

Mandates of the Working Group on the use of mercenaries; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur on the human rights of migrants; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

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Excellency,

We have the honour to address you in our capacities as Chairperson-Rapporteur of the Working Group on the use of mercenaries; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the situation of human rights defenders; Special Rapporteur on the human rights of migrants; and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment pursuant to Human Rights Council resolutions 24/13, 25/2, 25/18, 26/19, and 25/13.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **undue restrictions, harassment and reprisals against human rights defenders and journalists documenting and reporting on the situation of asylum seekers held at immigration detention facilities under the control of the Government of Australia. These defenders and journalists are documenting and reporting on the conditions of detention and ill-treatment in these centres, which may amount to torture. In addition, they are reporting on the impact of the adoption of the Border Force Act, which includes provisions leading to the potential criminalization of journalists and human rights defenders, as well as restrictions to the right to freedom of expression.**

According to the information received:

There are currently two detention facilities for the holding of asylum seekers at Manus Island, within the State of Papua New Guinea, namely the Regional Processing Centre at Lombrum and the East Lorengau Transit Facility, in Lorengau. There are three such detention facilities on the island of Nauru (designated as RPC1, RPC2 and RPC3). All five detention facilities were established under the control of the Government of Australia, through Memorandum of Understanding between the Governments of Australia, the Government of Papua New Guinea, and the Government of Nauru, signed into force on 8 September 2012 and 29 August 2012, respectively.

All five of the above-mentioned detention facilities, in their day-to-day operation, are managed by Transfield Services under contract by the Government of Australia, and Wilson Security, a private company sub-contracted by Transfield Services to provide security services at the detention facilities at Manus Island and Nauru. Until March 2014, this service was provided by G4S, a publically traded private security company.

Restrictions and harassment of human rights defenders at immigration detention facilities at Manus Island and Nauru

It is alleged that since the creation of the above-mentioned detention facilities in 2012, asylum seekers defending their rights and the rights of other detained asylum seekers, from within the detention facilities, in particular through communicating with human rights advocates, lawyers and the media about the conditions and treatment of those detained, have been subjected to restrictions on their legitimate human rights work as well as on the exercise of their right to freedom of expression, including limited access to phones and internet, as well as intensified monitoring of communications through both physical and digital surveillance.

Such activists are also alleged to have had their phones seized and their living spaces raided, been subjected to interrogation as to the content of their communications, threatened with physical beatings, held in solitary confinement and transferred elsewhere, as a result of their human rights activities. The alleged restrictions, harassment and threats have been carried out by detention facility staff, including private security contractors.

Those individuals amongst the detained asylum seekers at Manus Island and Nauru, who are engaged in denouncing human rights abuses at their respective detention facilities, allegedly face serious retaliations for their activities at the hands of detention centre personnel. The retaliations have taken the form of ill-treatment, which have included threats in relation to the withdrawal of witness statements, as well as beatings, incommunicado detention for extend periods of time, and transfer to isolated detention compounds and Lorengau jail, where individuals are held in solitary confinement. Many have also faced restrictions on their access to food, medical care, water and sanitation.

In 2014, representatives from amongst the detained asylum seekers at Manus Island were allegedly subjected to torture, after raising concerns with the detention authorities in relation to increased restrictions on internet and phone protocols.

It is alleged that claims about ‘misbehaviour’ of detained asylum seekers who represent their fellow asylum seekers at Manus Island and Nauru have been falsely reported by detention centre staff, in an attempt to justify mistreatment or

punishment . This has included allegations of assault against an asylum seeker detained at Nauru, by Wilson Security staff, and the reclassifying of two asylum seekers at Manus Island as ‘trouble-makers’ and ‘dangerous’ on the basis of their raising of concerns in relation to internet and phone usage.

Stigmatisation of human rights defenders advocating for the rights of asylum seekers detained at Manus Island and Nauru

It is further alleged that several journalists and human rights advocates engaged in documenting and reporting on the human rights violations and abuses at the detention facilities on Manus Island and Nauru, have been classified as ‘prohibited persons’ by authorities at the detention centres. At least one of the ‘prohibited persons’ has been identified in posters displayed at detention facilities on Manus Island, in a style reminiscent of criminal wanted posters. Asylum seekers detained at Manus Island and Nauru who have been found to be communicating with these ‘prohibited persons’ have been subjected to reprisals by detention centre staff.

Furthermore, it is reported that the Australian Government authorities have presented unsubstantiated allegations against human rights defenders working on the situation of the detained asylum seekers, indicating for instance that refugee advocates encouraged asylum seekers at Manus Island to engage in mass hunger strikes.

