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Dated: 18th Sep 2022

Dear Prosecutor

RE: OTP-CR-220/17 Detention Slavery 7.1(c) with Torture 7.1(f), AUSTRALIA.
A preliminary finding and Request for urgent assertion of ICC jurisdiction

Firstly, I thank you for your letters of reply on 12/5/2022 and 12/2/2020, and especially notifying me that the ICC has special requirement to observe its complementarity role; and my previous communication efforts were lacking of any substantive findings. I also took note of the advise that this matter may be raised with national and other international authorities. The ICC Prosecutors may be aware, Australia held a general elections in May 2022, which sees a new Labour Federal Government coming into power. This has caused a slight shift in political atmosphere. But I cannot foresee, unfortunately, for any cooperation that would be forthcoming in regards opening up information on the cases of offshore detention from the new Labour Federal Government.

1. Regardless of prevailing political atmosphere, I have sent in early January 2022 an *in confidence* briefing note to some selected members of parliamentarians. On 20 February 2022, I've made a public submission in regards to Australia's Detention Slavery to the 53rd Session of UN Human Rights Council via Special Rapporteur Mr. Tomoya Obokata. As the ICC Prosecutors may aware, for a good many decades, the general public and global community's understanding for slavery, by and large, have not been moving much further beyond that of historic chattel slavery. I believe the general explanation on the possibility of the new forms of slavery ought to be made at any available forums. I posit that two documents for your information.

With this letter, I am submitting the analysis note: "FAYSAL AHMED, DUTY TO ATTEND AND PROXIMITY" as part of the preliminary findings. Background to Faysal Ahmed's case and the evidence I have collected are provided for in the linked URL. In this incident, the detention authorities have breached their duty to render assistance to severely ill Faysal Ahmed; and the doctors deployed by IHMS have breached their duty to attend to medical emergency. The incident had been witnessed by at least 60 Sudanese asylum-seekers colleagues who put up the petition and as many as 250 other asylum-seekers who were detained in Manus Island detention center at that time.

I am calling upon ICC to asserts its additional jurisdiction on this Faysal Ahmed's case, with obvious application for all other cases, whereas the needs arising out from this incident. Following is my observation.

2. In 2022, when Australia ratified the Rome Statute, it has made the declaration that Australia will undertake the treaty obligation with the conditions [#1]:

> *=> It is Australia's right to exercise its jurisdictional primacy with respect to crimes within the jurisdiction of the ICC, and;*
> *=> Australia further declares that it interprets the crimes listed in Articles 6 to 8 [genocide, war crimes and crimes against humanity] of the Statute of the International Criminal Court strictly as defined in the International Criminal Court (Consequential Amendments) Bill.*

The preference by Australian courts, therefore, is that the crimes of Genocide, Crimes against Humanity and War Crimes will be interpreted and applied "*in a way that accords with the way they are implemented in Australian domestic law*". Australian practices the [English] common law in its domestic courts.

In Conformity with Common Law

By the end of 2021, I was able to identify the wrongful conducts by Commonwealth government's immigration department (DIBP), the governent's health care services contractor International Health and Medical Services (IHMS) and the doctors deployed by IHMS in regards to the health care of asylum-seekers by utilising the concepts of "inalienable rights" together with the "customarily accepted ethical and professional standards" for doctors. The summary of these findings were being given details in "Sec. VII Inalienable Rights to Health and Offshore Medevac Context" [#2]. Although such analysis does make sense in describing wrongful acts expressed in terms of human rights, I am reasonably certain that Australian authorities and the common law courts for various reasons will not properly take it into consideration, if general public or the plaintiffs themselves were to put these allegations in human rights contexts. I have therefore make efforts to transcribe that analysis into common law contexts. My findings thus far with continuing research in this task are being updated at the "Sec. X. Medevac and Common Law Patient Rights " [#2].

Doctor-Patient Contract

3. In determining cases for medical malpractice, the common law offers two differing approaches that utilising the law of tort or the law of doctor-patient contract. I find that the approach using the law of doctor-patient contract is naturally suited to examine our offshore medical incidents. From the outset, the Commonwealth Government (the DIBP, now renamed Department of Home Affairs) have the health care services contracted out to International Health and Medical Services (IHMS) in regards to offshore asylum-seekers. Under Commonwealth Government's contracted out health services (i.e. the outsourcing) arrangements, the provisions for health care services have been fragmented between a variety of unconnected health service providers. One must break down that contracted out structure so as to identify the legal duty that owed by each service providing entities to an offshore asylum-seeker patient. Here, I use generic word "provider" to represent each layers of health care service provider. Hence:

=> the provider-DIBP has overall non-delegable duty on health care of offshore asylum-seekers;
=> the contractor-Broadspectrum has contractual duty in care of asylum-seekers that has been stipulated by written terms of contract with DIBP;
=> the provider-contractor-IHMS has contractual duty on health care of offshore asylum-seekers that has been stipulated by written terms of contract with DIBP;
=> the provider-doctor has written employment contract with IHMS. That provider-doctor also has the doctor-patient implied-unwritten contract when treating the asylum-seeker patient. The provider-doctor can be normal employee or subcontracted by IHMS. The provider-doctor can either be a physician or a psychiatrist.

