Australian Human Rights Commission

President
Professor Gillian Triggs

Our ref: 2012-09267

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Dear Mr Vuthy and Ms Bugalski

Complaint by Equitable Cambodia and Inclusive Development International on behalf of families resettled under the Cambodia Railway Rehabilitation Project against the Commonwealth of Australia (AusAID)

I am writing to advise you of my decision regarding the complaint by Equitable Cambodia (EC) and Inclusive Development International (IDI) on behalf of families resettled under the Cambodia Railway Rehabilitation Project (CRRP) against the Commonwealth of Australia (by its international development agency, AusAID). The complaint alleges a breach of human rights under the *International Covenant on Civil and Political Rights* (ICCPR) and the *Convention on the Rights of the Child* (CRC) which are scheduled to, or declared under, the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).

In October 2013, AusAID ceased to be an executive agency and was integrated into the Department of Foreign Affairs and Trade.

The complaint

The complaint was jointly submitted by EC and IDI on behalf of 30 residents of Cambodia affected by the CRRP and their families (the complainants). The families have been required to resettle from sites along the railway tracks that are being repaired or

constructed as a result of the CRRP. The written complaint includes an authorisation letter with details of the 30 persons. The complaint includes a request that the identity of these persons be kept confidential. I consider that it is necessary to preserve the anonymity of these persons in order to protect their privacy or human rights and I have therefore given a direction pursuant to section 14(2) of the AHRC Act prohibiting the disclosure of their identity.

The complaint raises allegations under articles 2, 6 and 17 of the ICCPR and articles 2, 3, 6, 16, 24, 27, 28 and 32 of the CRC.

The CRRP is a project which aims to rehabilitate or construct railway lines from Poipet on the northwest border of Cambodia to Sihanouk on the south coast, through the capital Phnom Penh. The project includes the development of a freight and cargo railway facility near Phnom Penh. The complainants state that AusAID contributed A$26 million to the CRRP which had an overall cost of US$143 million. The CRRP is managed by the Asian Development Bank (ADB) in partnership with the Government of Cambodia.

The complainants state that there are at least 4,174 households who have been affected by the project because they are located in the railway corridor. The CRRP included resettlement plans which entitled households affected by the project to compensation. The complainants say that the overriding objective of the entitlement to compensation was to ensure that project affected households received assistance so that they would be at least as well-off as they would have been in the absence of the project. However, the complainants say that, in practice, resettlement did not occur as envisaged by the resettlement plans.

The complainants allege that affected persons were denied due process in relation to their resettlement entitlements and that some of them were threatened or coerced into agreeing to unfavourable resettlement terms. They also allege that the compensation actually provided to people resettled was insufficient which has led to impoverishment, loss of income and increased levels of household debt. The complainants further allege that the resettlement has impacted negatively on children in the families who have resettled as there has been increased food insecurity, a drop in school attendance and reduced access to health services. The complainants state that three children have died as a result of the lack of access to basic services and unsafe conditions at resettlement sites.

The complainants claim that the Commonwealth has human rights obligations to people in Cambodia affected by the CRRP because the Commonwealth is a significant financial

contributor to the CRRP. The complainants claim that the CRRP has resulted in a number of human rights violations of people resettled by the project. These alleged breaches fall into four categories:

(a) forced evictions amount to a breach of article 17 of the ICCPR which prohibits arbitrary or unlawful interference with a person's privacy, family, home or correspondence, and article 16 of the CRC which is in similar terms;

(b) the adverse impact of resettlement on children has resulted in breaches of the right to health (CRC article 24), the right to education (CRC articles 28 and 32) and the right to an adequate standard of living (CRC article 27);

(c) the deaths of three children as a result of the lack of access to basic services and unsafe conditions at resettlement sites violated the right to life in article 6 of the ICCPR and article 6 of the CRC;

(d) the best interests of children were not a primary consideration in the development and implementation of the project, contrary to article 3 of the CRC.

The complainants say that AusAID responded to advocacy from EC and other organisations and that in November 2011 it committed an additional A$1million for an Enhanced Income Restoration Program (EIRP). The complainants believe that this program will not be successful in reversing the impoverishment of many affected persons. They note that in a further meeting with AusAID in October 2012, AusAID committed to contributing a further A$1 million to the EIRP.

The complainants claim that the human rights violations identified above were not intended by Australia, but that they were a foreseeable consequence of the project. As to foreseeability, the complainants point to reports of human rights violations by Cambodia as a result of forced evictions in relation to other projects, and warnings about the present project, including reports by a number of United Nations bodies. The complainants say that the foreseeability of risk meant that there was an onus on the Commonwealth to conduct a comprehensive human rights risk assessment and ensure that safeguards were put in place to prevent these risks being realised. By contributing funds to the project without undertaking this risk assessment, the complainants say that the Commonwealth breached its human rights obligations. The complainants also claim that the Commonwealth was in breach of its obligations by failing to take sufficient remedial action to mitigate harm in fact suffered.

