/world-us-canada-39676947>

⁵⁷ Australian Associated Press 9 February 2017 'PNG deports Manus asylum seekers'

<http://www.news.com.au/national/breaking-news/png-starts-to-deport-manus-asylum-seekers/news->

⁵⁸ Australian Associated Press 9 February 2017 'PNG deports Manus asylum seekers'

<http://www.news.com.au/national/breaking-news/png-starts-to-deport-manus-asylum-seekers/news-story/088e32ebae6c38fd48a18162e1cc97bc>

⁵⁹ Sky News Published: 3:18 pm, Sunday, 16 April 2017 Asylum seeker injured after Manus 'gunfire'

ODC.⁶⁰ On 1 August 2016, an amended statement of claim was filed which included an additional allegation that the Defendants had falsely imprisoned the Detainees at the Centre. The action is being brought on behalf of 1900 asylum seekers who were held at the Centre between 21 November 2012 and 12 May 2016.⁶¹

Many of the concerns highlighted in the RAID and HRLC's OECD 2014 complaint are also identified in the statement of claim and are pertinent to any assessment of G4S's alleged responsibility for human rights abuses at the Centre. A few of these issues are briefly summarized below [quotations from the statement of claim are in bold and references in are square brackets].

– *G4S Duty of Care*

At all material times during the G4S Period each of the Commonwealth [of Australia] and G4S owed to Detainees at the Centre, including the Claimants, a duty to take reasonable care to avoid foreseeable harm to the Detainees [§ 49]

G4S was obliged by the contract to provide a range of Services to promote the wellbeing of Detainees and create an environment that supports security and safety at the Centre [item 2.1.3;]

G4S failed to take reasonable care to ensure that Detainees were provided with reasonable protection, in accordance with Australian Precautions⁶², from exposure to violent or anti-social behaviour from other Detainees or from G4S personnel. [§95]

From late 2012 or early 2013, it was known that the local population was dangerously hostile toward the Centre, staff associated with the Centre and Detainees.⁶³

– *G4S failed to take adequate steps to improve conditions at the Centre*

G4S made no or no adequate response to the risk that the internal fencing was inadequate to prevent persons gaining unauthorised access to the Centre and compounds and causing harm to Detainees. [p. 71]

G4S told the Senate inquiry that between it had raised numerous concerns about the sub-standard infrastructure at the Centre and particularly the inadequate fencing.⁶⁴ **As at January 2014, no security infrastructure upgrades had been completed.** [p.72]

G4S knew or ought reasonably to have known that a failure to take reasonable steps to ensure that detainees were provided with food and water of an appropriate quality, adequate shelter and accommodation, and proper medical care and health services could be harmful.[§56]

⁶⁰ The Manus Island class action is brought by Mr Majid Karami Kamasae (the “Plaintiff”) against the Commonwealth of Australia, G4S Australia Pty Ltd and Broadspectrum (Australia) Pty Ltd (the “Defendants”), <https://media.slatergordon.com.au/third-amended-statement-of-claim-manus.pdf>

⁶¹ The case is due to start on May 1, and run for three to six months

⁶² The standard of care required of the Commonwealth in respect of persons held in immigration detention in Australia.

⁶³ Senate inquiry § 1.60-1.67

⁶⁴ G4S Submission, 1.4

In its October 2013 report the UNHCR concluded that the policies, operational approaches, and harsh physical conditions of the MIRPC did not comply with international standards and did “not provide safe and humane conditions of treatment in detention.”⁶⁵

– *Absence of an effective complaints mechanism*

G4S had no or no adequate formal system for receiving, investigating or assessing complaints about Detainee behaviour. Detainees had no independent, private, process for making a complaint about the conduct of other Detainees. [§108]

The absence of an effective complaints mechanism was compounded by the secrecy surrounding the Centre, its inaccessibility and the obstacles that have been placed in the way of visits by third parties including: UN bodies, human rights organisations and the media to prevent them from independently assessing and reporting on the conditions of the detainees is a matter of particular concern. In the absence of independent oversight abuse can flourish.

Furthermore there was no whistleblower protection in place to alert the company to problems. As was noted by the Senate, draconian non-disclosure agreements had prevented MIRPC staff from disclosing issues. Staff were continually warned that breaches of these confidentiality requirements was punishable, including by prosecution.⁶⁶ The Senate, which had itself been prevented by the Australian Government from making a site visit⁶⁷, commented on the ‘striking difference between the official statements and evidence provided by the department and service providers running the centre’ and the first-hand testimony of individuals who had worked at and observed the centre.⁶⁸ The Senate concluded.

On issues including the provision of healthcare services to transferees, the adequacy of accommodation and facilities, and access to legal advice and other assistance for transferees, there are massive contradictions between the 'official' evidence given by the Australian Government and its contractors, and the evidence of other observers.

