

**IN THE MATTER OF A PROSECUTION**

**OF THE AUSTRALIAN GOVERNMENT**

IN RELATION TO INDEFINITE DETENTION AND FORCIBLE REMOVAL OF ASYLUM SEEKERS

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**COMMUNIQUÉ TO THE PROSECUTOR AT THE INTERNATIONAL CRIMINAL COURT**

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This communiqué is submitted with a view to inviting the Prosecutor to utilise its *proprio motu* investigative powers under art 15 of the *Rome Statute of the International Criminal Court*.

The facts and external circumstances in this matter are such that positive complementarity is a feasible outcome.

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## Summary of Submissions

1. Successive Australian Governments have committed breaches of the *Rome Statute of the International Criminal Court* (the “**Rome Statute**”). Those breaches involve the indefinite detention of asylum seekers who have committed no offence and regardless of their age or health or sex. The breaches also include forcible removal of asylum seekers to Pacific Island countries where they are detained and seriously mistreated, for the stated purpose of “stopping the boats”: that is, deterring people from seeking asylum in Australia.
2. This Communiqué details the available evidence to be adduced in a prosecution of a contravention of articles 7(1)(d), 7(1)(e), 7(1)(f), 7(1)(h) and 7(1)(k) of the Rome Statute.<sup>9</sup>
3. The contraventions arise out of the Administering Authorities implementation of the Immigration Policies (as those terms are later defined in this Communiqué): see Part II.
4. The contraventions fall within the jurisdiction of the International Criminal Court (“**ICC**” or the “**Court**”): see Part III.
5. This Communiqué outlines what we submit are clear contraventions of the Rome Statute by successive Australian Governments. Detailed reasons are provided as to why the relevant facts and evidentiary considerations should persuade the Prosecutor to embark on a Preliminary Examination: see the various elements outlined and analysed in Part II.
6. We submit that the circumstances dealt with in this Communiqué are such that the alleged contraventions not only warrant the instigation of an investigation by the Prosecutor under art 15 of the Rome Statute, but also, it is clear on the facts available that in this case positive complementarity is a feasible outcome: see Part IV.
7. Indeed, Australia has legislated domestically to prevent offences that would otherwise be prosecuted under, for example, art 7(1)(e) of the Rome Statute being prosecuted except by the Attorney-General, thus ensuring that the government of the day will not bring criminal proceedings in relation to its own mistreatment of asylum seekers. In the present circumstances, the commission *and* prosecution of an offence under domestic law is a function of the State: see Part IV at [169].
8. Simply put, the instigation of a preliminary investigation may be a catalyst for positive domestic complementarity.
9. Positive complementarity has repeatedly been noted as a primary goal for the Prosecutor at the ICC as it moves forward: detailed at Part IV [166]. In the Policy Paper on Preliminary Examinations (the “**PPPE**”), the Office of the Prosecutor (“**OTP**”) notes:

Where potential cases falling within the jurisdiction of the Court have been identified, the Office will seek to encourage, where feasible, genuine national investigations and prosecutions by the States concerned in relation to these crimes.<sup>10</sup>

10. The ICC is founded on complementarity; that is, it should complement its member states’ domestic judicial jurisdiction.<sup>11</sup> In the PPPE document, the Prosecutor states:

As reflected in the principle of complementarity, national jurisdictions have the primary responsibility to end impunity for the crimes listed under the Rome Statute, namely genocide, crimes

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<sup>9</sup> *Rome Statute of the International Criminal Court*, opened for signature on 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).

<sup>10</sup> the Prosecutor, ‘Policy Paper on Preliminary Examinations’ (Policy Paper, International Criminal Court, 2013) at [17].

<sup>11</sup> *Rome Statute of the International Criminal Court*, opened for signature on 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 17(1).

against humanity, and war crimes. However, in the absence of genuine national proceedings, the OTP will seek to ensure that justice is delivered for crimes within the jurisdiction of the Court. (emphasis added)

[...]

Where national systems remain inactive or are otherwise unwilling or unable to genuinely investigate and prosecute, the ICC must fill the gap left by the failure of States to satisfy their duty.<sup>12</sup>

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<sup>12</sup> the Prosecutor, 'Policy Paper on Preliminary Examinations' (Policy Paper, International Criminal Court, 2013) <[http://www.icc-cpi.int/en\\_menus/icc/press and media/press releases/Documents/OTP Preliminary Examinations/OTP - Policy Paper Preliminary Examinations 2013.pdf](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%202013.pdf)>.

## Part I: Background

### Introduction

11. This Communiqué alleges a number of contraventions of the Rome Statute. It deals briefly with the elements of each offence, and comments where appropriate on the Prosecutor's internal steps for a preliminary analysis of the contents of this Communiqué.
12. There are two matters to which specific attention is directed:
  - a. Australia's system of indefinite mandatory detention of asylum seekers who arrive in Australia without a visa (colloquially referred to as "**boat people**" because they typically arrive by boat, having used people smugglers to get them to Australia); and
  - b. The forcible removal of boat people to Manus Island (part of Papua New Guinea) and Nauru (the Pacific Solution as set out below).
13. The contraventions of the Rome Statute alleged in this Communiqué stem from the immigration policies of the Australian Government ("**Immigration Policies**"). The Immigration Policies were introduced in 1992, and have existed in varying forms since that time.
14. We acknowledge the temporal jurisdictional restrictions that bind the ICC, and note that this Communiqué only contains allegations of offences committed after 1 July 2002. Information provided in relation to any factual matters that occurred prior to 1 July 2002 is for background only.

### The indefinite mandatory detention regime

15. The Australian *Migration Act 1958 C<sup>th</sup>* ("**Migration Act**") includes the following provisions:
  - a. section 189:

#### **189 Detention of unlawful non-citizens**

(1) If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person.

16. For clarity, the expression "unlawful non-citizen" is a defined term: it does not imply that a boat person commits any offence by arriving in Australia seeking protection. A person who arrives in Australia without papers does not thereby commit any offence. Section 14 of the Migration Act provides:

#### **14 Unlawful non-citizens**

(1) A non-citizen in the migration zone who is not a lawful non-citizen is an unlawful non-citizen.

17. The indefinite detention of "unlawful non-citizens" is required by section 196, which provides:

#### **196 Duration of detention**

(1) An unlawful non-citizen detained under section 189 must be kept in immigration detention until:

- (a) he or she is removed from Australia under section 198 or 199; or
- (aa) an officer begins to deal with the non-citizen under subsection 198AD(3); or
- (b) he or she is deported under section 200; or
- (c) he or she is granted a visa.

18. A decision of the High Court of Australia in 2004 held that a non-citizen who does not have a visa, and is refused a protection visa but cannot be removed from Australia (on account of being stateless) can remain

in detention for the rest of their life. See *Al Kateb v Godwin*  
<http://www.austlii.edu.au/au/cases/cth/HCA/2004/37.html>

### **The Tampa Incident and the creation of the Pacific Solution**

19. In August 2001, 433 asylum seekers were aboard an unseaworthy Indonesian fishing vessel en route to Australia with a view to seeking asylum.<sup>13</sup> The fishing vessel, then sinking, was spotted by Australian authorities during a routine surveillance flight, and broadcast a call to ships in the area to render assistance even though the vessel was at that stage still in the Indonesian search and rescue zone. A Norwegian container ship, the *MV Tampa* (the “**Tampa**”), attended and took aboard the passengers of the fishing vessel (the “**Tampa Asylum Seekers**”).
20. A five-day standoff ensued between the Australian Government and the captain of the Tampa as to where the Tampa Asylum Seekers were to be taken. One hundred and fifty of the Tampa Asylum Seekers went directly to New Zealand for processing, with the remaining 283 sent to Nauru where the Office of the United Nations High Commissioner for Refugees (“**UNHCR**”) agreed to conduct refugee status determinations for them.
21. In January 2005, the UNHCR released ‘UNHCR Nauru Case Load Tampa’, outlining the outcomes for the 424 Afghan, 3 Pakistani and 6 Sri Lankan asylum seekers from the Tampa. By January 2005, 186 of the Tampa caseload had returned to their country of origin, one had died on Nauru and the remainder (246) had been resettled, mostly in New Zealand.<sup>14</sup>

### **Pacific Solution**

22. The Tampa incident is recognised as the catalyst for the ‘Pacific Solution’, which was introduced in the months that followed. Under the Pacific Solution, certain areas of Australia’s territory were excised from Australia’s migration zone, meaning that non-citizens arriving to seek asylum could not make valid applications for any form of visa (including protection visas) without the exercise of ministerial discretion (the “**Pacific Solution**”, forming part of Australia’s Immigration Policies as defined above).<sup>15</sup> The areas excised included Christmas Island, the Ashmore and Cartier Islands, and the Cocos (Keeling) Islands.<sup>16</sup>
23. In addition, as part of the Pacific Solution, “**Offshore Processing Centres**” were established on Nauru and Manus Island (Papua New Guinea). Unauthorised arrivals (being asylum seekers arriving by boat without a valid visa (“**Unauthorised Arrivals**”)) were taken and remained there whilst their asylum claims were processed. The use of Offshore Processing Centres forms part of the Immigration Policies as defined above: successive governments have made it clear that boat people who arrive in Australia will be put in offshore detention, and “[will never be resettled in Australia](#)”.<sup>17</sup>
24. Australia’s Immigration Policies have resulted in mandatory detention for Unauthorised Arrivals, both at Offshore Processing Centres and domestic immigration centres (together “**Immigration Detention**”). Immigration Detention comprises part of the Immigration Policies as defined above.

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<sup>13</sup> J Phillips, *Tampa: Ten Years On*, FlagPost, Parliamentary Library, Canberra, 22 August 2011, <<http://parliamentflagpost.blogspot.com/2011/08/tampa-ten-years-on.html>> (viewed 22 April 2015).

<sup>14</sup> Ibid.

<sup>15</sup> Joint Standing Committee on Migration, *Immigration detention in Australia: a new beginning: criteria for release from detention*, First report of the inquiry into immigration detention, House of Representatives, Canberra, December 2008 <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=mig/detention/index.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=mig/detention/index.htm)> (viewed 22 April 2015) 152.

<sup>16</sup> H Spinks and J Phillips, ‘Immigration Detention in Australia’ (Background Note, Parliamentary Library, Parliament of Australia, 2013) <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fprspub%2F1311498%22>> 9.

<sup>17</sup> See for example ABC news report 20 July 2013 <http://www.abc.net.au/news/2013-07-19/manus-island-detention-centre-to-be-expanded-under-rudd27s-asy/4830778>

25. The Pacific Solution ended in about 2007, during the last year of the Howard Government, but it was revived in 2012 under the Gillard Government. It continues under the (current) Turnbull Government. Reports of cruelty and mistreatment are more numerous and more serious now than in earlier versions of the Pacific Solution.
26. In its current incarnation, the Pacific Solution appears to have, as its primary objective, breaking the spirit of the people held on Manus or Nauru. Set out in Annexure A is a statement by a doctor who has spent most of his professional life working in the Australian prison system, but who recently spent time working as a doctor in the detention system on Manus.
27. The UNHCR has delivered reports highly critical of the Pacific Solution.<sup>18</sup> Its [report on Nauru](#) and its [report on Manus](#) are both highly critical of Australia's treatment of asylum seekers held in those places under the Pacific Solution in its present form.
28. Amnesty International has issued several reports equally critical of Australia's treatment of asylum seekers on [Nauru](#)<sup>19</sup> and [Manus](#)<sup>20</sup> and the conditions in which they are held. It says Manus is "[as bad as Nauru](#)."<sup>21</sup>
29. On 1 July 2015 the Australian Border Force Act (the "**Act**") came into operation. Apart from other things, it makes it a criminal offence for a person who works in Australia's detention system to disclose facts they observe during their work. The penalty for disclosing facts observed in the detention system (on-shore and offshore) is two years' jail.<sup>22</sup>
30. On 26 September 2015, the UN special rapporteur Francois [Crepeau cancelled his planned trip](#)<sup>23</sup> to Nauru and Manus because of a concern that workers in the detention centres would not be able to provide information for fear of prosecution by Australian authorities. He was quoted as saying: "This threat of reprisals with persons who would want to cooperate with me on the occasion of this official visit is unacceptable," he said. "The Act prevents me from fully and freely carrying out my duties during the visit, as required by the UN guidelines for independent experts carrying out their country visits."
31. Statements of people who have worked in the detention system on Manus are found in Annexures A, B, C & D below. A statement of a person who worked in the detention system on Nauru is found in Annexure E below.

### **Christmas Island**

32. The mistreatment of asylum seekers is not limited to the Pacific Solution. Christmas Island is part of Australia, although it is more than 1500 kilometers north-west of mainland Australia.
33. Christmas Island has, for a long time, been the commonest point of arrival of asylum seekers arriving in Australia by boat, which is why it was the site of the Tampa episode.
34. Statements by people who have worked in, or visited, the detention centre on Christmas Island are found in Annexures F & G below.

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<sup>18</sup> Its report on Nauru is found at [http://unhcr.org.au/unhcr/images/2012-12-14%20nauru%20monitoring%20report%20final.pdf#\\_ga=1.249381255.1444519822.1443842035](http://unhcr.org.au/unhcr/images/2012-12-14%20nauru%20monitoring%20report%20final.pdf#_ga=1.249381255.1444519822.1443842035) and its report on Manus is found at [http://unhcr.org.au/unhcr/files/2013-07-12\\_Manus\\_Island\\_Report\\_Final%281%29.pdf#\\_ga=1.140395699.1444519822.1443842035](http://unhcr.org.au/unhcr/files/2013-07-12_Manus_Island_Report_Final%281%29.pdf#_ga=1.140395699.1444519822.1443842035)

<sup>19</sup> <https://www.amnesty.org/en/countries/asia-and-the-pacific/nauru/report-nauru/>

<sup>20</sup> Manus: <http://www.amnesty.org.au/refugees/comments/33587>

<sup>21</sup> <http://www.amnesty.org.au/news/comments/26539/>

<sup>22</sup> see section 42 of the [Australian Border Force Act](#)

<sup>23</sup> <http://www.smh.com.au/federal-politics/political-news/un-postpones-australian-visit-over-failure-to-guarantee-protection-of-detention-centre-whistleblowers-from-recrimination-20150926-gjvym2.html>

## Australian Human Rights Commission enquiries 2004 and 2014

35. The [Australian Human Rights Commission](#) (“AHRC”) has presented two major reports on Australia’s detention of asylum seekers.
36. The [Commission’s 2004 Report “A last resort?”](#) focused on children in immigration detention.
37. The [Commission’s 2014 report](#) also concentrated on the plight of children in immigration detention. It was delivered to the Australian Government in late 2014, and was released by the Australian Government in early 2015, on the last day on which it was required by statute to release it. The [submissions received by the Commission](#) provide a very rich source of material concerning the circumstances and effects of the detention of refugee children in Australia’s immigration detention system. Although many submissions were anonymous (presumably for fear of Government reprisals), they can generally be relied on as accurate accounts of the detail of the treatment of children in Australia’s immigration detention system.
38. As well as providing a useful account of the detention of refugee children by Australia, the AHRC 2014 report includes, in Appendix 1, a useful summary of Review of detention policy and practices from 2004–2014

### Senate enquiry 2015

39. Many more witnesses are available who can speak of the detention system in Nauru. The Australian Senate recently held an enquiry into the detention system. Parliamentary privilege protected those who were concerned about the operation of the Act. The [submissions received by the Senate Committee can be found here](#). Its [final report can be found here](#).

