

# ASSOCIATION WITH ABUSE:

The financial sector's association with gross human rights abuses of people seeking asylum in Australia

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Human Rights  
Law Centre



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# 1. EXECUTIVE SUMMARY

## **FERROVIAL'S INVOLVEMENT IN AUSTRALIA'S OFFSHORE DETENTION CENTRES**

Australia's system of privatised, offshore detention centres (ODCs) for asylum seekers on remote Pacific islands is an ongoing human rights catastrophe. Spanish stock exchange-listed company Ferrovial SA – the company that operates Heathrow Airport, toll roads in North America and security services – operates the ODCs through its subsidiary Broadspectrum, exposing Ferrovial to complicity in gross human rights abuses and attendant material legal, financial and reputational risk.

As of May 2016 around 847 people are being held in Manus Island ODC (in northern Papua New Guinea) and 466 people in Nauru ODC.<sup>1</sup> Most of these people are asylum seekers from Iran, Afghanistan, Iraq, Pakistan, Sri Lanka, Bangladesh or are stateless. They include children, women (including pregnant women), the elderly and victims of torture. All have been in the ODCs for extended periods. The men currently held in the Manus Island ODC have all been there for more than two years.

People are arbitrarily and indefinitely warehoused in the ODCs on Nauru and Manus Island in inhumane conditions and without hope for safe resettlement. In April the PNG Supreme Court found that the detention of asylum seekers and refugees on Manus Island breached the right to personal liberty in the PNG constitution, rendering their detention unlawful. The ODCs have also been decisively and repeatedly condemned by expert human rights bodies and by the international community. Rates of mental illness and self-harm by people detained at the ODCs are alarmingly high. Both centres are now tinderboxes in which people endure well-documented trauma, neglect and despair.

## **FERROVIAL MUST END ITS BUSINESS IN ABUSE**

Ferrovial acquired Broadspectrum in May 2016 with the full, prior knowledge of the scale and severity of the human rights abuses at the core of the offshore detention regime. While Ferrovial has committed not to tender for work beyond the current contract's expiration in February 2017, this does not cure the company's failure to discharge its existing responsibilities to respect human rights as outlined within the UN Guiding Principles on Business and Human Rights, the authoritative global standard for corporate human rights responsibilities, and its own human rights policy. Neither does it excuse the company's contribution to gross human rights abuses in the intervening time. Even one day of business in gross human rights abuse is too much.

**Given the severity of the impacts and the impossibility of meaningful mitigation of the abuses, Ferrovial must cease and remediate abuses within the ODCs, by:**

- a. Immediately releasing all people held in the ODCs to humane conditions in Australia or, with their consent, an equivalent situation with adequate support and services in accordance with UNHCR's recommendation; and
- b. Immediately ending all involvement in the ODCs.

## **RESPONSIBILITIES OF FERROVIAL'S INVESTORS AND FINANCIERS**

Ferrovial is a sizeable player in the global economy, with a market capitalisation of almost €14 billion and far-reaching relationships in the financial sector that enable its operations.<sup>2</sup> Investors and financiers bear their own responsibility to respect human rights. This responsibility extends to human rights impacts that they are linked to through their business relationships. Ferrovial's investors and financiers must uphold international business and human rights standards by rejecting association with the gross human rights abuses in which Ferrovial is directly involved through its operations at the ODCs.

Experience has shown that the gross human rights abuses at the ODCs are bad for business. Any association with human rights abuse on this scale brings with it significant operational instability, legal liability and reputational damage that threatens relationships with employees and customers.

**Ferrovial's financial backers must take immediate action to end the business relationships that associate them with the gross human rights abuses being perpetrated at the ODCs.**

## **CONSEQUENCES OF ASSOCIATION WITH ABUSE**

Ferrovial is now the target of a global campaign against corporate involvement in Australia's abusive immigration detention regime. In addition to existing targeting of Ferrovial's newly acquired non-detention client base in Australia, and substantial engagement with Ferrovial's investors and financiers, the campaign will engage the company's clients and charitable partnerships internationally, and submit complaints to various authorities of review and investigation.

In 2016, NBIA will launch campaigns targeting other key client growth sectors for Ferrovial and Broadspectrum, including the Australian health, education, welfare and justice sectors. NBIA has also engaged in confidential meetings with Broadspectrum clients in the resources and industrial sectors. These actions will have implications for Ferrovial's partners in the financial sector.

**Many of Ferrovial's clients, investors and financiers have indicated serious concern about Ferrovial's business in abuse. Ongoing complicity in gross human rights abuses is a material financial and reputational risk threatening a company's future growth and earnings.**

## 2. CORPORATE INVOLVEMENT IN AUSTRALIA'S OFFSHORE DETENTION REGIME FOR ASYLUM SEEKERS

Despite the well-publicised nature of the human rights abuses occurring within the Australian offshore detention centres (ODCs), companies, including Ferrovial, have benefited from lucrative government contracts to operate the ODCs. Prior to its successful acquisition of Broadspectrum, Ferrovial itself estimated that Broadspectrum derived the majority of its earnings before interest, taxes, and amortization (EBITDA) over at least the last 12 months from the ODC contracts.<sup>3</sup> According to the Australian Government's AusTender Website, the total sum paid to Broadspectrum averages to AUD\$1.4million per day by the Australian Government for its work at the ODCs.<sup>4</sup>

Broadspectrum had been the lead contractor administering the Nauru ODC since September 2012, and since February 2014 had been the lead contractor for both the Nauru and Manus Island ODCs. The role of the lead contractor is essential and extensive, with Broadspectrum (now Ferrovial) making decisions about detainee welfare, movement, communication, behaviour, accommodation, food, clothing, water, security and general conditions. Under the contract, Ferrovial can make recommendations as to whether the placement of detainees is appropriate, whether detainees are put into solitary 'managed accommodation', and in certain circumstances to use force, or authorise the use of force, against detainees.<sup>5</sup>

**Ferrovial's activities in providing services is essential to maintaining a system that violates human rights standards and constitutes a breach of the corporate responsibility to respect human rights contained in the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises.**

### **a) Private Sector awareness of complicity in gross human rights abuses**

NBIA's November 2015 report, Business in Abuse (NBIA Report), sets out the evidence of Broadspectrum's complicity in gross human rights abuses on a large scale.<sup>6</sup> Relying only upon the findings of international and domestic expert authorities including Australian Parliamentary committees, the United Nations Special Rapporteur on Torture, the Australian Human Rights Commission and Amnesty International, the NBIA Report detailed horrifying abuses and the resultant severe mental and physical harm inflicted upon asylum seekers and refugees within the ODCs during Broadspectrum's provision of services.

After the release of the NBIA Report, Broadspectrum failed to take appropriate action to end its complicity in abuse, even renegotiating and signing contract variations with the

full knowledge that performing under them would require the violation of fundamental human rights standards.<sup>7</sup> In so doing, Broadspectrum manifestly failed to discharge its responsibility to respect human rights.

In December 2015, despite overwhelming evidence of Broadspectrum's complicity in human rights abuses being on the public record, Spanish company Ferrovial commenced a hostile takeover bid for Broadspectrum.

Ferrovial initially offered Broadspectrum shareholders \$1.35 per share and increased its bid to \$1.50 per share in April 2016 after poor uptake of the initial offer. Critically, this increase in the offer price was made after NBIA provided Ferrovial management with the NBIA Report and a specific globally-released Alert about Ferrovial's exposure to human rights abuses and likely legal, financial and reputational risks.<sup>8</sup> NBIA offered to meet with Ferrovial in order to assist with the company's human rights due diligence but the offer was declined by Ferrovial until after Ferrovial had acquired more than the requisite shareholdings for the takeover to proceed. The takeover bid proved successful in May 2016.

Ferrovial's institutional shareholders include Norges Bank Investment Management (on behalf of the Norwegian Government Pension Fund) which at the time of publication owns a 1.69% share (valued at USD283million) in Ferrovial, despite being provided with evidence of human rights abuses, and a broad swathe of the global banking sector, as detailed in Appendix A.