Response to the complaint

The Commission provided a copy of the complaint to the Commonwealth on 19 December 2012. The Australian Government Solicitor replied to the complaint on behalf of the Commonwealth on 15 March 2013. The Commission sent you a copy of this reply on 1 May 2013.

The Commonwealth refers to section 11(1)(f) of the AHRC Act which states that a function of the Commission is to inquire into any act or practice that may be inconsistent with or contrary to any human right. Section 3 of the AHRC Act defines 'human rights' as the rights and freedoms recognised in the instruments scheduled to or declared for the purposes of the AHRC Act. The rights protected by the ICCPR and the CRC are human rights for the purposes of the AHRC Act as they apply to Australia.

The Commonwealth states that the scope of the Commission's inquiry power under section 11(1)(f) of the AHRC Act is limited by the extent of Australia's human rights obligations under the relevant international instruments – in this case, the treaty obligations under the ICCPR and CRC. The Commonwealth notes that article 2(1) of the ICCPR provides that States must abide by the Covenant with respect to 'all individuals within its territory and subject to its jurisdiction'. The CRC has a similar jurisdictional limitation: article 2(1) provides that States shall respect and ensure the rights set forth in the Convention 'to each child within their jurisdiction'. The Commonwealth submits that the only possible application of the ICCPR and CRC to the present circumstances would be if a view could be formed that the persons on whose behalf the complaint was made, although within the territory of a foreign State, are in fact subject to the jurisdiction of Australia.

The Commonwealth says that under international law, only in exceptional circumstances could a person be considered to be within the 'jurisdiction' of Australia where they were within the territory of another State. The Commonwealth states that this exceptional situation might arise in one of two cases:

1. Effective control over territory: where one State is exercising effective control over the territory or part of the territory of another State. The focus of the test is whether the relevant State is exercising all of the powers normally exercised by a sovereign State, such as the power to prescribe and enforce laws, so that it is in a position to ensure human rights. This may include situations such as military occupation of

another State, peace-keeping operations or a United Nations mandated mission, or consensual deployment.

2. Possibly, effective control over persons: where one State is exercising effective control over persons within the territory of another State. Case law suggests that these circumstances are limited to situations in which agents of a State (for example, military or police forces or diplomatic or consular agents) are exercising some form of physical power and control over a person in the territory of another State.

The Commonwealth states that in both cases it is clear that in order to satisfy the test of 'effective control' a high degree of control is required.

The Commonwealth says that the question for this complaint is not whether Australia had effective control over the particular actions that caused the alleged breaches of rights. Rather, the question is whether Australia had effective control over the territory in which the complainants were located, or, possibly, effective control over the complainants themselves.

The Commonwealth argues that it cannot be said that Australia exercises effective control in Cambodia such as to give rise to obligations under the ICCPR or the CRC in relation to the alleged breaches of human rights. It says that Australia's involvement in providing funding to the project and thereafter in monitoring the project and carrying out remedial projects is not sufficient to reach the threshold required for effective control. The Commonwealth says that even if it were accepted that Australia had some direction over the carrying out of the CRRP (for example, through conditions of funding) this would not constitute effective control. The Commonwealth submits that Australia did not have any control over the territory of the resettlement sites. Nor did it have control over persons in the sense that its agents were exercising physical control over the complainants.

The Commonwealth submits that the complaint does not contain allegations of an act or practice by or on behalf of the Commonwealth that may be inconsistent with any human right under section 11(1)(f) of the AHRC Act. The Commonwealth says that the complaint alleges inconsistency only with human rights in Cambodia, in relation to which Australia does not have relevant international human rights obligations, since Australia has no effective control over either territory or persons in Cambodia, including in relation to the CRRP.

Opportunity to provide further information

In a letter to you dated 1 May 2013 the Commission set out the information in the submissions of the parties and provided its preliminary assessment of this information. You were invited to provide any further information or comments in support of your complaint.

You provided additional information by email dated 28 June 2013. The Castan Centre for Human Rights Law (Castan Centre) also provided information by email dated 28 June 2013 and you asked that the Castan Centre's submissions be considered by the Commission.

My decision

Under section 20(2)(c)(ii) of the AHRC Act, the Commission may decide not to continue to inquire into a complaint if it is of the opinion that the complaint is misconceived or lacking in substance.

I have considered all the information that has been provided. I am of the opinion that the complaint is misconceived. Therefore, I have decided not to continue my inquiry into the complaint pursuant to section 20(2)(c)(ii) of the AHRC Act.

I will explain the reasons for my decision.

