Dr U Ne Oo

Ref.: OTP-CR-220/17

Date: 12 February 2020

Dear Sir,

On behalf of the Prosecutor, I thank you again for your communication received on 10 July 2017, as well as any subsequent related information.

In our letter of 6 December 2018, we informed you that the Office of the Prosecutor ("Office") was carrying out an analysis of the allegations in your communication, based, *inter alia*, on the information you provided. The purpose of this analysis was to assess whether on the basis of the information available, the alleged crimes appear to fall within the jurisdiction of the International Criminal Court ("ICC" or "Court") and therefore warrant the opening of a preliminary examination into the situation at hand.

Following this evaluation, the Office would like to inform you that the matters described in your communication do not appear to fall within the jurisdiction of the Court.

As you are aware, the ICC is entrusted with a very specific and carefully defined jurisdiction under the Rome Statute ("Statute"). The Court may only exercise jurisdiction over crimes committed on the territory or by nationals of States Parties, after the entry into force of the Rome Statute, on 1 July 2002 or following the entry into force of the Statute for the State Party concerned. This jurisdictional regime can only be otherwise extended where a non-Party State lodges an *ad hoc* declaration accepting the exercise of jurisdiction by the Court with respect to crimes committed on its territory and by its nationals, or where the United Nations Security Council refers a situation to the Prosecutor acting under Chapter VII of the UN Charter. The Court's subject-matter jurisdiction is limited to the most serious crimes of concern to the international community as a whole, namely: genocide, crimes against humanity, war crimes, and the crime of aggression. To be admissible, relevant cases must be grave enough to justify action by the Court and must sati sfy the complementarity principle, as set out in article 17 of the Statute.

Your communication alleges that crimes against humanity may have been committed by the Australian government against migrants or asylum seekers arriving by boat who were interdict ed at

sea (either in Australia's territorial waters or international waters), transferred to offshore processing centres in Nauru and Manus Island, and detained there for prolonged periods under inhuman conditions from 2001 to the present day. It is further alleged that these acts were committed jointly with, or with the assistance of, the governments of Nauru and Papua New Guinea, as well as private entities contracted by the Australian government to operate the centres of the islands.

In assessing the allegations received, as is required by the Statute, the Office examined several forms of alleged or otherwise reported conduct and considered the possible legal qualifications under article 7 of the Statute.

In terms of the conditions of detention and treatment, although the situation varied over time, the Office considers that some of the conduct at the processing centres on Nauru and on Manus Island appears to constitute the underlying act of imprisonment or other severe deprivations of physical liberty under article 7(1)(e) of the Statute. [1] The information available indicates in this regard that migrants and asylum seekers living on Nauru and Manus Island were detained on average for upwards of one year in unhygienic, overcrowded tents or other primitive structures while suffering from heatstroke resulting from a lack of shelter from the sun and stifling heat. These conditions also reportedly caused other health problems—such as digestive, musculoskeletal, and skin conditions among others—which were apparently exacerbated by the limited access to adequate medical care. It appears that these conditions were further aggravated by an environment rife with sporadic acts of physical and sexual violence committed by staff at the facilities and members of the local population. The duration and conditions of detention caused migrants and asylum seekers — including children — measurably severe mental suffering, including by experiencing anxiety and depression that led many to engage in acts of suicide, attempted suicide, and other forms of self-harm, without adequate mental health care provided to assist in alleviating their suffering.

These conditions of detention appear to have constituted cruel, inhuman, or degrading treatment ("CIDT"), and the gravity of the alleged conduct thus appears to have been such that it was in violation of fundamental rules of international law. This conclusion – including regarding the relevance of victims being subjected to CIDT – is consistent with jurisprudence from other international courts and tribunals and human rights supervisory bodies regarding the level of severity required to establish a deprivation of liberty that falls within the intended scope of the crime provided under article 7(1)(e).