As the Financial Times commented in April 2017,

*Australia has done everything it can to make the refugees it detains in offshore camps voiceless — confiscating phones, refusing journalists access and threatening staff with jail if they speak out about the wretched conditions.*⁶⁹

– *Relations with PNG Police*

G4S knew or ought reasonably to have known that the PNG Mobile Police were poorly trained... did not have conventional riot force capability ... had a force escalation procedure that rapidly escalated to the use of lethal force in a manner inconsistent with Australian Precautions.⁷⁰

⁶⁵ UNHCR, *UNHCR Monitoring Visit to Manus Island, Papua New Guinea, 23-25 October 2013*

⁶⁶ Senate inquiry §2.28 -§ 2.30

⁶⁷ Senate Inquiry §1.8-1.9

⁶⁸ Senate Inquiry §8.46

⁶⁹ Financial Times, 21 April 2017 *op.cit*

⁷⁰ Statement of Claim paragraph 65

G4S told the Senate inquiry that on 10 February 2014 it had raised concerns with the Department about the suitability of the PNG police mobile squad given its propensity to use disproportionate force to maintain order.⁷¹ G4S subsequently admitted that it might have been able to do more to coordinate with the PNG police prior to the events.⁷²

As at June 2013, the UNHCR described the Centre as “a volatile environment in which otherwise minor disagreements or misunderstandings had the potential to spark significant tensions or self-harm as pressure, uncertainty and feelings of vulnerability increased among the asylum-seekers.”⁷³

– *Training*

Centre staff, and in particular G4S personnel, were not selected, trained, qualified or equipped, in accordance with Australian Precautions

In its submission to the Senate Inquiry, G4S claimed that it “has exemplary training standards derived from the group’s extensive experience in providing justice and immigration services in Australia and around the globe. The training given to security staff on Manus Island, including to the subcontracted PNG local staff, was appropriate to the circumstances.”⁷⁴

But this view was contradicted by a number of witnesses at the Senate inquiry, one of whom, Martin Appleby (a former G4S safety and security officer and training officer), described the training and risk management as “woefully inadequate”.⁷⁵

7. Self- Assessment of G4S Performance

Despite the accumulated evidence to the contrary from UN bodies, expert reports and witness statements G4S told the Senate inquiry that it believed that “it performed the services under the Manus contract well and that it met and exceeded the requirements of the contract.” Furthermore in December 2013, the Secretary of the Department expressly stated that “the decision to appoint a new service provider and offer no further extension to G4S’s contract for services at the Centre was not related to any performance issues.”⁷⁶

The limitations of self-reporting are all too apparent from the service provider reports that G4S submitted to the Department. The reports for September and December 2013 and January 2014 are remarkably upbeat.

The contract included an incentives and abatement regime (Schedule 6 Performance Management Framework Principles). Poor performance would incur fines, and good performance bonuses. However under most categories no financial penalty (abatement) would apply unless the same failure occurred on three separate occasions. From reviewing the Individual Service Provider Reports it seems that the G4S was never penalised for any

⁷¹ G4S submission §1.4; see also Senate Inquiry § 5.20

⁷² G4S Submission §1.5

⁷³ UNHCR, *UNHCR Monitoring Visit to Manus Island, Papua New Guinea, 11-13 June 2013*, pp 11, 16.

⁷⁴ G4S Submission §2.4

⁷⁵ Senate inquiry: §2.56 – §2. 61; see also Martin Appleby Witness Statement 18

⁷⁶ G4S Submission 8.1 (e)]

shortcomings in its performance. G4S's performance under the categories of welfare, care, and security were rated by the department as either 4 ("exceeds expectations") or 3 ("meets expectations").⁷⁷

Schedule 6 of the contract also included a provision, "Excusable Performance Failure Events" (EPF), which allowed G4S, provided the department had been given prior notification, to suspend some key performance measures. According to its September 2013 report, G4S, when "in excess of 300 transferees" arrived at the Centre, applied for an Excusable Performance Failure "against the monumental changes that are taking place." The report concludes that the safety and security of the site has not been compromised and there has not been any disturbance of the general operation of the facility.⁷⁸ The tone of the reports for the months of December 2013 and January 2014, although covering a period of "protest action" and "an extremely tense situation" - remains resolutely upbeat. According to the company, despite some individual personnel failings, "overall G4S demonstrated satisfactory performance."