### **3. HUMAN RIGHTS ABUSES IN THE ODCS**

Under Australia's Migration Act, asylum seekers arriving by boat are subject to mandatory, indefinite and non-reviewable detention.<sup>9</sup> The possibility of release by a court is expressly precluded.<sup>10</sup> All asylum seekers arriving after 19 July 2013 are subject to mandatory removal to ODCs on Nauru or Manus Island.<sup>11</sup> The only exception to these mandatory detention and removal provisions is the personal, non-compellable and non-reviewable discretion of the Immigration Minister. As of May 2016 around 847 people are being held in Manus Island ODC and 466 people in Nauru ODC.<sup>12</sup> Most of the asylum seekers in the ODCs are from Iran, Afghanistan, Iraq, Pakistan, Sri Lanka, Bangladesh or are stateless.<sup>13</sup> They include 50 children, 56 women (including pregnant women), the elderly and victims of torture. All have been in the ODCs for extended periods.<sup>14</sup> The men currently held in the Manus Island ODC have all been there for more than two years.<sup>15</sup>

The ODCs have been criticised repeatedly since their inception in 2012, including by the UN High Commissioner for Human Rights<sup>16</sup>, the Committee Against Torture<sup>17</sup>, the UN Special Rapporteur on Torture<sup>18</sup>, the Australian Human Rights Commission<sup>19</sup>, the Human Rights Law Centre<sup>20</sup>, Amnesty International<sup>21</sup> and Human Rights Watch<sup>22</sup>, among others. In Australia's recent review before the Human Rights Council, the Australian

Government received at least 60 recommendations criticising these policies on asylum seekers and refugees.<sup>23</sup>

Of additional concern is the increasing lack of independent and public oversight of the ODCs. Public inspections of the ODCs by independent authorities including United Nations experts and the Australian Human Rights Commission have been regularly refused since 2013. The Australian Border Force Act (2015) has further hampered transparency regarding the ODCs by criminalising unauthorised disclosures of information by anyone who undertakes work in the ODCs.<sup>24</sup>

On 2 May 2016, days after Ferrovial's success in its takeover bid became apparent, the UNHCR released a call to empty the ODCs on Nauru and Manus Island, stating that:

*There is no doubt that the current policy of offshore processing and prolonged detention is immensely harmful. There are approximately 2000 very vulnerable refugees and asylum-seekers on Manus Island and Nauru. These people have already been through a great deal, many have fled war and persecution, some have already suffered trauma. Despite efforts by the Governments of Papua New Guinea and Nauru, arrangements in both countries have proved completely untenable.*

*The situation of these people has deteriorated progressively over time, as UNHCR has witnessed firsthand over numerous visits since the opening of the centres. The consensus among medical experts is that conditions of detention and offshore processing do immense damage to physical and mental health. UNHCR's principal concern today is that these refugees and asylum-seekers are immediately moved to humane conditions with adequate support and services.<sup>25</sup>*

No Business in Abuse's November 2015 report provides a comprehensive catalogue of evidence establishing a broad range of human rights abuses within the ODCs. Using sources conservatively, the NBIA Report estimated that Broadspectrum had been complicit in the violation of 47 international laws.<sup>26</sup> The following sections summarise the central abuses.

### **a) Rights to liberty, freedom from arbitrary detention and freedom of movement**

The UN Human Rights Committee has consistently judged Australia's policy and practice of mandatory detention of asylum seekers to constitute arbitrary detention.<sup>27</sup> Acknowledging this long established consensus in its 2014 The Forgotten Children report, the Australian Human Rights Commission (AHRC) remarked,

*[t]here is nothing new in the finding that mandatory immigration detention is contrary to Australia's international obligations. The Australian Human Rights Commission and respective Presidents and Commissioners over the last 25 years have been unanimous in reporting that such detention, especially of children, breaches the right not to be detained arbitrarily.<sup>28</sup>*

For several years the ODCs on Nauru and Manus Island were entirely closed facilities. Asylum seekers and refugees were legally prohibited from leaving and practically prevented from doing so by secure perimeters patrolled by guards and security personnel. In recent months the governments of Australia, Nauru and PNG have responded to legal challenges by ‘opening’ the centres to varying degrees. Despite these changes, refugees and asylum seekers in the ODCs still experience significant restrictions on their liberty and freedom of movement both inside and outside the centres, resulting in violations of their rights to liberty, freedom of movement and, as discussed below, arbitrary detention.

On 26 April 2016, the PNG Supreme Court held that the detention of asylum seekers and refugees on Manus Island breached the right to personal liberty in the PNG constitution, rendering their detention unlawful.<sup>29</sup> The governments of Australia and PNG have attempted to circumvent the ruling and their international legal responsibilities by declaring the camp “open.”

Similarly, the centre on Nauru has also been described as “open” since 4 October 2015, when the Nauruan Government released a statement announcing changes to the Nauruan legal and regulatory regime to increase freedom of movement for asylum seekers and refugees in the ODC. The “opening” of the ODC was precipitated by, and designed to circumvent, challenges to its legality. The announcement came more than three years after the re-opening of the ODC but just two days before the Australian High Court was due to assess its lawfulness.

The UNHCR Guidelines define detention as:

*the deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will included, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities.*<sup>30</sup>

The Guidelines equate “detention” with “deprivation of liberty,” as distinct from “restrictions on liberty,” the distinction between which is “one of degree or intensity, and not one of nature or substance.”<sup>31</sup>

The European Court of Human Rights has also found that the right to liberty can be violated in circumstances where the victim is not locked up, but where other factors can combine so that they are effectively in an “open prison”.<sup>32</sup>

The asylum seekers in the Nauruan ODC are unable to leave the tiny island that is only 21 km<sup>2</sup> in area. There are significant safety concerns outside the ODC, including reports of rapes, violence and threats towards asylum seekers. Nauru is a very small community of approximately 10,000 local residents with strong cultural ties. It is difficult for asylum seekers with no pre-existing ties to Nauru to be able to find work opportunities, or to participate in social activities beyond the asylum seeker group.

The circumstances following the “opening” of the ODC on Manus Island are difficult to determine at this early stage. Reports indicate that while the asylum seekers and refugees in the ODC are permitted to catch one of three buses into the main town each morning, they are not able to walk off the ODC because it is on a naval base on an isolated and remote part of the island. As in Nauru, some asylum seekers and refugees on the Manus ODC are reluctant to leave the centre because they have significant concerns for their safety, and several violent assaults on refugees and asylum seekers outside the centre have been reported. It is also understood that the men are only allowed to leave Manus Island if they agree to be resettled on PNG.<sup>33</sup>

In a statement of agreed facts filed in Papua New Guinea Supreme Court, the PNG Government has conceded that the 302 asylum seekers who have filed the case are beginning their third year in the ODC, still do not know when they will be released, and have never appeared before the court to have their matters judicially sanctioned.<sup>34</sup>

Cumulatively, these circumstances indicate that asylum seekers and refugees in the ODCs remain under the control of the authorities to the extent that they are effectively in a detention environment, and are subject to violations of their rights to liberty, freedom from arbitrary detention and freedom of movement. Further, opening the gates of the centres does not address the cruelty and abuse at the core of the operation of the ODCs, outlined in the sections below.

## **b) Cruel, inhuman and degrading treatment and inhumane conditions**

The ODCs have been subject to consistent and damning criticism by international and Australian experts, including the UN High Commissioner on Human Rights, Mr Zeid Ra’ad Al Hussein, who has expressed ‘dismay’ at the ‘inadequate’ conditions in the ODCs.<sup>35</sup>

Similarly, the UN Committee Against Torture’s 2014 Concluding Observations on Australia, including the following paragraph on Australia’s offshore detention regime:

*The Committee is concerned at the State party’s policy of transferring asylum seekers to the regional processing centres located in Papua New Guinea (Manus Island) and Nauru for the processing of their claims, despite reports on the harsh conditions prevailing at the centres, including mandatory detention, including for children; overcrowding, inadequate health care; and even allegations of sexual abuse and ill-treatment. The combination of these harsh conditions, the protracted periods of closed detention and the uncertainty about the future reportedly created serious physical and mental pain and suffering.*<sup>36</sup>

In March 2015, the Special Rapporteur on Torture, Juan Mendez, found that:

*... the Government of Australia, by failing to provide adequate detention conditions; end the practice of detention of children; and put a stop to the escalating violence and tension at the Regional Processing Centre, has violated the right of the asylum seekers, including children, to be free from torture or cruel, inhuman or degrading treatment, as provided by Articles 1 and 16 of the CAT.<sup>37</sup>*

Criticism of the conditions within the ODCs has also been reflected in the findings on the Australian Parliament's Legal and Constitutional Affairs Committee's report into violence at the Manus Island ODC, which stated:

*The conditions and facilities at Manus Island RPC [Regional Processing Centre] were variously described to the committee as harsh, inadequate and inhumane. Submitters and witnesses who had been employed at the RPC identified numerous concerns, and in some cases expressed their shock, about the poor living conditions including cramped and over-heated sleeping quarters, exposure to the weather, poor sanitation and sewage blockages, unhygienic meals and poorly managed service of meals.<sup>38</sup>*

The Association for the Prevention of Torture, a leading international NGO, has suggested that conditions within the ODCs are so intentionally and uncompromisingly cruel that they may constitute torture under international law:

*It is our considered view that Australia's offshore detention of asylum seekers is likely to constitute a prima facie regime of cruel, inhuman or degrading treatment, and may even constitute torture. This assessment is based on the deliberate provision of only extremely basic conditions as part of a systematic policy in order to deter others, and the severity of suffering caused to detainees. The suffering is aggravated by the mental anguish that asylum seekers face caused by lengthy delays in processing and assessing claims, and uncertainty as to their status or future prospects, including where they will be settled if their claims are successful. For those with family members that already legally reside in Australia, they have been told they will never be able to permanently live with these family members in Australia even if they are found to be genuine refugees. Off-shore immigration detainees also have to face severe challenges of an extreme tropical climate and the consequences of the remoteness of the camps, including lack of access to appropriate or specialist medical care, lack of access to lawyers and other support services.<sup>39</sup>*

### **c) Right to the highest attainable standard of health**

The Australian Government itself has admitted that long term detention causes serious, negative health consequences, with the Secretary of the Australian Department of Immigration stating in 2014, "...there is a reasonably solid literature base which we're not

contesting at all which associates a length of detention with a whole range of adverse health conditions.”<sup>40</sup>

On 4 November 2013, the Australian Primary Healthcare Nurses Association argued that conditions in offshore detention centres do not promote adequate health care:

*Main concerns surrounding the provision of adequate health services, particularly on Nauru and Manus Island, include a lack of mental health care and engaging activity, increased risks of communicable diseases, the threat of malaria (particularly on PNG, where there is a 94 per cent risk of infection), inadequate supply of vaccinations, lack of medical accountability and measurement of the standards of care, and the inability of professionals to act autonomously.*<sup>41</sup>

## **UNTREATED SEPTICAEMIA KILLS HAMID KEHAZAEI**

The lack of adequate healthcare at the Manus Island ODC had fatal consequences in September 2014 when Hamid Kehazaei contracted cellulitis after cutting his foot. The 24-year-old asylum seeker from Iran made several requests for treatment that were denied. Within days, the cellulitis developed into septicaemia. He was transferred back to Australia, but died soon after his arrival. Mr Kehazaei was reportedly kept on Manus Island for a week waiting for approval to be medically transferred to Port Moresby, despite showing signs of septicaemia. Dr Peter Young, the former director of mental health services at detention centre service provider International Health and Mental Services (IHMS) has explained: whenever people are placed in a remote place like this, where there aren't access to local services on the ground, it inevitably creates a situation in which there are going to be delays when people have deteriorating conditions and when higher level, tertiary care is required.<sup>42</sup>

The Australian Parliament's Physical and Mental Health Subcommittee of the Joint Advisory Committee for Nauru Regional Processing Arrangements has emphasised that the fact and conditions of detention at the ODCs contribute to severe mental health problems, particularly in light of the particular mental health risk factors that apply to asylum seeker populations.<sup>43</sup> The mental health crisis in the ODCs is evidenced in shocking levels of self-harm, with regular reports of detainees sewing their lips together, cutting their own necks and attempting to hang themselves.<sup>44</sup>

### **d) Child abuse and other violations of the children's rights**

Australia is unique in its treatment of asylum seeker children. No other country allows asylum seeker children to be detained indefinitely and arbitrarily.<sup>45</sup> Successive inquiries by the Australian Human Rights Commission have found that the indefinite and arbitrary detention of asylum seeker children is inconsistent with Australia's human rights obligations under the *Convention on the Rights of the Child*.<sup>46</sup>

In 2014, the Medical Journal of Australia published a report stating that the vast majority of Australian paediatricians believe this practice of mandatory detention of asylum seeker children constitutes child abuse<sup>47</sup>, a position since supported by the Australian Medical Association (AMA).<sup>48</sup> The AMA also called for a moratorium on any child being transferred to Nauru after doctors at Brisbane’s Lady Cilento Children’s Hospital refused to discharge a one-year old asylum seeker child for fear the child would be returned to Nauru following medical treatment in Australia.<sup>49</sup>

In August 2015 an Australian Parliamentary Inquiry into the Nauru ODC (referred to as the ‘RPC’ in the proceedings) concluded that:

*The committee is particularly disturbed by the evidence it has received about abuse of children, traumatised and mental illness among children, and the impact of the persistent, indefinite detention of children in the poor conditions which prevail at the RPC. These children are not only denied a reasonable approximation of childhood in the RPC, but often do not feel safe, and in fact often are not safe. Their extreme vulnerability is further exacerbated by their location in a country which lacks an adequate legal or policy framework for their protection. The committee accepts the evidence provided by legal experts that the continued transfer of children to Nauru, and detention of them in the RPC, is likely to breach Australia’s obligations under the Convention on the Rights of the Child.”<sup>50</sup>*

## **AUSTRALIAN DOCTOR REPORTS PROVIDES EXAMPLE OF EXTRAORDINARY TRAUMA OF CHILDREN IN NAURU ODC**

Dr Isaacs, an Australian paediatrician who was contracted to provide medical services at the ODC in Nauru spoke to the Australian media in 2015, reporting that he “saw a six-year-old girl who tried to hang herself with a fence tie and had marks around her neck. I’ve never seen a child self-harm of that age before.”<sup>51</sup>

### **e) Right to security of the person**

Asylum seekers and refugees in both the Manus Island and Nauru ODCs are denied their rights to security of their person in unsafe conditions and suffer all forms of violence including sexual violence. On Broadspectrum’s own figures, sexual assault and major incidents of self-harm occur with unprecedented regularity in the Nauru ODC.<sup>52</sup> In March 2015 an independent review commissioned by the Australian Government found evidence of rape, threats of rape, indecent assault, sexual harassment and physical assault, including by contract services providers.<sup>53</sup>

## **VIOLENCE AT MANUS ODC ON 16-17 FEBRUARY 2014**

On 16 February 2014, tensions within the Manus Island ODC reached a flashpoint following a meeting with PNG and Australian officials during which asylum seekers were informed that they would never be resettled in Australia and were likely to have to remain at the Manus Island ODC for an indeterminate period and possibly up to four years.<sup>54</sup>

In the days that followed the meeting there was an outbreak of violence within the ODC. Staff from G4S, the company that ran the ODC before Broadspectrum took over the contract, were implicated in the violence that resulted in the serious injury of dozens of asylum seekers and the death of an Iranian asylum seeker, Reza Berati.<sup>55</sup>

In its report on the events at the ODC the Senate Legal and Constitutional Affairs References Committee concluded that:<sup>56</sup>

*... the hopelessness of the situation transferees found themselves in, with no clear path forward and no certainty for the future, was the central factor in the incident of 16 to 18 February... The committee is of the view that harsh and inhumane conditions at the Manus Island RPC were a significant factor which, while not a direct cause, did increase the volatility of the centre and make protest activity more likely.*

The situation at the Manus Island ODC remains largely the same and the threat of violence is of ongoing concern.

## **4. CORPORATE RESPONSIBILITY FOR HUMAN RIGHTS ABUSES IN THE ODCS**

While the Australian Government is the architect and funder of the offshore detention regime, the indefinite warehousing of asylum seekers and refugees in inhumane conditions would not be possible without the participation of Ferrovial. Ferrovial provides services central to maintaining a system that violates human rights standards, placing both the company and its stakeholders in the financial sector in breach of the corporate responsibility to respect human rights contained in the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises.

This section provides an overview of the content of the corporate responsibility to respect human rights, details the ways in which Ferrovial and its stakeholders in the financial sector are failing to meet relevant international human rights standards, and makes recommendations as to how these companies must act to address their role in the ongoing human rights catastrophe.