Reasons for my decision

Once the Commission receives a complaint in writing by a person aggrieved by an act or practice, alleging that the act or practice is inconsistent with or contrary to any human right as defined by the AHRC Act, the Commission must conduct an inquiry (s 20(1) AHRC Act) unless one of the conditions in s 20(2) is satisfied, in which case the Commission may decide not to inquire (or not to continue to inquire) into the act or practice.

The Commission has jurisdiction pursuant to the AHRC Act to inquire into allegations that the Commonwealth has acted in a way that is inconsistent with or contrary to some, but not all, of the human rights obligations undertaken by Australia. Relevantly for this inquiry, the Commission has jurisdiction to inquire into alleged breaches of the ICCPR and the CRC.

The Commission is able to inquire into alleged breaches of these instruments to the extent that they apply to Australia (s 3(4) AHRC Act). This means that the Commission will not have jurisdiction to inquire into a particular act or practice to the extent that Australia has made a reservation to the instruments that covers that act or practice. Similarly, however, the Commission's jurisdiction is not limited to acts or practices that occur within the territory of Australia if the instruments apply to Australia's conduct extraterritorially.

Australia's commitments under the ICCPR and the CRC are made to the other States who are party to those instruments, and are undertaken in respect of a particular group of individuals. In the case of the ICCPR, the relevant group of individuals comprises those within Australia's territory and those subject to its jurisdiction (article 2(1)). In the case of the CRC, the relevant group of individuals comprises each child within Australia's jurisdiction (article 2(1)). These provisions limiting the scope of the application of the ICCPR and the CRC are commonly referred to as jurisdiction clauses. In this regard, the ICCPR and the CRC can be contrasted to the International Covenant on Economic Social and Cultural Rights (ICESCR) which does not contain an equivalent jurisdiction clause.

Some authors have suggested that the lack of a jurisdiction clause in the ICESCR, combined with repeated references to international cooperation and assistance, may indicate a broader scope for that instrument.[1]

The meaning of the jurisdiction clauses in the ICCPR and the CRC was considered by the International Court of Justice (ICJ) in an advisory opinion dealing with the building of a wall by Israel in the Occupied Palestinian Territory.[2] The ICJ held that the phrase in article 2(1) of the ICCPR 'within its territory and subject to its jurisdiction' was disjunctive. As the ICJ held at [109] of its reasons:

> ... while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.

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1 M Langford, F Coomans and F Gómez Isa, 'Extraterritorial Duties in International Law' and S Skogly 'Causality and Extraterritorial Human Rights Obligations' both in M Langford, W Vandenhole, M Scheinin and W van Genugten (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press, 2013), p 57 and pp 254-256.

2 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136.

After observing that the constant practice of the UN Human Rights Committee is consistent with this, the Court held that:[3]

> The *travaux préparatoires* of the Covenant confirm the Committee's interpretation of Article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligation when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence ... .

The ICJ reached the same conclusion about the reach of the CRC (at [113]).

More recently, the Committee on the Rights of the Child has used the language from the ICCPR in describing the term 'jurisdiction' in article 2(1) of the CRC. It has said:[4]

> Under the Convention, States have the obligation to respect and ensure children's rights within their jurisdiction. The Convention does not limit a State's jurisdiction to "territory". In accordance with international law, the Committee has previously urged States to protect the rights of children who may be beyond their territorial borders. It has also emphasized that State obligations under the Convention and the Optional Protocols thereto apply to each child within a State's territory and to all children subject to a State's jurisdiction.

In order that a person outside the territory of a State be regarded nonetheless as 'subject to its jurisdiction', it is necessary to establish that the person is within the power or effective control of the State. Thus in General Comment 31 of the UN Human Rights Committee on the nature of the legal obligations imposed on parties to the ICCPR, the Committee explained that:[5]

> States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their

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3 Ibid at [109]. See also at [111].

4 Committee on the Rights of the Child, *General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights*, UN Doc CRC/C/GC/16 (17 April 2003) at [40].

5 UN Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 at [10] (29 March 2004).

jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.

This approach was accepted as correct, for example, in the joint report on the situation of detainees at the United States of America Naval Base at Guantánamo Bay provided in February 2006 by five holders of mandates of special procedures from the United Nations Human Rights Council (Special Rapporteurs).[6] In that report, the authors stated that:[7]

> While article 2 [of the ICCPR] refers to persons 'within [a State Party's] territory and subject to its jurisdiction', the Human Rights Committee, which monitors implementation of the Covenant, has clarified that 'a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State party'. Similarly, the International Court of Justice (ICJ) in its advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories recognized that the jurisdiction of States is primarily territorial, but concluded that the ICCPR extends to 'acts done by a State in the exercise of its jurisdiction outside of its own territory'. Accordingly, the particular status of Guantánamo Bay under the international lease agreement between the United States and Cuba and under United States domestic law does not limit the obligations of the United States under international human rights law towards those detained there. Therefore, the obligations of the United States under international human rights law extend to the persons detained at Guantánamo Bay.