The Office's characterisation of detentions – including with respect to their duration and the conditions to which migrants and asylum seekers were subjected – are also largely consistent with the assessments made by various UN bodies, human rights organisations, and, in part, certain domestic inquiries in Australia. Overall, taking into account the duration, the extent, and the

[1] This is without prejudice to an assessment of the required contextual elements, which is discussed separately below. In this context, the Office notes that it appears that once the facilities on Nauru and Manus Island were converted into "open centres" as of October 2015 and May 2016, respectively, the migrants and asylum seekers can no longer be considered, under the particular circumstances presented, to have been severely deprived of their physical liberty, as required by article 7(1)(e) of the Statute.

conditions of detention, the alleged detentions in question appear to have been of sufficient severity to constitute the crime of imprisonment or other severe deprivation of physical liberty under article 7(1)(e) of the Statute. By contrast, based on the information available, it does not appear that the conditions of detention or treatment were of a severity to be appropriately qualified as the crime against humanity of torture under article 7(1)(f) of the Statute, or of a nature and gravity to be qualified as the crime against humanity of other inhumane acts under article 7(1)(k) of the Statute.

With respect to the alleged acts of deportation under article 7(1)(d) of the Statute, it does not appear that Australia's interdiction and transfer of migrants and asylum seekers arriving by boat to third countries meets the required statutory criteria to constitute crimes against humanity . In this respect, the Office's analysis of whether the transfer of migrants and asylum seekers amounts to deportation has focussed primarily on whether the persons in question – intercepted either in international waters or in Australia's territorial waters – could have been considered 'lawfully present' in the area from which they were displaced. In this context, the Office considered both relevant domestic legislation as well as applicable international law standards, with due regard also for international refugee law, human rights standards more broadly, and various principles enshrined in the UN Convention on the Law of the Sea, such as those concerning freedom of navigation in the high seas and the right of innocent passage.

Ultimately, however, the Office was not satisfied that there was a basis to conclude that the migrants or asylum seekers were lawfully present in the area(s) from which they were deported, within the scope and meaning of this element of the crime of deportation under the Statute. In this respect, for example, the Office considers that while the removal of migrants or asylum seekers to territories where they would be subjected to CIDT would engage a State's human rights obligations, this does not affect the distinct legal question of whether the persons to be so removed were 'lawfully present' for the purpose of international criminal law and the crime of deportation. To consider otherwise would render the question of lawful presence under that provision relative to, or dependent on, the legality of a person's subsequent treatment. Such a circular approach would arguably be the opposite of the logic of the elements of the crime under article 7(1)(d), which seeks to ensure that only if persons are lawfully present are they protected from deportation or forcible transf er without grounds permitted under international law.

Finally, with respect to the crime against humanity of persecution under article 7(1)(h) committed in connection with other prohibited acts under the Statute, the Office considers that the above identified conduct of imprisonment or severe deprivation of liberty does not appear to have been committed on discriminatory grounds.

With respect to remaining alleged or otherwise reported relevant conduct, based on the information available, it did not appear to the Office that any other acts constituted crimes within the jurisdiction of the Court.

Bearing in mind the Office's finding with respect to imprisonment or other severe deprivations of physical liberty under article 7(1)(e), the Office proceeded to assess whether the requisite contextual elements were also met since, notably, the identified conduct was committed in the context of

Australia's offshore detention and processing of migrants in Nauru and Papua New Guinea, which was carried out and pursued as part of border control policies adopted by successive governments.

Having assessed the information available, there is insufficient information at this stage to indicate that the multiple acts of imprisonment or severe deprivation of liberty were c ommitted pursuant to or in furtherance of a State (or organisational) policy to commit an attack against migrants or asylum seekers seeking to enter Australia by sea, as required by article 7(2)(a) of the Statute. Specifically, the information available at this stage does not provide sufficient support for finding that the failure on the part of the Australian authorities under successive governments, whose policies varied over time, to take adequate measures to address the conditions of the detentions and treatment of migrants and asylum seekers seeking to enter Australia by sea, or to stop further transfers, was deliberately aimed at encouraging an 'attack', within the meaning of article 7. In this context, although Australia's offshore processing and detention programmes were initiated to pursue, among other things, a policy of immigration deterrence, as confirmed by official announcements and statements, the information available at this stage does not support a finding that cruel, inhuman, or degrading treatment was a deliberate, or purposefully designed, aspect of this policy.

The Office could not otherwise establish a State or organisational policy to commit the acts described by the governments of Nauru and Papua New Guinea or other private actors. As such, based on the information available, the crimes allegedly committed by the Australian authorities, jointly with, or with the assistance of, the governments of Nauru and Papua New Guinea, and private actors, as set out in the communication, do not appear to satisfy the contextual elements of crimes against humanity under article 7 of the Statute.

