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Australia's Guantanamo Bay: How Australian Migration Laws Violate the United Nations Convention Against Torture

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NOTE

**AUSTRALIA’S GUANTANAMO BAY: HOW
AUSTRALIAN MIGRATION LAWS VIOLATE
THE UNITED NATIONS CONVENTION
AGAINST TORTURE**

KATELIN MORALES

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I. INTRODUCTION

In 2013, a Sri Lankan man was brutally beaten and tortured by the police, after being forcibly returned to Sri Lanka by the Australian government.¹ Even though Australian officials were aware of the risks of torture in Sri Lanka, the man was still deported and, as a result, subjected to cruel, inhuman and degrading treatment.²

Australian refugee and asylum law has been consistently criticized by human rights treaty bodies and other United Nations experts.³ Both the United Nations Committee Against Torture in 2008, and the Human Rights Committee in 2009 expressed grave concern for

1. See HUMAN RIGHTS LAW CTR., TORTURE AND CRUEL TREATMENT IN AUSTRALIA: JOINT NGO REPORT TO THE UNITED NATIONS COMMITTEE AGAINST TORTURE 51 (2014) (citing Oliver Laughland, *Australian Police Declined to Interview 'Tortured' Sri Lankan Asylum Seeker*, GUARDIAN AUSTL. (Mar. 11, 2014, 1:39 PM), <http://www.theguardian.com/world/2014/mar/11/repatriated-sri-lankan-asylum-seekers-torture-claims-ignored-by-police>) (reporting that the Australian agencies charged with investigating the returnee's torture complaint refused to conduct an independent investigation and deferred to the Sri Lankan police who denied the accusation).

2. See Laughland, *supra* note 1 (stating that Australian officials had a detailed account of the returnee's alleged torture before sending him back to Sri Lanka).

3. See, e.g., H.R.C. Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant - Concluding Observations of the Human Rights Committee: Australia, 95th sess., U.N. Doc. E/C.12/AUS/CO/4 (June 12, 2009) (explaining that the Australian Migration Act endangered the rights of migrants and may violate international law).

Australia's Migration Act 1958 (the "Migration Act").⁴ Their concerns centered on Australia's method of refugee status determination, use of regional processing centers for those arriving by sea, and failure to enshrine into legislation a refugee's right to not be returned to his or her country of persecution.⁵

Australia claimed to the U.N. Committee against Torture (the "Committee") that: (1) the Migration Act is in compliance with the Convention Against Torture; and (2) no torture or other ill-treatment occurs in Australia's regional processing centers, located in Papua New Guinea and Nauru.⁶

This comment argues that Australian law does not comply with the U.N. Convention Against Torture⁷ because: (1) the language of the Migration Act greatly diverges from the language of the Convention Against Torture; and (2) in practice, Australian law permits

4. See Comm. Against Torture, Consideration of Reports Submitted by State Parties Under Article 19 of the Convention: Concluding Observations of the Committee Against Torture, 40th Session, ¶ 11, U.N. Doc. CAT/C/AUS/CO/3 (May 22, 2008) [hereinafter Comm. Against Torture, Concluding Observations] (describing the Committee's general concern with mandatory detention and risks of prolonging such detention); Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, 95th Session, ¶¶ 19-20, 23, U.N. Doc. CCPR/C/AUS/CO/5 (Apr. 2, 2009) [hereinafter Human Rights Comm., Concluding Observations] (demonstrating that Australian migration law has concerned international human rights bodies for a number of years).

5. See Comm. Against Torture, Concluding Observations, *supra* note 4, ¶ 15 (expressing concern that the prohibition of non-refoulement is not enshrined in Australian legislation as an "express and non-derogable provision," and that the non-refoulement obligations under the Convention depend on the exclusive use of the Minister's discretionary power); Human Rights Comm., Concluding Observations, *supra* note 4, ¶¶ 19, 23 (urging Australia to reform its immigration detention policy to fully respect the principle of non-refoulement).

6. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention Pursuant to the Optional Reporting Procedure: Australia, ¶¶ 113-15, 149 U.N. Doc. CAT/C/AUS/4-5 (Jan. 9, 2014) [hereinafter Comm. Against Torture, Optional Reporting Procedure] (claiming that Australia is committed to complying with its non-refoulement obligations under international law, and the amendment to the Migration Act, in particular, article 3, provides a "protection assessment process" that reflects Australia's commitment to protecting against serious human rights abuses).

7. This comment focuses on Australia's violation of articles 3 and 16 of the U.N. Convention Against Torture; however, Australia may also be in violation of the Convention's General Comment 3 and universal jurisdiction clause to investigate and prosecute acts of torture.

noncompliance with the Convention Against Torture, specifically torture, ill-treatment, and indefinite detention. Part II of this comment provides an overview of articles 3 and 16 of the Convention Against Torture and explains what it means for a state to be in compliance with these Articles.⁸

Part III compares the language of article 3 of the Convention Against Torture with language of the Migration Act. Part III also describes the conditions in Australia's regional processing centers.⁹ Part IV recommends that Australia should cease use of its regional processing centers.¹⁰ Furthermore, this comment recommends that Australia heed the recommendations of the Committee Against Torture and, if not, the Committee should be allowed to implement consequences when states do not comply with the Convention.¹¹ Finally, Part V concludes that Australia remains in violation of articles 3 and 16.¹²

II. BACKGROUND

A. THE CONVENTION AGAINST TORTURE

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") was adopted and open for signature, ratification, and accession by a U.N. General Assembly resolution on December 10, 1984.¹³ Under the CAT, each state commits to prohibit and prevent torture and other cruel, inhuman or degrading treatment or punishment.¹⁴ The CAT has eighty-one signatories and 156 parties to it.¹⁵

8. See discussion *infra* Part II.A (defining the obligations and scope of articles 3 and 16 of the Convention Against Torture).

9. See discussion *infra* Part III.C.

10. See discussion *infra* Part IV.A-B.

11. See discussion *infra* Part IV.C.

12. See discussion *infra* Part V (reinforcing that Australia should do everything in its power to comply with their international obligations).

13. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 112-13, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT]; G.A. Res. 39/46 (Dec. 10, 1984) (noting that CAT did not come into force until June 26, 1987).

14. *Id.* at preamble, art. 2.