Legislative changes affecting human rights defenders

On 1 July 2015, the Border Force Act 2015 came into effect on Australian territory. Section 42 of the Act amends the Commonwealth Criminal Code Act 1995, with the effect of criminalizing the release of ‘protected information’ by an ‘entrusted person’ without express prior authorization by the Secretary of the Australian Border Force, and providing a penalty for the offence of two years’ imprisonment. ‘Protected information’ is defined as any information gained in the course of employment or engagement in activities with the Australian Border Force. Section 42 of the Act also expressly outlines that the Secretary does not have the power to authorize the disclosure of information to public international institutions.

It is alleged that section 42 of the Border Force Act has the effect of criminalizing the act of sharing information by individuals to third parties, including to international human rights mechanisms, the media and the public at large, in relation to human rights violations taking place at the detention facilities in Australia and in Australia’s off-shore processing centres in Papua New Guinea and Nauru.

Serious concern is expressed at the allegations of harassment, undue restrictions and acts of intimidation and reprisals against journalists and human rights defenders,

including asylum seekers who defend their rights and the rights of others from within the detention facilities at Manus Island and Nauru, and other activists who advocate for the rights of asylum seekers under control of Australia. We express concerns at the allegations that indicate that these are orchestrated with the intention of curtailing the spread of information in relation to the alleged human rights violations at immigration detention facilities under control of the Government of Australia. Concern is also expressed about the conditions of detention and ill-treatment allegedly perpetrated against asylum seekers in these immigration detention facilities, that may amount to torture and other forms of cruel, inhuman and degrading treatment or punishment.

Additional concern is expressed regarding the impact of the Border Force Act on individuals who share information with third parties. Concerns relate to the provisions of section 42, leading to the potential criminalization of journalists and human rights defenders and to undue restrictions to the right to freedom of expression, that includes the right to right to seek, receive and impart information and ideas of all kinds. We recall that these rights are especially crucial to human rights defenders and journalists in the performance of their work and functions in a democratic society. Concerns also relate to the right of anyone-whether in their official or private capacity- to contact and present information and claims to United Nations and other international, regional or national human rights mechanisms, including the Special Procedures of the Human Rights Council. In this connection, we are particularly concerned about the impact that the Border Force Act would have on ensuring that the Terms of references for fact-finding missions by Special Rapporteurs and the Human Rights Council Resolution on cooperation with the United Nations, its representatives and mechanisms in the field of human rights would be fully met without anyone suffering from threats, harassment or punishment or be subjected to judicial proceedings.

While we do not wish to prejudge the accuracy of these allegations, we would like to draw the attention of your Excellency's Government to the relevant international norms and standards that are applicable to the issues brought forth by the situation described above.

In connection with the above alleged facts and concerns, please refer to the **Reference to International Law Annex** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

It is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and any comment you may have on the above-mentioned allegations.
2. Please provide the full details of any investigation and prosecutions which have been undertaken in relation to above-mentioned allegations that may constitute human rights violations, which have reportedly taken place at the

abovementioned detention facilities. In particular, please provide information on the allegations of harassment and acts of intimidation and reprisals against defenders and journalists, as well as on the conditions of detention and alleged ill-treatment of certain asylum-seekers that may amount to torture and other forms of cruel, inhuman and degrading treatment or punishment, within the centres.

3. Please indicate what measures have been taken to ensure that human rights defenders and journalists working on issues relating to the detention of asylum seekers in Australian controlled immigration facilities are able to carry out their legitimate work in a safe and enabling environment without fear of threats or acts of intimidation, reprisals or harassment of any sort.

4. Please provide information on the measures taken to prevent the criminalization of journalists, human rights defenders and other individuals for sharing information on the human rights situation of asylum seekers. In particular, please provide information on the measures taken to ensure the conformity of the Border Force Act with international human rights norms and standards.

5. Please provide us with assurance that all those who meet with Special Procedures mandate holders during the course of their country missions are able to share any relevant information regarding the situation of asylum seekers and shall not be sanctioned under the Border Force Act, thereby allowing us to fully comply with the Terms of references for fact-finding missions by special rapporteurs and the Human Rights Council Resolutions (12/2 and/24/24) on cooperation with the United Nations, its representatives and mechanisms in the field of human rights.

We would appreciate receiving a response within 60 days.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations. We also urge the relevant authorities to initiate the necessary procedures to ensure the conformity of the Border Force Act with international human rights norms and standards.

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

We would like to inform your Excellency's Government that we have addressed a communication with similar content to the Governments of Nauru and Papua New Guinea.

Please accept, Excellency, the assurances of our highest consideration.