Accordingly, the Prosecutor has determined that there is no basis to proceed at this time. Nonetheless, consistent with article 15(6) of the Statute and rule 49(2) of the Rules of Procedure and Evidence, this decision may be reconsidered in the light of new facts or information.

I am grateful for your interest in the ICC. I hope you will appreciate that with the defined jurisdiction of the Court, many allegations will be beyond the reach of this institution. In this regard, please also note that the ICC is designed to complement, not replace national jurisdictions. Thus, you may wish to raise your concerns with other appropriate national or international authorities.

Yours sincerely,

Phakiso Mochochoko

Director

Jurisdiction, Complementarity and Cooperation Division

Cc: Mark Dillon, Head of the Information & Evidence Unit

Ms Kate Allingham
Office of Andrew Wilkie MP

Via email: Kate.Allingham@aph.gov.au

Ref.: OTP-CR-322/14/001

Date: 12 February 2020

Dear Madam,

On behalf of the Prosecutor, I thank you again for your communication received on 29 June 2017, as well as any subsequent related information.

In our letter of 6 December 2018, we informed you that the Office of the Prosecutor ("Office") was carrying out an analysis of the allegations in your communication, based, *inter alia*, on the information you provided. The purpose of this analysis was to assess whether on the basis of the information available, the alleged crimes appear to fall within the jurisdiction of the International Criminal Court ("ICC" or "Court") and therefore warrant the opening of a preliminary examination into the situation at hand.

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sea (either in Australia's territorial waters or international waters), transferred to offshore processing centres in Nauru and Manus Island, and detained there for prolonged periods under inhuman conditions from 2001 to the present day. It is further alleged that these acts were committed jointly with, or with the assistance of, the governments of Nauru and Papua New Guinea, as well as private entities contracted by the Australian government to operate the centres of the islands.

In assessing the allegations received, as is required by the Statute, the Office examined several forms of alleged or otherwise reported conduct and considered the possible legal qualifications under article 7 of the Statute.

In terms of the conditions of detention and treatment, although the situation varied over time, the Office considers that some of the conduct at the processing centres on Nauru and on Manus Island appears to constitute the underlying act of imprisonment or other severe deprivations of physical liberty under article 7(1)(e) of the Statute.[1] The information available indicates in this regard that migrants and asylum seekers living on Nauru and Manus Island were detained on average for upwards of one year in unhygienic, overcrowded tents or other primitive structures while suffering from heatstroke resulting from a lack of shelter from the sun and stifling heat. These conditions also reportedly caused other health problems—such as digestive, musculoskeletal, and skin conditions among others—which were apparently exacerbated by the limited access to adequate medical care. It appears that these conditions were further aggravated by an environment rife with sporadic acts of physical and sexual violence committed by staff at the facilities and members of the local population. The duration and conditions of detention caused migrants and asylum seekers — including children — measurably severe mental suffering, including by experiencing anxiety and depression that led many to engage in acts of suicide, attempted suicide, and other forms of self-harm, without adequate mental health care provided to assist in alleviating their suffering.

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With respect to the alleged acts of deportation under article 7(1)(d) of the Statute, it does not appear that Australia's interdiction and transfer of migrants and asylum seekers arriving by boat to third countries meets the required statutory criteria to constitute crimes against humanity. In this respect, the Office's analysis of whether the transfer of migrants and asylum seekers amounts to deportation has focussed primarily on whether the persons in question – intercepted either in international waters or in Australia's territorial waters – could have been considered 'lawfully present' in the area from which they were displaced. In this context, the Office considered both relevant domestic legislation as well as applicable international law standards, with due regard also for international refugee law, human rights standards more broadly, and various principles enshrined in the UN Convention on the Law of the Sea, such as those concerning freedom of navigation in the high seas and the right of innocent passage.

Ultimately, however, the Office was not satisfied that there was a basis to conclude that the migrants or asylum seekers were lawfully present in the area(s) from which they were deported, within the scope and meaning of this element of the crime of deportation under the Statute. In this respect, for example, the Office considers that while the removal of migrants or asylum seekers to territories where they would be subjected to CIDT would engage a State's human rights obligations, this does not affect the distinct legal question of whether the persons to be so removed were 'lawfully present' for the purpose of international criminal law and the crime of deportation. To consider otherwise would render the question of lawful presence under that provision relative to, or dependent on, the legality of a person's subsequent treatment. Such a circular approach would arguably be the opposite of the logic of the elements of the crime under article 7(1)(d), which seeks to ensure that only if persons are lawfully present are they protected from deportation or forcible transfer without grounds permitted under international law.