### Perpetrators – Individual responsibility

40. On the basis of the brief factual outline provided above, there are a number of persons who have, or would have had whilst elected, knowledge of the relevant facts outlined in the elements detailed below, and played a considerable role in the implementation and enforcement of the Immigration Policies. Further, these people have, or would have had whilst elected, the requisite intent to cause a particular consequence or were aware that the consequence would occur in the ordinary course of events (for example, that the implementation and enforcement of the Immigration Policies would result in Immigration Detention, or deportation and Immigration Detention, of boat people).
41. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) outlined in *Prosecutor v. Zejnil Delalić et al.* at [342]:

The Appeals Chamber is of the view that to establish that an individual has committed the offence of unlawful confinement, something more must be proved than mere knowing "participation" in a general system or operation pursuant to which civilians are confined. In the Appeals Chamber’s view, the fact alone of a role in some capacity, however junior, in maintaining a prison in which civilians are unlawfully detained is an inadequate basis on which to find primary criminal responsibility of the nature which is denoted by a finding that someone has committed a crime. Such responsibility is more properly allocated to those who are responsible for the detention in a more direct or complete sense, such as those who actually place an accused in detention without reasonable grounds to believe that he constitutes a security risk; or who, having some powers over the place of detention, accepts a civilian into detention without knowing that such grounds exist; or who, having power or authority to release detainees, fails to do so despite knowledge that no reasonable grounds for their detention exist, or that any such reasons have ceased to exist. [...] <sup>24</sup>

42. Prime Ministers and Ministers for Immigration (as the Department of Immigration and Border Protection (“**Department**”) has been titled from time to time) have the ultimate responsibility for the drafting, implementation, funding, and oversight of the Immigration Policies. Those ministers, together with the

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<sup>24</sup> *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Judgement (AC), 20 February 2001 [342].

corresponding ministers in the Nauruan and Papua New Guinean Governments (to the extent and in so far as those ministers participated in the framing, implementation and administration of the Immigration Policies from time to time) are considered to be perpetrators for the purpose of this Communiqué (the “**Administering Authorities**”).

43. Various persons named below as Administering Authorities have, or had, the power to release civilian detainees from Immigration Detention and fail (or failed, as the case may be) to do so, where there are or were no reasonable grounds for their detention, such as that they are a risk to the security of the State.<sup>25</sup> One way in which the Administering Authorities hold, or have held, such power would be to amend the legislation providing for mandatory detention of unauthorised arrivals. Another, more specific example of such a power is s 197AB of the *Migration Act*, which empowers the Australian Minister for Immigration and Border Protection (“**Minister**”) to make a Residence Determination, allowing a person who has been detained mandatorily under s 189 of that Act to reside in the community at a specified place. That power is only able to be exercised by the Minister personally.<sup>26</sup>
44. A non-exhaustive list of persons falling within the description of Administering Authorities, and the dates they held office, is set out below:

Name	From	To
Mr Malcolm Turnbull (current Australian Prime Minister)	15-9-15	Current
Mr Tony Abbott (former Australian Prime Minister)	18-9-13	15-9-15
Mr Kevin Rudd (former Australian Prime Minister)	3-12-07	24-6-10
	27-6-13	18-9-13
Ms Julia Gillard (former Australian Prime Minister)	24-6-10	27-6-13
Mr John Howard (former Australian Prime Minister)	11-3-96	3-12-07
Mr Peter Dutton (current Australian Immigration Minister)	23-12-14	Current
Mr Scott Morrison (former Australian Immigration Minister)	18-9-13	23-12-14
Mr Tony Burke (former Australian Immigration Minister)	1-7-13	18-9-13
Mr Brendan O’Connor (former Australian Immigration Minister)	4-2-13	1-7-13

<sup>25</sup> Ibid [378].

<sup>26</sup> *Migration Act 1958* (Cth) s 197AF.

Name	From	To
Mr Chris Bowen (former Australian Immigration Minister)	14-9-10	4-2-13
Mr Chris Evans (former Australian Immigration Minister)	3-12-07	14-9-10
Mr Kevin Andrews (former Australian Immigration Minister)	30-1-07	3-12-07
Ms Amanda Vanstone (former Australian Immigration Minister)	7-10-03	30-1-07
Mr Phillip Ruddock (former Australian Immigration Minister)	11-3-96	7-10-03
Mr Baron Waqa (current Nauruan President and Minister for Foreign Affairs and Trade) and	11-06-13	current
Mr Rimbink Pato (current Papua New Guinean Minister for Foreign Affairs and Immigration)-	23-07-12 (date of election)	current

- a. Mr Malcolm Turnbull (current Australian Prime Minister);
- b. Mr Tony Abbott (former Australian Prime Minister);
- c. Mr Kevin Rudd (former Australian Prime Minister);
- d. Ms Julia Gillard (former Australian Prime Minister);
- e. Mr John Howard (former Australian Prime Minister);
- f. Mr Peter Dutton (current Australian Immigration Minister);
- g. Mr Scott Morrison (former Australian Immigration Minister);
- h. Mr Tony Burke (former Australian Immigration Minister);
- i. Mr Brendan O'Connor (former Australian Immigration Minister);
- j. Mr Chris Bowen (former Australian Immigration Minister);
- k. Mr Chris Evans (former Australian Immigration Minister);
- l. Mr Kevin Andrews (former Australian Immigration Minister);
- m. Ms Amanda Vanstone (former Australian Immigration Minister);
- n. Mr Phillip Ruddock (former Australian Immigration Minister);
- o. Mr Baron Waqa (current Nauruan President and Minister for Foreign Affairs and Trade); and

p. Mr Rimbink Pato (current Papua New Guinean Minister for Foreign Affairs and Immigration).

### State responsibility

45. Australia's Immigration Policies include the Immigration Detention of boat people in other states (Nauru and Papua New Guinea) at Offshore Processing Centres. For the Administering Authorities to be liable for the Immigration Detention of boat people in the Offshore Processing Centres, it must be proved that Australia has state responsibility for the same. We argue that under the International Law Commission's ("ILC") Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001 ("ILC Draft Articles") and comparable case law, Australia is responsible for the deportation, detention and treatment of these people.
46. The Australian Government argues that Australia's responsibility for asylum seekers, whom Australia has interdicted and initially processed on Christmas Island or mainland Australia, passes to the Governments of Papua New Guinea and Nauru once Australia physically delivers asylum seekers to these territories. This argument is based on the fact that the detention centres these people are detained in are located on the sovereign territory of Papua New Guinea and Nauru,<sup>27</sup> that Australia has no control over these Governments and that these Governments have agreed to conduct the refugee status determination (RSD) process for asylum seekers transported there.<sup>28</sup>
47. Under the ILC Draft Articles state responsibility is based on the following general principles:
  - a. every internationally wrongful act of a State entails the international responsibility of that State;<sup>29</sup>
  - b. there is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character;<sup>30</sup> and
  - c. an internationally wrongful act should be attributed to a state.<sup>31</sup>
48. The ILC Draft Articles also provide guidance for when conduct is attributable to a State. The ILC Draft Articles provide that conduct can only be attributed to a State if the conduct is: (a) performed by the organs of that State's government; (b) performed by persons or entities exercising elements of government authority; or (c) directed or controlled by the State.<sup>32</sup> It is this last test of direction and control which this Communiqué focuses on.<sup>33</sup>
49. Article 8 attributes conduct of private persons or groups of persons to a State, if they are acting under the direction or control of the State. This test is reflective of case law from international judicial bodies, which provide guidance for what constitutes sufficient direction or control (although the ILC does recognise that

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<sup>27</sup> *Is Australia responsible for asylum seekers detained on Manus Island?* (<http://www.abc.net.au/news/2014-02-27/who-is-responsible-for-asylum-seekers-detained-on-manus/5275598> accessed 30 October 2015).

<sup>28</sup> Statement by Michael Pezzullo, Department of Immigration and Border Protection, *Opening statement to the Senate Select Committee regarding the Regional Processing Centre in Nauru*, 9 June 2015 (<https://www.border.gov.au/about/news-media/speeches-presentations/regional-processing-centre-in-nauru> accessed 30 October 2015).

<sup>29</sup> Article 1, *ILC Draft Articles*.

<sup>30</sup> Article 12, *ILC Draft Articles*.

<sup>31</sup> Articles 4 to 11, *ILC Draft Articles*.

<sup>32</sup> See Chapter II, specifically Articles 4, 5 and 8, *ILC Draft Articles*.

<sup>33</sup> See also, for example, Article 5 (which covers the conduct of persons or entities exercising elements of government authority), in which the ILC uses the example of a State being responsible for the actions of private security firms which the State has contracted with to act as prison guards, and in that capacity to exercise public powers such as powers of detention and discipline.

this must be determined on a case by case basis).<sup>34</sup> The International Court of Justice (ICJ), for example, in the *Military and Paramilitary Activities in and against Nicaragua* case<sup>35</sup> used a test of “effective control”<sup>36</sup> so that conduct would only be attributable if it *would not have occurred* without the involvement of the State in question. This is effectively a “but for” test. This test was also examined more recently by the ICTY in *Tadic*.<sup>37</sup> This decision is particularly relevant for the present situation because the ICTY was established to hold individuals accountable for crimes and *Tadic* examined both the state responsibility of Yugoslavia, and the individual criminal responsibility of Tadic. The ICTY held in that case that the requisite degree of control was “overall control going beyond mere *financing and equipping* of such forces and involving also *participation in the planning and supervision* of military operations”<sup>38</sup> (emphasis added).

50. Regional courts and United Nations bodies have also examined analogous situations to the present in which States have sufficiently high levels of control over people located in other States to trigger the first State’s jurisdiction (and human rights obligations). The case of *JHA*<sup>39</sup> is similar to the present situation. In that case, the United Nations Committee Against Torture held that Spain exercised “de facto control”<sup>40</sup> and, as such, had jurisdiction over a group of migrants when such migrants were detained in Mauritius. The presence of these migrants on Mauritian territory was as a result of a diplomatic agreement under which Mauritius would temporarily house the migrants in exchange for technical support, in the form of humanitarian and medical assistance, from Spain. This arrangement bears a striking resemblance to that between Australia, and Papua New Guinea and Nauru. Other cases addressing State control over people in the territory of other States include: the European Court of Human Rights (“ECHR”) in *Hirsi*<sup>41</sup> (which held that Italy had jurisdiction over migrants detained on Italian military and coastguard ships when located outside Italian territory); *Al-Saadoon*<sup>42</sup> (which held that the United Kingdom had jurisdiction over two Iraqi citizens held in a detention centre in Iraq, because of “the total and exclusive de facto, and subsequently also de jure control”<sup>43</sup> of the UK over the premises and the persons detained there, initially as a result of the threat and use of military force, and then from occupation orders); and the Inter-American Commission for Human Rights in *Ameziane*<sup>44</sup> (which held that the US had jurisdiction over an Algerian citizen, including when he was held at a US airbase in Afghanistan (because the USA exercised “total and exclusive de facto control”<sup>45</sup> over the prison) and when he was held in Guantanamo Bay (over which the USA has been “exercising its jurisdiction”<sup>46</sup> for more than a century largely due to the 1903 American Cuban Treaty)).
51. Turning to the facts of the present situation, the underlying reason asylum seekers are located on Manus Island and Nauru is due to the implementation of official Australian Immigration Policy and law.<sup>47</sup> Asylum seekers are housed in buildings that the Australian Government paid to build and pay to maintain. The facilities are staffed by contractors whose agreements are with the Australian Government and / or are

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<sup>34</sup> “It is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it.” Commentary (5) on Article 8 *ILC Draft Articles*.

<sup>35</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)*, Merits, Judgment, ICJ, Reports 1986.

<sup>36</sup> *Ibid*, [115].

<sup>37</sup> *Prosecutor v Dusko Tadic* ICTY, Case IT-94-1-A (1999).

<sup>38</sup> *Prosecutor v Dusko Tadic* ICTY, Case IT-94-1-A (1999) ILM, vol. 38, No. 6 (November 1999), 1546, [145], quoted in *ILC Draft Articles*, 48.

<sup>39</sup> *JHA v Spain*, CAT/C/41/D/323/2007, 21 November 2008.

<sup>40</sup> *Ibid*, [8.2].

<sup>41</sup> *Hirsi Jamaa & Ors v Italy*, No. 27765/09, ECHR 2012.

<sup>42</sup> *Al-Saadoon and Mufdhi v United Kingdom*, No. 61498/08, (Admissibility Decision), 30 June 2009, ECHR.

<sup>43</sup> *Ibid*, [34].

<sup>44</sup> *Djamel Ameziane v USA*, Petition P-900-08, Report No, 17/12, Judgment on Admissibility, Inter-Am. CHR, 20 March 2012.

<sup>45</sup> *Ibid*, [32].

<sup>46</sup> *Ibid*, [33].

<sup>47</sup> *Migration Act* 1958, Division 7. In particular, section 198AD.

funded by the Australian Government, including where locally engaged staff are employed by local subcontractors. These services cover all aspects of the functioning of the detention centres, including garrison and security services; medical; welfare; education; case management; and construction.<sup>48</sup> Importantly, although these services are provided by private contractors, the Australian Government has step in rights under the main contract for the provision of these services.

52. The governance of the detention centres is conducted via joint committees between the Government of Australia, and the Governments of Nauru and Papua New Guinea (as relevant). At the Nauru detention centre, for example, governance is via two bodies – a Joint Committee and a Joint Working Group. The Joint Committee includes representatives from the Australian Government, with the Deputy Commonwealth Ombudsman being an observer. It is co-chaired by representatives of the Nauruan Government and the Department. The Joint Working Group meets weekly, and its members include the Australian High Commissioner for Nauru and officers of the Department.<sup>49</sup> The *RPC Act* (Nauru) provides that the Operational Manager (responsible for overseeing operations at the detention centre) can be appointed by the Department or the Nauruan Government.<sup>50</sup> While the Operational Managers have to date been Nauruan, these operational managers have complained that they do not receive sufficient information about the day-to-day working of the Nauru detention centre.<sup>51</sup> Further, that they do not have access to, or knowledge of, the contract provisions between the Department and its contract service providers.<sup>52</sup>
53. The Australian Government has a permanent office at the Nauru RPC, at which officers of the Australian Border Force are located.<sup>53</sup> These officers wear official clothing bearing the insignia of the Australian Border Force and the Australian coat of arms.
54. The Australian Government also provides capacity building support to the Governments of Nauru and Papua New Guinea to train their nationals in RSD. Due to the lack of RSD experience, Australian officials either conduct RSD interviews themselves, or assist nationals of Papua New Guinea and Nauru to do the same.
55. As such, under either the “but for” test, or the “de facto” or “de jure” tests, given the high level of control (and financing) over the planning, strategy, management and daily operations of the detention centres it is submitted that Australia has state responsibility for asylum seekers during their detention on Manus Island and Nauru.<sup>54</sup>
56. This section focused on Australia’s state responsibility for the detention centres on Manus Island and Nauru. For completeness sake, it is important to note that Australia has state responsibility for the transfer of asylum seekers to these territories. These asylum seekers are interdicted by Australian flagged and owned vessels as part of Australian law and a coordinated Australian Government policy of interception, are then processed on Australian territory (usually Christmas Island) by Australian Government employees or contractors, and are then flown on Australian flagged, owned and manned planes to Manus Island and Nauru.

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<sup>48</sup> See *Review into recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru*, 6 February 2015 (*Moss Report*), Part II; *UNHCR monitoring visit to Manus Island, PNG, 23 to 25 October 2013*, 4; *UNHCR monitoring visit to the Republic of Nauru 7 to 9 October 2013*, 4.

<sup>49</sup> *Plaintiff M68*, n 12, Gordon J, [305].

<sup>50</sup> *Ibid.*, Gordon J, [315].

<sup>51</sup> *Moss Report*, n 35, 73, [5.3].

<sup>52</sup> *Ibid.*, [5.6].

<sup>53</sup> The Moss Report states that as of 6 February 2015 there were 20 Department of Immigration and Border Protection identifiable positions on Nauru.