G4S appears to have taken no steps to use its leverage with the Australian Department of Immigration and Border Protection (DIBP) to mitigate the additional problems created by severe overcrowding as the number of asylum seekers transferred to the Centre rose over time, such as by seeking to impose under its contract an upper limit on the number of asylum seekers that could be transferred to the Centre. Indeed G4S stood to profit from the overcrowding as it received an additional fee for each new "transferee" it accepted.⁷⁹ The contract recognised that the number of "transferees and site requirements will vary from time to time" and that the level of resourcing and daily rates and deployment allowances would be adjusted accordingly.⁸⁰

8. Conclusion

An effective remedy includes sanctions against those responsible for human rights violations, both to punish them and to deter future violations. None of the administrative inquiries, neither the Cornall Review or the Senate report, tackled head on the problems with G4S as lead contractor, nor the inherently flawed Manus Island contract, nor the abject lack of government oversight. As the Statement of Claim makes clear: "At all material times during the G4S Period, G4S, its agents and contractors, in providing the Services at the Centre in respect of Detainees, did so as agent for the Commonwealth."⁸¹ But this does not exonerate G4S from its own responsibility to respect human rights.

While there is little doubt that the reputation of G4S suffered as a result of its alleged acts of omission and commission at the Manus Island ODC, the company escaped formal censure, or criminal investigation and, (as far as RAID is aware), financial penalties for its contractual

⁷⁷ Individual Service Provider Reports (ISPR) released by DIBP under the FOIA 1982 (obtained by HRLC)

⁷⁸ ISPR Sep-13

⁷⁹ See Martin Appleby Witness Statement 18;

⁸⁰ G4S contract, Schedule 2: Fees and Payment ; cl. 3.1.3

⁸¹ Statement of Claim, paragraph 47

failures. However as a result of the on-going class action the company now faces extremely costly legal proceedings.

The international standing of the Australian Government which is a defendant in the class action has been badly damaged because of its offshore detention regime. Between 2013-2014, the estimated cost to the Australian tax payer for holding a single person in offshore detention for 12 months was over AUD \$400,000 [\$328, 268 USD].⁸² According to the Asylum Seeker Resource Centre, the cost of maintaining the Manus Island detention centre is vastly more expensive than it would be to process asylum seekers in Australia.⁸³ In 2015 operational costs reached over [AUD] \$600 million per annum, according to senate estimates.⁸⁴ In comparison processing in Australia costs just 20% of the amount required to process someone on Manus Island.⁸⁵ Apart from the inherent cruelty of the system, the offshore detention regime makes little financial sense.

Neither has Australia's offshore detention regime been an unmixed blessing for Papua New Guinea. Australia is PNG's largest aid donor. According to Australia's Department of Foreign Affairs and Trade over 40 per cent of the population remain poor and face hardship and 80 to 85 per cent of Papua New Guinean's reside in traditional rural communities. An estimated 40 per cent of children are stunted, one in five children are not enrolled in school.⁸⁶ The Memorandum of Understanding of September 2012 between PNG and Australia failed to ensure that people held at the centre were "treated with dignity and respect and that relevant human rights standards were met."⁸⁷ While the MoU provided employment opportunities, the ODC exacerbated tensions between local people and the detainees and strained the capacity of the PNG police force. Apart from the many other challenges it faces, the PNG Government now has the additional burden of finding a way of resolving the legacy of Australia's failed offshore detention policy.

In 2010 G4S was one of the first companies to sign the International Code of Conduct for Private Security Service Providers (ICoC). The Code makes explicit that companies cannot evade responsibility for human rights abuses by arguing they had to meet contractual obligations:

Signatory Companies will not knowingly enter into contracts where performance would directly and materially conflict with the principles of the Code, applicable

⁸² Calculation based on the combined value of AUD \$ 594,620,073.65 reported by the Australian government <https://www.tenders.gov.au> for reported contracts of G4S (contracts reported from 10 October 2012 -28 March 2014)

⁸³ Asylum Seeker Resource Centre April 2015 , Manus Island Detention Centre

⁸⁴ Hansard, Senate Estimates, 20 October, 2014

⁸⁵ Hansard, Senate Estimates, 27-28 May 2013.

⁸⁶ Department of Foreign Affairs and Trade, Development Assistance in Papua New Guinea, <http://dfat.gov.au/geo/papua-new-guinea/development-assistance/Pages/papua-new-guinea.aspx> (accessed 17 April 2017).

⁸⁷ *Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the Transfer and Assessment of Persons in Papua New Guinea and Related Issues*

national or international law, or applicable local, regional or international human rights law, and are not excused by any contractual obligation from complying with the Code. [ICoC 20]

When asked about this (after the OECD complaint was filed), G4S shrugged off its ICOC responsibilities on the grounds that these only applied to a specific entity, Global Risk Services, and not to the G4S group as a whole.⁸⁸

The G4S case study suggests that commercial imperatives will always tend to override a company's allegiance to codes of conduct, CSR policies and commitments. Human rights due diligence and other "voluntary measure", set out in the GPs and OECD Guidelines, are clearly insufficient to hold companies accountable or provide a means of redress for the victims. This can only happen if human rights due diligence is mandatory and backed by the threat of meaningful sanctions. Codes and soft law instruments are part of a continuum ultimately it must include a realistic prospect of judicial remedy.

⁸⁸ Communication to the ICoCA Board.