## a) Corporate responsibility to respect human rights

All companies have an overarching responsibility to respect human rights in their business activities, as outlined by the authoritative global standard, the UN Guiding Principles on Business and Human Rights.<sup>57</sup> This responsibility is mirrored in the OECD Guidelines for Multinational Enterprises applicable to companies headquartered or operating in OECD nations, which includes Ferrovial and many if not all of its major stakeholders. The Guiding Principles have been deemed relevant to the interpretation of commitments made under the UN Global Compact, of which Ferrovial, along with many of its major stakeholders, is a participant.<sup>58</sup>

The Guiding Principles provide that “[b]usiness enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved”.<sup>59</sup>

The responsibility to respect human rights is not legally binding in nature, but nor is it voluntary.<sup>60</sup> The responsibility to respect human rights: “constitutes a global standard of expected conduct applicable to all businesses in all situations.”<sup>61</sup> It exists over and above the requirement of compliance with any local laws, including the laws of PNG, Nauru or Australia.<sup>62</sup> In other words, companies providing or linked to services within the ODCs cannot avoid responsibility simply because the human rights abuses in question are government sanctioned. The UN Office of the High Commissioner for Human Rights has provided the following guidance for companies facing an inconsistency between national law and policy international human rights standards:<sup>63</sup>

*Typically, some of the most challenging situations for companies arise when national law directly conflicts with international human rights standards or does not fully comply with them. For example, a State’s national legislation may not provide for equal rights of men and women or may restrict the rights to freedom of expression and freedom of association. If the national legislative environment makes it impossible for a company to fully meet its responsibility to respect human rights, the company is expected to seek ways to honour the principles of internationally recognized human rights and to continually demonstrate its efforts to do so. This could mean, for example, protesting against government demands, seeking to enter into a dialogue with the government on human rights issues, or seeking exemptions from legal provisions that could result in adverse human rights impact. But if over time the national context makes it impossible to prevent or mitigate adverse human rights impact, the company may need to consider ending its operations there, taking into account credible assessments about the human rights impact of doing so.*

The Interpretive Guide to the Guiding Principles specifies the three basic ways in which an enterprise can be involved in an adverse impact on human rights:<sup>64</sup>

- (a) It may cause the impact through its own activities;*
- (b) It may contribute to the impact through its own activities—either directly or through some outside entity (Government, business or other);*
- (c) It may neither cause nor contribute to the impact, but be involved because the impact is caused by an entity with which it has a business relationship and is linked to its own operations, products or services.*

Guiding Principle 19 specifies that appropriate action in response to human rights abuses will vary according to the relationship between the business and the adverse impact, and the extent of its leverage in addressing the adverse impact.

## **b) Ferrovial's Business in Abuse**

Ferrovial had fallen short of its human rights responsibilities by failing to conduct adequate due diligence and failing to ensure that the company does not cause or contribute to adverse human rights impacts.

### **(i) Ferrovial's failure to conduct adequate due diligence**

Human rights due diligence is central to the corporate responsibility to respect human rights (Guiding Principle 17 and Chapter IV, paragraph 5 of the OECD Guidelines). Due diligence involves:

- (a) conducting human rights due diligence on any new projects, ventures, business relationships or acquisitions;<sup>65</sup>
- (b) having a system for due diligence to be conducted on an ongoing basis, taking into account the long term nature of many commercial contracts;<sup>66</sup> and
- (c) heeding the results of that due diligence, which may mean declining to enter new business relationships where impacts are severe and irremediable, or having strategies in place in order to mitigate or remediate them.<sup>67</sup>

The Commentary to Guiding Principle 17 provides that:

*Human rights due diligence should be initiated as early as possible in the development of a new activity or relationship, given that human rights risks can be increased or mitigated already at the stage of structuring contracts or other agreements, and may be inherited through mergers or acquisitions.<sup>68</sup>*

While information about the human rights abuses occurring in the context of offshore detention has been available since the early 2000s, the reopening of the centres in 2012 brought with it a steady stream of reports condemning human rights abuses at the ODCs.<sup>69</sup>

Ferrovial launched its hostile takeover bid for Broadspectrum in December 2015 and NBIA provided its report to Ferrovial later that month. NBIA also offered to meet with Ferrovial representatives at their convenience. Ferrovial declined this offer and stated in correspondence dated 19 January 2016 that its ability to undertake due diligence was curtailed by its lack of access to the ODCs. Inigo Meirás, Ferrovial's co-CEO, wrote, in a letter to NBIA:

*We are aware of the contract that Broadspectrum has with the Australian Government's Department of Immigration and Border Protection regarding*

*Welfare and Garrison Support Services at the Regional Processing Centres in Nauru and Manus Province. However, we do not have any specific or operational details in relation to this contract other than the material that is in the public domain and therefore we cannot form a judgment on the claims made and the appropriateness of the response by Broadspectrum at this time.*

*Further, there is no certainty that our takeover offer will be successful and, if so, when this will happen.*

*For these reasons... we believe it would be more appropriate for us to engage with you if we are successful in the offer.*

This response misunderstands the nature of human rights due diligence, which requires companies to form judgements about the scale and scope of adverse human rights impacts and the extent to which they can be mitigated before forming new business relationships. In declining to thoroughly consider evidence of human rights abuses within the ODCs, Ferrovia failed to discharge its responsibility under Guiding Principle 18, which provides that:

*in order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should:*

- (a) Draw on internal and/or independent external human rights expertise;*
- (b) Involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.*

The Commentary to Principle 18 provides:

*The initial step in conducting human rights due diligence is to identify and assess the nature of the actual and potential adverse human rights impacts with which a business enterprise may be involved. The purpose is to understand the specific impacts on specific people, given a specific context of operations. Typically this includes assessing the human rights context prior to a proposed business activity, where possible; identifying who may be affected; cataloguing the relevant human rights standards and issues; and projecting how the proposed activity and associated business relationships could have adverse human rights impacts on those identified.*

The Commentary goes on to emphasise the importance of engagement with civil society where consultation with affected communities is not possible:

*To enable business enterprises to assess their human rights impacts accurately, they should seek to understand the concerns of potentially affected stakeholders by consulting them directly in a manner that takes into account language and other potential barriers to effective engagement.*

*In situations where such consultation is not possible, business enterprises should consider reasonable alternatives such as consulting credible, independent expert resources, including human rights defenders and others from civil society.*

Ferrovial should not have entered into a relationship where it is complicit in gross human rights abuse. Undertaking and effectively integrating the results of robust human rights due diligence would have prevented Ferrovial's contribution to human rights abuse.

## **(ii) Ferrovial's contribution to human rights abuse**

Fulfilling the responsibility to respect human rights requires companies to “[a]void causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur.”<sup>70</sup>

Ferrovial's provision of material support to the ODCs falls within the UN Guiding Principles' category of “contributing to” an adverse human rights impact, at a minimum.<sup>71</sup> The relationship between Ferrovial and the ODCs is akin to the example of how a business might contribute to human rights abuses set out in the Interpretive Guide to the UN Guiding Principles: “performing construction and maintenance on a detention camp where inmates were allegedly subject to inhumane treatment.”<sup>72</sup>

Where a company contributes to adverse human rights impacts, Guiding Principle 19 provides that:

*it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible. Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm.*

Contractors working in Australia's ODCs have not and cannot prevent or substantially mitigate the ongoing abuses.<sup>73</sup> Save the Children Australia, which provided welfare services in the Nauru ODC, acknowledged this in April 2015 when it stated:

*It is the act of prolonged and arbitrary detention that creates the circumstances that give rise to harm. No amount of hard work, collaboration or improvement to process or infrastructure can make up for this fact.*<sup>74</sup>

**Given the severity of the impacts and the impossibility of meaningful mitigation of the abuses, Ferrovial must cease and remediate abuses within the ODCs, by:**

**a. Immediately releasing all people held in the ODCs to humane conditions in Australia or, with their consent, an equivalent situation with adequate support and**

**services in accordance with UNHCR's recommendation; and**  
**b. Immediately ending all involvement in the ODCs.**

### **(iii) Ferrovia's obligation to remedy**

The corporate responsibility to respect human rights also incorporates the right to a remedy and Guiding Principle 22 provides that "businesses that have caused or contributed to adverse impacts should provide for or cooperate in their remediation through legitimate processes".<sup>75</sup> The interpretative guide to the Guiding Principles specifies that:

*an enterprise cannot, by definition, meet its responsibility to respect human rights if it causes or contributes to an adverse human rights impact and then fails to enable its remediation.*<sup>76</sup>

To be effective, remedies must be capable of leading to a prompt, thorough, and impartial investigation, cessation of the violation and adequate reparation.<sup>77</sup> Reparation may include restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition.<sup>78</sup>

**Ferrovia must provide for or cooperate in the provision of effective remedies for the harm suffered by asylum seekers and refugees detained in the ODCs.**

### **c) The Financial Sector's Association with Abuse**

With a market capitalization of almost €14 billion,<sup>79</sup> Ferrovia is a sizeable player in the global economy. The reach of its value chain is impossible to quantify, however the company has business relationships with a significant proportion of the global banking sector through its finance arrangements and its investors.