<sup>54</sup> It is also important to note that both Papua New Guinea and Nauru are, to varying degrees, dependent on Australian aid (and have long historical connections to Australia). This brings into question whether the Governments of these States are truly independent as against Australian interests.

## Part II: Alleged Offences

### Preconditions

57. The Rome Statute sets down a number of matters for general consideration as Preconditions for all crimes against humanity. The Preconditions are provided in the chapeau of article 7(1) (the “**Preconditions**”):
- a. “widespread or systematic”;
  - b. “attack directed against any civilian population”; and
  - c. “with knowledge of the attack”.<sup>55</sup>
58. This Communiqué deals with those Preconditions in the order that they appear in the elements of the various offences under the Rome Statute.<sup>56</sup>

### Article 7(1)(d): Deportation or forcible transfer of population

59. Article 7(1)(d) of the Rome Statute deals with deportation or forcible transfer of population. Article 7(1)(d) of the Rome Statute provides that:

For the purpose of this Statute, ‘crime against humanity; means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(d) Deportation or forcible transfer of population;

60. The elements as they apply to the factual circumstances underpinning this Communiqué are addressed seriatim below.

### **Element 1: The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts.**

61. The first element of art 7(1)(d) can be broken into the following elements: the perpetrator has: (1)(a) deported or (1)(b) forcibly transferred, (2) without grounds permitted under international law, (3) one or more persons, (4) to another State or location, (5) by expulsion or other coercive acts.

#### Deported or forcibly transferred

62. There can be little argument that Australia, in transferring boat people who arrived in Australian territory to the territory of other States (Nauru and Manus Island, Papua New Guinea), deported these people.
63. It is also arguable that Australia forcibly transferred these people. The Elements of Crimes provides that the use of force is “not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.”<sup>57</sup> There is evidence that Australian officials take advantage of a coercive environment and use psychologically questionable methods to secure transfer.<sup>58</sup> Eye witness accounts, for example, set out that many deported asylum seekers have just endured an often treacherous

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<sup>55</sup> *Rome Statute of the International Criminal Court*, opened for signature on 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 7(1).

<sup>56</sup> The Elements of Crimes are reproduced from the *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002* (United Nations publication, Sales No. E.03.V.2 and corrigendum), part II.B.

<sup>57</sup> Article 7(1)(d), footnotes 12 and 13, *ICC Elements of Crimes*.

<sup>58</sup> *This is breaking people, Human rights violations at Australia’s asylum seeker processing centre on Manus Island, PNG*, n 58, 31 – 34.

sea voyage and are thus psychologically weakened. They believe they have no choice but to obey Australian Government officials, are unsure what their rights are, and are handcuffed and escorted to Australian aircraft, often within 48 hours of arriving on Christmas Island (where they are initially processed).<sup>59</sup> Further, under s 198AD of the *Migration Act*, an officer *must* remove a boat person from Australia to a “regional processing country” (as that term is defined in the *Migration Act*).

#### Without grounds permitted under international law

64. While there is a general right of States to remove non-citizens from their territory, this right is tempered when dealing with refugees. The drafters of the Convention Relating to the Status of Refugees (“**Refugee Convention**”) were concerned to ensure that any refugee at risk of being expelled from a State could appeal to a competent authority with power to prevent such expulsion – such a right is now enshrined in Article 32 of the Refugee Convention.<sup>60</sup> As outlined in Part I, Australian law mandates that boat people must be deported from Australia. Further, the decision to remove these people from Australia is not subject to any judicial or administrative review process.
65. Various international human rights instruments and customary international law also prohibit *refoulement*.<sup>61</sup> There is a strong argument that deporting asylum seekers to offshore processing centres where they are detained in poor conditions with very uncertain RSD processes constitutes constructive *refoulement*.
66. Some asylum seekers are very obviously put directly in danger through such deportation. The most obvious group are homosexuals who are deported to Papua New Guinea, where homosexuality is a criminal offence.<sup>62</sup> As such, not only is the deportation of asylum seekers in these conditions not permitted under international law, it is specifically prohibited. An examination of the individual circumstances of each person deported to Manus Island or Nauru is obviously required.

#### One or more persons

67. As of 31 January 2016, 484 asylum seekers are detained on Nauru and 916 asylum seekers are detained on Manus Island, for a total of 1,400 people.<sup>63</sup>

#### To another State or location

68. It is well documented (including by the Department itself) that Australia deports boat people to Nauru and Manus Island, Papua New Guinea.

#### By expulsion or other coercive acts

69. Please see the above section entitled “Deported or forcibly transferred” regarding the coercive conditions of expulsion. Further, it is well documented (including by the Department itself) that Australia transports boat people via plane from Australia to Nauru and Manus Island.

**Element 2: Such person or persons were lawfully present in the area from which they were so deported or transferred.**

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<sup>59</sup> See Annexure F – Statement of Witness F; *UNHCR monitoring visit to Manus Island, PNG*, 23 to 25 October 2013, n 12. [111]; *UNHCR monitoring visit to the Republic of Nauru*, 7 to 9 October 2013, n 35, [109].

<sup>60</sup> Hathaway, *The Rights of Refugees Under International Law*, 670-671.

<sup>61</sup> Article 33, *Refugee Convention*; Article 3 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 1984; *International Covenant on Civil and Political Rights* 1966; Hathaway and Foster, *The Law of Refugee Status* (Cambridge University Press, 2<sup>nd</sup> ed, 2014), Ch 1.2.2.

<sup>62</sup> *PNG Criminal Code Act* 1974; *UNHCR monitoring visit to Manus Island, Papua New Guinea 23 to 25 October 2013*, n 12, [123].

<sup>63</sup> <http://www.border.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-31-jan-2016.pdf> (accessed 22 February 2016).

70. The right to seek and be granted asylum is enshrined in the Universal Declaration of Human Rights as one of the most fundamental human rights.<sup>64</sup> The fundamental nature of the right to seek asylum is also reflected in its inclusion in the Refugee Convention. As such, asylum seekers are not breaking any international law by attempting to reach Australia. Regardless of domestic legislation, under international law such people are lawfully present in Australia, in Australia's territorial waters and on the high seas.

**Element 3: The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.**

71. The perpetrator of forcible deportation must also be aware of the factual circumstances that establish the lawfulness of the presence of asylum seekers in the area they are deported from. While the individual awareness of each of the Administering Authorities requires a forensic examination, there is a prima facie argument that these people were aware or are aware of these factual circumstances. The Administering Authorities are educated (some with law degrees, including the current Australian Prime Minister) and briefed senior members of the Australian Government who interact regularly with the United Nations. As such, it would be very difficult for the Administering Authorities to argue that they did not know that boat people seeking asylum were lawfully present in Australia.

**Element 4: The conduct was committed as part of a widespread or systematic attack directed against a civilian population.**

**'Widespread or systematic'**

72. This section covers the element of the prohibited conduct being part of a widespread or systematic attack directed against a civilian population in relation to deportation, imprisonment, torture, other inhumane acts and persecution.
73. This concept is an indispensable element of a crime against humanity, included in the Rome Statute to reflect the widely-affirmed findings in a number of earlier judgments that<sup>65</sup> "...it is a prerequisite that the act must be committed as part of a widespread or systematic attack and not just a random act of violence"<sup>66</sup>.
74. This concept is also largely regarded as being disjunction – ie it is only necessary to prove that the attack was either widespread or systematic, not both. This Communiqué examines what we believe is the stronger case for the treatment of boat people as being "systematic."
75. The ICTY considered<sup>67</sup> this concept and outlined the characteristics of circumstances that might be considered *systematic* (citing the Rome Statute and the *Statute of the International Tribunal for Rwanda*):<sup>68</sup> a consciously pursued policy or plan;<sup>69</sup> the repeated and continuous commission of inhumane acts linked to one another;<sup>70</sup> the preparation and use of significant public or private resources, whether military or

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<sup>64</sup> Article 14, *Universal Declaration of Human Rights*.

<sup>65</sup> *the Prosecutor v. Jean-Paul Akayesu*, Case no. ICTR-96-4-T, 2 September 1998 (the "**Akayesu Judgment**"), [563]-[584]; *the Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case no. ICTR-95-1-T, 21 May 1999 (the "**Kayishema-Ruzindana Judgment**"), [119]-[134].

<sup>66</sup> See the Akayesu Judgment at [579]; affirmed in Kayishema-Ruzindana Judgment at [123].

<sup>67</sup> *Prosecutor v Tihomir Blaškić*, case no IT-95-14-T (3 March 2000) [202].

<sup>68</sup> *Statute of the International Criminal Tribunal for Rwanda*, U.N. Doc. S/Res/955 (1994) (entered into force 8 November 1994), as last amended by Security Council Resolution 171 (2006) of 13 October 2006.

<sup>69</sup> See the Tadić Judgment at [648], and the ICTR, in the Akayesu (at [580]) and Kayishema-Ruzindana Judgments (at [123]).

Each refer to the plan or policy in order to define the element of "systematicity". See also the case of *the Prosecutor v. Merten* 75 ILR 1987 pp 362-363 where the Dutch Supreme Court evoked the condition of "systematicity" in reference particularly to a policy consciously directed against a group of persons: "The concept of crimes against humanity also requires – although this is not expressed in so many words in the [...] definition – that the crimes in question form part of a system based on terror or constitute a link in a consciously pursued policy directed against particular groups of people" (emphasis added).

<sup>70</sup> *Prosecutor v Tihomir Blaškić*, case no IT-95-14-T (3 March 2000) [202].

other;<sup>71</sup> and the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.<sup>72</sup>

76. The *Akayesu* Judgment considered and affirmed this concept, finding that “[s]ystematic may be defined as thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources... There must be some kind of preconceived plan or policy.”<sup>73</sup>
77. The practice of mandatory detention pursuant to the Immigration Policies has always been, and continues to be, carried out pursuant to various State policies; Australian Immigration Policies are the cornerstone, facilitated by Administering Authorities in Papua New Guinea and Nauru.<sup>74</sup> The Immigration Policies have been promoted as a core policy of consecutive Australian Governments, including the current Federal Government.<sup>75</sup> Moreover, significant physical and financial public resources have been allocated to the implementation of the Immigration Policies,<sup>76</sup> including through the extensive use of military and civilian personnel.
78. The organisation and facilitation of the various inhumane acts, and their repeated and continuous commission, required significant capital expenditure by incumbent governments. As at October 2014, the Australian Government Deputy Secretary for Immigration confirmed that the Australian Government had expended more than AUD 1.22 billion of public funds in the construction and operation of offshore Immigration Detention Centres mandated by the Immigration Policies.<sup>77</sup>
79. The implementation of the Immigration Policies has led to the repeated and continuous commission of inhumane acts. These inhuman acts were, and continue to be, linked to one another on the basis that they were, and continue to be, organised, funded, facilitated, and permitted by the Administering Authorities. On this basis, it is apparent that the Immigration Policy and its consequent breaches of articles 7(1)(d), 7(1)(e), 7(1)(f), 7(1)(h) and 7(1)(k) of the Rome Statute were systematic.

#### **‘Attack directed against any civilian population’**

80. Of the three Preconditions, “attack directed against any civilian population” is the only one that is expressly defined within the Rome Statute. Article 7(2) provides that:

For the purpose of paragraph 1:

- (a) ‘Attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian

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<sup>71</sup> Ibid.

<sup>72</sup> *Prosecutor v Tihomir Blaškić*, case no IT-95-14-T (3 March 2000) [203].

<sup>73</sup> The *Akayesu* Judgment at [580].

<sup>74</sup> See, Janet Philips and Harriet Spinks, *Immigration Detention in Australia* (Parliament of Australia, Department of Parliamentary Services 2013) 5-20, available at

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fprspub%2F1311498%22>> accessed 17 April 2015.

<sup>75</sup> See, e.g., *The Coalition’s Operation Sovereign Borders Policy* (July 2013) 7.

<sup>76</sup> See, Immigration and Border Protection Portfolio, *Portfolio Budget Statements 2014-15: Budget Related Paper NO. 1.11* (Commonwealth of Australia 2013), available at < <http://www.immi.gov.au/pub-res/Documents/budget/2014-15-pbs-full.pdf>> accessed 18 August 2014.

<sup>77</sup> See, Immigration and Border Protection Portfolio, *Portfolio Budget Statements 2014-15: Budget Related Paper NO. 1.11* (Commonwealth of Australia 2013), available at < <http://www.immi.gov.au/pub-res/Documents/budget/2014-15-pbs-full.pdf>> accessed 18 August 2014; Sarah Whyte, ‘Offshore detention centres: annual costs hit \$1 billion’ *Sydney Morning Herald* (Online), 20 October 2014 < <http://www.smh.com.au/federal-politics/political-news/offshore-detention-centres-annual-costs-hit-1-billion-20141020-118s6i.html>>.

population, pursuant to or in furtherance of a State or organizational policy to commit such attack.<sup>78</sup>

81. Accordingly, this sub-element will be satisfied if it can be proven that there was a course of conduct involving the multiple commissions of acts of deportation, imprisonment, torture, other inhumane acts and persecution against any civilian population, linked to the State policy dealt with in the above sub-element (the 'widespread or systematic' sub-element).
82. A course of conduct involving the multiple commissions of these prohibited acts is addressed in the relevant section for each prohibited act. For the prohibited act of deportation, this has been established in the first element above. It has also already been established in the 'widespread or systematic' sub-element above that the 'course of conduct' was committed pursuant to Australian Government Immigration Policies. This leaves only that the 'course of conduct' was committed against a civilian population.
83. The Rome Statute does not define the term 'civilian population'. It is generally accepted in international humanitarian law and international criminal law, however, that a population is classified as comprising two broad groups: combatants and civilians.<sup>79</sup>
84. It cannot reasonably be suggested that asylum seekers are combatants (in particular, they lack any military organisation, weapons, uniforms, hierarchy or any other military style trappings), and they therefore fall within the category of civilians. This logic is adopted in Article 50 of *Additional Protocol to the Geneva Convention*, that is, 'civilians' are defined in the negative: those who are not combatants.<sup>80</sup>
85. Further, case law indicates that the term 'civilian population' must be broadly defined. According to the ICTY, 'civilian population does not mean that the entire population of a given State or Territory must be victimised ... in order for the acts to constitute a crime against humanity'.<sup>81</sup> See in particular the decision on the confirmation of charges in the case of Laurent Gbagbo: <http://www.icc-cpi.int/iccdocs/doc/doc1783399.pdf> for the concept 'civilian population' and the other components of element 4). As the ICTY in *Prosecutor v Kunarac* found:

It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian 'population' rather than a limited and randomly selected number of individuals.<sup>82</sup>

86. In furtherance of the Immigration Policies, it is clear that a civilian population is being targeted, namely, asylum seekers attempting to enter Australia by boat or otherwise without a valid visa.

**Element 5: The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.**

87. This section covers this element in relation to deportation, imprisonment, torture, other inhumane acts and persecution.
88. The Australian Government knew that the conduct was part of a systematic attack directed against a civilian population.

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<sup>78</sup> *Rome Statute of the International Criminal Court*, opened for signature on 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 7(2).

<sup>79</sup> International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609, art 50.

<sup>80</sup> International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609, art 50.

<sup>81</sup> *Prosecutor v Duško Tadić*, case no IT-94-1-T (7 May 1997) [644].

<sup>82</sup> *Prosecutor v Kunarac*, case nos IT-96-23 and IT-96-23/1-A (12 June 2002) [90].