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Yours sincerely,

Phakiso Mochochoko

Director

Jurisdiction, Complementarity and Cooperation Division

Cc: Mark Dillon, Head of the Information & Evidence Unit

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AUSTRALIA, ASYLUM SEEKERS AND CRIMES AGAINST HUMANITY?

AMY MAGUIRE, LAURA BEREICUA, ANNABEL FLEMING and OLIVIA FREEMAN

The claim

On 21 October 2014, independent federal MP Andrew Wilkie wrote to the Office of the Prosecutor of the International Criminal Court ('ICC') to request the investigation and prosecution of the Australian Prime Minister, Tony Abbott, and his 19 cabinet ministers. Wilkie alleges that the Australian government has inflicted crimes against humanity upon asylum seekers and refugees.

Specifically, Wilkie alleges violations of Article 7 of the Rome Statute of the ICC[1] through acts including:

- imprisonment and other severe deprivation of physical liberty in violation of fundamental rules of international law;
- deportation and other forcible transfer of population; and
- other international acts causing great suffering, or serious injury to body and mental and physical health.[2]

Wilkie also claims that the government is violating provisions of the *Refugee Convention*,[3] *Convention on the Rights of the Child*,[4] and the *International Covenant on Civil and Political Rights*.[5]

Announcing his request to the ICC, Wilkie argued that the government 'is pandering to racism, xenophobia and selfishness instead of acting like leaders. … if they won't listen to the swathe of community outrage, then hopefully they'll listen to the International Criminal Court'.[6] Wilkie denied that his initiative was a 'stunt'. He and his advisor, Tasmanian barrister Greg Barns, are confident that Australia's government is guilty of crimes against humanity.[7] Indeed, Australia has been repeatedly condemned for violations of human rights in this context,[8] most recently in relation to its treatment of child asylum seekers.[9]

Unsurprisingly, Wilkie's controversial move was quickly met with condemnation from government members. Liberal Party MP Andrew Nikolic condemned Wilkie for 'vague' accusations,[10] which he said were 'embarrassing' and which 'the majority of Australians [would] see' as offensive and against Australia's national interest.[11] The then Department of Immigration and Border Protection Minister, Scott Morrison, was quoted to the effect that Wilkie's request was an 'attention-seeking' stunt. In his view, 'Australia is a sovereign country that implements our policies consistent with our domestic laws and our international obligations.'[12] Morrison said that the Australian government would not be intimidated into 'a return to the failed policies of the past that resulted in unprecedented cost, chaos and tragedy on our borders.'[13]

Yet, in March 2015, the UN Special Rapporteur on Torture submitted a report to the UN Human Rights Council, finding that Australia is violating the rights of asylum seekers to freedom from torture and inhuman treatment.[14] Prime Minister Abbott responded by saying: 'I really think Australians are sick of being lectured to by the United Nations, particularly given that we have stopped the boats.'[15] The Australian government also wholly rejected a finding by the UN Human Rights Committee that the indefinite detention of asylum seekers who had received adverse ASIO assessments constituted a 'cruel and degrading practice' in conflict with Australia's human rights obligations.[16]

This article evaluates the prospect of an ICC prosecution against Australia's Prime Minister and Cabinet, and considers the meaning of Wilkie's allegations in the context of international criminal law. We conclude that the ICC is unlikely to initiate the requested prosecution, but we acknowledge Wilkie's initiative as a distinctive means of promoting public and international scrutiny of Australia's treatment of asylum seekers.

The International Criminal Court

Established in 2002, the ICC is the first permanent international court conferred with criminal jurisdiction. It aims to end impunity for perpetrators of the most serious crimes of international concern. Based in The Hague, the Court is governed by the 1998 Rome Statute, which sets out the crimes falling under its jurisdiction, the procedures to be followed and mechanisms for cooperation between State parties and the Court. To date 123 countries have become State parties to the Statute.