The roles of DIBP and IHMS are to support and facilitate the provider-doctor on treating asylum-seeker patients. As such, the terms of doctor-patient contract -- implied and usually unwritten -- must be held as the highest order of precedence amongst, when in implementation. The common law required the provider-doctor to observes the primary legal duty to "advise and treat the patient with reasonable skill and care".

The Pivotal Role of Medical Doctors

4. When taking into consideration of the doctor-patient contractual relationship, the pivotal role that played by doctors in entire offshore detention enslavement scheme become apparent. These are the doctors who, by their own volition, have chosen to compromise the universally accepted ethical and professional standards to engaged in offshore detention scheme. In common law, these doctors will be seen not as mere accomplices, but as principals in commissioning of the crime of slavery.

The Nationality of IHMS Doctors & Other Medical Staffs

In Australia, all nurses & doctors are required to observe the medical practitioner's ethical and professional standards when treating patients. In addition, Australian medical practitioners have the mandatory reporting obligation when faced with a reasonable belief that departure from accepted professional standards (See Dr. Sanggaran et al(2013) and Dr. Young (2014) on Evidence [#3]). What I've also observed has been that, during 2013-2015 when the LNP Government moved to tighten asylum-seekers' access to reasonable medical care, there were certain objections made by professional peak bodies, such as Australian Medical Association, to these unlawful practices that taken place in offshore detention centres. As such, the Australian medical practitioners were necessarily discouraged to seek employment on offshore detention centres. The IHMS appeared, therefore, have sourced its medical staffs primarily from outside Australia. Therefore, by the time Faysal Ahmed health incident took place in 2016, the doctors and nurses who working at Manus Island detention centre, by and large, were not Australian nationals. Because the place of wrong has been that of Papua New Guinea, Australian domestic courts will have no jurisdiction to try those foreigners. However, Australian domestic courts shall still have jurisdiction to try Australian nationals and the entities registered in Australia under the provision of the Crime Act (1995, Cth) s. 268.117 extended geographical jurisdiction -- category D.

5. Another complicating factors in these offshore cases could be the possibility of some of those foreigner doctors who worked at offshore detention centres may now have acquired Australian residency or Australian citizenship. It is plausible that those foreigner doctors might be enticed to work with IHMS on the promissory note or, even with legitimate expectations, that they'll be given priority in migration decisions. Even if it is the case those doctors are now Australian residents, Australian domestic courts cannot simply put them on criminal trial; they must have to be tried as foreigners. Therefore, there is the potential to creating a mistrial, without having ICC jurisdiction as addition.

Also requiring the ICC's jurisdictional intervention is the involvement of oversea medical entities, such as Pacific International Hospital in Papua New Guinea and Republic of Nauru Hospital, in the offshore medical care processes. There are strong indicators from other few cases that these entities also have been part of unlawful activities.

6. Australia's promise for trying its own nationals accused of commissioning ICC crimes "in a way that accords with the way they are implemented in Australian domestic law" could also cause potential errors in laws. Australian Criminal Code Act (1995, Cth) have provisions for Div. 270 Slavery and Div. 274 Torture. The ICC Consequential Amendment Act with Div. 268 of Criminal Code Act (1995, Cth), at a first look, may give same provisions for slavery and torture crimes. However, the Div. 268.10 ICC Slavery law would required higher threshold than Div. 270 Slavery. These details in laws, to my view, are better be examined and plans laid out beforehand by the proper and competent national and international legal authorities so as to reduce potentials for creating mistrials, which can eventually cause the acquittal of perpetrators.

We can therefore conclude that in the offshore enslavement cases, Australia will be unable to genuinely carried out prosecution due to jurisdictional limitations. I am therefore renewing the call for ICC to assert its additional jurisdiction on this Faysal Ishak Ahmed enslavement case.

In closing, I thank the Prosecutor for your continuing attention in this investigative work.

Yours respectfully and sincerely,

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Copy to:
1. United Nations Organisations.
2. Australian Commonwealth Authorities.
3. Others.

Enclosures

1. 5/1/2022: BRIEFING NOTE (IN CONFIDENCE)
2. 20/2/2022: SUBMISSION TO 51st SESSION OF HUMAN RIGHTS COUNCIL (PUBLIC)
3. 13 & 27/8/2022: FAYSAL AHMED, DUTY TO ATTEND AND PROXIMITY (PUBLIC)

References:

[#1] Implementation of the Rome Statute for the International Criminal Court: A Quiet Revolution in Australian Law by Gillian Triggs, Sydney Law Review (Vol 25, 2003).
< http://classic.austlii.edu.au/au/journals/SydLawRw/2003/23.html >

[#2] Offshore Deaths, Detention Slavery and ICC Legal Contexts (Live-Updates).
< http://www.aus4iccwitness.org/node/92 >

[#3] Evidence, Incidents and Attributions.
< http://www.aus4iccwitness.org/evidence/ >