89. The Administering Authorities drafted, implemented, funded, and facilitated the conduct, and were told on numerous occasions by a number of bodies, that such actions breach international laws.<sup>83</sup>
90. This advice was clear, unqualified, and stated in no uncertain terms that the Immigration Policies (in this case, the conduct) may breach international laws.<sup>84</sup> As outlined earlier, various NGOs have produced reports detailing the legal standing of the Immigration Policies in the context of wider international law. Those reports have clearly identified a number of international legal obligations that have been contravened as a consequence of the Immigration Policies.<sup>85</sup>
91. Notwithstanding this advice, the Administering Authorities continued to permit widespread contravention of articles 7(1)(d), 7(1)(e), 7(1)(f), 7(1)(g) and 7(1)(k) of the Rome Statute.
92. The Administering Authorities must also have the intent required for the underlying crime, which, in this case, is the deportation or forcible transfer of population.<sup>86</sup> The Australian Government has, and has had, that intent over a number of years. This is again demonstrated by the implementation of the Immigration Policies jointly with the other Administering Authorities.

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<sup>83</sup> See, for example: Juan E. Méndez, *Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, UN Doc A/HRC/28/68/Add.1 (6 March 2015) at [16]-[31]; United Nations High Commissioner for Refugees, Submission No 133 to the Joint Standing Committee on Migration, *Inquiry into Immigration Detention in Australia*, 12 September 2008; Australian Human Rights Commission, 'The Forgotten Children: National Inquiry into Children in Immigration Detention 2014' (2014).

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> Antonio Cassese, 'Crimes Against Humanity' in Antonio Cassese, Paola Gaeta and John RWD Jones (eds), *The Rome Statute of the International Criminal Court* (Oxford University Press 2002) 363-4.

## **Article 7(1)(e): Imprisonment and deprivation of physical liberty**

93. Article 7(1)(e) of the Rome Statute deals with imprisonment and the deprivation of physical liberty. Article 7(1)(e) of the Rome Statute provides that:

For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law.

94. No judgment of the ICC has addressed the interpretation of the published elements of this offence.<sup>87</sup> The elements as they apply to the factual circumstances underpinning this Communiqué are addressed seriatim below.

### **Element 1: The perpetrator imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty.**

#### Imprisonment or severe deprivation of liberty

95. The first element of art 7(1)(e) can be broken into two alternative limbs: the perpetrator has (1) *imprisoned one or more persons*, or (2) *otherwise severely deprived one or more persons of physical liberty*.<sup>88</sup> Together, the two limbs cover a broad spectrum of deprivations of physical liberty.

#### *Imprisonment*

96. In defining “imprisonment”, the ICTY held that “any form of arbitrary physical deprivation of liberty of an individual may constitute imprisonment under Article 5(e) of the Statute [of the ICTY] as long as the other requirements of the crime are fulfilled”.<sup>89</sup> Article 5(e) of the *Statute of the International Criminal Tribunal for the former Yugoslavia* (“**Statute of the ICTY**”) dealt with “imprisonment”. It is likely that the corresponding term, ‘imprisoned’, in art 7(1)(e) of the Rome Statute would be construed accordingly.

#### *Severely deprived ... of physical liberty*

97. Some indication as to the meaning of this phrase can be drawn from the text of art 7(1)(e). The use of the phrase ‘or otherwise’ indicates that severe deprivation of liberty is something other than arbitrary physical deprivation of liberty. Indeed, the ICC inserted this phrase to ensure that a narrow definition of imprisonment was not used. The ICC has indicated that it would consider evidence concerning the length of detention, the conditions of detention, evidence that victims were cut off from the outside world, and evidence that detention was part of a series of repeated detentions in determining the severity of deprivation of liberty.<sup>90</sup>
98. In *Prosecutor v Tihomir Blaškić*, in finding that the conditions of deprivation of liberty were severe, the ICTY states (at p 692):

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<sup>87</sup> The Elements of Crimes are reproduced from the *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002* (United Nations publication, Sales No. E.03.V.2 and corrigendum), part II.B.

<sup>88</sup> *Rome Statute of the International Criminal Court*, opened for signature on 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 7(1)(e).

<sup>89</sup> *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, Judgement (TC), 15 March 2002 [112].

<sup>90</sup> Case Matrix Network, ‘ICC Case Matrix: Article 7(1)(e) Deprivation of Liberty’ (Online Resource, International Criminal Court, 2013)

<[https://www.cmn.cx/cms/index.php?folder=668&id=5930#\\_Toc320868669](https://www.cmn.cx/cms/index.php?folder=668&id=5930#_Toc320868669)>.

They lacked medicines and there was insufficient water and food. The Trial Chamber points to the murders and acts of physical violence, including rape, which occurred in the village.<sup>91</sup>

99. The Trial Chamber relied – *inter alia* – on these matters in finding that the conditions of detention were in breach of the corresponding article of the Statute of the ICTY.<sup>92</sup> In *Prosecutor v. Dario Kordić and Mario Čerkez*, the Trial Chamber of the ICTY considered matters of the nature described above in determining whether detention might be cruel or inhumane:

The Trial Chamber is satisfied that during detention in the detention centres in Crkvina and Bijeljina, the prisoners did not have sufficient space and sufficient food and water supply. They were kept in unhygienic conditions and did not have access to sufficient medical care.<sup>93</sup>

100. And at [743]:

Several Prosecution witnesses gave evidence that there was very little contact with family members from outside in the detention facilities in Bosanski Samac.<sup>94</sup>

#### Conditions of detention in Immigration Detention

101. As at 31 March 2014, there were 153 babies, 204 pre-schoolers (aged 2 to 4 years old), 336 primary school aged children, and 196 teenagers in Immigration Detention. As at 31 January 2016, 142 children remain in Immigration Detention.<sup>95</sup>
102. The conditions of Immigration Detention facilitated by the Australian Government have been, and remain, poor. Immigration Detention is set up to function like a prison. The detainees represent a group of people stretched both psychologically and physically to the limits of human endurance. There is inadequate food and water,<sup>96</sup> a lack of medicine and medical treatment,<sup>97</sup> overcrowding, and a subsistence of violent incidents.<sup>98</sup> Further, the length of detention is generally indefinite at the outset.<sup>99</sup>
103. Conditions of detention vary across the detention network, however all detention centres are fenced and locked.<sup>100</sup> Each has security checkpoints.<sup>101</sup> A former trauma counsellor for Save the Children concludes that “[the Nauru Offshore Processing Centre] is set up as a prison.”<sup>102</sup>

<sup>91</sup> *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgement (TC), 3 March 2000 [692].

<sup>92</sup> *Ibid.*

<sup>93</sup> *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Judgement (TC), 26 February 2001 [775].

<sup>94</sup> *Ibid* [743].

<sup>95</sup> <http://www.border.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-31-jan-2016.pdf> (accessed 26/02/2016).

<sup>96</sup> Australian Human Rights Commission, ‘The Forgotten Children: National Inquiry into Children in Immigration Detention 2014’ (2014) 183.

<sup>97</sup> Australian Human Rights Commission, ‘The Forgotten Children: National Inquiry into Children in Immigration Detention 2014’ (2014) 107; see also the ‘Statement of Witness A’ included at Annexure A to this Communiqué.

<sup>98</sup> Australian Human Rights Commission, ‘The Forgotten Children: National Inquiry into Children in Immigration Detention 2014’ (2014) 107; see also the ‘Statement of Witness B’ and its exhibits included at Annexure B to this Communiqué.

<sup>99</sup> Australian Human Rights Commission, ‘The Forgotten Children: National Inquiry into Children in Immigration Detention 2014’ (2014) 85.

<sup>100</sup> See the ‘Statement of Witness A’ at [4]; see also Australian Human Rights Commission, ‘The Forgotten Children: National Inquiry into Children in Immigration Detention 2014’ (2014) 138.

<sup>101</sup> Name withheld, former professional working in immigration detention, Submission No 8 to the National Inquiry into Children in Immigration Detention 2014  
<[https://www.humanrights.gov.au/sites/default/files/Submission%20No%208%20-](https://www.humanrights.gov.au/sites/default/files/Submission%20No%208%20-%20)

104. The Australian Human Rights Commission's National Inquiry into Children in Immigration Detention (the "**National Inquiry**") made a number of significant findings on the conditions of detention. In its report (the "**National Inquiry's Report**"), the National Inquiry outlined numerous incidents of assaults, sexual assaults, and self-harm involving children as well as an endemic pattern of the prolonged detention of hundreds of children (many unaccompanied), including dozens with mental and physical disabilities, causing extreme levels of physical, emotional, psychological and developmental distress.<sup>103</sup>

105. From January 2013 to March 2014 there were numerous assaults and self-harm incidents in detention centres in Australia where children are held. These include:<sup>104</sup>

- 57 serious assaults;
- 233 assaults involving children;
- 207 incidents of actual self-harm;
- 33 incidents of reported sexual assault (the majority involving children); and
- 183 incidents of voluntary starvation/hunger strikes (with a further 27 involving children).

106. Conditions in Immigration Detention Centres are unhygienic. In the detention centre on Nauru, showers are generally restricted to 30 seconds each day.<sup>105</sup> According to site staff, "there have been multiple times that Offshore Processing Centre 3 has run out of water, resulting in overflowing and blocked toilets with faeces on the toilets or on the floor of the toilet."<sup>106</sup> A child detained in Immigration Detention writes:

Because of this situation, new diseases came out like skin rashes, mosquitoes discovered and new flies ... Disease got worse in the camp and still expanding. Sometimes because of the smell, our camp it's like a sewer. The cleaners cleaning the toilets whenever they want. Around the toilets are mountain of toilet paper and pee and poo and water up to your ankle.<sup>107</sup>

107. The National Inquiry was told at a public hearing<sup>108</sup> that the state of the toilets and the lack of water contributed to dehydration:

%20Name%20withheld%20-

%20Former%20professional%20working%20in%20immigration%20detention.doc> (viewed 9 April 2015).

<sup>102</sup> Australian Human Rights Commission, 'The Forgotten Children: National Inquiry into Children in Immigration Detention 2014' (2014) 185.

<sup>103</sup> Australian Human Rights Commission, 'The Forgotten Children: National Inquiry into Children in Immigration Detention 2014' (2014) 13.

<sup>104</sup> Department of Immigration and Border Protection, *Incidents in facilities where children are held*, Item 12, Schedule 2, First Notice to Produce, 31 July 2014: where is this sourced from?.

<sup>105</sup> Name withheld, teacher in Nauru, Submission No156 to the National Inquiry into Children in Immigration Detention 2014, 1 <<http://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/national-inquiry-children-immigrationdetention-2014-0>> (viewed 9 April 2015).

<sup>106</sup> Names withheld, employees of Save the Children Australia in Nauru, Submission 183 to the National Inquiry into Children in Immigration Detention 2014

<[https://www.humanrights.gov.au/sites/default/files/Submission%20No%20183%20-%20Names%20withheld%20-%20Employees%20of%20Save%20the%20Children%20Australia%20in%20Nauru\\_0.pdf](https://www.humanrights.gov.au/sites/default/files/Submission%20No%20183%20-%20Names%20withheld%20-%20Employees%20of%20Save%20the%20Children%20Australia%20in%20Nauru_0.pdf)> (viewed 9 April 2015) p 4.

<sup>107</sup> Name withheld, child detained in Nauru OPC, Submission No 132 to the National Inquiry into Children in Immigration Detention 2014  
<<https://www.humanrights.gov.au/sites/default/files/Submission%20No%20132%20-%20Name%20withheld%20-%20Child%20detained%20in%20Nauru%20OPC.pdf>> (viewed 21 April 2015) p 2.

<sup>108</sup> Department of Immigration and Border Protection, *Miscarriages*, Supplementary Question, First Notice to Produce, 31 March 2014.

... the dehydration was often related to both the fact that they didn't have access to water throughout the day on demand and the other reason was that a lot of them, particularly women and children, didn't want to drink water during the day because they didn't want to use the shared toileting facilities.<sup>109</sup>

108. A 13-year-old girl "had only two pairs of underwear and only one she could use while on her period. She felt shame because she was an adolescent girl and each day she had to wash her underwear and hang them to dry in front of her father, which was not culturally appropriate. She went for months without additional underwear despite multiple written requests."<sup>110</sup> New sheets and detergent are not provided to children who wet their bed.<sup>111</sup>

109. In the National Inquiry's Report, Clinical Psychologist, Guy Coffey writes that "there appears to be high instances of post-natal depression in women who have been transferred from Nauru to the mainland for the birth of their infant".<sup>112</sup> Indeed, healthy foetuses have been terminated as a result of mothers' fears for the health of any newborns:

Women (not just these four) are fearful of their health whilst pregnant and detained on Nauru, they are terrified of giving birth on Nauru and extremely worried about the health impacts the environment may have on a newborn child. In all four cases, the women have expressed that if it were not for their immigration detention on Nauru, they would very much want to have these babies.<sup>113</sup>

110. Dr Elizabeth Elliot, a Professor of Paediatrics and Child Health, described the health hazards of the Immigration Detention environment:

Cramped living conditions intended for temporary use and overcrowding have dire health consequences, enabling rapid spread of infections. Asthma is common, with episodes of wheeze exacerbated by infection, dust and life lived in air-conditioning in a punishing climate. The long wait for transfer to the mainland for medical or surgical treatment is incomprehensible to families. From a paediatrician's perspective these delays in treatment – for children with delayed speech, poor hearing, rotten teeth, sleep apnoea and infection – are unacceptable and may have lifelong consequences.<sup>114</sup>

<sup>109</sup> Australian Human Rights Commission, 'The Forgotten Children: National Inquiry into Children in Immigration Detention 2014' (2014) 183.

<sup>110</sup> Names withheld, employees of Save the Children Australia in Nauru, Submission No183 to the National Inquiry into Children in Immigration Detention 2014, pp 46-47. At <[https://www.humanrights.gov.au/sites/default/files/Submission%20No%20183%20-%20Names%20withheld%20-%20Employees%20of%20Save%20the%20Children%20Australia%20in%20Nauru\\_0.pdf](https://www.humanrights.gov.au/sites/default/files/Submission%20No%20183%20-%20Names%20withheld%20-%20Employees%20of%20Save%20the%20Children%20Australia%20in%20Nauru_0.pdf)> (viewed 20 April 2014).

<sup>111</sup> Names withheld, employees of Save the Children Australia in Nauru, Submission No183 to the National Inquiry into Children in Immigration Detention 2014, pp 46-47. At <[https://www.humanrights.gov.au/sites/default/files/Submission%20No%20183%20-%20Names%20withheld%20-%20Employees%20of%20Save%20the%20Children%20Australia%20in%20Nauru\\_0.pdf](https://www.humanrights.gov.au/sites/default/files/Submission%20No%20183%20-%20Names%20withheld%20-%20Employees%20of%20Save%20the%20Children%20Australia%20in%20Nauru_0.pdf)> (viewed 20 April 2014).

<sup>112</sup> Australian Human Rights Commission, 'The Forgotten Children: National Inquiry into Children in Immigration Detention 2014' (2014) 89.

<sup>113</sup> ChilOut, *Submission No 168 to the National Inquiry into Children in Immigration Detention 2014*, Supplementary Attachment, p 3. At <http://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/national-inquiry-childrenimmigration-detention-2014-0> (viewed 7 May 2015); Australian Human Rights Commission, 'The Forgotten Children: National Inquiry into Children in Immigration Detention 2014' (2014) 91.

<sup>114</sup> Australian Human Rights Commission, 'The Forgotten Children: National Inquiry into Children in Immigration Detention 2014' (2014) 107.