I consider it is important to emphasise, however, that it will only be in exceptional cases that persons outside the territory of the State will be regarded as subject to its jurisdiction for these purposes. Thus, in considering the equivalent issue, the European Court of Human Rights in relation to the European Convention on Human Rights held in *Al-Skeini v the United Kingdom*,[8] that a State's jurisdictional competence under the equivalent article in the European Convention on Human Rights (Art 1) 'is primarily territorial ... . Jurisdiction is presumed to be exercised normally throughout the State's territory' (at

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6 Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Asma Jahangir; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, Situation of detainees at Guantánamo Bay, UN Doc E/CN.4/2006/120.

7 Ibid at [11].

8 *Al-Skeini v United Kingdom* [GC] (Application no. 55721/07), 7 July 2011.

[131]). Conversely, the Court observed that 'acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 only in exceptional cases' (at [131]). The Court then summarised a number of exceptional circumstances which it had previously recognised were capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territory boundaries, emphasising that each case must turn upon its own particular facts. The cases pointed to included cases where:

- diplomatic or consular agents of a State exert authority or control over others when in the territory of another State (at [134]);

- 'through the consent, invitation or acquiescence of the Government of that territory, [a State] exercises all or some of the public powers normally to be exercised by that Government ... . Thus where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State' (at [135]);

- through the use of force by a State's agents operating outside its territory the individual is thereby brought under the control of the State's authorities into the State's jurisdiction, the decisive factor in such cases being the exercise of physical power and control over the person in question, rather than whether there was full and exclusive control over the ship or place where the individuals were held (at [136]). Certainly that will be the case where there is full and effective control over the person as two of the authorities referred to in *Al-Skeini* held, although it is not apparent that full and exclusive control is essential.

However, the importance attributed by the Court to assessing each case by reference to its individual circumstances makes it plain that the Court was not intending exhaustively to define the cases in which jurisdiction over individuals outside the territory of the State for relevant purposes might exist.

I am of the view that it in this matter a threshold question is whether the complainants are subject to the jurisdiction of Australia such as to enliven Australia's obligations under the ICCPR and the CRC. The complainants and their families have been required to resettle from sites along the railway tracks that are being repaired or constructed as a result of the CRRP. The complainants are all within the territory of Cambodia. Cambodia is a party to

both the ICCPR and the CRC. As such, Cambodia will ordinarily have obligations to respect and ensure the rights set out in the ICCPR and the CRC to the complainants.

In considering the question of effective control over territory, there is no suggestion in the complaint that the Commonwealth has effective control over either the corridor of impact of the railway line where the complainants previously resided or the resettlement sites to which they have been relocated. Nor is there a suggestion that the Commonwealth is exercising public powers in Cambodia which would ordinarily be exercised by the Cambodian Government. For example, it is not suggested that Australia was directly involved in or responsible for the way in which the CRRP was administered, including the way in which the resettlement plans were implemented. The CRRP is managed by the ADB in partnership with the Government of Cambodia.

The complaint relates to three categories of alleged conduct by the Commonwealth (one act and two omissions), all of which occurred in Australia but which are said to have had extraterritorial effects:

(a) failure to conduct a sufficient prior assessment of the human rights risks involved in the CRRP prior to providing funding to the project;
(b) the provision of funding for the project in circumstances where risks to human rights were foreseeable;
(c) inadequate remediation of human rights breaches when they occurred.

None of these acts or omissions indicate any degree of control by the Commonwealth over territory in Cambodia.

Similarly, in considering the question of effective control over people, there is no suggestion that the Commonwealth, an authority of the Commonwealth or a person acting on its behalf had physical power or control over the complainants. This can be contrasted to some of the authorities relied on by the complainants dealing with occupation of foreign territory by military forces.[9]

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[9] For example, in *Armed Activity in the territory of the Congo (Democratic Republic of Congo v Uganda)* [2005] ICJ Reports 168, important findings prior to conclusions about breaches of human rights and international humanitarian law in the Democratic Republic of Congo were that Uganda was an occupying power in Ituri and was responsible for the actions of the Ugandan armed forces throughout the DRC, see [166], [179]-[180] and [205]-[220].

For these reasons, as set out in the preliminary view of the Commission dated 1 May 2013, I consider that Australia does not have jurisdiction over the complainants for the purposes of the ICCPR or the CRC and that the complaints in relation to the CRRP pursuant to articles of these instruments are misconceived.

I deal below with a number of other submissions raised on behalf of the complainants and also some submissions by the Castan Centre.