15. See *Chapter IV Human Rights: 9. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNITED NATIONS TREATY COLLECTION, <https://treaties.un.org/pages/ViewDetails.aspx?src=>

Article 3 of the CAT provides that no state shall “expel, return (‘refouler’) or extradite” a person to another state where there are “substantial grounds” to believe that he or she would be subjected to torture or other ill-treatment.¹⁶ Pursuant to this article, the state’s competent authorities are obliged to take into account “all relevant considerations” when assessing this risk of torture.¹⁷ Significantly, because the CAT also requires signatory states to take all necessary legislative, judicial, and administrative measures to comply,¹⁸ a state’s legislation—including its policies towards asylum seekers and refugees—must likewise comply with the CAT.¹⁹

Article 1 of the CAT defines torture as any act where:

[S]evere pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is 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.²⁰

Further, article 16 of the CAT requires states to prohibit “other” acts of torture that do not necessarily fit into the definition described in article 1.²¹ Thus, state parties acknowledge that they will stay true

TREATY&mtmsg_no=IV-9&chapter=4&lang=en (last visited Oct. 16, 2015) [hereinafter CAT Signatories, Reservations, and Objections] (showing Australia as both a signatory and a party to CAT).

16. CAT, *supra* note 13, at art. 3 (“No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”).

17. *Id.* (“For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”).

18. CAT, *supra* note 13, at art. 2(1) (requiring each state to take effective legislative, administrative, judicial or other measures to prevent acts of torture in all territories within its jurisdiction); *see, e.g.*, MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL 32276, THE U.N. CONVENTION AGAINST TORTURE: OVERVIEW OF U.S. IMPLEMENTATION POLICY CONCERNING THE REMOVAL OF ALIENS (2006) (describing the legislative reforms necessary to make U.S. law consistent with CAT article 3).

19. *Id.*

20. CAT, *supra* note 13, at art. 1.

21. CAT, *supra* note 13, at art. 16 (“Each State Party shall undertake to

to the CAT's purpose—beyond protecting against only clear incidents of torture.

i. As a Party to the Convention Against Torture, Australia Must Comply With Its Terms

Australia signed the CAT on December 10, 1985, and ratified it on August 8, 1989 without reservations.²² Reservations permit a state to participate in a treaty without committing to all of its provisions.²³ In fact, Australia only made declarations of affirmation under CAT articles 21 and 22.²⁴ Thus, as a signatory to the CAT, Australia must comply with all parts of it, including articles 3 and 16.²⁵

a. Scope of the CAT

As previously mentioned, the scope of the CAT is outlined in article 2, which requires each state party to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”²⁶ The Committee against Torture stated, in General Comment 2, that it defines

prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article [1], when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”).

22. ASS'N FOR THE PREVENTION OF TORTURE, APT SUBMISSION ON AUSTRALIA 3 (2014); CAT Signatories, Reservations, and Objections, *supra* note 15.

23. See Bradford C. Smith, *Reservations* (2005), https://treaties.un.org/doc/source/training/regional/2006/10_12-14July-2006/reservations_and_declarations.ppt (declaring the U.N. accepted definition of “reservation” as a statement made by a state pronouncing its exclusion or modification to certain provisions of a treaty).

24. See CAT Signatories, Reservations, and Objections, *supra* note 15 (“Australia hereby declares that it recogni[z]es, for and on behalf of Australia, the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations . . . or on behalf of individuals subject to Australia’s jurisdiction who claim to be victims of a violation by a State Party of the provisions of the aforesaid Convention.”).

25. See UN HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY 391 (Helen Keller & Geir Ulfstein eds., 2012) (explaining that state signatories must provide for the legal effect of treaty obligations within their domestic laws and courts).

26. CAT, *supra* note 13, at art. 2.

“territory”, as used in article 2, to encompass all lands and people in detention over which the state exercises direct, indirect, de facto, or de jure control.²⁷ The Committee stated that signatories are obliged to abide by the Convention in all the territories it exercises effective control over.²⁸

b. Complying with Article 3 of the CAT

Article 3 of the CAT sets the international standard for determining whether a person must be protected from removal.²⁹ This standard is binding on all signatories, including Australia.³⁰ As mentioned above, article 3 states that no person shall be extradited or deported to a third country when the state has “substantial grounds” to believe that the person will be subjected to torture or other ill-treatment.³¹

Although the “substantial grounds” standard³² is not expressly defined within the CAT, it has been interpreted by human rights bodies, at the international, regional, and national levels,³³ to mean that state parties must examine whether complainants would face “a foreseeable, real and personal risk” of torture if he or she is extradited to the country of alleged torture.³⁴

27. See HUMAN RIGHTS LAW CTR., *supra* note 1, at 91 (noting a state is responsible for ensuring the provisions of the CAT are enjoyed by all persons under its control regardless of where that control is exercised).

28. *Id.*

29. See CAT, *supra* note 13, at art. 3 (explaining that the standard of proof for extraditing a person must be whether there are “substantial grounds” for which one could opine that he or she may be at risk of being subjected to torture).

30. See CAT, *supra* note 13, at art. 29 (declaring that every signatory is bound by the provisions and purpose of the Convention against Torture).

31. CAT, *supra* note 13, at art. 3; see Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-refoulement: Opinion*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 89, 92 (Erika Feller et al., eds., 2003) (providing that the “substantial grounds” threshold may be met by a “consistent pattern of gross, flagrant or mass violations of human rights.”).

32. CAT, *supra* note 13, at art. 3.

33. See ASS'N FOR THE PREVENTION OF TORTURE, *supra* note 22, at 15-17 (noting that the standard of “substantial grounds” has been debated by the Committee Against Torture, the Human Rights Committee, and the European Court of Human Rights).

34. *Id.* at 16 (citing multiple cases before the Committee against Torture where it reiterates the level of risk required); see Comm. Against Torture, General

B. AN OVERVIEW OF THE AUSTRALIAN MIGRATION ACT

In 1957 the Parliament of Australia passed the Migration Act. The country's growing population of immigrants resulted in a revised version of the law in 1958, which permitted non-Europeans to enter Australia and become citizens after fifteen years of residency.³⁵

Although the Migration Act intended to regulate and monitor foreigners arriving in Australia,³⁶ it contains a number of questionable provisions as to its method of regulation. First, the law mandates the detention of all asylum seekers who arrive without a visa, without exceptions for vulnerable persons, such as children.³⁷ Second, the Act establishes the creation and use of "regional processing centers,"³⁸ which are offshore detention centers located in third-party countries.³⁹ These centers are utilized for smugglers, and unauthorized maritime arrivals,⁴⁰ such as refugees entering the

Comment No. 3, Implementation of Article 14 by State Parties, ¶ 8, U.N. Doc. CAT/C/GC/3 (Nov. 19, 2012) ("The preventive obligations under the Convention require States parties to ensure that the victim receiving such restitution is not placed in a position where he or she is at risk of repetition of torture or ill-treatment.").