Each company with which Ferrovia has business relationships bears its own responsibility to respect human rights. A well-established responsibility to respect human rights exists in respect of financiers and investors, including minority investors.<sup>80</sup>

The Office of the High Commissioner for Human Rights has explicitly stated that the OECD Guidelines are applicable to enterprises in the financial sector:

*The financial sector is covered by the Guiding Principles in the same ways as all other sectors... financial institutions can cause adverse human rights impacts. They can also contribute to adverse impacts through their clients and other business relationships.*

The OECD has made similar comments in respect of the OECD Guidelines:<sup>81</sup>

*...the Guidelines are applicable to enterprises in the financial sector. This includes the entire range of financial institutions and actors, e.g. commercial banks,*

*retail banks, investment banks, rating agencies, financial service providers, institutional investors, etc. Financial institutions, like any other MNEs, should thus avoid causing or contributing to adverse impacts, and seek to prevent or mitigate those impacts when their operations, products and services can be directly linked to them by a business relationship.*

The Thun Group of Banks, a consortium of European banks (including several that have business relationships with Ferrovial), produced a discussion paper that calls on banks

*examine how the Guiding Principles can best be applied across all types of products and services provided to clients and what the scope and depth of the human rights responsibilities and due diligence requirements should be, including what can reasonably be achieved in terms of leverage. Banks should consider assessing the human rights impacts inherent in a business opportunity and to what extent it is possible to eliminate or minimise adverse effects.<sup>82</sup>*

The following sections outline the appropriate action to be taken by investors and financiers in business relationships with Ferrovial.

### **(i) Ferrovial's investors' association with abuse**

Ferrovial's most significant investment relationships are set out in the table below. Members of the del Pino family, including Rafael del Pino Cavlo-Sotelo (Ferrovial's CEO), hold a sizable stake in the company. Other investors include business enterprises subject to the Guiding Principles.

<b>Investor Name</b>	<b>% Ownership</b>	<b>Investor Sub-Type</b>	<b>Country</b>
del Pino Calvo-Sotelo (Rafael)	20.06	Individual Investor	Spain
del Pino Calvo-Sotelo (Maria)	8.07	Individual Investor	Spain
del Pino Calvo Sotelo (Leopoldo)	4.17	Individual Investor	Spain
BlackRock Institutional Trust Company, N.A.	2.99	Investment Advisor	United States
del Pino Calvo-Sotelo (Joaquin)	2.53	Individual Investor	Spain
Norges Bank Investment Management (NBIM)	1.69	Sovereign Wealth Fund	Norway
The Vanguard Group, Inc.	1.26	Investment Advisor	United States
Columbia Threadneedle Investments (UK)	1.20	Investment Advisor/ Hedge Fund	England
Alken Asset Management LLP	0.99	Investment Advisor/ Hedge Fund	England
Deutsche Asset & Wealth Management	0.70	Investment Advisor	United States
Deutsche Asset Management Investment GmbH	0.69	Investment Advisor/ Hedge Fund	Germany
Deutsche Investment Management Americas, Inc.	0.51	Investment Advisor	United States
Artemis Investment Management LLP	0.43	Investment Advisor/ Hedge Fund	England
Bergareche Busquet (Santiago)	0.33	Individual Investor	Spain
BBVA Asset Management, S.A., S.G.I.I.C.	0.31	Investment Advisor	Spain
JPMorgan Asset Management U.K. Limited	0.29	Investment Advisor/ Hedge Fund	England
Brookfield Investment Management Inc.	0.29	Investment Advisor/ Hedge Fund	United States
Royal London Asset Management Ltd.	0.28	Investment Advisor/ Hedge Fund	England
BlackRock Advisors (UK) Limited	0.24	Investment Advisor/ Hedge Fund	England

The enterprises listed above, and all those that are shareholders in Ferrovial, have a direct link to the human rights abuses taking place in the ODCs. The OECD's briefing paper on due diligence in the financial sector provides:

*Despite the multiple tiers of business relationships, the investor's operations are directly linked to the adverse impacts caused or contributed to by an enterprise it is investing in, albeit passively or through an index fund.<sup>83</sup>*

An investor will be linked to an adverse impact, even if the shareholding is a minority shareholding.<sup>84</sup> Professor John Ruggie, former UN Special Representative for Business and Human Rights, has explained that in cases where an investor has a very small shareholding the options for an appropriate response include:

*attempts to engage the enterprise [that is causing or contributing to the harm] with the aim of improving its performance, alone or in collaboration with shareholders; voting proxies; and divesting if the harm is severe and the company is not responsive.<sup>85</sup>*

The Office of the United Nations High Commissioner for Human Rights has stated that:

*If human rights risks are identified in connection with a potential investee company at the screening stage, it is appropriate for investors to consider whether to proceed with the investment. If such risks are identified only once the investment is already made, the question is whether the investor has leverage to effect the desired change in the practices of the investee company.<sup>86</sup>*

As discussed above, the capacity of any business enterprise – including Ferrovial and its financial sector stakeholders – to eliminate or mitigate the harm being caused in the ODCs is negligible. The Commentary to Guiding Principle 19 recognises that there will be situations in which a company lacks the leverage to mitigate harm. In such cases, it is recommended, “the enterprise should consider ending the relationship, taking into account credible assessments of potential adverse human rights impacts of doing so”.<sup>87</sup>

The severity of the human rights impacts in question should also guide a company's response to its links with adverse human rights impacts. The Interpretive Guide states:

*the more severe the abuse, the more quickly the enterprise will need to see change before it takes a decision on whether to end the relationship. In any case, as the commentary states, “for as long as the abuse continues and the enterprise remains in the relationship, it should be able to demonstrate its own ongoing efforts to mitigate the impact and be prepared to accept any consequences—reputational, financial or legal—of the continuing connection”.*

The OECD financial sector briefing materials also foresee circumstances in which the only response consistent with a company's responsibilities under the Guiding Principles is to exit the relationship:

*“[due diligence] should inform choices about whether to invest in or finance a particular client and also about whether to call a loan or disinvest as a last resort when it may not be possible to prompt change in a client involved in a particularly serious adverse impact.”<sup>88</sup>*

**Given the overwhelming evidence of severe and systemic human rights violations in the ODCs, and the limited capacity of investors or Ferroviai to mitigate the harm, Ferroviai’s investors should exit their relationship with Ferroviai and make a public statement recording that decision.**

## **Norges Bank Investment Management**

Norges Bank Investment Management (NBIM) owns a 1.69% share in Ferroviai, despite being provided with evidence of human rights abuses.

NBIM’s Human Rights Expectation Document explicitly adopts the UN Guiding Principles and the OECD Guidelines. It sets out the fund’s expectation that: “Companies should carry out relevant impact and risk assessments prior to for example making significant investments in new business activities, agreeing mergers and acquisitions, entering into new countries, regions or locations and establishing new business relationships.”<sup>89</sup> NBIM’s Children’s Rights Expectation Document is similarly explicit about the responsibility of companies in which it invests to comply with children’s human rights standards.<sup>90</sup>

In light of its human rights commitments and the well-documented nature of the abuses of human rights and children’s rights occurring at the ODCs, NBIM should immediately divest from Ferroviai now that the company has assumed responsibility for the ODCs. Furthermore, the Council of Ethics advising NBIM should commence an investigation into Ferroviai under the fund’s Ethical Guidelines.<sup>91</sup> Under the Guidelines, companies may be “put under observation or be excluded if there is an unacceptable risk that the company contributes to or is responsible for... serious or systematic human rights violations, such as murder, torture... and deprivation of liberty...”. NBIM should apply a conduct based exclusion under their Guidelines to investments in Ferroviai on the basis of the company’s failure to undertake or act on human rights due diligence resulting in their contribution to gross human rights abuses, from the time of the takeover.