Maastricht Principles

The complaint refers extensively to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights. It is suggested that these principles apply to the economic social and cultural rights relied on in the CRC (presumably, in the context of this complaint, articles 24, 27, 28 and 32 of the CRC). It is also suggested that, 'given the desirability of an interdependent and mutually reinforcing construction of international human rights treaties' the Maastricht Principles should also be applied to civil and political rights (presumably in the context of this complaint, articles 6 and 17 of the ICCPR and articles 3, 6 and 16 of the CRC).

Articles 31 and 32 of the Vienna Convention on the Law of Treaties[10] (VCLT) set out the following relevant principles applicable to the interpretation of treaties.

> **Article 31: General rule of interpretation**
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> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
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> ...
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> 3. There shall be taken into account, together with the context:

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10 [1974] ATS 2; entered into force for Australia and generally on 27 January 1980. The principles contained in the VCLT may properly be utilised to interpret the ICCPR and the CRC even though the VCLT entered into force after those other instruments because the VCLT is a codification of the customary law rules of the interpretation of treaties: *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338 at 356.

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties. ...

Article 32: Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; ... .

The Maastricht Principles do not amount to a subsequent agreement between the parties to either the ICCPR or the CRC. They are not an agreement between States but rather a statement by 40 experts in international law and human rights, adopted by them in their individual capacity. While some non-government organisations have described the principles as a 'restatement' of the law on extraterritoriality in the area of economic, social and cultural rights,[11] this may be too ambitious a description as discussed in more detail below. Some of the individual signatories to the principles have noted that the role that jurisdiction plays in human rights law is 'unsettled'[12] and have described the Maastricht Principles as 'filing the normative and accountability gap resulting from processes of globalization and the traditional notion that human rights have a territorial scope of application only'.[13]

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11 For example, the Global Initiative for Economic, Social and Cultural Rights in its Parallel Report submitted to the Pre-Sessional Working Group of the Committee on Economic, Social and Cultural Rights on the occasion of the consideration of List of Issues related to Second Periodic Report of the People's Republic of China during the Committee's 51st Session, January 2013 at [21].

12 For example, M Langford, W Vandenhole, M Scheinin and W van Genugten (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press, 2013), Introduction, p 24.

13 For example, F Coomans, 'Situating the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights', Maastricht Faculty of Law Working Paper, 26 April 2013, p 2.

It is possible that the Maastricht Principles will become relevant to the consideration of the extraterritorial application of economic, social and cultural rights over time if subsequent practice by States establishes their agreement to these principles or, possibly, in relation to instruments that are ambiguous about their extraterritorial application following an application of the principles set out in article 31.

The scope of the concept of 'jurisdiction' is set out in principle 9, which provides:

> A State has obligations to respect, protect and fulfil economic, social and cultural rights in any of the following:
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> a) situations over which it exercises authority or effective control, whether or not such control is exercised in accordance with international law;
> b) situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory;
> c) situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realize economic, social, and cultural rights extraterritorially, in accordance with international law.

Principle 9(a) broadly conforms to how the term 'jurisdiction' has been interpreted in the context of the ICCPR and the CRC as set out above. The majority of the discussion of principle 9 in the Commentary to the Maastricht Principles is devoted to this aspect of jurisdiction.

The basis of the broader principle 9(b), in the area of economic, social and cultural rights, is said to be the 'obligations of international cooperation set out in international law'.[14] This reflects the language of article 2(1) of the ICESCR which provides that each State party to that instrument undertakes 'to take steps, individually and through *international assistance and cooperation*, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization' of the rights recognised therein. As noted above, some authors have suggested that this language,

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14 O De Schutter, A Eide, A Khalfan, M Orellana, M Salomon and I Seiderman, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights' (2012) 34 *Human Rights Quarterly* 1084 (Commentary to the Maastricht Principles) at 1090.

combined with the lack of a jurisdiction clause in the ICESCR, may indicate a broader scope for that instrument.[15]

The Commentary to the principles also refers to state practice, particularly in relation to declarations made about the right to development, as demonstrating support for this principle. However, it also recognises that:[16]

> Despite its provision in binding international instruments, disagreement persists as to the legally binding nature of the obligation of international cooperation as expressed in the International Covenant on Economic, Social and Cultural Rights. ...
>
> There are disagreements as to the scope of the duty and its precise implications while, conversely, there is broad agreement that the Covenant imposes at least some extraterritorial obligations in the area of economic, social and cultural rights.

In support of principle 9(b), the Commentary includes one paragraph containing references to some cases dealing with civil and political rights.[17] The first two cases are from the European Court of Human Rights, including *Al-Skeini*. That case and the position of the European Court of Human Rights on the question of jurisdiction have been discussed above.