35. See generally *The Changing Face of Modern Australia MAT – 1950s to 1970s*, AUSTRALIAN GOV'T, <http://www.australia.gov.au/about-australia/australian-story/changing-face-of-modern-australia-1950s-to-1970s> (last visited Oct. 16, 2015) (discussing the influx of immigrants to Australia during the 1950s as a catalyst for the Migration Act).

36. See Migration Act 1958, § 4.

37. HUMAN RIGHTS LAW CTR., *supra* note 1, at 1 (noting that vulnerable migrants, such as children, are also detained upon arrival to Australia).

38. See, e.g., *The Regional Processing Centers Proposed by the United Kingdom Violate Human Rights and Refugee Principles*, HUMAN RIGHTS WATCH, <http://www.hrw.org/legacy/backgrounder/eca/refugees0603/2.htm> (last visited Oct. 16, 2015) (reporting on the United Kingdom's proposed adoption of the regional processing country model).

39. *Migration Act 1958*, § 198AA (declaring that the Minister has the discretionary power to designate countries as third party immigration processing centers for unauthorized maritime arrivals); see, e.g., Simon Cullen, *First Asylum Seekers Arrive on Manus Island*, ABC NEWS (Nov. 21, 2012, 4:19 AM), <http://www.abc.net.au/news/2012-11-21/first-asylum-seekers-arrive-on-manus-island/4383876> (referring to the policies of offshore processing as proclaimed in the Migration Act).

40. *Migration Act 1958*, § 198AA ("Parliament considers that: (a) people smuggling, and its undesirable consequences including the resulting loss of life at sea, are major regional problems that need to be addressed; and (b) unauthori[z]ed maritime arrivals, including unauthori[z]ed maritime arrivals in respect of whom Australia has or may have protection obligations under the Refugees

country by sea.⁴¹ Indeed, any asylum seeker who lands on Australian soil by boat after July 19, 2013 is mandatorily detained in Australia and, when practical, transferred to these offshore regional processing centers,⁴² located in Papua New Guinea and Nauru.⁴³ The Minister on Immigration need only believe it is in Australia's national interest to send asylum seekers to these third-party countries.⁴⁴

In August 2013, Australia signed a *Memorandum of Understanding* with both Papua New Guinea and Nauru to ensure that refugees and asylum seekers at the regional processing centers are not subject to torture or other ill-treatment.⁴⁵ However, these

Convention . . . should be able to be taken to any country designated to be a regional processing country; and . . . (d) the designation of a country to be a regional processing country need not be determined by reference to the international obligations or domestic law of that country.”).

41. *Id.* at § 5AA (“defining unauthorized maritime arrivals” as unlawful non-citizens who enter Australia by sea and persons born in the migration zone or a regional processing center).

42. *Id.* at § 189(1)-(3); see *The Changing Face of Modern Australia – 1950s to 1970s*, AUSTRALIAN GOV'T, <http://www.australia.gov.au/about-australia/australian-story/changing-face-of-modern-australia-1950s-to-1970s> (last visited Oct. 16, 2015) (indicating that migrants are detained in Australia for a considerable amount of time, until they can be transferred to a regional processing center, where they are detained again).

43. Comm. Against Torture, Optional Reporting Procedure, *supra* note 6, at ¶¶ 122, 138, 200.

44. See AUSTL. LAWYERS FOR HUMAN RIGHTS, SUBMISSION ON AUSTRALIA 10 (2014) (acknowledging that under the Migration Act, the Minister is not required to consider non-refoulement obligations in his or her determination of whether sending asylum seekers to third countries is within Australia's national interests).

45. *Id.*; see *Memorandum of Understanding Between the Republic of Nauru and the Commonwealth of Australia, Relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues*, AUSTRALIAN GOV'T (Aug. 3, 2013), <http://dfat.gov.au/geo/nauru/Documents/nauru-mou-20130803.pdf> [hereinafter *MOU with Republic of Nauru*] (describing a commitment, which prohibits “transferees” from being sent to other countries where there is a risk of torture or cruel and inhumane treatment); *Memorandum of Understanding Between the Government of the Independent State of Papua New Guinea and the Government of Australia, Relating to the Transfer to, and the Assessment and Settlement in, Papua New Guinea of Certain Persons, and Related Issues*, AUSTRALIAN GOV'T (Aug. 6, 2013), <http://dfat.gov.au/geo/papua-new-guinea/Documents/joint-mou-20130806.pdf> [hereinafter *MOU with Papua New Guinea*] (echoing the same commitment described in the Memorandum of Understanding Between Nauru and Australia, also prohibits “transferees” from being sent to other countries where there is a risk of torture or cruel and inhumane treatment).

memoranda offer mere diplomatic assurances against torture⁴⁶ Without a mechanism of enforcement, the Committee against Torture views them as ineffective.⁴⁷

i. Regional Processing Centers

Australian law mandates that asylum seekers who arrive by boat are subject to detention and transfer to Australia's regional processing centers in Nauru and Papua New Guinea.⁴⁸ Many seeking protection in Australia are fleeing political turmoil in Indonesia and Sri Lanka.⁴⁹ As of July 31, 2014, 1,146 asylum seekers were detained in Nauru and 1,127 asylum seekers were detained in Papua New Guinea.⁵⁰ Asylum seekers await determination in Nauru and Papua New Guinea, but an excessive number of asylum applications are denied.⁵¹

In addition, even when persons are found to be genuine refugees, they are not ultimately resettled in Australia.⁵² There are a number of

46. See "Diplomatic Assurances" Against Torture, HUMAN RIGHTS WATCH (Nov. 10, 2006), <http://www.hrw.org/news/2006/11/10/diplomatic-assurances-against-torture> (describing a diplomatic assurance as a perfunctory promise from a receiving government that it will not engage in torture in order to "smooth the way for undesirable foreigners to be sent to another country where they will be at risk of torture and other abuse.").

47. See *id.* (indicating that diplomatic assurances cannot truly protect people at risk of torture from such treatment on return); see also Comm. Against Torture, *Agiza v. Sweden*, Communication No. 233/2003, ¶ 13.4, U.N. Doc. CAT/C/34/D/233/2003 (May 20, 2005).

48. HUMAN RIGHTS LAW CTR., *supra* note 1, at 34. See *Migration Act 1958*, (Cth) pt 2 div 15 s 272 (Austl.).

49. See JANET PHILLIPS & HARRIET SPINKS, PARLIAMENT OF AUSTRALIA, BOAT ARRIVALS IN AUSTRALIA SINCE 1976 5-6 (2013), http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2011-2012/BoatArrivals (maintaining that in the 1990s through the mid 2000 there has been increased Australian engagement with Indonesia and Malaysia).