## (ii) Financiers

Ferrovial's financiers, like its investors, have a distinct responsibility to respect human rights. A bank's relationships with Ferrovial and its operations in the ODCs may be characterised in one of three ways, either through the provision of finance for:

- (a) The specific purpose of Ferrovial's acquisition of Broadspectrum;
- (b) General corporate purposes; or
- (c) A specific purpose unrelated to Ferrovial's acquisition or operation of Broadspectrum.

Banks that have lent money to Ferrovial in order to acquire Broadspectrum have contributed to human rights abuses in the ODCs. In discussing the ways in which financiers may contribute to adverse human rights impacts, the OECD's briefing materials provide the example of where a bank:

*lends money to a company to construct a large processing plant to be built on a community land that results in the displacement of affected populations without meaningful stakeholder engagement" this may be considered "contributing to" adverse impacts.*<sup>92</sup>

The specific funders, if any, of the Broadspectrum deal are not publicly known. However, it is possible to identify several banks that finance Ferrovial through general corporate loans. On 26 February 2016 a consortium of 22 banks financed a loan – refinancing for a previous credit facility - of €1.25 bn for general corporate purposes (see Appendix A). Each of the 22 banks involved in this deal made a €56.82 million line of finance available to Ferrovial. **The 22 banks that formed the consortium are:**

- Banca IMI (Intesa Sanpaolo)
- Banco de Sabadell
- Banco Popular Espanol SA
- Banco Santander SA
- BankAmerica Corp
- Bankinter SA
- Barclays PLC
- BBVA
- BNP Paribas SA
- Citigroup
- Credit Agricole CIB
- Deutsche Bank
- Goldman Sachs & Co
- HSBC Holdings PLC
- Instituto de Credito Oficial
- JPMorgan Chase & Co
- Mediobanca
- Mizuho Bank Ltd
- Morgan Stanley Group Inc
- Royal Bank Of Scotland Plc
- Societe Generale
- The Royal Bank of Canada

Banks that provide finance through a general corporate loan, including those banks listed above, can also be characterized as contributing to adverse human rights impacts in the ODCs, recognising the enabling role of such financial arrangements for Ferrovial and the fact that, absent specific exclusions in the loan agreement, banks are not able to guarantee that their loan does not form part of a general pool of finance used to support the Broadspectrum takeover or current and future operation of the ODCs.

Even if banks that have financed Ferrovial through general corporate loans are not considered to have contributed themselves to the abuses in the ODCs, they are at least directly linked to the abuses through their business relationships. The OECD's briefing materials point out that "causality is not a direct factor for determining linkage"<sup>93</sup> and further that:

*In the case that the financial operation, product or service is primarily concerned with the general performance of the client, then the financial institution is likely expected to respond to all adverse impacts associated with any of the activities of the client*<sup>94</sup>

A paper on Banks and Human Rights, prepared by the United Nations Environment Programme Finance Initiative (a partnership between UNEP and the global financial sector), explains that:

*when banks engage in general banking activities, such as providing a general corporate loan, or arranging financing for a merger or acquisition, they often have more limited leverage... this limited leverage does not relieve banks of the responsibility to seek to prevent or mitigate adverse human rights impacts; it simply affects how this responsibility can be exercised.*<sup>95</sup>

The same paper cautions against becoming overly concerned about the categorization of a company's involvement:

*Although such categorization can be useful, companies can focus excessively on categorizing how they may be involved with human rights impacts. If an impact is difficult to categorize, this should not prevent action. Rather, it is important for companies to first focus on avoiding or mitigating the adverse impact and demonstrating that they have done so.*<sup>96</sup>

The OECD's briefing materials make a similar point, stating that the concepts of contributing and direct linkage:

*Lie along a spectrum and it is likely that in some circumstances there will not always be a clear answer as to whether an action or omission by a financial institution is closer to a situation of contribution or directly linked. In both cases the emphasis should be on prevention and mitigation of adverse impacts...*<sup>97</sup>

Regardless of whether a bank is characterised as contributing to or being linked to the human rights abuses in the ODCs, the appropriate response - in light of the severity of the human rights abuses and the negligible capacity to mitigate the harm – is to exit the business relationships through Ferrovia that provide a direct link to the ODCs. Banks that have contributed to human rights impacts are also obliged to provide for or cooperate in the provision of a remedy to those harmed.<sup>98</sup>

**Given the overwhelming evidence of severe and systemic human rights violations in the ODCs, and the limited capacity of financiers or Ferrovia to mitigate the harm, Ferrovia's financiers that have provided direct finance to support the Broadspectrum takeover, or that have provided general corporate loans to Ferrovia, should exit their relationship with Ferrovia and make a public statement recording that decision.**

### **(iii) Other relationships with financiers**

The Guiding Principles do not cover situations where a bank provides finance to a company for a specific project, and that company is involved in adverse human rights impacts in activities unrelated to the project financed by the bank.<sup>99</sup> However, even where a financial enterprise has a business relationship with Ferrovia that does not involve a direct link to the abuse in the ODCs (either through direct financing of the takeover, or through a general corporate loan to Ferrovia) the enterprise will nevertheless be exposed to financial and reputational risk through its association with a company involved in gross human rights abuse. The nature and scope of the relevant material risk is discussed in the following section.

**Any enterprise in a financing relationship with Ferrovia should apply an exclusion to Ferrovia's activities in the ODCs and communicate this to Ferrovia and publicly.**

## **5. MATERIAL RISK AND ASSOCIATION WITH ABUSE**

As the Guiding Principles articulate, where a business poses a risk to human rights, it also poses a risk to its own long-term interests.<sup>100</sup> For Ferrovia and its stakeholders in the financial sector, there are material legal, financial and reputational risks associated with operating the ODCs. Broadspectrum's experience over the last 18 months illustrates how quickly those risks can manifest, and how devastating they can be for the standing and stability of a company.

### **a) Legal risk**

The Interpretive Guide to the Guiding Principles states that businesses should equate gross human rights abuses with other serious crime:

*If enterprises are at risk of being involved in gross human rights abuses, prudence suggests that they should treat this risk in the same manner as the risk of involvement in a serious crime, whether or not it is clear that they would be held legally liable<sup>101</sup>*

There are obvious practical reasons why companies should approach gross human rights abuses in this way: businesses that rely on the perpetration of gross human rights abuses are in a precarious position. To illustrate in this situation, the PNG Supreme Court's decision that the detention of asylum seekers and refugees on Manus Island breaches the right to personal liberty in the PNG constitution has introduced significant operational and financial risk to the running of the Manus Island ODC.<sup>102</sup> The consequences of the ruling are that Broadspectrum has been operating a domestically unlawful detention centre in PNG. It remains unclear whether the subsequent 'open centre' changes to the ODC have rendered the centre legal under PNG law and refugees held in the ODC have reported that security has been compromised since the ruling was handed down.<sup>103</sup> In addition, an application currently before the PNG Supreme Court seeks compensation for this illegal detention. The application covers over 900 asylum seekers, and the lawyer leading the case has indicated that compensation could be in the vicinity of \$125,000 per asylum seeker, or a total of \$112.5 million.<sup>104</sup> All of these risks and liabilities could and should have been foreseen and avoided through the conduct of human rights due diligence.

There is also significant material risk associated with Ferrovial's legal liability for harm caused in the ODCs. Many asylum seekers detained on Manus Island and Nauru have experienced severe physical and mental harm, which may be actionable in Australian courts. Broadspectrum has indemnified the Australian Government in relation to the illness, injury or death of any person in the offshore detention centres.<sup>105</sup> These indemnifications pose financial risk to Ferrovial's business, and may have financial implications for its financial sector stakeholders.

### **Liability for legal proceedings and claims**

Karami Kamasae v The Commonwealth of Australia & Ors is an ongoing class action brought on behalf of detainees from the Manus Island ODC who suffered injury a result of conduct by the Australian Government, G4S (contracted to provide detention services at the Manus Island ODC before February 2014) and Broadspectrum (formerly Transfield). The Statement of Claim filed by the plaintiff alleges that the defendants failed to take reasonable care in relation to food and water, accommodation, healthcare and security arrangements at the Manus Island ODC.<sup>106</sup>

There is also a question of the liability of Ferrovial, its directors and officers for crimes against humanity under domestic (Australian and Spanish) law and international criminal law. NBIA is aware that at least one leading American legal institution has communicated its analysis of this risk directly to Ferrovial.