The decision of the Human Rights Committee in *Munaf v Romania* (which is also relied on by the complainants), and the passage extracted in the Commentary from the European Court of Human Rights decision in *Ilaşcu v Moldova and Russia* both deal with a significantly different issue, namely the issue of *non-refoulement*. This is the obligation of a State not to send someone who is currently within its territory to another State where their life or freedom would be threatened. A key aspect of this obligation is that it is one owed to persons within the territory of a State. To that extent, the conduct by the State is not extraterritorial (although the obligation is triggered by the risk of conduct by others occurring extraterritorially). This obligation is owed at least where there is a real risk of a

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15 M Langford, F Coomans and F Gómez Isa, 'Extraterritorial Duties in International Law' and S Skogly 'Causality and Extraterritorial Human Rights Obligations' both in M Langford, W Vandenhole, M Scheinin and W van Genugten (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press, 2013), p 57 and pp 254-256.

16 Commentary to the Maastricht Principles at 1094.

17 Commentary to the Maastricht Principles at 1108, para (7).

breach of articles 6 or 7 of the ICCPR.[18] There is debate about whether this principle applies to anticipated breaches of other rights and, if so, to which ones. It is not necessary for me to deal with that issue here. It is sufficient to note that these cases do not establish a general proposition that a State is always responsible for an effect that takes place in another State that is contrary to a principle in a human rights instrument where an act by it within its own territory was a link in a causal chain that led to the effect and where the effect was foreseeable.

Principle 9(b) seeks to divorce 'factual causality' from the preliminary question of jurisdiction and seeks to establish responsibility on this basis alone. As one of the individual signatories to the Maastricht Principles has recognised, such an approach would be a departure from the judgments of the ICJ and the European Court of Human Rights.[19] It is a departure that is difficult to justify in the case of instruments such as the ICCPR and the CRC which contain an explicit jurisdictional requirement.

No authority is cited in the Commentary to the Maastricht Principles in support of principle 9(c), although again it is said to flow from the language of international assistance and cooperation used in article 2(1) of the ICESCR.

As noted above, it is possible that the Maastricht Principles will become relevant to the consideration of the extraterritorial application of economic, social and cultural rights over time. However, in the context of the present complaint, there is existing case law setting out the meaning of the jurisdiction clauses in the ICCPR and the CRC. The Maastricht Principles do not further assist in assessing the jurisdictional reach of these instruments.

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18 UN Human Rights Committee, General Comment No 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) at [12]. See also UN Human Rights Committee, General No 20, *Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), (Replaces general comment No. 7)*, (Adopted at the Forty-fourth Session of the Human Rights Committee, on 10 March 1992) at [9]; M Nowak, *UN Commentary on Civil and Political Rights, CCPR Commentary* (2nd ed, 2005), pp 185-188.

19 S Skogly, 'Causality and Extraterritorial Human Rights Obligations' in M Langford, W Vandenhole, M Scheinin and W van Genugten (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (Cambridge University Press, 2013), p 240.

Committee on the Rights of the Child

As noted above, the Committee on the Rights of the Child has affirmed that the term 'jurisdiction' in article 2(1) of the CRC is not limited to territorial jurisdiction. It has said:[20]

> Under the Convention, States have the obligation to respect and ensure children's rights within their jurisdiction. The Convention does not limit a State's jurisdiction to "territory". In accordance with international law, the Committee has previously urged States to protect the rights of children who may be beyond their territorial borders. It has also emphasized that State obligations under the Convention and the Optional Protocols thereto apply to each child within a State's territory and to all children subject to a State's jurisdiction.

This interpretation of jurisdiction is consistent with the discussion of jurisdiction earlier in this letter and the language used in the ICCPR.

The second sentence of article 4 of the CRC provides that:

> With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation.

The Committee explained the meaning of this sentence in a General Comment:[21]

> The second sentence of article 4 reflects a realistic acceptance that lack of resources - financial and other resources - can hamper the full implementation of economic, social and cultural rights in some States; this introduces the concept of "progressive realization" of such rights: States need to be able to demonstrate that they have implemented "to the maximum extent of their available resources" and, where necessary, have sought international cooperation. When States ratify the Convention, they take upon themselves obligations not only to implement it within their jurisdiction, but also to contribute, through international cooperation, to global implementation.

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20 Committee on the Rights of the Child, *General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights*, UN Doc CRC/C/GC/16 (17 April 2003) at [40].

21 Committee on the Rights of the Child, *General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child*, UN Doc CRC/GC/2003/5 at [5].