50. HUMAN RIGHTS LAW CTR., *supra* note 1, at 35; Australian Gov't, Dep't of Immigration and Border Protection, Immigration Detention and Community Statistics Summary 4 (2014).

51. See Amnesty Int'l, *This is Breaking People: Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island, Papua New Guinea*, AI Index ASA 12/002/2013 (Dec. 2013) [hereinafter *Amnesty Int'l, This is Breaking People*] (concluding that those held in regional processing centers are often denied their right to seek asylum).

52. *Regional Resettlement Arrangement Between Australia and Papua New Guinea*, AUSTRALIAN GOV'T (July 19, 2013), <http://dfat.gov.au/geo/papua-new>

asylum seekers who are returned to countries that do not provide substantial legal or human rights protections, such as Indonesia, who is not a party to the Refugee Convention of the International Covenant on Civil and Political Rights.⁵³ Finally, some asylum seekers, who attempt to flee countries that discriminate against the lesbian, gay, bisexual, transgender, queer (“LGBTQ”) community, are still transferred to Papua New Guinea, where homosexuality is a punishable crime.⁵⁴

a. Conditions in Regional Processing Centers

The United Nations High Commissioner for Refugees (“UNHCR”) has expressed concern about the conditions in Australia’s offshore processing centers.⁵⁵ Reports by the UNHCR have found that asylum seekers are subjected to conditions that fail to meet international standards for humane treatment, such as arbitrary detention, oppressive conditions, and inefficient processing.⁵⁶ The uncertainty of the length of detention and delays in processing claims has many negative impacts on the physical and psychological health of asylum seekers.⁵⁷

guinea/pages/regional-resettlement-arrangement-between-australia-and-papua-new-guinea.aspx [hereinafter *Regional Resettlement Arrangement*]; see ASS’N FOR THE PREVENTION OF TORTURE, *supra* note 22, at 8 (alleging that resettlement in Australia after being held at a regional processing center is impossible).

53. See HUMAN RIGHTS LAW CTR., *supra* note 1, at 49, 95 (asserting that Indonesia has human rights concerns that may trigger non-refoulement obligations).

54. See Rishi Iyengar, *Gay Asylum Seekers Could Be Resettled in Papua New Guinea, Which Outlaws Homosexuality*, TIME (Sept. 24, 2014), <http://time.com/3424197/australia-gay-asylum-seekers-png-papua-new-guinea-manus-island/> (informing that homosexuality is punishable in Papua New Guinea for up to fourteen years).

55. HUMAN RIGHTS LAW CTR., *supra* note 1, at 35; see U.N. HIGH COMM’R FOR REFUGEES, UNHCR MONITORING VISIT TO THE REPUBLIC OF NAURU: 7 TO 9 OCTOBER 2013 1 (2013), <http://unhcr.org.au/unhcr/images/2013-11-26%20Report%20of%20UNHCR%20Visit%20to%20Nauru%20of%207-9%20October%202013.pdf> (indicating that the conditions of offshore regional processing centers is not safe and humane in terms of treatment in detention).

56. HUMAN RIGHTS LAW CTR., *supra* note 1, at 36-37; see U.N. HIGH COMM’R FOR REFUGEES, *supra* note 55, at 1.

57. HUMAN RIGHTS LAW CTR., *supra* note 1, at 36-37; ASS’N FOR THE PREVENTION OF TORTURE, *supra* note 22, at 12.

Asylum seekers in Australia's offshore processing centers also face harsh physical conditions.⁵⁸ Significant overcrowding, cramped living quarters, unhygienic conditions, little privacy, and harsh tropical climate contribute to the poor conditions of Australia's regional processing centers in Nauru and Papua New Guinea.⁵⁹ Additionally, the remote location of the centers contributes to the lack of access to lawyers and medical services for asylum seekers.⁶⁰

III. ANALYSIS

A. THE MIGRATION ACT VIOLATES ARTICLE 3 OF THE CONVENTION AGAINST TORTURE, BECAUSE THE LANGUAGE OF THE LEGISLATION DIFFERS GREATLY FROM THE LANGUAGE OF THE CONVENTION AGAINST TORTURE

Since the review of Australia's third periodic report in 2008 by the Committee Against Torture,⁶¹ Australia's policies regarding asylum seekers and refugees has significantly deteriorated.⁶² The language of the Migration Act greatly diverges from that of the Convention Against Torture.⁶³ First, Australia's legislation concerning non-

58. HUMAN RIGHTS LAW CTR., *supra* note 1, at 36-37.

59. *Id.*

60. *Id.* at 38 (recounting the story of Hamid Kehazael, an asylum seeker detained on Manus Island in Papua New Guinea, who became infected with cellulitis after injuring his foot. His requests for treatment were denied and the cellulitis developed into septicaemia. Due to the lack of medical care, Mr. Kehazael died of an easily treatable ailment only days later. A former director of International Health and Mental Services, a detention center service provider, explained, "whenever people are placed in a remote place like [Manus Island] where there [is no] access to local services on the ground, it inevitably creates a situation in which there are going to be delays when . . . care is required.").

61. *See* Comm. Against Torture, Concluding Observations, *supra* note 4, at 1-10 (noting many serious human rights concerns in Australia's migration laws).

62. *See* ASS'N FOR THE PREVENTION OF TORTURE, *supra* note 22, at 3 (confirming that a number of proposed bills to the Migration Act will have grave effects on refugees and asylum seekers).

63. *See Factsheet: Complementary Protection*, ANDREW & RENATA KALDOR CTR. FOR INT'L REFUGEE LAW, http://www.kaldorcentre.unsw.edu.au/sites/default/files/Complementary%20Protection%2025.07.14_reformatted.pdf (last updated July 25, 2014) (indicating that the Migration Amendment Bill 2013 would repeal the complementary protection provisions in the Migration Act 1958).

refoulement seems to apply differently to citizens and non-citizens.⁶⁴ For example, the CP Act states specific different provisions for citizens and non-citizens, by mandating use of regional processing centers for “unlawful maritime arrivals”.⁶⁵ The Convention Against Torture was meant to apply to all human beings, regardless of what state he or she belongs to.⁶⁶ In addition, which country a person is from is of no concern in the CAT’s provision requiring universal jurisdiction to investigate and prosecute instances of torture.⁶⁷ By providing different standards for citizens and non-citizens under the law, the language of the Migration Act diverges too greatly to be considered in compliance with the Convention against Torture.⁶⁸

Australia may argue that it is not bound by the language of article 3 and the Committee’s interpretation. Other countries, such as the United States and Canada amend their non-refoulement obligations.⁶⁹

64. AUSTRALIAN GOV’T., AUSTRALIAN LAW REFORM COMM’N, FAMILY VIOLENCE AND COMMONWEALTH LAWS – IMPROVING LEGAL FRAMEWORKS 540 (2011).