Elzbieta Karska
Chairperson-Rapporteur of the Working Group on the use of mercenaries

David Kaye
Special Rapporteur on the promotion and protection of the right to freedom of opinion
and expression

Michel Forst
Special Rapporteur on the situation of human rights defenders

François Crépeau
Special Rapporteur on the human rights of migrants

Juan E. Méndez
Special Rapporteur on torture and other cruel, inhuman or degrading treatment or
punishment

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to draw your attention to the following human rights standards:

We would like to remind your Excellency's Government of the absolute and non-derogable prohibition of torture and other ill-treatment as codified in articles 2 and 16 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which Australia ratified in 1989. Further, Article 7 of the International Covenant on Civil and Political Rights, to which Australia is a party, provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." In particular, we would like to recall paragraph 6 of General Comment No. 20 of the Human Rights Committee (adopted at the 44th session of the Human Rights Committee, 1992), which states that prolonged solitary confinement of the detained or imprisoned person, may amount to acts prohibited by article 7 of the ICCPR.

We would also like to draw your attention to the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment adopted by the General Assembly on 9 December 1988. (Adopted by General Assembly resolution 43/173 of 9 December 1988).

We also would like to refer your Excellency's Government to Article 19 of the International Covenant on Civil and Political Rights and Article 19 of the Universal Declaration of Human Rights, which provide the right to freedom of opinion and expression, which includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

In relation to allegations of undue restrictions, harassment and acts of intimidation and reprisals against human rights defenders, we would like to refer your Excellency's Government to the fundamental principles set forth in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, also known as the UN Declaration on Human Rights Defenders. In particular, we would like to refer to articles 1 and 2 of the Declaration which state that everyone has the right to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels and that each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms.

Furthermore, we would like to bring to the attention of your Excellency's Government the following provisions of the UN Declaration on Human Rights Defenders:

- article 5 (c), which provides for the right to communicate with non-governmental or intergovernmental organizations;
- article 6 point a), which provides for the right to know, seek, obtain, receive and hold information about all human rights and fundamental freedoms;
- article 6 points b) and c), which provides for the right to freely publish, impart or disseminate information and knowledge on all human rights and fundamental freedoms, and to study, discuss and hold opinions on the observance of these rights;
- article 9, paragraph 1, which provides for the right to benefit from an effective remedy and to be protected in the event of the violation of those rights;
- article 9, paragraph 4, point a), which provides for the right to unhindered access to and communication with international bodies;
- article 12, paragraphs 2 and 3, which provides that the State shall take all necessary measures to ensure the protection of everyone against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the Declaration.

We would also like to refer to Human Rights Council resolution 13/13, which urges States to put an end to and take concrete steps to prevent threats, harassment, violence and attacks by States and non-State actors against all those engaged in the promotion and protection of human rights and fundamental freedoms.

We also wish to refer to Human Rights Council resolution 22/6, which indicates that domestic law should create a safe and enabling environment for the work of human rights defenders (PPs 10-13). It also urges States to ensure that legislation designed to guarantee public safety and public order contains clearly defined provisions consistent with international human rights law and that it is not used to impede or restrict the exercise of any human right (OP 4). The Council further urges States to acknowledge publicly the important and legitimate role of human rights defenders in the promotion of human rights, democracy and the rule of law (OP 5) and to ensure that laws affecting human rights defenders are “clearly defined, determinable and non-retroactive” (OP 11).

In addition, we would like to recall the Human Rights Council Resolution (A/HRC/RES/12/2) on cooperation with the United Nations, its representatives and mechanisms in the field of human rights which, inter alia, urges “governments to prevent and refrain from all acts of intimidation or reprisal against those who seek to cooperate or have cooperated with the United Nations, its representatives and mechanisms in the field of human rights, or who have provided testimony or information to them;... condemns all acts of intimidation or reprisal by Governments and non-State actors against individuals and groups who seek to cooperate or have cooperated with the United Nations, its

representatives and mechanisms in the field of human rights;... calls upon States to ensure adequate protection from intimidation or reprisals for individuals and members of groups who seek to cooperate or have cooperated with the United Nations, its representatives and mechanisms in the field of human rights, and reaffirms the duty of all States to end impunity for such actions by bringing the perpetrators, including accomplices, to justice in accordance with international standards and by providing an effective remedy for their victims”.

In relation to the alleged human rights violations committed by private security contractors, we refer to paragraph 18 of Human Rights Council 27/10 which requested the Working Group on the use of mercenaries “to continue to monitor mercenary and mercenary-related activities in all their forms and manifestations, as well as private military and security companies in different parts of the world.” We note that under the aforementioned Memoranda of Understanding with Nauru and Papua New Guinea, the Australian government is primarily responsible for the costs of the agreements’ implementation, including the contracting of private security guards and other service providers. In this regard, we refer to the Guiding Principles on Business and Human Rights adopted and unanimously endorsed by the Human Rights Council in 2011, including by your Excellency’s Government. The Guiding Principles underscore as a fundamental principle that States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies, including where appropriate, by requiring human rights due diligence. States should also exercise adequate oversight in order to meet human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.