111. Medical care is insufficient, as is demonstrated in the Witness Statements annexed to this Communiqué.<sup>115</sup>
112. Requests for medical assistance are available, but only in English. Witness D notes that on number of occasions the guards at the Manus Island OPC disposed (in bulk) of the requests for medical attention without reviewing them. Witness D continues that on one occasion a detainee was refused dental care (or medical treatment of any form) for such an extended period, that he removed a piece of wire from the camp fence, and forcibly extracted his own tooth without anaesthetic or medical assistance.<sup>116</sup>
113. The Commonwealth Ombudsman has noted that:

detainees are particularly vulnerable to harm – especially psychological harm – for a range of reasons. ... These vulnerabilities can be exacerbated by the conditions of their detention, particularly overcrowding, exposure to self-harm incidents, and lack of meaningful activities. These vulnerabilities can also be exacerbated by anxiety about, and frustrations with, immigration decision-making processing, and especially by the length of their detention.<sup>117</sup>

#### Length of detention

114. Official statistics of the Department note that, on average, the general population of refugees spend 457 days in Immigration Detention; 804 current detainees have been in Immigration Detention for more than 366 days, and of those, 434 current detainees have been in Immigration Detention for more than 730 days.<sup>118</sup> These figures are accurate for the population that remained in immigration detention at 31 January 2016.<sup>119</sup> Based on official statistic of the Department as of 28 February 2015, the average child spends 231 days in Immigration Detention.
115. These figures relate only to current detainees: previously, the population of detainees in immigration detention was significantly larger, with the average time spent in detention much longer: in 2005, 31 per cent of detainees had been held for one year or more, and in 2007 there were 367 people who had been in detention for two years or more.<sup>120</sup> As at 31 October 2011, 39 per cent of the detention population had been in detention for more than 12 months.<sup>121</sup>
116. The conduct set out above constitutes a deprivation of physical liberty of the most severe variety. It is our submission that the severity of the conduct is such that it will satisfy one limb of the first element: it is at the very least a severe deprivation of physical liberty.

#### **Element 2: The gravity of the conduct was such that it was in violation of fundamental rules of international law.**

117. The Rome Statute does not outline the relevant rules of international law that are to be considered 'fundamental' for the purposes of an analysis of this element of the offence,

<sup>115</sup> Please see Annexures A, C, D, E, and F.

<sup>116</sup> See Annexure D, Statement of Witness D [13].

<sup>117</sup> Australian Human Rights Commission, 'The Forgotten Children: National Inquiry into Children in Immigration Detention 2014' (2014) 85.

<sup>118</sup> Department of Immigration and Border Protection, 'Immigration Detention and Community Statistics Summary' 28 February 2015 <<http://www.immi.gov.au/About/Documents/detention/immigration-detention-statistics-feb2015.pdf>>.

<sup>119</sup> <http://www.border.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-31-jan-2016.pdf> (accessed 26 February 2016).

<sup>120</sup> Senate Legal and Constitutional Affairs Legislation Committee, Answers to Questions on Notice, Immigration Portfolio, Additional Estimates 2004-5, nos. 108 and 124, 15 February 2005.

<sup>121</sup> DIAC, *Annual Report 2009-10*, DIAC, Canberra, p 115.

however it is unlikely that the phrase would be construed in a way inconsistent with other international treaties,<sup>122</sup> particularly, those that concern the deprivation of the liberty.

118. The *International Covenant on Civil and Political Rights* (the “**ICCPR**”)<sup>123</sup> contains fundamental rules of international law, including the rule set out in art 9. Article 9 has been cited previously as such a provision by international judicial bodies.<sup>124</sup> By way of illustrating the recognition of the fundamental nature of Articles 7(1)(e) of the Rome Statute and Article 9 of the ICCPR, s 268.12 of the *Criminal Code Act 1995* (Cth) (the “**Commonwealth Criminal Code**”)<sup>125</sup> creates an offence under Australian law framed in terms similar to art 7(1)(e) of the Rome Statute.<sup>126</sup> Section 268.12(b) makes contravention of articles 9, 14, and 15 of the ICCPR the equivalent of the requirement in art 7(1)(e) that there be a breach of a fundamental rule of international law.<sup>127</sup> Article 9 of the ICCPR provides that:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

...

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.<sup>128</sup>

119. Note also article 37(b) of the UN Convention on the Rights of the Child which imposes a higher standard than the ICCPR, providing that:

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.<sup>129</sup>

120. In *Prosecutor v. Dario Kordić and Mario Čerkez* the Trial Chamber of the ICTY noted that, at [299] (our emphasis):

The International Law Commission further indicates that arbitrary imprisonment is contrary to Article 9 of the Universal Declaration of Human Rights and to Article 9 of the International Covenant on Civil and Political Rights.<sup>130</sup>

121. The Trial Chamber of the ICTY has considered what might constitute arbitrary detention. In *Prosecutor v. Blagoje Simić et al.*, the Trial Chamber concluded:

[...] the arrests of groups of women, children and elderly, who were subsequently detained in Zasavica and Crkvina were arbitrary, with no lawful basis. They were

<sup>122</sup> John Tobin, ‘Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation’ (2010) 23 *Harvard Human Rights Journal* 201, 234-234.

<sup>123</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9.

<sup>124</sup> *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Judgement (TC), 26 February 2001, at [299].

<sup>125</sup> *Criminal Code Act 1995* (Cth) s 268.

<sup>126</sup> *Ibid* s 268.12.

<sup>127</sup> *Criminal Code Act 1995* (Cth) s 268.12(b).

<sup>128</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9.

<sup>129</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 37(b).

<sup>130</sup> *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Judgement (TC), 26 February 2001, at [299].

arrested because they were non-Serbs, not because there was a reasonable suspicion that they had committed any offences, or for reasons of their safety.<sup>131</sup>

122. At [681], the Trial Chamber continues (our emphasis):

The detention of these persons became unlawful when they were subjected to continued detention without respect for their rights to liberty and security of the person, and to a fair trial. [...] The legality of their detention was never reviewed by the Serb authorities.<sup>132</sup>

123. The United Nations Human Rights Council has made clear that detention must be necessary and reasonable in all the circumstances, and a proportionate means of achieving a legitimate aim; where it is not, it will be deemed arbitrary.<sup>133</sup> Where the aim could be achieved through less invasive means than detention, then that person's detention will be arbitrary.<sup>134</sup>

124. In *Prosecutor v. Milorad Krnojelac* the ICTY took steps to outline clearly what might be deemed arbitrary detention. At [114] the ICTY notes that (our emphasis):

... under Article 5(e) of the Tribunal's Statute, a deprivation of an individual's liberty will be arbitrary and, therefore, unlawful if no legal basis can be called upon to justify the initial deprivation of liberty. If national law is relied upon as justification, the relevant provisions must not violate international law. In addition, the legal basis for the initial deprivation of liberty must apply throughout the period of imprisonment. If at any time the initial legal basis ceases to apply, the initially lawful deprivation of liberty may become unlawful at that time and be regarded as arbitrary imprisonment.<sup>135</sup>

125. The UNHRC has repeatedly found that the mandatory detention enforced or permitted under Australia's Immigration Policies is arbitrary and violates article 9 of the ICCPR.<sup>136</sup>

126. The UNHRC conducted an investigation into Australian Immigration Detention in 2013 which presented relevant findings, including:

In the absence of any substantiation of the need to individually detain each author, it may be inferred that such detention pursues other objectives: a generalized risk of absconding which is not personal to each author; a broader aim of punishing or deterring unlawful arrivals; or the mere bureaucratic convenience of having such persons permanently available. None of these objectives provides a legitimate justification for detention.<sup>137</sup>

<sup>131</sup> *Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-17/1-T, Judgement (TC), 17 October 2003 at [657].

<sup>132</sup> Ibid at [681].

<sup>133</sup> United Nations Human Rights Council *General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add. 13 (2004), [6] at <[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.13&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.13&Lang=en)> (viewed 2 May 2015).

<sup>134</sup> United Nations Human Rights Council decisions in: *C v Australia*, Communication No. 900/1999, UN Doc CCPR/C/76/D/900/1999 (2002) at [8.2]; *Baban v Australia*, Communication No. 1014/2001, UN Doc CCPR/C/78/D/1014/2001 (2003) at [7.2]; *D and E v Australia*, Communication No. 1050/2002, UN Doc CCPR/C/87/D/1050/2002 (2006), at [7.2]; *Shams & Ors v Australia*, Communication No. 1255/2004, UN Doc CCPR/C/90/D/1255/2004 (2007) at [7.2].

<sup>135</sup> *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, Judgement (TC), 15 March 2002 at [114].

<sup>136</sup> See, e.g. *FKAG v Australia*, HRC communication no 2094/2011, UN Doc CCPR/C/108/D/2094/2011 (26 July 2013); and *MMM v Australia*, HRC communication no 2136/2012, UN Doc CCPR/C/108/D/2136/2012 (25 July 2013).

<sup>137</sup> See, e.g. *FKAG v Australia*, HRC communication no 2094/2011, UN Doc CCPR/C/108/D/2094/2011 (26 July 2013); and *MMM v Australia*, HRC communication no 2136/2012, UN Doc CCPR/C/108/D/2136/2012 (25 July 2013) (noting at [3.4] that: "In the absence of any substantiation of the need to individually detain each author, it may be inferred that such detention pursues other objectives: a generalized risk of absconding which is not personal to each author; a broader aim of punishing or deterring unlawful arrivals; or the mere

127. The justification of detention by reference to national law will not necessarily provide a defence to an offence against art 7(1)(e). As set out above, the ICTY stated in *Krnjelac* (at [114]) that “if national law is relied upon as justification, the relevant provisions must not violate international law.”<sup>138</sup> While Immigration Detention may be authorised by the *Migration Act 1956* (Cth), for the reasons set out above, in practice that detention contravenes fundamental rules of international law.

128. Immigration Detention is also contrary to the Commonwealth Criminal Code, insofar as that Code reproduces art 7(1)(e) of the Rome Statute. Considerations as to an unwillingness to institute domestic prosecutions as a result of such contravention are dealt with in further detail at Part III.

**Element 3: The perpetrator was aware of the factual circumstances that established the gravity of the conduct.**

129. The Immigration Policies are drafted, implemented, and continuously monitored by the Australian Government, jointly with the Nauruan and Papua New Guinean Governments (the “**Administering Authorities**”, as defined earlier). The Administering Authorities participated in the planning, organisation and execution of the Immigration Policies.

130. Various reports of international bodies, including organs of the United Nations, have made, and continue to make, the Administering Authorities aware of the gravity of the horrendous factual circumstances that have contravened and continue to contravene various international legal obligations<sup>139</sup> These contraventions are intrinsically linked to the ongoing implementation and administration of the Immigration Policies.

131. In his report on the inquiry into torture and abuse in Immigration Detention (amongst other situations under investigation) (the “**Report of the Special Rapporteur**”), United Nations Special Rapporteur on Torture, Juan Méndez 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.<sup>140</sup>

132. In response to the Report of the Special Rapporteur, the current Prime Minister said that Australians were “sick of being lectured to by the United Nations.”<sup>141</sup>

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bureaucratic convenience of having such persons permanently available. None of these objectives provides a legitimate justification for detention.”)

See further, *A v Australia*, HRC communication no 560/1993, UN Doc CCPR/C/59/D/560/1993 (3 April 1997); *C v Australia*, communication no 900/1999, UN Doc CCPR/C/76/D/900/1999 (28 October 2002); *Baban v Australia*, communication no 1014/2001, UN Doc CCPR/C/78/D/1014/2001, (6 August 2003); *Bakhtiyari v Australia*, communication no 1069/2002, UN Doc CCPR/C/79/D/1069/2002 (29 October 2003); *D and E v Australia*, communication no 1050/2002, UN Doc CCPR/C/87/D/1050/2002 (9 August 2006); *Shafiq v Australia*, communication no 1324/2004, UN Doc CCPR/C/88/D/1324/2004 (13 November 2006); *Shams and others v Australia*, communications nos 1255,1256,1259,1260,1266,1268,1270,1288/2004, UN Docs CCPR/C/90/D/1255,1256,1259, 1260,1266,1268,1270&1288/2004 (11 September 2007); and *Kwok v Australia*, communication no 1442/2005, UN Doc CCPR/C/97/D/1442/2005 (23 November 2009).

<sup>138</sup> *Prosecutor v. Milorad Krnjelac*, Case No. IT-97-25-T, Judgement (TC), 15 March 2002 at [114].

<sup>139</sup> See, for example: Juan E. Méndez, *Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, UN Doc A/HRC/28/68/Add.1 (6 March 2015) at [16]-[31]; United Nations High Commissioner for Refugees, Submission No 133 to the Joint Standing Committee on Migration, *Inquiry into Immigration Detention in Australia*, 12 September 2008; Australian Human Rights Commission, ‘The Forgotten Children: National Inquiry into Children in Immigration Detention 2014’ (2014).

<sup>140</sup> Juan E. Méndez *Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, UN Doc A/HRC/28/68/Add.1 (6 March 2015) at [16]-[31].

<sup>141</sup> Danuta Kozaki, ‘Abbot says Australians ‘sick of being lectured to by UN’ after scathing report on asylum policies’, *ABC News* (online), 9 March 2015 < <http://www.abc.net.au/news/2015-03-09/tony-abbott-hits-out->

133. Various criticisms concerning breaches of the United Nations' Convention on the Rights of the Child can be found in the National Inquiry's Report. Professor Gillian Triggs, President of the Australian Human Rights Commission, oversaw the National Inquiry. On receiving the final version of the National Inquiry's Report, the current Attorney-General and Prime Minister dismissed it, saying it was a 'politicised exercise'.<sup>142</sup> The Prime Minister stated:

It is true that the government has lost confidence in the President of the Human Rights Commission. The government has lost confidence in the President of the Human Rights Commission.

...

It is absolutely crystal clear: [the National Inquiry's Report] by the President of the Human Rights Commission is a political stitch-up.<sup>143</sup>

134. Significantly, no member of the Government contradicted any of the facts contained in the National Inquiry's Report: instead, they publicly attacked and vilified its author.

135. The Report, and the political response to it, demonstrate awareness of the fact that the contraventions continue to occur, and also demonstrate awareness of the repeated comments made by international bodies as to the legal consequences of the Immigration Policies.

### **Article 7(1)(f): Torture**

136. Article 7(1)(f) of the Rome Statute deals with torture. Article 7(1)(f) of the Rome Statute provides that:

For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(f) Torture;

137. The ICC's Elements of Crimes defines "torture" as occurring when the "perpetrator inflicted severe physical or mental pain or suffering upon one or more persons."<sup>144</sup> It also requires that such "person or persons were in the custody or under the control of the perpetrator,"<sup>145</sup> and such "pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions."<sup>146</sup> Further, unlike the definition under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the ICC does not require a purposive reason for the torture, the acts of torture are sufficient in themselves to constitute a crime.

138. The elements as they apply to the factual circumstances underpinning this Communiqué are addressed seriatim below.

### **Element 1: The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons**

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united-nations-asylum-report/6289892>; Lisa Cox, 'Tony Abbott: Australians 'sick of being lectured to' by United Nations, after report finds anti-torture breach', *Sydney Morning Herald* (online), 10 March 2015 <<http://www.smh.com.au/federal-politics/political-news/tony-abbott-australians-sick-of-being-lectured-to-by-united-nations-after-report-finds-antitorture-breach-20150309-13z3j0.html>>.

<sup>142</sup> E Borrello and J Glenday, 'Gillian Triggs: Tony Abbott says Government has lost confidence in Human Rights Commission President', *ABC News* (online), 24 February 2015 <<http://www.abc.net.au/news/2015-02-24/gillian-triggs-says-brandis-wants-her-to-quit-rights-commission/6247520>>.

<sup>143</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 24 February 2015, 1088 (Tony Abbott, Prime Minister).

<sup>144</sup> Article 7(1)(f), *ICC Elements of Crimes*.

<sup>145</sup> Article 7(1)(f), *ICC Elements of Crimes*.

<sup>146</sup> Article 7(1)(f), *ICC Elements of Crimes*.