65. *Migration Amendment (Complementary Protection) Act 2011* (Cth) sch 1 s 12 (Austl.) (“[a] *non-citizen* in Australia (other than a non-citizen mentioned in paragraph (a)) to whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm . . . [emphasis added]”).

66. *See generally* CAT, *supra* note 13, at preamble (stating that CAT recognizes that “the equal and inalienable rights of *all members* of the human family is the foundation of freedom, justice and peace in the world . . . [emphasis added]”).

67. *Id.* at art. 5 (noting that the obligation of States to investigate and prosecute allegations of torture is also international customary law).

68. *See* Comm. Against Torture, Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Australia, 5-6, U.N. Doc. CAT/C/AUS/CO/4-5 (Dec. 23, 2014) [hereinafter Comm. Against Torture, Concluding Observations on Australia Reports] (criticizing, specifically, Australia’s policies and legislation concerning non-refoulement, mandatory immigration detention, and offshore processing of asylum claims).

69. ASS’N FOR THE PREVENTION OF TORTURE, *supra* note 22, at 17 (noting that both the United States and Canada have applied a higher threshold for non-refoulement assessments, which has created confusion as to which standard should be applied); CAT Signatories, Reservations, and Objections, *supra* note 13 (“[t]he United States understands the phrase, ‘where there are substantial grounds for believing that he would be in danger of being subjected to torture,’ as used in article 3 of the Convention, to mean ‘if it is more likely than not that he would be tortured.’”).

However, since Australia did not enter into a reservation, Australia is violating their article 3 non-refoulement obligations.⁷⁰ Unless a state has specifically reserved on a point of the CAT, it cannot be exempt from honoring its obligations.⁷¹

B. THE MIGRATION ACT PERMITS VIOLATION OF THE CONVENTION AGAINST TORTURE

Under Australian law, detention is mandatory for all that travel to the country without a visa, without exception.⁷² Asylum seekers who arrive in Australia by boat after July 19, 2013 are transferred to regional processing centers.⁷³ Since July 2013, with the exception of those cases where asylum seeker vessels are turned back at sea, all those who attempt to arrive in Australia by boat are initially detained in Australia.⁷⁴ Asylum seekers are then detained until they can be “practically” transferred to a regional processing center.⁷⁵ Once transferred to a regional processing center, these asylum seekers are then detained for the duration of their processing, with no possibility of being settled in Australia.⁷⁶ The detention of unauthorized maritime arrivals in Australia and later in a regional processing

70. CAT Signatories, Reservations, and Objections, *supra* note 13.

71. See CAT, *supra* note 13, at art. 30(2) (mandating that States must declare themselves not to be bound by paragraph I of CAT).

72. *Migration Act 1958*, (Cth) div 8 sub-div B (Austl.) (declaring that all unauthorized maritime arrivals, or those who enter Australia by sea without a visa, are subject to detention until determination of refugee status); see Amnesty Int'l, *This is Breaking People*, *supra* note 51, at 11 (describing how “detainees” otherwise known as “transferees” are not free to leave the regional processing centres); see also HUMAN RIGHTS LAW CTR., *supra* note 1, at 3 (defining detention as arbitrary and indefinite).

73. See *Migration Act 1958*, div 2 sub-div B (declaring that all unauthorized maritime arrivals are subject to transfer to a regional processing center, which are currently in Papua New Guinea and Nauru); see, e.g., AUSTL. LAWYERS FOR HUMAN RIGHTS, *supra* note 44, at 2.

74. Amnesty Int'l, *This is Breaking People*, *supra* note 51, at 11-12.

75. See *Migration Act 1958*, pt 2 div 8 sub-div B s 198AD(3) (declaring that unauthorized maritime arrivals are detained in Australia and can be transferred to a regional processing center whenever reasonably practical).

76. Amnesty Int'l, *This is Breaking People*, *supra* note 51, at 11-12; see *MOU with Republic of Nauru*, *supra* note 45 (describing how the Commonwealth of Australia will assist countries with regional processing centres such as Nauru in the removal of Transferees to third countries); see *MOU with Papua New Guinea*, *supra* note 45 (allowing Transferees who enter Papua New Guinea to settle in the country).

center is essentially arbitrary because all unauthorized maritime arrivals,⁷⁷ whether they fit into the category of refugee or not, are detained.⁷⁸

Australia is bound under the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child to not subject anyone to arbitrary detention.⁷⁹ Australia's mandatory detention regime has been criticized by the United Nations High Commissioner for Human Rights who stated that "when detention is mandatory and does not take into account individual circumstances, it can be considered arbitrary, and therefore in breach of international law."⁸⁰ Although the Convention against Torture does not specifically name arbitrary detention, the practice of arbitrary detention definitely makes a state more likely to violate the CAT.⁸¹

77. See *Migration Act 1958*, pt 1 s 5(AA) (defining unauthorized maritime arrivals as persons who enter Australia by sea and become unlawful non-citizens because of that entry, persons who are not excluded maritime arrivals, persons who are born in the migration zone, and persons who are born in regional processing centers).

78. Amnesty Int'l, *This is Breaking People*, *supra* note 51, at 15; see *Migration Act 1958*, pt 2 div 8 s 198AA sub-div B ("This Subdivision is enacted because the Parliament considers that: (a) people smuggling, and its undesirable consequences including the resulting loss of life at sea, are major regional problems that need to be addressed; and (b) unauthorised maritime arrivals, including unauthorised maritime arrivals in respect of whom Australia has or may have protection obligations under the Refugees Convention as amended by the Refugees Protocol, should be able to be taken to any country designated to be a regional processing country.").

79. See *Right to Security of the Person and Freedom From Arbitrary Detention*, AUSTL. HUMAN RIGHTS COMMISSION, <https://www.humanrights.gov.au/right-security-person-and-freedom-arbitrary-detention> (last visited Oct. 16, 2015) (declaring arbitrary detention in opposition with international law); Convention Relating to the Status of Refugees, 152, July 28, 1951, 189 U.N.T.S. 137 Final Act [hereinafter Refugee Convention] (showing Australia's participation in the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons).

80. *Statement by the United Nations High Commissioner for Human Rights, Navi Pillay*, OFF. OF THE UN. HIGH COMMISSIONER FOR HUM. RTS. (May 25, 2011), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11062&LangID=E>.