Unlike other mechanisms of judicial redress at an international level, the ICC operates on the principle of individual criminal responsibility established in the Nuremburg war crimes trials:

> Individuals have international duties which transcend the national obligations of obedience imposed by the individual State … crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[17]

Working under this mandate, the ICC prosecutes those who bear the greatest responsibility for the crimes under its jurisdiction; being, the crime of genocide, war crimes, crimes against humanity and the crime of aggression.[18]

The ICC is a court of last resort. Its jurisdiction can only be invoked if a State party is unwilling or unable to genuinely carry out investigations or prosecute through its domestic judicial system. If the Court's jurisdiction is invoked, a case can then come before the ICC in three ways. First, any State party or non-State party that accepts the Court's jurisdiction can request the Office of the Prosecutor to carry out an investigation. Second, the prosecutor may initiate investigations *proprio motu* (on the prosecutor's own initiative) on the basis of reliable information concerning a State party. A precondition to the exercise of the Court's jurisdiction in both of these instances is that the crime must have been committed on the territory of a State party or those responsible must be citizens of a State party.[19] Third, the United Nations Security Council can refer a case to the Court under Chapter VII of the Charter of the United Nations.

Since its establishment, 22 cases from nine locations have been brought before the ICC. The jurisdiction of the Court has been invoked in all three ways to investigate and prosecute individuals. All individuals prosecuted to date have been nationals of African states implicated in armed conflict situations.

Testing Wilkie's claim

According to former UN Secretary-General Kofi Annan:

> There can be no global justice … unless the worst of crimes — crimes against humanity — are subject to the law. … The establishment of an International Criminal Court will ensure that humanity's response will be swift and will be just.[20]

In joining Wilkie in the submission to the ICC, Barns characterised Australia's treatment of asylum seekers as falling within this 'worst of crimes' category, stating:

> Article 7 of the Statute defines 'crimes against humanity' to mean acts such as deportation, imprisonment or other severe deprivation of liberty in violation of fundamental rules of international law, torture and other similar acts that are committed as part of a widespread or systematic attack directed against any civilian population.[21]

There are, however, a number of obstacles to succeeding in this claim. In practice, the ICC's capacity to dispense justice in response to crimes against humanity has been hampered by a number of legal and practical challenges, which we discuss below. The need to establish jurisdiction stands as the first significant obstacle to Wilkie's claim.

Jurisdiction

Australia is a party to the Rome Statute and states its commitment to the ICC's objectives.[22] This means that the ICC potentially has jurisdiction to investigate Wilkie's allegation of crimes against humanity.[23] Heads of government and other high-ranking officials are not immune from prosecution by the ICC and this means that status and power ought not to provide protection from the operation of international criminal law.[24] The procedure of the Court empowers activists like Wilkie to directly attribute crimes to leaders and governments and bring attention to issues of international concern.

This was achieved in the case of Thomas Lubanga, the leader of the UPC Militia in Congo who, in 2006, was the subject of a successful execution of warrant, arrest and conviction. While this case evidenced international criminal accountability in action,[25] it is one of only two convictions to date by the ICC, and conviction was unsurprising given Lubanga himself was found to be directly and physically involved in war crimes. A more recent case concerned Kenyan President Uhuru Kenyatta, who appeared before the ICC over allegations that he helped instigate violence following Kenya's December 2007 presidential election.[26] Unlike Lubanga, Kenyatta is alleged to have been 'criminally responsible as an indirect co-perpetrator' and this prosecution demonstrates that the ICC may be willing to initiate prosecutions against heads of government, even where they are alleged to have contributed *indirectly* to crimes against humanity.

For the ICC to initiate a prosecution against Abbott and his cabinet ministers, the prosecutor would need to be satisfied that there is a prima facie case, justifying 'a reasonable basis to proceed'.[27] This may prove difficult, given that the prosecutor's initial investigation is confined to public or volunteered sources.[28] Abbott and his cabinet ministers are unlikely to volunteer evidence against themselves and, given the government's policy of secrecy and lack of transparency surrounding matters of immigration and border protection,[29] the challenge for an ICC prosecutor seeking sufficient evidence to meet the pre-trial legal tests is heightened.