139. The ICTY has examined the context and conditions of detention in relation to these elements. A comparison of these conditions reveals a number of similarities, particularly in relation to the off-shore detention of asylum seekers. The ICTY, for example, found that conditions of overcrowding, poor ventilation, poor sanitary and medical facilities in various concentration camps constituted inhumane acts.<sup>147</sup> Similar criticisms have been made of the conditions of the Offshore Processing Centres.<sup>148</sup> While comparable jurisprudence has not yet examined whether or not such conditions reach the higher threshold of torture, it is telling that the Special Rapporteur for the Convention against Torture has determined that the conditions of detention on Nauru constitute torture.<sup>149</sup> Further, the UNHCR in its report on Nauru also raised serious concerns that the conditions at the detention centre constitute torture.<sup>150</sup>
140. We argue that the conditions and context of the detention of asylum seekers, both in Australia and offshore, inflicted severe physical or mental pain or suffering. See the above discussion at “Article 7(1)(e): Imprisonment and deprivation of personal liberty” Element 1 of this Part II regarding the conditions and length of detention, and the impact this has had on the mental and physical health of detained asylum seekers.
141. See the same section of this Communiqué (“Article 7(1)(e): Imprisonment and deprivation of personal liberty” Element 1) regarding the number of people on whom severe physical or mental pain or suffering has been inflicted.

**Element 2 – Such person or persons were in the custody or under the control of the perpetrator**

142. Asylum seekers detained in Australia are detained under Australian law, by the Australian Government or contractors of the Australian Government. The Administering Authorities, as senior members of the Australian Government, are or were responsible for creating these laws and / or administering these laws. The Minister for Immigration, in particular, has non-compellable and non-reviewable powers to release asylum seekers from detention in Australia. As such, the Administering Authorities, and in particular the Minister for Immigration has ultimate control over these asylum seekers.
143. It is also argued that asylum seekers detained on Nauru and Manus Island are in the custody and control of Australia, and therefore the Administering Authorities. Please refer to the above section on “State responsibility” for further on this.

**Element 3 – The pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions**

144. Given that seeking asylum is enshrined as a fundamental human right under international law, it is argued that prolonged detention in the conditions and context outlined in this Communiqué are not lawful sanctions. Please refer to the above discussion at “Article 7(1)(d): Deportation or forcible transfer of population” Element 2 for further on this.

<sup>147</sup> See *The Prosecutor v Jadranko PRLIĆ, Bruno STOJIĆ, Slobodan PRALJAK, Milivoj PETKOVIĆ, Valentin ĆORIĆ, Berislav PUŠIĆ* (IT-04-74-T) ICTY. These men were charged by the ICTY with being part of a joint criminal enterprise to ethnically cleanse non-Croats from certain areas of Bosnia and Herzegovina, which included establishing and operating a network of prison camps, including the Helidrom and Dretelj camps. See also *Prosecutor v Dario Kordic and Mario Cerkez*, Case No. IT-95-14/2-T, Judgment (TC), 26 February 2001 [775].

<sup>148</sup> See *The Moss Report; UNHCR monitoring visit to Manus Island, Papua New Guinea 23 to 25 October 2013*, n 12; *UNHCR monitoring visit to the Republic of Nauru 7 to 9 October 2013; This is breaking people, Human rights violations at Australia’s asylum seeker processing centre on Manus Island*, PNG.

<sup>149</sup> *JAL 27/03/2014 Case No. AUS 1/2014*. While the Special Rapporteur does not specify which regional processing centre was the subject of the complaint, given that children are mentioned, it is assumed that the centre is Nauru (as no children are present on Manus Island).

<sup>150</sup> *UNHCR monitoring visit to the Republic of Nauru 7 to 9 October 2013*, [90].

### Article 7(1)(k): Other inhumane acts

145. Article 7(1)(k) of the Rome Statute deals with other inhuman acts. Article 7(1)(k) of the Rome Statute provides that:

For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

146. As such, if the conditions and practice of detention (and deportation for those asylum seekers detained off-shore) are not sufficient to constitute torture, the ICC provides for this lower standard of suffering.<sup>151</sup> The Elements of Crime defines the crime of “other inhumane acts” as occurring where the “perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act,”<sup>152</sup> and that such “act was of a character similar to any other act referred to in Article 7, paragraph 1, of the Statute,”<sup>153</sup> and the “perpetrator was aware of the factual circumstances that established the character of the act.”<sup>154</sup>

147. The elements as they apply to the factual circumstances underpinning this Communiqué are addressed seriatim below.

#### **Element 1: The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act**

148. The ICTY has examined the context and conditions of detention (which is the “inhumane act”) in relation to these elements. A comparison of these conditions reveals a number of similarities, particularly in relation to the off-shore detention of asylum seekers. The ICTY, for example, found that conditions of overcrowding, poor ventilation, poor sanitary and medical facilities in various concentration camps constituted inhumane acts.<sup>155</sup> Similar criticisms have been made of the conditions of the Offshore Processing Centres.<sup>156</sup> Both the Special Rapporteur for the Convention against Torture and UNHCR in its report on Nauru have held that such conditions constitute cruel, inhuman or degrading treatment.<sup>157</sup>

<sup>151</sup> Noting that the ICC in the *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* ICC-01/04-01/07 Decision on the confirmation of charges held that the reference to “other” inhumane acts means that acts constituting CAH according to articles 7(1)(a) to 7(1)(j) of the Rome Statute cannot be simultaneously considered as an other inhumane act.

<sup>152</sup> Article 7(1)(k), ICC *Elements of Crimes*.

<sup>153</sup> Being the list of prohibited acts. Article 7(1)(k), ICC *Elements of Crimes*.

<sup>154</sup> Article 7(1)(k), ICC *Elements of Crimes*.

<sup>155</sup> See *The Prosecutor v Jadranko PRLIĆ, Bruno STOJIĆ, Slobodan PRALJAK, Milivoj PETKOVIĆ, Valentin ĆORIĆ, Berislav PUŠIĆ* (IT-04-74-T) ICTY. These men were charged by the ICTY with being part of a joint criminal enterprise to ethnically cleanse non-Croats from certain areas of Bosnia and Herzegovina, which included establishing and operating a network of prison camps, including the Helidrom and Dretelj camps. See also *Prosecutor v Dario Kordic and Mario Cerkez*, Case No. IT-95-14/2-T, Judgment (TC), 26 February 2001 [775].

<sup>156</sup> See *The Moss Report; UNHCR monitoring visit to Manus Island, Papua New Guinea 23 to 25 October 2013*, n 12; *UNHCR monitoring visit to the Republic of Nauru 7 to 9 October 2013; This is breaking people, Human rights violations at Australia’s asylum seeker processing centre on Manus Island, PNG*.

<sup>157</sup> *JAL 27/03/2014 Case No. AUS 1/2014*. While the Special Rapporteur does not specify which regional processing centre was the subject of the complaint, given that children are mentioned, it is assumed that the centre is Nauru (as no children are present on Manus Island). *UNHCR monitoring visit to the Republic of Nauru 7 to 9 October 2013*, [90].

149. See also the above discussion at “Article 7(1)(e): Imprisonment and deprivation of personal liberty” Element 1 of this Part II regarding the conditions and length of detention, and the impact this has had on the mental and physical health of detained asylum seekers.

**Element 2 – The act was of a character similar to any other act referred to in Article 7, paragraph 1, of the Statute**

150. The act (detaining (and in some cases deporting) asylum seekers) is the same act which forms the basis for the submissions relating to deportation, imprisonment and torture.

**Element 3 – The perpetrator was aware of the factual circumstances that established the character of the act.”<sup>158</sup>**

151. The perpetrator must also be aware of the factual circumstances that established the act. Given that the Administering Authorities are educated and briefed senior members of the Australian Government who interact with the United Nations, and given the numerous reports from the UNHCR<sup>159</sup>, Amnesty International,<sup>160</sup> other organisations and numerous media reports detailing the conditions of detention and transportation, it would be very difficult for the Administering Authorities to argue that they did not know of the relevant factual circumstances. Please see the above discussion at “Article 7(1)(e): Imprisonment and deprivation of personal liberty” Element 1 of this Part II regarding the conditions and length of detention, for further on this.

**Article 7(1)(h): Persecution**

152. Article 7(1)(h) of the Rome Statute provides that:

For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(h) Persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

153. The ICC’s Elements of Crimes defines persecution as occurring when the “perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights,” “that the perpetrator targeted such person or persons by reason of the identity of a group or collectively or targeted the group or collectively as such,” that such “targeting was based on ... or other grounds that are universally recognised as impermissible under international law,” and finally that the “conduct was committed in connection with any act referred to in Article 7, paragraph 1,<sup>161</sup> of the Statute or any crime within the jurisdiction of the Court.”<sup>162</sup>

154. The elements as they apply to the factual circumstances underpinning this Communiqué are addressed seriatim below.

**Element 1: The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights**

<sup>158</sup> Article 7(1)(k), ICC *Elements of Crimes*.

<sup>159</sup> UNHCR *monitoring visit to Manus Island, Papua New Guinea 23 to 25 October 2013*, n 12; UNHCR *monitoring visit to the Republic of Nauru 7 to 9 October 2013*, n 35.

<sup>160</sup> *This is breaking people, Human rights violations at Australia’s asylum seeker processing centre on Manus Island, PNG*.

<sup>161</sup> Being the list of prohibited acts.

<sup>162</sup> Article 7(1)(h), ICC *Elements of Crimes*.

155. Please see the above discussions at “Article 7(1)(e): Imprisonment and deprivation of personal liberty” Element 1 and “Article 7(1)(d): Deportation or forcible transfer of population” Element 2, regarding the detention (and in some cases, deportation) of asylum seekers as being contrary to international law.

156. Various international conventions set out fundamental rights which are generally universally accepted. The rights these instrument protect include: freedom from arbitrary detention and the right to liberty,<sup>163</sup> freedom from arbitrary interference with private and family life,<sup>164</sup> freedom from torture and other cruel and inhumane treatment,<sup>165</sup> and relevantly for children detained on Nauru and in Australia, the right to have decisions made in their best interests.<sup>166</sup> Detained (and deported) asylum seekers are denied these rights.

**Element 2: The perpetrator targeted such person or persons by reason of the identity of a group or collectively or targeted the group or collectively as such**

157. Boat people detained in Australia and deported and detained at the Offshore Processing Centres are solely sourced from people seeking asylum in Australia and who arrived by boat. As such, they are targeted as a group of people. This is supported by the fact that such treatment is enshrined under Australian law and Australia’s Immigration Policies.

**Element 3: The targeting was based on ... or other grounds that are universally recognised as impermissible under international law**

158. Please see the above discussions at “Article 7(1)(e): Imprisonment and deprivation of personal liberty” Element 1 and “Article 7(1)(d): Deportation or forcible transfer of population” Element 2, regarding the detention (and in some cases, deportation) of asylum seekers as being contrary to international law

159. In particular, given that the UDHR provides for the right to seek and enjoy asylum, and the Refugee Convention provides for the right to seek asylum, there is a strong argument that the targeting of asylum seekers is based on impermissible grounds, being that such behaviour is contrary to the right to seek asylum.<sup>167</sup>

**Element 4: The conduct was committed in connection with any act referred to in Article 7, paragraph 1,<sup>168</sup> of the Statute or any crime within the jurisdiction of the Court**

160. The act (detaining (and in some cases deporting) asylum seekers) is the same act which forms the basis for the submissions relating to deportation, imprisonment and torture.

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<sup>163</sup> Article 9(1), *ICCPR*; Articles 3 and 9 *UDHR*.

<sup>164</sup> Article 17(1), *ICCPR*; Article 12 *UDHR*.

<sup>165</sup> Article 7, *ICCPR*.

<sup>166</sup> Article 3, *Convention on the Rights of the Child*.

<sup>167</sup> Article 14, *UDHR*.

<sup>168</sup> Being the list of prohibited acts.

### Part III: Preliminary Assessment by the Prosecutor

161. Part III of this Communiqué is comprised of a brief analysis of the Prosecutor's stated process of conducting a preliminary analysis of a situation. These statutory-based steps have been sourced from the PPPE.<sup>169</sup>

#### Jurisdiction

162. The OTP should be satisfied that there is a reasonable basis to believe that a crime within the jurisdiction of the ICC has been, and is being, committed:

- a. The matters described in this Communiqué occurred after 1 July 2002.
- b. As set out in Part II of this Communiqué, the subject matter of the matters described in this Communiqué extends to crimes against humanity, as defined in art 7 of the Rome Statute.
- c. The crimes described in this Communiqué are alleged to have been committed by, and on the territory of, States Parties of the Rome Statute, namely Australia and Nauru.<sup>170</sup>
- d. It is further noted that although the OTP is bound by territorial and personal parameters set out in art 12 of the Rome Statute (on the basis that any investigation will be instigated using art 15 *proprio motu* powers), it is submitted that the content of this Communiqué falls within those parameters.

#### Admissibility

163. Considerations as to admissibility are comprised of two limbs:

- a. Complementarity; and
- b. Gravity.<sup>171</sup>

164. There is no stipulated sequence as to the consideration of the two limbs, however it is noted that the OTP must be satisfied as to admissibility on both aspects before proceeding.<sup>172</sup>

165. Given no investigation has been opened by the OTP at this stage, it is accepted that any considerations as to admissibility will take into account any 'potential' cases that might be identified in the course of a preliminary examination.<sup>173</sup> We have included in this Communiqué evidence that might be considered relevant for any future investigation conducted by the OTP.

#### Complementarity

166. Criminal investigations and prosecutions have not been instigated domestically, despite adverse findings from a number of independent investigative bodies, including the Australian

<sup>169</sup> the Prosecutor, 'Policy Paper on Preliminary Examinations' (Policy Paper, International Criminal Court, 2013).

<sup>170</sup> We acknowledge that Papua New Guinea is not a party to the *Rome Statute*.

<sup>171</sup> *Rome Statute of the International Criminal Court*, opened for signature on 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 17(1): subparagraphs (a)-(c) for 'complementarity', and subparagraph (d) for 'gravity'.

<sup>172</sup> the Prosecutor, 'Policy Paper on Preliminary Examinations' (Policy Paper, International Criminal Court, 2013) 10.

<sup>173</sup> *Ibid* at 10.

Human Rights Commission,<sup>174</sup> the United Nations Human Rights Commission,<sup>175</sup> and the UN Special Rapporteur for Torture.<sup>176</sup>

167. A functioning Australian judiciary is precluded from reviewing the conduct under domestic law as a consequence of certain legislative provisions that prohibit the bringing of charges under domestic law without the consent of the Attorney-General.<sup>177</sup>

168. It is noted that the absence of national proceedings may not, on its own, be sufficient to make the case admissible.<sup>178</sup> In this case however, it is a matter of fact that there is an absence of national proceedings. The alleged crimes inculcate the State apparatus, together with those ministers responsible for law and order (with reference in this case only to the investigation and prosecution of crimes against humanity as they are legislated domestically): together with the comments made by the Attorney General and Prime Minister on the reports of various bodies in relation to the Immigration Policies, it appears unlikely that a prosecution will be brought.

169. In this case, the Attorney General (a political appointment), must provide written consent for the commencement of prosecutions for offences of crimes against humanity.<sup>179</sup> This includes prosecution under s 268.12 of the Commonwealth Criminal Code, *imprisonment or other severe deprivation of physical liberty*.<sup>180</sup>

#### **268.121 Bringing proceedings under this Division**

- (a) Proceedings for an offence under this Division must not be commenced without the Attorney General's written consent.
- (b) An offence against this Division may only be prosecuted in the name of the Attorney General.
- (c) However, a person may be arrested, charged, remanded in custody, or released on bail, in connection with an offence under this Division before the necessary consent has been given.