81. Juan E. Méndez (Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *Observations on Communications Transmitted to Governments and Replies Received*, U.N. Doc. A/HRC/28/68/Add.1, at 9 (Mar. 6, 2015) (surmising that bills allowing for arbitrary detention put Australia in violation of the CAT).

i. Australia's Use of Regional Processing Centers Violates Article 3 of the CAT

Under the Migration Act, the Minister has the *discretionary power* to decide which countries are regional processing centers and who should be sent to these regional processing centers.⁸² The Act does not articulate what should be considered when making these discretionary decisions. As a result of this provision, the Minister neglects to account for Australia's non-refoulement obligations under article 3 of the CAT when deciding whether to transfer an asylum seeker to Papua New Guinea or Nauru.⁸³ Non-refoulement obligations are relevant whenever an asylum seeker or refugee is transferred or deported to a third country.⁸⁴ Therefore, Australia is bound by it even when processing refugees offshore.

Australia's neglect of its non-refoulement obligation is further illustrated by the Migration Act itself.⁸⁵ The Act provides that "the designation of a country to be a regional processing country need not be determined by reference to the international obligations or domestic law of that country."⁸⁶ Essentially, Australia does not have to take into consideration a country's international obligations, or lack thereof, and human rights conditions when deciding where to process claims of asylum.⁸⁷ This practice is evident when looking at the homes of Australia's two regional processing centers. Papua New Guinea is not a party to the CAT or the Optional Protocol to the CAT (OPCAT).⁸⁸ Papua New Guinea and Nauru do not have access to

82. *Migration Act 1958*, (Cth) Long Title (Austl.) 302 (stating that the Minister and Parliament have the power to decide which countries should be designated as regional processing countries).

83. HUMAN RIGHTS LAW CTR., *supra* note 1, at 39 (inferring that the Minister's discretion does not take into account Australia's international obligations).

84. *Id.* at 46-47.

85. *Migration Act 1958*, §198(AA)(d) (inferring that CAT does not need to be accounted for when Australia makes decisions concerning the locations of its regional processing centers).

86. *Id.*

87. *Id.*

88. CAT Signatories, Reservations, and Objections, *supra* note 15; *see also* Human Rights Law Ctr., *supra* note 1, at 39 (noting that Papua New Guinea is not obligated to the same human rights provisions as Australia).

complementary protection.⁸⁹

In addition, Papua New Guinea has strict laws against homosexuality.⁹⁰ Unauthorized maritime arrivals may be part of the LGBTQ community attempting to escape discrimination in their home countries.⁹¹ Transferring LGBTQ asylum seekers and refugees to Papua New Guinea could subject them to discrimination, cruel, inhuman and degrading treatment, and torture.⁹²

a. No One Leaves the Regional Processing Center

In the fifteen months since the first asylum seekers were sent to Australia's regional processing centers on Manus Island in Papua New Guinea, no one has been released from detention.⁹³ This remains true despite completion of processing for many and recommendations by immigration officials that a number of detainees are refugees entitled to protection and settlement.⁹⁴ Under article 3 of the CAT, every asylum seeker has the right to a refugee determination.⁹⁵ Under Australia's scheme, though, the process is so delayed that the determination may never happen, or the process is so inefficient and biased that it does not comply with international law.⁹⁶ As a result, because of Australia's violation, asylum seekers

89. CAT Signatories, Reservations, and Objections, *supra* note 15.

90. See Iyengar, *supra* note 54 (describing that the consequences for homosexuality in Papua New Guinea can be imprisonment for up to 14 years).

91. See *id.* (explaining that LGBTQ refugees are especially vulnerable to torture if detained in Papua New Guinea).

92. *Id.*

93. See Amnesty Int'l, Australia: Submission to the United Nations Committee Against Torture, 53rd Session (3-28 November 2014), AI Index ASA 12/004/2014 11-12 (Oct. 2014) [hereinafter Amnesty Int'l, *Australia*] (noting that this system of non-release exists despite the processing and completion of many of the detainees).

94. See Alison Rourke, *Australia to Deport Boat Asylum Seekers to Pacific Islands*, GUARDIAN, (Aug. 13, 2012, 8:18 AM), <http://www.theguardian.com/world/2012/aug/13/australia-asylum-seekers-pacific-islands> (noting that after the July 19, 2013 announcement of the regional resettlement agreement, the majority of those held offshore prior to that were subsequently transferred back to Australia, to allow room for later detainees); see also Amnesty Int'l, *Australia*, *supra* note 93, at 11-12 (inferring that many refugees are denied the process of their claims).

95. CAT, *supra* note 13, at art. 3(2) (assuring the determination by "competent authorities" of refugee status to all those who apply).

96. HUMAN RIGHTS LAW CTR., *supra* note 1, at 37-38 (inferring that

are denied their rights under the CAT.

C. AUSTRALIA'S USE OF REGIONAL PROCESSING CENTERS
VIOLATES ARTICLE 16 OF THE CONVENTION AGAINST TORTURE

Papua New Guinea and Nauru both signed a *Memorandum of Understanding* with Australia, in order to set up Australia's regional processing centers.⁹⁷ These memoranda ensured Australia that both Papua New Guinea and Nauru would respect international law when processing asylum seekers.⁹⁸ These memoranda, though, are essentially diplomatic assurances against torture.⁹⁹ Diplomatic assurances are ineffective under the law because there is no way to enforce them.¹⁰⁰

In *Agiza v. Sweden*,¹⁰¹ Agiza was transferred to Egypt by Sweden under diplomatic assurances that he would be treated humanely.¹⁰² Agiza was tortured in Egypt despite these assurances.¹⁰³ The Committee Against Torture ruled that Sweden violated its obligations under the Convention against Torture because diplomatic assurances could not protect Agiza from the risk of torture.¹⁰⁴ Similarly, diplomatic assurances between Australia and Papua New Guinea cannot protect asylum seekers from the risk of torture and other ill-treatment.¹⁰⁵ If Papua New Guinea or Nauru were to violate the *Memorandum of Understanding* with Australia, the countries

Australian refugee status is biased and inefficient).

97. See *MOU with Republic of Nauru*, *supra* note 45 (establishing Nauru as a host for one or more the regional processing centers).

98. *Id.* ("The Participants will treat Transferees with dignity and respect and in accordance with relevant human rights standards.").

99. See discussion, *supra* Part II.B (remarking that the Memoranda of Understanding, which assure that each country abides by international law, are unenforceable diplomatic assurances).

100. See generally "*Diplomatic Assurances*" *Against Torture*, *supra* note 46 (noting examples of states that fail to abide by diplomatic assurances).