Even if the test was met, the Australian government would likely reject the ICC's claim of jurisdiction and refuse to volunteer its officials for trial in The Hague. In that case, the ICC would have no enforcement power to convict or punish the alleged perpetrators in absentia.[30]

Elements of crimes against humanity

Aside from the jurisdictional issues, the ICC will also need to be satisfied that the crimes alleged by Wilkie satisfy the elements of the crimes against humanity under the Rome Statute. In his letter to the ICC, Wilkie alleges that the Australian government has committed crimes against humanity by imprisoning, deporting, and forcibly transferring asylum seekers who arrive by sea. He also alleges that the Australian government has engaged in activities that have both directly and indirectly caused great suffering and serious injury to asylum seekers.

Article 7(1)(a) – (k) of the Rome Statute lists the crimes against humanity. In order to convict Abbott and his ministers, the ICC would have to conclude that the acts alleged by Wilkie were sufficiently grave[31] and 'committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.'[32]

The concept of 'gravity' is not defined in the Rome Statute and the appropriate scope of the term remains a matter of substantial debate, which makes it difficult to apply to the present case. However, art 17(1)(d) gives the ICC power to deem a case inadmissible if it is not 'of sufficient gravity to justify further action by the court.' The ICC has refused to hear cases where, although crimes against humanity may have been committed, the cases were not regarded as sufficiently grave to justify the ICC's intervention. For example, in 2014 the ICC issued a report in which it found that Israeli soldiers had committed war crimes during the interception of a humanitarian aid flotilla bound for the Gaza Strip. It decided not to open a prosecution though, on the basis that the cases raised were not of sufficient gravity to justify further action by the court.[33] In the case of Wilkie's allegations against the government, it is possible that the gravity would be assessed as greater than in the flotilla case, due partly to the larger

numbers of people involved, but it may still fall short of the kinds of situations that are currently before the court.

In addition to being sufficiently grave, the acts alleged must be 'widespread' or 'systematic'. Whether an act is 'widespread' concerns the scale of the attack and its victims. The term 'systematic' relates to whether the government has followed an organised and regular pattern or policy. It is important to note that these two elements are disjunctive, and therefore both elements do not need to be satisfied. In this case, it would be relevant that, as of March 2015, over 7000 people were held in the various forms of immigration detention established under the Australian migration regime.[34] Given that the Australian government has repeatedly identified asylum seekers arriving by boat as a target group for its mandatory and offshore detention schemes, it could be reasonably open to the ICC to conclude that Australia's actions meet the definitions of 'widespread' and 'systematic'.

Further, there must be an 'attack directed against a civilian population' as defined in art 7(2)(a). The term 'population' may prove to be a problematic threshold in this case. It may be difficult to establish that separate small groups of people intercepted while travelling towards Australia by boat constitute a 'population', considering that the word ordinarily means a number of people in a specific place. It is more likely, however, that a population has been constituted once the asylum seekers have been transferred to detention centres, at which point they are inhabiting a single place.

To satisfy the remainder of art 7(2)(a), the prosecutor would have to show that the conduct of Abbott and his ministers involved multiple commissions of the acts alleged by Wilkie. The term 'attack' does not, on its own, add a discrete element to the crime and should be read in conjunction with the preceding terms 'widespread' and 'systematic'. When read this way, 'attack' provides the context which distinguishes an act which would typically be a domestic crime from one of international concern. The Rome Statute also requires that an attack be carried out 'pursuant to or in furtherance of a state or organisational policy to commit such an attack.'[35] This raises the question of whether a prosecution could establish that the Australian government has a policy that commits the illegal acts alleged by Wilkie.

Public statements from the government could be called upon to satisfy this element. In addition, part of Australia's policy can be found on the website of the Department of Immigration and Border Protection where the government advises that: 'people who arrived illegally by boat are referred to as illegal maritime arrivals. The Australian government is committed to not providing permanent protection visas to people who arrive illegally.'[36] This requirement surely sets an extremely high bar for the ICC prosecutor to overcome though, and the evidence in this case may be limited.

Further, the ICC must be satisfied that Abbott and his ministers were aware of the context in which their conduct took place. The wording of the Statute does not require the alleged acts of Abbott's government to be linked to armed conflict, nor does any discriminatory intent need to be proven. Rather, the term 'context' would refer to Australia's long-standing commitment to the *Refugee Convention* and the implausibility of any suggestion that Australia is unaware of its obligations to refugees who come into its jurisdiction.