States have obligations to implement the CRC in relation to children within their jurisdiction. If they are unable to do so, for example because of lack of resources, they are obliged to seek international cooperation. Other States who are party to the CRC are required to contribute to those international cooperation efforts with the aim of ensuring that each State can fulfil its obligations to children within its own jurisdiction. The obligation of international cooperation does not mean that States have direct obligations to ensure the realisation of the rights in the CRC to children that are not within their jurisdiction.[22]

The Committee has recently provided guidance about the regulation of business enterprises that have their main place of business in one jurisdiction (the home State) and operate, for example through a subsidiary, in another state (the host State). The Committee has said:[23]

> Host States have the primary responsibility to respect, protect and fulfil children's rights in their jurisdiction. They must ensure that all business enterprises, including transnational corporations operating within their borders, are adequately regulated within a legal and institutional framework that ensures that they do not adversely impact on the rights of the child and/or aid and abet violations in foreign jurisdictions.
>
> Home States also have obligations, arising under the Convention and the Optional Protocols thereto, to respect, protect and fulfil children's rights in the context of businesses' extraterritorial activities and operations, provided that there is a reasonable link between the State and the conduct concerned. A reasonable link exists when a business enterprise has its centre of activity, is registered or domiciled or has its main place of business or substantial business activities in the State concerned. When adopting measures to meet this obligation, States must not violate the Charter of the United Nations and general international law nor diminish the obligations of the host State under the Convention.

The kinds of measures considered appropriate by the Committee for home States to adopt include making of access to public finance conditional on a business carrying out a

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22 See the repeated references to jurisdiction in Committee on the Rights of the Child, *General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child*, UN Doc CRC/GC/2003/5 at [1], [30], [37], [40], [41], [44], [48] and [49].

23 Committee on the Rights of the Child, *General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights*, UN Doc CRC/C/GC/16 (17 April 2003) at [42]-[43].

process to identify, prevent or mitigate any negative impacts on children's rights in their overseas operations.

The Castan Centre has submitted that there is no reason to limit this principle to private entities and that States should also be responsible for 'extraterritorial acts of [their] own organs in relation to human rights'. As noted above, States do have obligations to ensure the rights set out in the CRC to children within their jurisdiction, even if those children are not within its territory. This may well occur when State organs are operating overseas. However, in the present complaint, the only overt act complained of is the provision by the Commonwealth of funding to the Asian Development Bank project to be administered by the ADB in Cambodia. It does not appear that this conduct, if engaged in by an Australian business, would fall within the principles described by the Committee and referred to above. The proposed extension of liability to States in the circumstances described in this complaint goes beyond that recognised to date by the Committee.

Some of the articles of the CRC dealing with economic, social and cultural rights contain explicit obligations of international cooperation. Relevantly for the present complaint:

- article 24(4) dealing with the right to health provides that 'State Parties undertake to promote and encourage international cooperation with a view to achieving progressively the full realization of the right recognised in the present article. In this regard, particular account shall be taken of the needs of developing countries';

- article 28(3) provides that 'State Parties undertake to promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.'

The Committee on the Rights of the Child has not provided detailed guidance about the extent of the obligations to promote and encourage international cooperation in articles 24(4) and 28(3). References to article 24(4) in the General Comments dealing with health are couched in relatively general terms and fluctuate between binding and non-binding language.[24] It may be that States' obligations pursuant to these articles receive further

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[24] Committee on the Rights of the Child, *General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health*, UN Doc CRC/C/GC/15 (17 April 2013) at

clarification over time. On the basis of the Commission's current understanding of the legal obligations, and in particular in light of the jurisdictional limit in the CRC, I do not consider that the particular matters alleged in the present complaint raise potential breaches of human rights under the CRC that are owed by Australia in respect of the complainants.

State responsibility

The complainants allege that even if the Commonwealth has not itself engaged in a breach of human rights, it may be liable for a breach of human rights engaged in by another State if it provided aid or assistance in the commission of that breach.

As noted above, Cambodia is a party to the ICCPR and the CRC. The complainants allege that the Commonwealth is partly responsible for breaches of the ICCPR and the CRC by Cambodia as a result of the provision of financial aid to the CRRP.

The complainants rely on article 16 of the International Law Commission's Draft articles on Responsibility of States for Internationally Wrongful Acts (ILC Draft Articles).[25] That article provides:

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
>
> (a) that State does so with the knowledge of the circumstances of the internationally wrongful act; and
> (b) the act would be internationally wrongful if committed by that State.

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[86]-[89]; Committee on the Rights of the Child, *General comment No. 4 (2003): Adolescent health and development in the context of the Convention on the Rights of the Child*, UN Doc CRC/GC/2003/4 (1 July 2003) at [43].

25 The ILC Draft Articles are not in themselves binding but are regarded in most respects as representative of customary international law which is binding upon all States: Triggs, G, *International Law: Contemporary Principles and Practices* (2nd ed) at [9.3] and Crawford, J, *Brownlie's Principles of International Law* (8th ed) p 540. Note also that the General Assembly has commended the ILC Articles on State Responsibility to the attention of governments without prejudice to the question of their future adoption or other appropriate action: GA Res 56/83, UN GAOR, UN Doc A/RES/56/83 (12 December 2001); UNGA Res 59/35, December 2004; UNGA Res 62/61, 8 January 2008 (deciding to examine the question of an international convention or other appropriate action on the basis of the articles), and UNGA Res 65/19, 6 December 2010 (deciding to include the question of a convention or other appropriate action on the basis of the articles).