101. Comm. Against Torture, *Agiza v. Sweden*, Communication No. 233/2003, at 1, U.N. Doc. CAT/C/34/D/233/2003 (May 20, 2005).

102. *Id.*

103. *Id.*

104. *Id.* at 28-31.

105. ASS'N FOR THE PREVENTION OF TORTURE, *supra* note 22, at 12-13 (identifying multiple instances of ill-treatment at Australia's regional processing centers such as little or no access to independent legal advice and in-humane treatment).

would not be held accountable.¹⁰⁶ Because of this, asylum seekers held in regional processing centers are constantly at risk of torture and cruel, inhuman or degrading treatment or punishment, especially since neither country adheres to the international standards on the prohibition of torture established by the CAT.¹⁰⁷

i. Conditions of the Regional Processing Centers Amount to Cruel, Inhuman and Degrading Treatment or Punishment

Article 16 of the CAT prohibits state use of cruel, inhuman or degrading treatment or punishment.¹⁰⁸ Cruel, inhuman or degrading treatment or punishment is a lesser form of torture.¹⁰⁹ It refers to any “harsh or neglectful treatment” that could damage a detainee’s physical and mental health.¹¹⁰ This includes prison conditions.¹¹¹ Therefore, if the detention conditions at the regional processing centers in Papua New Guinea and Nauru negatively affect asylum seekers’ mental or physical health, Australia could also be held liable for violating its obligations under article 16 of the CAT.¹¹²

As mentioned above, the conditions inside the regional processing centers are bare—they lack sufficient food, water, and access to legal and medical assistance.¹¹³ These centers are often overcrowded, have poor hygienic facilities, and poor ventilation.¹¹⁴ The hot conditions in Papua New Guinea and Nauru are harsh, and detainees are not provided with fans or tents.¹¹⁵ These conditions affect a detainee’s

106. See “Diplomatic Assurances” Against Torture, *supra* note 46 (noting other instances in which diplomatic assurances have failed when countries have been involved in the practice of torture).

107. See CAT Signatories, Reservations, and Objections, *supra* note 15 (displaying that Papua New Guinea is not a party to the Convention Against Torture or the Optional Protocol to the Convention Against Torture, and that Papua New Guinea and Nauru do not have access to complementary protection).

108. CAT, *supra* note 13, at art. 16.

109. Amnesty Int’l, *Australia*, *supra* note 93, at 15.

110. *Id.* (defining cruel, inhuman and degrading treatment or punishment under article 16 of CAT).

111. *Id.* (concluding that prison and detention conditions that amount to cruel, inhuman or degrading treatment or punishment can violate Article 16 of the Convention against Torture).

112. *Id.*

113. See Amnesty Int’l, *This is Breaking People*, *supra* note 51, at 5-6.

114. See AUSTL. LAWYERS FOR HUMAN RIGHTS, *supra* note 44, at 11-15; see also HUMAN RIGHTS LAW CTR., *supra* note 1, at 36-38.

115. See AUSTL. LAWYERS FOR HUMAN RIGHTS, *supra* note 44, at 13-14

physical and mental health. In addition to these poor conditions, detention at these regional processing centers is usually prolonged.¹¹⁶ As of April 30, 2014 the average period of time for detention was 305 days.¹¹⁷ Some asylum seekers await indefinitely for refugee determination and the processing of their claims.¹¹⁸ This indefiniteness and unknowing can cause grave mental health issues.¹¹⁹ There is evidence of suicides, depression, and post-traumatic stress syndrome.¹²⁰ In addition, Dr. John-Paul Sanggaran, who was a health provider at a regional processing center, documented the pervasiveness of mental health distress in detainees.¹²¹ These deplorable conditions show that Australia's regional processing centers violate article 16 of the CAT.¹²² Therefore, Australia has violated the Convention against Torture.¹²³

(observing that the temperature in the processing centers frequently exceeds 40 degrees Celsius).

116. ASS'N FOR THE PREVENTION OF TORTURE, *supra* note 22, at 7 (noting that the asylum processing system's inefficiency results in prolonged stays at the regional processing centers and the average holding time was excessive due to Australia's policy of deterrence).

117. *Id.*

118. *Id.* ("Some categories of detainees face indefinite detention, for example, stateless people whose asylum claim have been refused and are not likely to be accepted by other countries").

119. See, e.g., Gillian Triggs, *Mental Health and Immigration Detention*, 199 MED. J. AUSTL. 721, 721 (2013) (referencing the conclusion that "Mental distress and despair are clinical correlates of being held in detention").

120. Refugee Council of Austl., *Australia Compliance with the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ¶ 3.3 (2014), <http://www.refugeecouncil.org.au/r/sub/1410-CAT.pdf>.

121. See AUSTL. LAWYERS FOR HUMAN RIGHTS, *supra* note 44, at 13 (documenting instances in which medications, medical devices and prosthetics were taken from detainees prior to their transfer to detention facilities).

122. See CAT, *supra* note 13, at art. 16 (prohibiting all "acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture").

123. See Comm. Against Torture, *Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Australia*, para. 17, U.N. Doc. CAT/C/AUS/CO/4-5 (Dec. 23, 2014) [hereinafter *Comm. Against Torture, Concluding Observations on Australia Reports*] (noting the Committee's grave concern about conditions at the regional processing centers).

D. AUSTRALIA IS BOUND BY THE CAT IN PAPUA NEW GUINEA
AND NAURU

The Australian government has consistently asserted that their human rights obligations do not extend to their regional processing centers in Papua New Guinea and Nauru.¹²⁴ However, Australia does assert effective control over the regional processing centers and the asylum seekers detained there.¹²⁵ First, the centers are run by Australian authorities, who also provide security to the detainees.¹²⁶ Second, the Australian Prime Minister is the one who decides which persons are transferred to the regional processing centers.¹²⁷ Finally, medical attention to the detainees is provided by the Australian government.¹²⁸ These facts show that Australia has effective control of both the regional processing centers and the asylum seekers.¹²⁹ Therefore, under the Committee's interpretation of article 2 and General Comment 2, Australia is bound to provide the detainees in Papua New Guinea and Nauru the protections afforded to them under the CAT.