170. The Attorney General is highly unlikely to provide written authority for the prosecution of s 268.12 offences against senior ranking members of his own political party,<sup>181</sup> particularly in circumstances where the Immigration Policies are a major part of that party's political platform.

171. The complementarity element is satisfied on the basis outlined above.

#### **Gravity**

172. We understand that the OTP will consider scale, nature, manner of commission of the crimes, and their impact, in assessing the gravity.<sup>182</sup> [While these matters have been outlined in detail

<sup>174</sup> Australian Human Rights Commission, 'The Forgotten Children: National Inquiry into Children in Immigration Detention 2014' (2014).

<sup>175</sup> United Nations High Commissioner for Refugees, Submission No 133 to the Joint Standing Committee on Migration, *Inquiry into Immigration Detention in Australia*, 12 September 2008.

<sup>176</sup> Juan E. Méndez *Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, UN Doc A/HRC/28/68/Add.1 (6 March 2015) at [16]-[31].

<sup>177</sup> *Criminal Code Act 1995* (Cth) s 268.121.

<sup>178</sup> *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of the Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07-1497, 25 September 2009, [78].

<sup>179</sup> *Criminal Code Act 1995* (Cth) s 268.121.

<sup>180</sup> *Criminal Code Act 1995* (Cth) s 268.12.

<sup>181</sup> A number of the prospective Administering Authorities are members of the Attorney General's political party.

<sup>182</sup> the Prosecutor, 'Policy Paper on Preliminary Examinations' (Policy Paper, International Criminal Court, 2013) [9].

[at the first element of Part II] of this Communiqué, we remind the OTP that the mandate of the ICC is to bring those most responsible for grave breaches of international humanitarian law to justice. There is no legal test to determine if a situation is of sufficient gravity. Given, however, the human rights abuses which have been alleged and documented, and the total number of asylum seekers affected by the Immigration Policies, at least the scale and impact of the crimes clearly met the gravity threshold. We note that in response, for example, to alleged crimes committed in Iraq in 2003, the OTP said that the death of four to 12 victims and a limited number of victims of inhuman treatment was not sufficient to initiate an investigation.<sup>183</sup> The number of asylum seekers detained onshore and offshore obviously greatly exceeds this number.]

173. We also submit that any gravity requirement must be determined in context. The treatment of vulnerable boat people by Australia, as a democratic nation in peacetime (ie without the threat of war), is particularly grave.

174. The gravity of the offences is such that they warrant investigation, for the reasons outlined in the first and second element of Part II of this Communiqué.

### **Interests of justice**

175. In contrast to the above considerations, the ‘interests of justice’ is a negatively framed consideration.

176. There is in place a strong presumption that investigations and prosecutions will be in the interests of justice, and therefore a decision not to proceed on the grounds of the interests of justice would be highly exceptional. Moreover, there are no specific circumstances that provide substantial reasons, or reasons at all, to believe that the interests of justice are not served by an investigation at this time.

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<sup>183</sup> *OTP response to communications received concerning Iraq, 10.2.2006* ([https://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP\\_letter\\_to\\_senders\\_re\\_Iraq\\_9\\_February\\_2006.pdf](https://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf), accessed 8 October 2015.)

## Part IV: Important Ancillary Considerations

### Scope for Positive Complementarity

177. As outlined by William W. Burke-White:

Often, the most potent means available to the Court to motivate unwilling states to act is to threaten intervention should the states continue to abstain from undertaking their own investigations and prosecutions. A strong track record of ICC interventions makes those threats credible. By developing such a track record, the OTP can signal that international prosecution is a meaningful possibility, and this real possibility of international prosecution will likely make the alternative of domestic prosecutions far more palatable to states previously unwilling to act. Simultaneously, the OTP can make clear to states that real sovereignty costs will follow from such international intervention. The effective threat of international prosecution should therefore alter the incentives facing states regarding the activation of previously unwilling national judiciaries as an alternative or complement to international prosecution.<sup>184</sup>

178. Australia continues to exhibit a robust democracy and separation of powers. Domestic investigations and (where necessary) prosecutions are feasible possibilities, but not whilst the consent of the Attorney General is necessary, for the reasons outlined above. A credible threat of – or indeed the actual instigation of – an investigation by the Prosecutor would likely catalyse a reassessment of the Immigration Policies from a legal perspective. The facts of this case present a prime opportunity for the Prosecutor to attempt positive complementarity, and certainly to examine and demonstrate the indirect powers available.

179. Though there has been no evidenced intention to positively prevent an investigation or prosecution, it is our submission that written consent for the prosecution of any Administering Authorities is very unlikely to be forthcoming given the comments that have been made by the Attorney General and Prime Minister.<sup>185</sup>

180. It is possible in this case for the Prosecutor to ensure on-going compliance with the provisions of the Rome Statute without significant expenditure of resources.

### Conclusion and Prospects

181. This Communiqué has outlined three broad matters:

- a. The factual circumstances surrounding, and details of, the Immigration Policies;
- b. The way in which the Immigration Policies are facilitating contraventions of the Rome Statute; and
- c. The scope that exists for the Prosecutor to catalyse positive complementarity.

182. Part II of this Communiqué outlines in detail the manner in which the Immigration Policies represent an ongoing, Government-sanctioned contravention of the Rome Statute. The characteristics of the contravention are such that it falls within the jurisdiction of the ICC, and within the *proprio motu* powers of the Prosecutor.

<sup>184</sup> William W. Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' (2008) 49 *Harvard International Law Journal* 53, 87.

<sup>185</sup> Note the Attorney General and Prime Minister's dismissal of the National Inquiry's Report, stating that it was a "politicised exercise" (E Borrello and J Glenday, 'Gillian Triggs: Tony Abbott says Government has lost confidence in Human Rights Commission President', *ABC News* (online), 24 February 2015 <<http://www.abc.net.au/news/2015-02-24/gillian-triggs-says-brandis-wants-her-to-quit-rights-commission/6247520>>) and that "...the government has lost confidence in the President of the Human Rights Commission" (Commonwealth, *Parliamentary Debates*, House of Representatives, 24 February 2015, 1088 (Tony Abbott, Prime Minister)).

183. We consider that an investigation by the Prosecutor would have good prospects of success, and further, would be aided by the evidence annexed to this Communiqué.
184. As noted at various points in this Communiqué, the situation is one in which catalysing positive complementarity is an achievable outcome. The facts of this case present a prime opportunity for the Prosecutor to attempt positive complementarity, and certainly to examine and demonstrate the indirect powers available. A credible threat of – or indeed the actual instigation of – an investigation by the Prosecutor would likely catalyse a reassessment of the Immigration Policies from a legal perspective. This is especially so given that Mr Tony Abbott has very recently been replaced as Prime Minister of Australia. On 13 September 2015, The Liberal Party voted to replace Tony Abbott as leader and as a consequence Malcolm Turnbull became Prime Minister of Australia. (In Australia, the leader of the government party is the Prime Minister. The Prime Minister is not directly elected by the public.)

## ANNEXURES

### Comments on Annexures

1. The annexures below are ‘can say’ statements: they are an indication of the witnesses we have contacted, and the evidence they are able to give to any investigation. These statements are summaries of evidence given by the relevant witnesses to us. The statements are intended to demonstrate the existence of evidence available to the Prosecutor should an investigation be commenced.
2. The makers of all statements are available and contact details can be provided on request of the Prosecutor. They are set out here under pseudonyms to protect the anonymity of the witnesses.
3. Specific details, such as employer, duties and dates of employment, are framed in intentionally broad terms to protect the identity of the witnesses.
4. We have contact details for each of the witnesses and they can be provided on request.
5. The sworn statements are:
  - a. Annexure A – Statement of Witness A
  - b. Annexure B – Statement of Witness B
  - c. Annexure C – Statement of Witness C
  - d. Annexure D – Statement of Witness D
  - e. Annexure E – Statement of Witness E
  - f. Annexure F – Statement of Witness F

**Annexure A – Statement of Witness A (Manus)**

## INTERNATIONAL CRIMINAL COURT

Date: 18 May 2015

**STATEMENT OF “WITNESS A”**

I, [WITNESS A] of [ADDRESS WITHHELD], resident in Australia, can give evidence as follows:

1. I am a Medical Doctor, formerly employed at an Offshore Processing Centre (the “**Manus Island OPC**”) for some months. Whilst employed at the Manus Island OPC, my duties were mainly the supervision of the provision of medical care as provided by other doctors employed there, as well as the provision of medical care myself.
2. My professional experience includes the provision of health care services in maximum-security prisons in Australia.
3. On the whole, the conditions of detention at the Manus Island OPC are extremely poor. When I first arrived at the Manus Island OPC I was considerably distressed at what I saw, and I recall thinking that this must be similar to a concentration camp.
4. The detainees at the Manus Island OPC are detained behind razor wire fences, in conditions below the standard of Australian maximum-security prison.
5. My professional opinion is that the minimum medical requirements of the detained population were not being met. I have no reason to believe that the conditions of detention have improved since I ceased employment at the Manus Island OPC.
6. The conditions of detention at the Manus Island OPC appeared to be calculated to break the spirit of those detained in the Manus Island OPC. On a number of occasions the extreme conditions of detention resulted in detainees abandoning their claims for asylum and returning to their country of origin.
7. At the Manus Island OPC, bathroom facilities are rarely cleaned. There was a lot of mould, poor ventilation, and the structural integrity of the facilities is concerning.
8. No soap is provided to detainees for personal hygiene.
9. When detainees need to use the bathroom, it is standard procedure that they first attend at the guards’ station to request toilet paper. Detainees would be required to give an indication of how many ‘squares’ they will need. The maximum allowed is six squares of toilet paper, which I considered demeaning.
10. A large number of detainees continue to be in need of urgent medical attention.
11. Formal requests for medical attention are available to the detainees. The forms are only available in English. Many of the detainees do not have a workable understanding of English and the guards will not provide assistance.
12. The medical request forms are collected in a box throughout the week, and then on the weekend the box (together with its contents) is disposed of in a waste bin without having been reviewed. I witnessed this on a number of occasions, and understood it to be common practice.
13. On some occasions when I was given access to particular detainees to provide medical treatment, they told me that they had filled out and submitted more than 15 forms over

many months but until now had not received treatment. The medical complaints they had were serious and in urgent need of attention.

14. I have personally witnessed a number of instances of trickery and deception on behalf of Manus Island OPC guards. Medical treatment is often used as bait for removing detainees from their compound where a particular detainee has complained about conditions. Once removed, and prior to the provision of any form of acceptable medical attention, the relevant detainees are transported to the local prison as a form of punishment for agitation.
15. I often expressed my concern about the lack of medical treatment provided to the detainees. Never were my concerns addressed.

This is a 'can say' statement. It outlines the evidence that Witness A has provided to the us, and is able to provide to the Prosecutor in affidavit form. This statement was provided with the consent of Witness A.

**We have contact details for Witness A, and can provide them to the Prosecutor on request.**

**Annexure B – Statement of Witness B (Manus)**

## INTERNATIONAL CRIMINAL COURT

Date: 18 May 2015

**STATEMENT OF “WITNESS B” (Manus Island)**

I, **[WITNESS B]** of **[ADDRESS WITHHELD]**, resident in Iran, can give evidence as follows:

1. I am a former detainee at an Offshore Processing Centre (the “**Manus Island OPC**”). I was detained there for many months.
2. When I was detained at the Manus Island OPC, I was treated like an animal, and I was tortured.
3. I was detained at the Manus Island OPC on 16 and 17 February 2014, at the time that Reza Barati was murdered inside the detention centre.
4. I know that there were detainees who witnessed his murder.
5. Those detainees provided written statements to the police following his murder. The written statements named specific persons who they believed were responsible for his murder, as well as detailed accounts of misbehaviour by the guards.
6. I know that the detainees who provided those written statements were removed from their compound and taken to a different area of the Manus Island OPC, away from the other detainees.
7. Exhibited to this statement and marked “**EX-1**” is a true and correct copy of the statement made by the first witness to the murder.
8. Exhibited to this statement and marked “**EX-2**” is a true and correct copy of the statement made by the second witness to the murder.
9. Once removed, the detainees who had given statements were tied to chairs by Wilson Security guards, and physically assaulted.
10. They were then asked to retract their statements.
11. The detainees refused to retract their statements, and so the guards continued to beat them, more savagely.
12. They were then asked again to retract their statements.
13. The detainees still refused to retract their statements, and so the guards told them that if they still refused to retract their statements, they would allow the local men waiting outside to rape them.
14. I don’t know for sure whether or not the detainees retracted the statements. I expect that they did.

**We have contact details for Witness B, and can provide them to the Prosecutor on request.**

**Annexure B, Exhibit: EX-1 & 2**

“Affidavits [NAMES WITHHELD]”

*Concerning the murder of Reza Barati*

Attached at the end of this document

**Annexure C – Statement of Witness C (Manus)**

## INTERNATIONAL CRIMINAL COURT

Date: 18 May 2015

**STATEMENT OF “WITNESS C”**

I, [WITNESS C] of [ADDRESS WITHHELD], resident in Australia, can give evidence as follows:

1. I am a former employee at an Offshore Processing Centre (the “**Manus Island OPC**”). I worked there for a number of months.
2. I also have many years experience in the prisons system.
3. Whilst employed at the Manus Island OPC, I witnessed certain events that deeply disturbed me; I continue to be deeply disturbed by these events.
4. Detainees are not allowed communication with the outside world. They are restricted in the Internet sites that they have access to.
5. Asylum case managers that are granted access to the Manus Island OPC are searched on entry. The case managers may not bring paper or documents of any form into the Manus Island OPC.
6. When new detainees arrive at the Manus Island OPC, often, I saw one or two taken aside and offered a ‘more favourable’ assessment of their asylum claim if they agree to act as an informant on the balance of their boat group.
7. Staff at the Manus Island OPC operate on the assumption that detainees of all ages will attempt self-harm. As such, self-harm is not addressed as a symptom of anxiety or depression, or dealt with at all.
8. From what I witnessed, self-harm was not a concern to guards when it was reported.
9. Site-staff move detainees constantly without their permission. It is impossible for detainees to form friendships or find stability whilst their asylum claims are assessed.

This is a ‘can say’ statement. It outlines the evidence that Witness C has provided to us, and is able to provide to the Prosecutor in affidavit form. This statement was provided with the consent of Witness C.

**We have contact details for Witness C, and can provide them to the Prosecutor on request.**

**Annexure D – Statement of Witness D (Manus)**

## INTERNATIONAL CRIMINAL COURT

Date: 18 May 2015

**STATEMENT OF “WITNESS D”**

I, [WITNESS D] of [ADDRESS WITHHELD], resident in Australia, can give evidence as follows:

1. I am a current employee at an Offshore Processing Centre (the “**Manus Island OPC**”). I have been employed there for more than 12 months.
2. I have a number of years experience also in the Australian corrections system. The conditions of detention at the Manus Island OPC are markedly worse than those I have seen in the corrections system.
3. It is not possible for me to speak to my superiors about my concerns. In my experience people who speak out have a difficult time doing their jobs.
4. On a number of occasions detainees were forcibly removed from their accommodation at the Manus Island OPC and taken to the local prison. I was unaware, and remain unaware, of any offence that any of those detainees may have committed.
5. On the morning of the 20<sup>th</sup> of December 2014, I witnessed a detainee being handcuffed with zip-ties and forcibly transported to the local prison. He was visibly in extreme pain, and complained that the zip-ties were too tight. In response, the attending guards held him down and tightened the zip-ties. On arriving at the local prison, the guards could not remove the zip-ties because they were too tight to be cut off.
6. I do not know how the zip-ties were removed.
7. The detainee suffered long-term nerve damage.
8. The detainee asked why he had been detained and he was informed that it was for “being a smart-arse and trying to contact a lawyer”.
9. I know that a number of days earlier, that detainee had tried unsuccessfully to make contact with legal representation.
10. Detainees at the Manus Island OPC are not afforded adequate medical care. Of particular concern is dental hygiene. Dental problems are extremely prevalent, causing serious distress amongst the detainees.
11. For a number of months, dental treatment was refused to all detainees.
12. One detainee had approached guards in extreme pain, complaining about a tooth. The guards told him he did not have a medical issue that required treatment. Dental care was refused, and he was not afforded the opportunity to speak with a medical practitioner.
13. I then witnessed that detainee using wire taken from one of the security fences to manually extract a tooth from his jaw. Still, no dental care – or medical care of any persuasion – was provided to this man.
14. I have also witnessed a number of instances of untreated infection on the feet of detainees. In these circumstances the guards again provide faux medical diagnosis, sending the detainees away in want of treatment.