The legal threats associated with Ferrovial's management of the ODCs should be of concern to the financial sector. In addition to the direct financial costs, large scale litigation constitutes a significant distraction for senior executives who would otherwise be focused on Ferrovial's stated aim of growth and expansion into the Australian market.

## **b) Reputational risk**

### **(i) Reputational risk to Ferrovial**

Ferrovial is a signatory to the UN Global Compact, is listed on the Dow Jones Sustainability Index and FTSE4Good, and has enacted its own strict human rights policy.<sup>107</sup> Ferrovial's work in the ODCs places these ratings at risk. MSCI ESG Research flagged Broadspectrum's involvement in the ODCs as a 'Very Severe Controversy' and downgraded its IVA rating accordingly<sup>108</sup> - and it can reasonably be expected that this association will similarly affect Ferrovial and prove deleterious to Ferrovial's standing as a globally respected leader in corporate social responsibility.

The reputational damage associated with the operation of the ODCs is again illustrated by the experience of Broadspectrum over the last 18 months. The Australian media regularly calls on the company, along with individual officers and board members, to account for the abuses in the ODCs. Earlier this year, the Financial Review editorialised "we can't think of many worse jobs in corporate Australia than that of Diane Smith-Gander, chairman of Transfield-turned-Broadspectrum-soon-to-be-Ferrovial." The company was even forced by its former owners to re-brand because they felt the need to distance themselves from association with the ODCs.<sup>109</sup> Broadspectrum has gone from being a little-known logistics and infrastructure firm to one of the most notorious companies in Australia.

Ferrovial can expect its reputation to be similarly compromised by its contribution to abuses in the ODCs. Any attack on Ferrovial's relationships will impact upon the company's ability to attract and retain high quality employees, and may also compromise future earnings by making the company less attractive to potential customers (discussed further below).

### **(ii) Reputational risk to stakeholders**

Ferrovial's financial sector stakeholders, the vast majority of which have strong human rights commitments (referenced at Appendix A), are also exposed to material reputational risk. Many of these institutions claim to put human rights at the core of their business. BNP Paribas, for example,

*acknowledges its own responsibility as a provider of financial services. It thus seeks to ensure that it is not complicit, neither directly or indirectly, in violation of Human Rights.* <sup>110</sup>

Several institutions state that they to have due diligence processes in place in order to uncover human rights violations. For example, in respect of its client relationships, Citigroup states:

*Citi seeks to do business with clients who share our values with respect to human rights. We strive to carry out appropriate due diligence on clients to maintain high ethical standards and to protect our franchise. Through our client relationships we have an ability to share best practices, which we believe will help further the respect of human rights around the world.*

...

*Citi's status as a global bank affords us opportunities to promote environmental and social responsibility around the world, and we respect human rights through our client engagements and through the due diligence we perform related to transactions. Citi has developed internal policies such as the Environmental and Social Risk Management (ESRM) Policy, which contains environmental and social standards including the Equator Principles and is an important component of our human rights approach. The ESRM Policy contains certain human rights due diligence requirements that are consistent with the due diligence framework set forth in the UN Guiding Principles.*<sup>111</sup>

A number of Ferrovial's financiers state they are guided by multiple human rights standards. For example, Deutsche Bank's human rights commitment has internal and external policy and legal dimensions:

*A number of our core internal documents including the Deutsche Bank Code of Business Conduct and Ethics as well as our policies and guidelines reflect our commitment to respect human rights. In addition, Deutsche Bank is guided by a wide range of international external standards and principles, including:*

- *UN Guiding Principles on Business and Human Rights*
- *Universal Declaration of Human Rights*
- *International Labour Organization's Declaration on Fundamental Principles and Rights at Work*
- *Principles of the UN Global Compact*
- *UN Principles for Responsible Investment (PRI)*
- *OECD Guidelines for Multinational Enterprises*
- *IFC Performance Standards 112*

Similarly, HSBC acknowledges the role of corporations in respecting human rights. The Bank recognises that:

*human rights issues are complex and that the roles and responsibilities of business and other stakeholders are the subject of a continuing international dialogue. We are open and willing to engage in this dialogue where appropriate and constructive.*

*HSBC is guided by the International Bill of Human Rights and supports the UN Declaration of Human Rights and the principles concerning fundamental rights set out in the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work. HSBC is a signatory to or has publicly expressed support for a number of international codes:*

- *The UN Global Compact*
- *The OECD Guidelines for Multinational Enterprises*
- *The Global Sullivan Principles*
- *The UN Principles for Responsible Investment*
- *The UN Principles for Sustainable Insurance<sup>113</sup>*

Financial institutions such as HSBC<sup>114</sup>, JP Morgan Chase<sup>115</sup>, and BNP Paribas<sup>116</sup> explicitly state their expectation that their customers, including companies to which they provide finance, will uphold human rights standards in their policies.

Based on written policy, some of Ferrovial's financiers take a zero-tolerance approach to participation in human rights violations through their business relationships, explicitly stating that exit of a relationship is an option. Barclays, for example, asserts the following:

*We will not participate in the condoning of human rights violations. In defining those states or organisations with whom commercial transactions could contribute to human rights violations, we will be informed by United Nations Security Council Resolutions. We will comply with any United Nations, US, UK, European Union or other legitimate regional authority financial sanctions, including those arising from alleged breaches of human rights. We will take steps to understand the potential human rights impacts of our business relationships and transactions.*

*... Where we discover, or are made aware, that we have been associated with human rights violations we shall take steps to rectify the situation, taking account of the interests of those whose rights are being violated. In cases where we discover that we are associated with violations of human rights we will take appropriate mitigating action.* This may include exiting a particular business relationship, or constructive engagement with others to promote good practice.

These financial institutions, and others with business relationships with Ferrovial, have staked their reputations on adherence with human rights standards. In the face of incontrovertible evidence of gross human rights abuse at the ODCs, failure to meet the standards set out in the Guiding Principles and reflected in institutions' own policies will undermine their claims to genuine human rights commitments. As with Ferrovial, this has the potential to impact upon staff recruitment and turnover, and on their ability to attract and retain customers.

### **c) Financial risk**

Ferrovial relies upon its reputation to attract investors, finance and customers, particularly governments explicitly sensitive to corporate reputational and human rights concerns, such as the UK, EU and Canadian Governments. The company has also successfully leveraged its reputation to secure charitable partnerships with human rights-based development agencies such as Oxfam. Ferrovial's operation of the ODCs places its ability to secure government contracts in jeopardy and should be of concern to its financial sector stakeholders.

The threat to Ferrovial's reputation and relationships should be of particular concern, given its potential to impact upon the company's ability to secure access to the Australian, and broader Asia-Pacific markets, presumably with a focus on lucrative infrastructure contracts with government authorities. Broadspectrum's business in abuse has already impacted upon the company's future earnings. Six Australian local government authorities, including the City of Sydney, are in the process of excluding any company contracted to Australia's system of immigration detention from any future contractual relations.<sup>117</sup> Eighty five current campaigns are targeting other local government authorities. Other key sectors, including health and education, are also considering exclusions for companies that provide contracted services in the ODCs.

Evidence that investors respond to these risks emerged during the 2015 NBIA campaign, when numerous institutional investors in Broadspectrum divested their holdings, citing Broadspectrum's association with human rights abuses and the lack of transparency for investors<sup>118</sup>. In its Target's Statement lodged on 21 January 2016, Broadspectrum, by its own admission, attributed "market uncertainty" surrounding the company's contract negotiations with the Department of Border Protection (DIBP) to "activist campaigns."<sup>119</sup>

## 6. THE NO BUSINESS IN ABUSE CAMPAIGN, STAKEHOLDER ENGAGEMENT AND PLANS

Provision of services at the ODCs has made Ferrovial the target of a global campaign against corporate involvement in Australia's abusive immigration detention regime. In 2015 advocacy and campaigning was directed towards Broadspectrum's investors, financiers and broad client base. Following Ferrovial's announcement of its Broadspectrum takeover bid in December 2015, a global Alert regarding Ferrovial's impending complicity in gross human rights abuses was publically released by NBIA and HRLC, and specifically circulated to relevant institutions in the global financial community. In April 2016, before the takeover bid closed, the NBIA campaign formally sought direct engagement with European-based financial and investment stakeholders of Ferrovial. A NBIA European tour commenced in which numerous meetings took place with more than a dozen European and Europe-based financial institutions linked to Ferrovial. In the final days of this tour, Ferrovial announced its intention not to pursue renewal of the ODC contract following its expiration in February 2017. The NBIA campaign subsequently met with Ferrovial and outlined the thesis and recommendations to the company as reiterated in this report.