IV. RECOMMENDATIONS

A. ASYLUM SEEKERS WHO ARRIVE IN AUSTRALIA SHOULD HAVE
THEIR CLAIMS PROCESSED IN AUSTRALIA AND, IF FOUND TO BE
REFUGEES, RESETTLED IN AUSTRALIA

Australia should cease the use of its regional processing centers.¹³⁰ Since there is no way to ensure that the governments of Papua New Guinea and Nauru are respecting their *Memoranda of Understanding* and that those sent to regional processing centers are not being

124. HUMAN RIGHTS LAW CTR., *supra* note 1, at 36.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. HUMAN RIGHTS LAW CTR., *supra* note 1, at 40 (recommending that Australia process its claims in Australia rather than in third-party countries); AUSTL. LAWYERS FOR HUMAN RIGHTS, *supra* note 44, at 15 (recommending that Australia process the claims of detainees and end the use of offshore regional processing centers specifically in the Manus Islands and Nauru).

subjected to torture or other ill-treatment,¹³¹ the use of regional processing centers is illegal under international law. Many countries handle their immigration issues without the use of regional processing centers, and still comply with the CAT.¹³² Australia should do the same.

In addition, the CAT asserts universal jurisdiction to prosecute torture.¹³³ Therefore, once the offshore processing system is diminished in Papua New Guinea and Nauru, Australia should commission independent investigations of all allegations of torture and eventually prosecute.¹³⁴

Alternatively, Australia can highlight their needs for regional processing centers and opt to keep them running. If Australia were to insist on this need to keep the regional processing centers, due to an influx of unauthorized maritime arrivals, Australia should ensure that the centers comply with the CAT. This obligation would have to come from means other than diplomatic assurances, as they have been deemed ineffective under the CAT.¹³⁵ Finding a method to ensure that another country complies with the CAT is unlikely though, due to the idea of sovereignty.¹³⁶

131. See “Diplomatic Assurances” Against Torture, *supra* note 46 at 4 (“[s]ending countries that rely on such assurances are either engaging in wishful thinking or using the assurances as a fig leaf to cover their own complicity in torture.”).

132. Zara Rabinovitch, *Pushing Out the Boundaries of Humanitarian Screening with In-Country and Offshore Processing*, MIGRATION POL’Y INST. (Oct. 16, 2014), www.migrationpolicy.org/article/pushing-out-boundaries-humanitarian-screening-country-and-offshore-processing (noting that the United States and European countries practice in-country processing of refugees).

133. CAT, *supra* note 13, at art. 5 (establishing universal jurisdiction to investigate and prosecute alleged instances of torture or cruel, inhuman or degrading treatment or punishment).

134. See Amnesty Int’l, *This is Breaking People*, *supra* note 51, at 100 (noting that Australia should investigate and prosecute the instances of recording torture at the regional processing centers).

135. See discussion, *supra* Part III.C (arguing that the *Memorandums of Understanding* between Australia and Papua New Guinea and Nauru are diplomatic assurances); see also Comm. Against Torture, *Agiza v. Sweden*, Communication No. 233/2003, at 28-29, U.N. Doc. CAT/C/34/D/233/2003 (May 20, 2005) (noting that diplomatic assurances are not effective and “did not suffice to protect against the manifest risk”).

136. HUMAN RIGHTS LAW CTR., *supra* note 1, at 96 (stating that State Parties should attempt to enforce human rights provisions abroad but must refrain from violating other states’ sovereignty).

B. THE COMMITTEE AGAINST TORTURE SHOULD BE ALLOWED TO
ASSERT MORE POWER

To ensure that Australia abides with article 3 of the CAT, and the CAT in general, there are some recommendations the Committee Against Torture could implement. The Committee has already expressed their concerns and gave their recommendations to Australia in its concluding observations.¹³⁷ Concluding observations, though, are not necessarily binding on Australia.¹³⁸ The Committee relies on pressure from the media placed on the state in response to the Committee's concluding observations in 2014. Therefore, the Committee could institute a media team, utilizing Facebook, Twitter, and LinkedIn to follow country presentations during each session.¹³⁹ A team such as this would be able to gather support from citizens of Australia, to pressure the government to change the laws concerning refugees.

Alternatively, the United Nations could make the Committee Against Torture's concluding observations binding.¹⁴⁰ This would clearly place pressure on the Australian government. This recommendation is highly unlikely though because even if the concluding observations were binding, there would be no way to ensure that the recommendations were actually implemented.

Finally, Papua New Guinea and Nauru, countries where the regional processing centers exist, should invite the Special Rapporteur on Torture to visit Australia's offshore processing

137. Comm. Against Torture, Concluding Observations on Australia Reports, *supra* note 123, para. 17 (recommending that Australia cease processing asylum applicants in regional processing centers).

138. Kerstin Mechlem, Treaty Bodies and the Interpretation of Human Rights, 42 VAND. J. TRANSNAT'L L. 905 (2009); UN Committee against Torture, STOP VIOLENCE AGAINST WOMEN, <http://www1.umn.edu/humanrts/svaw/law/un/enforcement/comtorture.htm> (last visited Oct. 16, 2015 ("[t]he concluding comments are broad and not legally binding.")).

139. See *UN Increasingly Using Social Media to Publicize its Work*, Senior Official Says, UN NEWS CTR. (Apr. 27, 2011), <http://www.un.org/apps/news/story.asp?NewsID=38212#> (providing examples of the U.N.'s expanding presence in social media).

140. *Human Rights Treaty Bodies: Glossary of Treaty Body Terminology*, OFF. OF THE U.N. HIGH COMMISSIONER FOR HUM. RTS., <http://www2.ohchr.org/english/bodies/treaty/glossary.htm> (last visited Oct. 16, 2015).

centers.¹⁴¹ This would bring light to the real conditions of the detention centers, as well as put more pressure on Australia to abolish their use.¹⁴²

V. CONCLUSION

Every signatory to the CAT is obligated to abide by every part of it. This means that each signatory's laws must also abide by the articles of the CAT. Australia's migration laws are in clear violation of articles 3 and 16 of the CAT.¹⁴³ Australia's Migration Act allows for asylum seekers and refugees to be arbitrarily detained, tortured, ill-treated, and even sent to countries where mass violations of human rights are present.¹⁴⁴ Australia should cease their discrimination of these migrants travelling to Australia and provide refugees and asylum seekers what they are guaranteed under the CAT.

141. See *Migrants / Human Rights: Official Visit to Australia Postponed Due to Protection Concerns*, OFF. OF THE HIGH COMMISSIONER FOR HUM. RTS. (Sept. 25, 2015), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16503&LangID=E> (describing that the Special Rapporteur on Torture's official visit to Australia was postponed as a result of a lack of cooperation from the Australian government).

142. Méndez, *supra* note 81, at 7-9.

143. See Méndez, *supra* note 81, at 7-9 (stating specifically that the laws allow for arbitrary detention "without access to lawyers" and due to the fact that they increase "control on the issuance of visas on the basis of character and risk assessments").

144. HUMAN RIGHTS LAW CTR., *supra* note 1, at 46-47 (discussing how the 2013 and 2014 Bills would remove vital protections for asylum seekers).