There are three limits to liability under this principle, as described in more detail in the Commentary to the ILC Draft Articles. These are as follows:[26]

> First, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself.

The complainants say that human rights breaches were 'foreseeable'. There may be a factual issue in the present case about whether AusAID was aware of the circumstances which made the alleged conduct by Cambodia internationally wrongful.

For the purposes of the present complaint, it is sufficient to consider the second limit. A State is not responsible for aid or assistance under article 16 unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct.[27] The ILC notes that article 16 can apply to the provision of aid or assistance in the breach of human rights. However, it has warned that: '[w]here the allegation is that the assistance of a State has facilitated human rights abuses by another State, the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful conduct'.[28] It is conceded by the complainants in this case that the alleged wrongful conduct was not intended by the Commonwealth.[29]

The Commonwealth submits that the jurisdiction of the Commission under the AHRC Act is limited to inquiring into whether there has been an act or practice that is inconsistent with or contrary to Australia's human rights obligations, and not whether Australia has assisted in the breach by another State of its own human rights obligations. This issue may be related to the third limit in article 16, namely, whether the conduct would have been internationally wrongful if done by Australia. Given the position in relation to the second limit set out above, it is unnecessary for me to form a concluded view on this issue.

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26 Commentary to article 16 of the ILC Draft Articles, para (3).

27 Commentary to article 16 of the ILC Draft Articles, para (4).

28 Commentary to article 16 of the ILC Draft Articles, para (9). See also International Court of Justice, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, 26 February 2007 at [420]-[424].

29 Paragraph 89 of the complaint.

Breadth of the Commission's inquiry function

Finally, the Castan Centre submits that even if the Commonwealth does not have jurisdiction over the people affected by the CRRP, the Commission would still be required to conduct an inquiry under section 11(1)(f) of the AHRC Act if the conduct engaged in by AusAID was 'inconsistent' with the realisation of human rights by the complainants. One limb of this argument is based on a parsing of the phrase 'inconsistent with or contrary to any human right' in section 11(1)(f). The Castan Centre submits that the term 'inconsistent with' must be given a different meaning to the term 'contrary to'.

It is said that the term 'contrary to' any human right may relate to a breach of human rights, but that the term 'inconsistent with' is not so limited and that it 'clearly contemplates a broader range of practices'. I accept that the ordinary meaning of 'contrary' (in direct opposition) is narrower than 'inconsistent' (incompatible). However, in the context of section 11(1)(f), both terms relate to human rights as they apply to Australia.

In order for the Commission's jurisdiction to be invoked, it is necessary only that an allegation is made about an act or practice that 'may be' inconsistent with or contrary to human rights. Provided that a complaint raises a matter that arguably engages Australia's human rights obligations, then the Commission has a duty to inquire into it. However, where, as here, the Commission forms the view that the act or practice alleged cannot amount to conduct that is inconsistent with or contrary to Australia's human rights obligations because the complainants are not within the jurisdiction of Australia, the Commission may decide not to inquire into the act or practice, or decide not to continue to inquire into it.

A related submission by the Castan Centre is that the inquiry function under section 11(1)(f) 'is intended to cover any circumstance in which an Australian government agency engages in conduct which is inconsistent with the realisation of human rights, even if it does not amount to a breach of Australia's international legal obligations'.

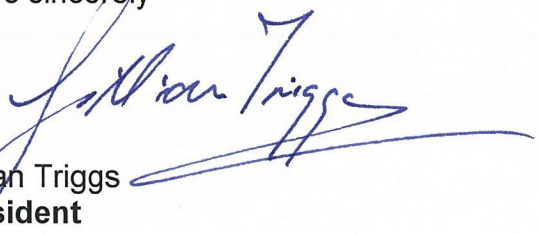
The way in which that submission is expressed suggests that it is possible to read 'human rights' in the AHRC Act as having a meaning that is broader than Australia's international legal obligations. However, as noted earlier in this letter, section 3(4) of the AHRC Act defines 'human rights' for the purposes of the Act by reference to (some of) Australia's international legal obligations.

Possible further action

If you think that my decision in relation to this complaint is not legally correct you may apply for a review of the decision by the Federal Court of Australia or the Federal Circuit Court of Australia under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The court does not review the merits of the case but may refer the matter back to the Commission for further consideration if it finds I was wrong in law or did not exercise my powers properly. You must lodge an application with the court within twenty eight (28) days of my decision.

If you have any questions about this letter, please contact Caroline Tjoa by phone on (02) 9284 9630/1300 369 711 or by email at caroline.tjoa@humanrights.gov.au.

Yours sincerely



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