In June 2016, following the finalisation of the Ferrovial takeover bid, the NBIA campaign wrote to all 22 banks involved in the latest syndicated general corporate loan to Ferrovial and major investors including the Norges Bank Investment Management for the Norwegian Pension Fund Global. In this letter we formally outlined our position as outlined in this report and provided the information we had received establishing their connection to Ferrovial. We invited all parties to provide a statement for inclusion in this report if they wished. Responses are contained at Appendix B.

Ferrovial was also invited to provide a statement for inclusion in this report. On 3 June 2016, Ferrovial provided the following statement for inclusion:

*In relation to the provision of services at the regional processing centres in Nauru and Manus Province, it is not a strategic activity in Ferrovial's portfolio. Ferrovial's view is that this activity will not form part of the Broadspectrum offering in the future.*

No further statement was provided by Ferrovial in response to the allegations outlined numerous times by the NBIA campaign that the company is complicit in gross human rights abuses and faces material financial, legal and reputation risk as a result.

Following the extensive private engagement with Ferrovial's investors and financiers, the campaign will now engage publically with these entities in an effort to compel compliance with the human rights responsibilities of these investors and financiers as outlined in this report. The campaign will also engage Ferrovial's clients and charitable partnerships internationally, and submit complaints to various authorities of review and investigation including the complaints procedure of the Norwegian Global Pension Fund, UN human rights bodies and the International Criminal Court.

## **7. RECOMMENDATIONS**

### **a) To Ferrovial**

Given the severity of the impacts and the impossibility of meaningful mitigation of the abuses, Ferrovial must cease and remediate abuses within the ODCs, by:

- a) Immediately releasing all people held in the ODCs to humane conditions in Australia or, with their consent, an equivalent situation with adequate support and services in accordance with UNHCR's recommendation; and
- b) Immediately ending all involvement in the ODCs.

Ferrovial must provide for or cooperate in the provision of further effective remedies for the harm suffered by asylum seekers and refugees detained in the ODCs.

### **b) To investors of Ferrovial**

Given the overwhelming evidence of severe and systemic human rights violations in the ODCs, and the limited capacity of investors or Ferrovial to mitigate the harm, Ferrovial's investors should exit their relationship with Ferrovial and make a public statement recording that decision.

### **c) To Ferrovial's financiers providing general corporate loans or specific Broadpectrum-related financing**

Given the overwhelming evidence of severe and systemic human rights violations in the ODCs, and the limited capacity of financiers or Ferrovial to mitigate the harm, Ferrovial's financiers that have provided direct finance to support the Broadpectrum takeover, or that have provided general corporate loans, should exit their relationship with Ferrovial and make a public statement recording that decision.

### **d) To any other enterprise in a financing relationship with Ferrovial**

Any enterprise in a financing relationship with Ferrovial should apply an exclusion to Ferrovial's activities in the ODCs and communicate this to Ferrovial and publicly.

## Appendix A: Financiers of loan issued 26 February 2016 – loan for general corporate purposes

Company	Value of relationship (million EUR)	Human rights commitment
Banca IMI (Intesa Sanpaolo)	56.82	Yes <sup>118</sup>
Banco de Sabadell	56.82	Yes <sup>119</sup>
Banco Popular Espanol SA	56.82	Yes <sup>120</sup>
Banco Santander SA	56.82	Yes <sup>121</sup>
BankAmerica Corp	56.82	Yes <sup>122</sup>
Bankinter SA	56.82	Yes <sup>123</sup>
Barclays PLC	56.82	Yes <sup>124</sup>
BBVA	56.82	Yes <sup>125</sup>
BNP Paribas SA	56.82	Yes <sup>126</sup>
Citigroup	56.82	Yes <sup>127</sup>
Credit Agricole CIB	56.82	Yes <sup>128</sup>
Deutsche Bank	56.82	Yes <sup>129</sup>
Goldman Sachs & Co	56.82	Yes <sup>130</sup>
HSBC Holdings PLC	56.82	Yes <sup>131</sup>
Instituto de Credito Oficial	56.82	Yes <sup>132</sup>
JPMorgan Chase & Co	56.82	Yes <sup>133</sup>
Mediobanca	56.82	Yes <sup>134</sup>
Mizuho Bank Ltd	56.82	Yes <sup>135</sup>
Morgan Stanley Group Inc	56.82	Yes <sup>136</sup>
Royal Bank Of Scotland Plc	56.82	Yes <sup>137</sup>
Societe Generale	56.82	Yes <sup>138</sup>
The Royal Bank of Canada	56.82	Yes <sup>139</sup>
<b>Total loan value</b>		<b>€1,250,000,000</b>

## **Appendix B: Responses received from financiers of loan issued 26 February 2016 and major investors of Ferrovial**

### **Banca IMI (Intesa Sanpaolo)**

Intesa Sanpaolo has engaged constructively on this issue, but has not submitted a formal statement.

### **Banco de Sabadell**

No response received

### **Banco Popular Espanol SA**

No response received

### **Banco Santander SA**

No response received

### **BankAmerica Corp**

Engagement but no formal statement submitted.

### **Bankinter SA**

No response received.

### **Barclays PLC**

Barclays has engaged constructively on this issue, but has not submitted a formal statement.

### **BBVA**

BBVA has engaged constructively on this issue and provided the following statement:

*We are engaging with our client Ferrovial since we were aware of the Broadspectrum issue and we welcome its decision not to renew the contract with the Australian government upon expiration on February 2017. We're convinced Ferrovial will comply with the obligations resulting from joining the Global Compact principles. This case has reassured us about the importance of having a protocol of action, clear and traceable, for this kind of issues arising from our business relationships - a protocol we're working on and that we'll make public and add to our new framework on social and environmental management-.*

### **BNP Paribas SA**

BNP Paribas SA has engaged constructively on this issue and provided the following statement:

*It is confirmed that the deal on 26/02/2016 has no linkage with any financing of the Broadspectrum acquisition. BNP Paribas maintains a longstanding relationship with Ferrovial, being among its core lenders since several years ago. We are one of the 22 banks participating in the mentioned 1.25bn€ Ferrovial's syndicated RCF, lastly refinanced in 2016, and which aims (since*

*inception, back in 2009) to serve for general corporate purposes. In any case, this facility (as stated, originally signed in 2009 and having gone through different refinancing processes) has no linkage to Broadspectrum acquisition/ nor financing. We decided, following the exchanges with NBIA/Get Up! to discuss this situation with the client. After exchanges, we also received a written answer from a high level manager of Ferrovial saying notably that they “will put all the mechanisms in place to make a positive contribution to the lives of asylum seekers”, until the end of the contract in 2017. We will continue monitoring the situation. We remain open to receive your feedbacks and maybe local observations in Australia, PNG and Nauru (from you or other parties).*

**Citigroup**

No response received

**Credit Agricole CIB**

Engagement but no formal statement submitted.

**Deutsche Bank**

Engagement but no formal statement submitted.

**Goldman Sachs &Co**

No response received.

**HSBC Holdings PLC**

HSBC has engaged constructively on the issue, but will provide no comment on particularities of clients or relationships.

**JPMorgan Chase &Co**

JPMorgan Chase has engaged constructively on this issue, but has not submitted a formal statement.

**Mediobanca**

No response received.

**Mizuho Bank Ltd**

No response received.

**Morgan Stanley Group Inc**

Morgan Stanley did not provide a formal statement, but indicated openness to engagement on the issue of Human Rights.

**Royal Bank Of Scotland Plc**

RBS provided the following statement:

*We review all clients operating in sensitive sectors according to our Environmental, Social and Ethical risk framework and also conduct regular due diligence assessments if and when issues emerge.*

**Societe Generale**

Societe Generale has engaged constructively on this issue but has not submitted a formal statement.

**The Royal Bank of Canada**

The Royal Bank of Canada has engaged constructively on this issue but has not submitted a formal statement.

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