15. In February 2014 there was a riot, during which a man's throat was slashed. Since that time, the relevant detainee has been very distressed. He was subsequently diagnosed with post-traumatic stress disorder.
16. I have witnessed the guards regularly intimidating this man, often by mocking him in ways that would remind him of having his throat cut. On a number of occasions I have seen the guards running their fingers across their throats to intimidate the detainee.
17. Wilson Security guards often wake the relevant detainee early in the morning, around 3am. The guards will stand around his bed to intimidate him once he is woken.
18. The population of the Manus Island OPC is made up of various ethnic groups. Each group naturally has members that take a leadership role.
19. I witnessed the leaders of the ethnic groups being forcibly removed and taken to the local prison. They remained there for 21 days, in crowded cells, sleeping like sardines together on the floor. I believe this was done to destabilise the ethnic groups.
20. Whilst detained in the prison, local police beat an intoxicated local man in front of the ethnic leaders to intimidate them. The man who was beaten lost most of his teeth in the incident.
21. Often the guards at the Manus Island OPC allow local police access to the site. On one occasion in December 2014, I witnessed local police take Qur'ans and other personal items (including photos) from detainees.
22. Also in December 2014, the guards conducted a number of raids on the accommodation of the detainees. All of these raids occurred in the early hours of the morning whilst the general population was asleep.
23. It is my view that these raids were conducted in a way designed to agitate and anger the detainees. The guards were always unduly aggressive and on a number of occasions treated the detainees in a way that I perceived to be designed to start a physical confrontation.
24. In December 2013, the local police lined the detainees up in the sun for hours. Whilst there, the local police seized a number of personal items from the detainees.
25. It is my view that this was designed to cause maximum distress amongst the detainees.
26. On a number of occasions in certain parts of the Manus Island OPC, Wilson Security guards tried to force the detainees to leave the camp so that they might be physically assaulted by local people outside the Manus Island OPC.

This is a 'can say' statement. It outlines the evidence that Witness D has provided to us, and is able to provide to the Prosecutor in affidavit form. This statement was provided with the consent of Witness D.

**We have contact details for Witness D, and can provide them to the Prosecutor on request.**

**Annexure E – Statement of Witness E (Nauru)**

## INTERNATIONAL CRIMINAL COURT

Date: 18 May 2015

**STATEMENT OF “WITNESS E”**

I, [WITNESS E] of [ADDRESS WITHHELD], resident in Australia, can give evidence as follows:

1. I work for a refugee advocacy organisation. I deal with many refugees who have been held at Offshore Processing Centres, including many from the Nauru Offshore Processing Centre (the “Nauru OPC”).
2. At the Nauru OPC, womens’ sanitary pads are considered a fire hazard, and so the detainees are forced to ask for them often.
3. Women seek also to use the sanitary pads as make-shift nappy’s given the high rates of bed wetting.
4. Women are also terrified of going to the toilets at night because of the male guards present there. They prefer to wet themselves.
5. Showers are restricted to extremely short periods at the Nauru OPC. A male guard sits outside a plastic sheet, and has control of the water.
6. Often, the male guard will stop the flow of water while young girls are washing their hair and ask the girls to expose themselves in before turning the water back on. This is a common complaint amongst former and current detainees. It has not been addressed.
7. The guards at the Nauru OPC have also on a number of occasions asked to see nude children. On at least on occasion a naked child was placed on the guards lap and rubbed in a way that I would consider to be inappropriate.
8. On one occasion a child (on seeing a psychologist) was asked to draw a picture of what made him upset. The drawing appeared to be a dark-skinned man with an erect penis.
9. A number of parents have similar complaints about their children being abused.
10. Male guards continue to loiter around the toilets, often offering lollies in exchange for the young children cleaning the toilets, which are filthy and covered in mould and excrement.
11. The guards forcibly restrained fathers who protested about their children being asked to clean the toilets in exchange for lollies.
12. On one occasion a 22 year-old girl (who has the physical appearance of a much younger child) attended the toilet facilities late at night. A male guard seriously sexually assaulted her. The victim feels she cannot report the identity of the guard to authorities as the guard is still working at the Nauru OPC where the remainder of her family is detained, and she believes that this will put her family in additional danger.

This is a ‘can say’ statement. It outlines the evidence that Witness E has provided to us, and is able to provide to the Prosecutor in affidavit form. This statement was provided with the consent of Witness E.

**We have contact details for Witness E, and can provide them to the Prosecutor on request.**

**Annexure F – Statement of Witness F (Christmas Island)**

## INTERNATIONAL CRIMINAL COURT

Date: 18 May 2015

**STATEMENT OF “WITNESS F”**

I, [WITNESS F] of [ADDRESS WITHHELD], resident in Australia, can give evidence as follows:

1. I am a Medical Doctor, formerly employed at the Christmas Island Refugee Processing Centre (“**Christmas Island**”). Whilst employed at Christmas Island, my duties were mainly to determine whether or not a particular refugee was fit to be transferred to the Manus Island Offshore Processing Centre or the Nauru Offshore Processing Centre.
2. I was employed on Christmas Island for an extended period, and was working there during July 2013, when boat arrivals were at their peak.
3. When asylum seekers arrived, they were usually badly sunburned, starving, and incontinent of urine and faeces. Often they had vomited on one another.
4. I was frustrated to see that it was standard procedure to strip these asylum seekers of their belongings on arrival. In my view, this policy became unreasonable when it extended to removing glasses and hearing aids with no discretion.
5. Asylum seekers were taken to the “induction shed” immediately on arrival.
6. There were so many asylum seekers and so little staff, so we were forced to sacrifice the quality of our health assessments.
7. The primary purpose of the health assessments was to ensure the asylum seekers were fit enough for detention on Nauru or Manus Island. Our health assessment checklists included a box that we could tick if we thought that the person was not fit for detention.
8. On a number of occasions I recall being instructed verbally to “never tick that box”.
9. On the electronic medical records, we were restricted to changing information about allergies. We were restricted from providing further medical assessment.
10. At one point when the centre was extremely busy, we were made aware that the government wanted to have as many asylum seekers transferred to the Nauru and Manus Island OPCs as possible. We were to make an example of the children who were fit to travel.
11. I recall being upset, as were my medically trained colleagues, when I was heard that a four year-old boy with cerebral palsy and a young mother with twins were sent to Manus Island without medical advice.
12. These were the first people sent with the intention of demonstrating, for the other recently arrived asylum seekers, who would be considered fit for detention.
13. On one occasion, a new member of the medical team refused to certify an asylum seeker for detention for medical reasons. My understanding is that she was removed from the medical certification process, and the asylum seeker was reassessed (positively) and sent to the Manus Island OPC or the Nauru OPC.
14. It is also my understanding that, generally speaking, in the transportation process from Christmas Island to Manus Island or Nauru, medical records were usually lost. As a result

of the loss of medical records, some women received between 18 and 19 separate, unnecessary vaccinations.

15. I know that five pregnant women were given vaccinations that were unsafe for expectant mothers. Of these women, I know that four suffered miscarriages.
16. I know also that a young boy who I considered to be inappropriate for detention on Manus Island or Nauru was sent to Manus Island where I understand he was repeatedly subject to sexual abuse, including rape.

This is a 'can say' statement. It outlines the evidence that Witness F has provided to us, and is able to provide to the Prosecutor in affidavit form. This statement was provided with the consent of Witness F.

**We have contact details for Witness F, and can provide them to the Prosecutor on request.**

## **Annexure G – Statement of Witness G (Christmas Island)**

### INTERNATIONAL CRIMINAL COURT

Date: 29 September 2015

#### **STATEMENT OF “WITNESS F”**

I, [WITNESS G] of [ADDRESS WITHHELD], resident in Australia, can give evidence as follows:

1. I arrived on Christmas Island [in mid September 2015].
2. There is identifiable and dysfunctional tension between Border Force who manage the centre, Serco who run the centre and Immigration who make all the decisions. This enormous discord and resentment and creates enormous incompetency and faulty service delivery as a result. I arrived at the centre after lengthy correspondence with Immigration to be told Serco were not aware of my application to visit. I was then questioned by a Border Force Superintendent who questioned what political or advocacy group I was a part of?
3. I visited the centre on three days [and spoke to a number of detainees]The detainees told me they were woken in the middle of the night in their previous I DC (immigration detention centre) by a group of men, Border Force officers, who are geared up for violence. They are taken from their beds in underpants, pyjamas – one man said he made the entire trip in one shoe. They are handled with extreme force and any resistance is met with violence and verbal abuse. One very small and young detainee was shoved to the floor and his head was hit. He still had the scar on the side of his face.

#### **Removal From Mainland To Christmas Island**

4. They are put on a plane and arrive at various airports where they are held until transported to Christmas. One detainee was handcuffed for 12 hours straight and still has problems with his wrist as a consequence. When they arrive on Christmas they find many of their belongings missing: personal photos and mementoes, watches, rings, clothes and shoes.

#### **Detainees Are Abused By Guards**

5. I was told by the detainees of ongoing physical and psychological abuse. Detainees spoke of the kindness of some Serco staff members, but said these ones are in the minority. They are regularly called cunts, arseholes,- they are told “Get the fuck out of here” “Shut the fuck up”
6. Consistently they are told “Its your fucking fault you’re here”. One notorious staff member they all spoke about – stands in people’s faces and says “Fucking hit me ..... I dare you”. One detainee asked me with complete genuineness “Why do they need to speak to us like this ..... we always do what they ask”. Another staff member was consistently named as being particularly racist and sadistic.
7. The Emergency Response Team, whom I personally saw on their way to trouble look like a football team. Muscled up and tattooed .... with skulls and overtly negative messages in some of their tattooing. All the detainees spoke about the extreme violence they experience at the hands of these people. Detainees have had their teeth broken, bruises, split lips, and cuts while being managed by these people. This crew also use abusive and threatening language and I found them extremely menacing in my brief interaction with them. I wouldn’t want to be in their hands for anything.
8. If you speak out, or defend a friend – you are threatened with consequences. These start at the most extreme Red Section where detainees spend up to a week (one detainee spent 4

days here during which time he started to cut him and tear at himself). This space has a metal door with a cement bed, a toilet, a camera and a light that stays on 24 hours. Food is passed through a grate.

9. After a period of time you are let into White 1. This is a basic camp bed, camera and lights – but you are allowed out for 30 minutes into a caged yard every day. If you question or argue with staff in this section you are returned to the Red section. One detainee told me the only way to survive this is to disappear into yourself. I ask him what this meant and he said “I just leave myself and stop talking because this is what they want” This man spent 2 months in White section and he also self-harmed extensively during this time.
10. If you continue to comply you are then moved in White 2. All the detainees spoke about a woman [name suppressed] who decides your punishment. They all said she is sadistic and often looks in on them and laughs. I personally witnessed her become enraged when she was locked out of her office – and her response was frightening. She was unaware I was sitting in the visitors’ room with the door open, and she screamed and kicked and pulled at the door. I was so uncomfortable with her behaviour, I coughed to let her know I was there.

### **Food**

11. There is no fruit and vegetables in the men’s diet (one detainees spoke of his dreams about lettuce) and many detainees have stomach, and gum issues. The food is often stale and very poor quality. I was aware that this a general issue on Christmas but in conjunction with poor health and medical assessment and response to these issues, this poses life-long issues for many of these young men.
12. I noticed every single man I saw shook excessively. Only one of the men I saw was not on medication. They are not diagnosed by a psychiatrist – yet a majority of them are on anti-depressants and sleeping tablets. I would find in the morning they were groggy and slow and their cognition improved as the day proceeded.

### **Guards**

13. The detainees talk of the apathy and negligence of their case managers. One man who has been waiting to return home – having signed 3 months ago, told how his case manager forgot to notify Immigration of his desire to return ... for a month. Case managers regularly tell detainees the best option is to return home – even those who been found processed and found to be refugees.
14. There was a very slack and slapdash approach to every aspect of dealing with myself and my friend, who accompanied me from Sydney. The rules changed every day. We never saw our friends on time. ... one day waiting forty minutes. I took a cool bag through the metal detector after having purchased over \$100 worth of special foods to take in for the guys. We were refused because we were told we were only allowed to bring in food purchased from the vending machine outside (chocolates and lollies).
15. Asylum seekers are given a 45 page TPV application and given no help or assistance with answering this – it’s all in English.

### **Effects of mistreatment**

16. Every detainee I saw is profoundly depressed and suicidal. Of the 7 men I saw, 5 are self-harming on a regular basis. They said the place is awash in blood – from bashing and constant self-harming.

17. A man with obvious mental health issues, from Iraq, who arrived .on Christmas Island on a boat 2 ½ years ago and has never left – explained to me in great detail his plans to slit his own throat and would kill himself any way he could find. He said repeated requests to be transferred anywhere .... even Nauru or Manus are ignored and not even responded to. I begged him to give me some time, to see what I could do to help him- I even told him I am suffering from cancer and don't have the choice he does. I told him his life was valuable and please not to kill himself. He was incredibly gracious and took my hand and said how incredibly sorry he was I had cancer. He said you deserve life, but I am sorry I can't live mine like this anymore”
18. On the above visit, which was my last, I was escorted out by the Director of Operations. He questioned me about what this man had said, specifically his threat to cut his own throat. I told him that yes he had said this and I am very concerned for his well-being. He raised his eyes and told me “It's very unfortunate he did this as he was doing so well” I said that the man is mentally unwell and in need of help and he proceeded to tell me he was attention seeking and would be reprimanded for this behaviour. I was incredulous and asked if he was serious. He said “Absolutely ..... he will be reprimanded”

### **Staff**

19. A man sat outside the room and took notes of everything I and the detainees said. Each visit a Serco officer sat outside in the doorway listening to our conversations.
20. The staff are jaded and institutionalised – and in the isolation that is Christmas Island have transcended the normal behaviours one would expect of people working in custodial care. There were numerous staff members on our plane and it is very evident there is a big drinking culture and many of the people working at Christmas are poorly educated and ill-equipped to deal with the social nuances of the population of Christmas. Many of them see all the residents at the centre as criminals and one staff member told me the asylum seekers broke our laws by coming there on a boat in the first place.
21. A frightening culture of cruelty, punitive responses, physical and verbal violence has been allowed to flourish and individuals are being damaged in ways they will spend the rest of their lives living with. I have no hesitation in stating the isolation and lack of community visitors has created a palpable redneck lawlessness that derives its validation from poorly conceived concepts of nationalism and truly ... a base and ugly form of jingoism.
22. Every detainee I saw was broken ... cried ... and beyond despair. They just looked to be completely deadened. One said to me “It doesn't matter what happens ..... I'm already dead”

This is a ‘can say’ statement. It outlines the evidence that Witness F has provided to us, and is able to provide to the Prosecutor in affidavit form. This statement was provided with the consent of Witness G.

**We have contact details for Witness G, and can provide them to the Prosecutor on request. We note that this person has not worked for the Department of Immigration (or a sub-contractor to it) and is therefore not within the reach of the Australian Border Force Act)**