In his letter to the ICC, Wilkie specifically referred to crimes falling under paras (1)(d), (e) and (k) of art 7. In addition to satisfying the general elements of Article 7 outlined above, the actions of Abbott and his ministers must also satisfy the following characterisations:

- Article 7(1)(d) refers to the deportation or forcible transfer of population. This paragraph requires that the Abbott government deported or forcibly transferred persons who were lawfully present in Australia to another State by expulsion or other coercive acts. It must be shown that Abbott and his ministers did not have grounds for such transfer under international law and were aware of the factual circumstances that established the lawful presence of such persons in Australia. The term 'forcibly' is not restricted to physical force and may include the threat of force or coercion. It should be straightforward to show that the Australian government is aware of its obligations of refugee protection and *non-refoulement* under international law. However, this element presents several further challenges. First, it will not be possible for all asylum seekers detained offshore to demonstrate that they were ever present in Australia, considering that some or many of them may have been apprehended outside Australia's territorial waters. Second, it may be difficult for the prosecutor to establish that international law prohibited the transfer of persons who were apprehended outside Australia. Indeed, the Australian government may well assert that persons apprehended at sea were in fact rescued from overloaded and dangerous boats, in line with its duty under the *Convention on the Law of the Sea*.[37] Third, as the *Migration Act* makes it unlawful for persons to enter Australia without a valid visa, the government would likely argue that the people in question were not 'lawfully present' in Australia.[38]
- Article 7(1)(e) refers to imprisonment or other severe deprivation of physical liberty. Under this subsection, the prosecution would have to prove that Abbott and his ministers imprisoned persons or severely deprived them of their physical liberty. The prosecutor must show that the Abbott government was aware it was committing this act as part of an attack, and that it was aware that such conduct was in violation of the fundamental rules of international law. Again, there could be an evidentiary challenge here, proving that asylum seekers detained in third party states are being imprisoned by the Australian government. This would be a question for interpretation by the Court.
- It is anticipated that the Abbott government, should it be subject to a prosecution, would argue that nothing in international law expressly prohibits mandatory immigration detention, and that this reduces the gravity of the government's practices. The prosecutor could make a counter-argument grounded in human rights law, demonstrating that mandatory detention can impose torture and/or inhumane treatment,[39] at least in some cases is arbitrary,[40] and violates the rights and best interests of children.[41]
- Article 7(1)(k) generally refers to other inhumane acts. The ICC would have to be satisfied that Abbott and his ministers inflicted great suffering or serious injury to body, mental or physical health by an inhumane act. The Abbott government must have had actual knowledge of the facts that go to the nature and gravity of the crimes that have been alleged. This is a broader charge than the two discussed above. Significant relevant evidence may be found in the publicly available reports previously issued by the United Nations, international rapporteurs, the Australian Human Rights Commission ('AHRC') and other human rights organisations to support this claim. We particularly note the damning conclusions of the AHRC's 2014 report, 'The Forgotten Children: National Inquiry into Children in Immigration Detention,' including the finding that prolonged immigration detention has a profound negative impact on the mental health and development of

children.[42]

There are two obvious arguments against this charge from the perspective of the Australian government: first, that its interception of asylum seekers at sea is lawful and necessary, and second, that any inhumane treatment experienced by asylum seekers in offshore detention is beyond the scope of the government to address as it is actually the responsibility of private security firms and others paid to operate detention centres. It would be possible to make the counter argument that inaction on the part of a State can be sufficient to show an intention to carry out the attack alleged. However, there is no precedent for an ICC finding in this context, and therefore seeking to establish the government's liability on that basis would be challenging and exceptional.

Principle of complementarity

Should the Office of the Prosecutor determine that there is a prima facie case against the Australian government, it must also consider whether a prosecution is warranted in the context of the ICC's complementary jurisdiction. According to the principle of complementarity the ICC is a court of last resort — that is, a court of secondary jurisdiction that can act only as a complement to, not a replacement for, the national court of its member states.[43] In this respect, the ICC maintains the sovereign right of states to prosecute their own criminals in a fair and just manner. This means the ICC will only intervene if a state is 'unwilling' or 'unable' to exercise their jurisdiction. In this way, the Court encourages States to develop their own institutions to internally manage these kinds of prosecutions.[44]

