



Opinion by
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Asylum seekers: we can't ignore our international law obligations

The Four Corners investigation on the circumstances surrounding the death of Iranian asylum seeker Reza Barati at the Manus Island detention centre in February was uncomfortable viewing. The ABC program highlighted the lawlessness of the centre and the vulnerability of the asylum seekers to violence.

But perhaps the most concerning aspect of the report was the Australian government's steadfast commitment to an arrangement that is both dysfunctional and inhumane. This commitment has not been shaken by Barati's death or the serious injuries suffered by 62 men in the care of Australia and Papua New Guinea in the February violence.

In a conference call with the centre's stakeholders obtained by Four Corners, a voice, believed to be Immigration Department deputy secretary Mark Cormack, says that the Australian government is... *not going to change their policy. They're not going to change their approach. They've got very strong resolve.*

International law obligations

The immigration minister, Scott Morrison, admits in the episode that he is unable to guarantee the safety of the asylum seekers in the Manus Island detention centre. He said *"It is absolutely my aspiration, it is my commitment, to ensure that these places are safe, but it is difficult I think to do that in every instance"*.

However, Australia cannot wash its hands of its legal responsibility to ensure the safety of the asylum seekers it transfers to PNG. If the government cannot guarantee the well-being of people seeking Australia's protection, it is unlawful, under international law, for Australia to transfer them to a place where they are at risk of harm.

Some of Australia's legal responsibility to asylum seekers stems from voluntarily signing and ratifying the International Covenant on Civil and Political Rights (ICCPR). The ICCPR applies to Australia wherever it exercises power or effective control.

Australia pays for the detention of asylum seekers in PNG and maintains a permanent presence at the detention centre. As was revealed in the Four Corners report, Australia makes decisions about the day-to-day operation of the centre, such as when certain information is revealed to asylum seekers. Therefore, Australia has clear power and effective control in the centre and is bound by its ICCPR obligations there.

Australia's responsibilities under the ICCPR include protecting life (under Article 6) and ensuring that individuals are not subject to cruel, inhumane or degrading treatment or punishment (Article 7). Under the ICCPR, Australia also has an obligation not to send someone to a place where their life may be in danger or where they may be subject to cruelty or inhumane treatment.

The transfer of asylum seekers to PNG is therefore a clear violation of Australia's international obligations.

The enforcement problem

Unfortunately, there is no effective means of enforcing Australia's obligations at an international level. As a result, it is left to Australian courts to monitor the legality of the government's actions. However, Australian courts can only enforce obligations under domestic law rather than international law.

When overturning the then-Gillard government's "Malaysia Solution" in 2011, the High Court ruled that Australia could only relocate asylum seekers to a country that meets certain human rights standards. That decision was based on Section 198A of the Migration Act.

In response to the ruling, the then-government amended the Migration Act to remove the requirement for Australia to declare that a country will meet "relevant human rights standards" before transferring asylum seekers. That is, while domestic law may have previously protected asylum seekers from being taken to PNG, the changes to the law make it more difficult to enforce Australia's international obligations in Australian courts.

Australia's extraterritorial processing regime under the new law is currently being tested before the High Court. Should the challenge be successful, Australia may have to cease the detention and processing of asylum seekers in PNG (and perhaps in Nauru).

The Four Corners episode offers some hope for united opposition to the Australian government's punitive policies by showing footage of the vigils for Barati, attended by thousands across the country. Without political pressure, any legal wins may be short-lived. Governments can readily change domestic law to suit their needs.

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