Australia would not be considered 'unable' to exercise its jurisdiction as set out in art 17(3) of the Rome Statute because Australia has the legal infrastructure and resources to investigate and prosecute crimes against humanity.[45] Australia is therefore distinguished from the precedent case of Libya where civil war and regime change meant no court existed to facilitate investigations or hold trials on war crimes. In that case, the ICC was authorised to step in as a support unit.[46]

It could be argued that the Australian government has shown a lack of intent to prosecute Abbott and his ministers, which might satisfy the test of 'unwilling' set out in art 17(2). This might give the ICC grounds to respond to Wilkie's claim. In that case, Australia could theoretically decide to use existing domestic law to initiate a local prosecution to avoid ICC intervention. Such a path was taken in Colombia, where the threat of ICC intervention in the state's affairs placed pressure on Columbian leaders to build a more democratic judicial system in order to oust the ICC's jurisdiction and uphold its legitimacy on the international stage.

Alternatively, the Australian government could evaluate Wilkie's claim and decide that there is no case to answer, or make Abbott and his ministers the subject of a long investigation, which would serve to block the ICC prosecutor from intervening in the foreseeable future. The ICC could then only intervene if the prosecutor was convinced that national authorities have been 'unwilling and unable' to carry out a genuine investigation — a difficult allegation to establish, particularly considering that Australia is a state relatively committed to the rule of law.

In summary, the bases which might permit ICC jurisdiction over Wilkie's claims are tenuous at best, due to a lack of analogous precedent cases and the significant jurisdictional 'loopholes permitting states to delay or even thwart the Court's proceedings'.[47]

Unfavourable precedent history of the Court

Aside from the legal obstacles mentioned, there are additional practical hurdles that the Court would need to overcome to initiate a prosecution. Since its establishment, the ICC prosecutor has received thousands of requests to open investigations into crimes around the world.[48] Yet, the Court has initiated only two investigations *proprio motu*.
The first conviction recorded was against Thomas Lubanga Dyilo, the Congolese war lord, guilty of enlisting and conscripting child soldiers to engage in armed conflict. The second of the ICC's convictions was also against a Congolese militant, Germain Katanga. Katanga was found guilty of being an accessory to war crimes due to his involvement in a massacre of 200 Hema civilians. This brief history proves that a prosecution against members of the Australian Government would be unprecedented.

Lack of resources and politicisation

Current ICC Prosecutor, Fatou Bensouda, has emphasised that a lack of resources is the main practical challenge presently facing the Court.[49] The Court requires an enormous amount of financial and human resources to investigate alleged violations and initiate prosecutions. Bensouda says that this issue has worsened in recent times due to an 'explosion' of cases before the Court. This means that the Court is increasingly forced to be strategic in the way it prioritises which allegations to pursue. This is made more complicated by the fact that, unlike the more strict separation of powers of many domestic legal systems, the ICC has to operate in an inherently political environment. For these reasons, it is likely that the ICC may be less inclined to prosecute Abbott and his ministers, because the crimes allegedly committed could be perceived as less grave than other alleged violations referred to the ICC from other jurisdictions. In addition, the Court may consider it too risky to investigate and prosecute Abbott and his ministers given the significant legal obstacles the prosecution would face in bringing the Australian government to the Court and proving the claims.

Conclusion

Australia's treatment of asylum seekers and refugees undermines our self-perception as a responsible international citizen.[50] In March 2015, prominent human rights barrister Julian Burnside joined the call for an investigation into alleged crimes against humanity committed by successive Australian government officials against asylum seekers. Burnside is seeking the support of international lawyers to champion a communiqué to the ICC. Although he does not expect a prosecution to be mounted, Burnside hopes that an ICC investigation would draw the attention of the Australian public to what he calls 'our mistreatment of asylum seekers.'[51]

A key value of the ICC is its ability to directly and indirectly influence states to comply with international criminal law standards on a domestic level. While Wilkie's initiative appears unlikely to succeed on its face, it is a distinctive means of seeking to bring the Australian government before the court of national and international public opinion. Enhanced international scrutiny is an important, if limited, means of holding Australia to account for its obligations to some of the world's most vulnerable people. Enhanced public scrutiny of government action could force policy shifts to bring Australia into accordance with its international legal obligation.[52] As the UN Special Rapporteur on Torture Juan Méndez argued, in March 2015, stirring up public debate can promote improvements in

government performance.[53]

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