


# Australia’s Offshore Detention Regime and Crimes Against Humanity

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By: Miho Kitamura

**Introduction**

Australia’s migration detention practices, especially its offshore detention regime, has attracted serious international criticism for their treatment of asylum seekers inside their detention facilities. However, the International Criminal Court (ICC) has spoken on this case as the Office of the Prosecutor (OTP) wrote a letter to Andrew Wilkie, an independent federal Member of Parliament in Australia, explaining the reasons why they would not be investigating Australia for crimes against humanity under Article 7 of the *Rome Statute*. By examining the conditions inside the offshore

detention camps on Nauru and Manus Island, Papua New Guinea (PNG), it becomes evident that there is a discrepancy between the OTP's reasoning and the legal and factual elements that are necessary to constitute the prohibited acts under Article 7. Arguments can be made that the contextual elements, as well as the underlying prohibited acts under Article 7 which include deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty, torture, persecution, and other inhumane acts are met. At the very least, a preliminary examination should have been opened, and the reluctance to investigate Australian officials shows the difficulties in holding powerful states accountable.

**I. Mandatory offshore detentions and outsourcing responsibility**

Australia's offshore detention regime aims to outsource and avoid responsibility in two ways: through extra-territorial migration management, and through moral and legal distancing by employing other state and non-state actors (Kalpouzos, page 585). Since August 2012, 4,183 people have been transferred to Nauru and PNG. In 2017, the average time in immigration detention was 454 days, but the majority of people had been held in detention for over 730 days (the Communiqué, page 24). As of August 2020, almost 100 people had been held in detention for over five years, with several having spent more than ten years in detention.

**i. Nauru**

Nauru is the third smallest country in the world behind Vatican City and Monaco. While Australia first began sending refugees to Nauru in 2001, the policies were codified in 2012 when Australia and Nauru entered into a Memorandum of Understanding (the Communiqué, page 25). Amnesty International (pages 12-5) has called Nauru a client state of Australia, as Australia pays Nauru a hefty fee for every asylum seeker detained in the facilities. Australia also contracted with non-state actors to run the facilities, including security companies, health care services, and legal services (the Communiqué, page 26). Although all centres are "open," asylum seekers and refugees are not allowed to leave without prior authorization, and the facilities are surrounded by fencing, guards, and cameras (the Communiqué, page 28).

Life in the detention facilities on Nauru have been described as inadequate, overcrowded, and dangerous (the Communiqué, page 28). Temperatures on the island can rise up to 40 degrees Celsius with 95 percent humidity, but the tents provide little relief from the heat and are not built to withstand tropical downpours (the Communiqué, page 28). As many as 50 people live in each tent, and many sleep on blankets or on military style cots (the Communiqué, page 28). One source has stated that there are only six toilets to serve 700 people, and about six showers for every 100 people (the Communiqué, page 28). In addition, there are daily restrictions on water intake and food is often rotting or spoiled (the Communiqué, page 36).

In 2015, the Australian government released The Moss Review, which investigated allegations of abuse on Nauru, and found that guards had sexually exploited women, men, and children in exchange

for access to showers and other facilities. In 2016, *The Guardian* published The Nauru Files, which contained more than 2000 leaked incident reports from Nauru “painting a picture of dysfunction and cruelty.” The leaked files showed the devastating trauma and abuse of children including “seven reports of sexual assault of children, 59 reports of assault on children, 30 [incidents] of self-harm involving children, and 159 [incidents] of threatened self-harm involving children.” The Australian Human Rights Commission found that children in Nauru’s detention facilities suffered from extreme levels of physical, emotional, and psychological distress.

Furthermore, requests to receive medical treatment are often delayed or even ignored (the Communiqué, page 35). In one incident, six young boys attempted to kill themselves and were found bleeding, but were initially refused any medical treatment (the Communiqué, page 35). The United Nations Committee on the Rights of the Child reported of limited postnatal care for newborns and their mothers (the Communiqué, page 35). Individuals with disabilities are rarely accommodated (the Communiqué, page 35).

**ii. Manus Island, Papua New Guinea**

Manus Island is part of Manus Province in PNG, and is located north of the mainland. Since 2001, Manus Island has detained asylum seekers, but Australia and PNG formally entered into an agreement in September 2012. (the Communiqué, page 36). Like Nauru, Australia has contracted with a number of non-state actors to run the detention facilities (the Communiqué, page 37). In June 2013, Manus Island was made a “single adult male only facility,” which continues until today (the Communiqué, page 37).

In April 2016, the Supreme Court of PNG ruled that the forceful detention of asylum seekers at the Manus Island Regional Processing Centre (RPC) was unconstitutional and illegal (the Communiqué, page 35). The detainees were moved to alternate centres near the main city of Lorengau, and were given three options: to 1) settle in PNG for those determined to qualify for refugee status, 2) voluntarily depart from PNG, or 3) involuntarily be removed as a non-refugee. Settlement in Australia was not an option. During this transitional period, *The Guardian* reported that the Australian government was trying to coerce those who were determined to be refugees to return to their countries of origin, even though they could face persecution, arrest, and torture. Instead of facilitating a peaceful transfer to the new centres, the Australian government progressively ceased services to force asylum seekers to move out on their own. The asylum seekers feared moving to the newer centres, as they felt it was more dangerous to move closer to town, and protests by the local community reinforced these fears. Between October and November 2016, PNG officials entered the RPC and sabotaged water tank pipes, and humanitarian efforts to deliver food and other resources to the 600 detained men were blocked. In late November, PNG police and immigration officials went to the RPC, forcibly removed the asylum seekers, and took them to the newer centres. As of June 2021, 125 detainees are still on the Island.

As for the conditions inside the RPC, the majority of the men had slept in over-heated and crowded tents (the Communiqué, pages 40-41). There were reports of constant flooding, mould, and fungi growing on the walls, as well as frequent sewage blockages (the Communiqué, pages 41-42). The meals were described as inedible, with mosquitos and other insects burrowing inside them and each person received only 500 milliliters of water per day where temperatures averaged 27 to 30 degrees Celsius (the Communiqué, pages 41-43). The detained men were also subjected to severe physical and sexual abuse (the Communiqué, page 45). Guards assaulted asylum seekers without any repercussions (the Communiqué, page 46). Logham Sawari, a detained man, spoke of a guard punching him after he requested more washing powder (the Communiqué, page 46). Both the detainees and workers described the showers as a "rape dungeon." (the Communiqué, at page 48). Similarly to Nauru, numerous incidents of self-harm and suicide attempts have been reported (the Communiqué, at page 48).

**II. The role of the ICC and the lack of accountability for migration violations**

The ICC was established in 2002 and is governed by the 1998 *Rome Statute*. It is the first permanent international court with criminal jurisdiction, and the Statute grants the ICC jurisdiction over four main crimes: genocide, war crimes, crimes against humanity, and the crime of aggression. The court can exercise jurisdiction over these crimes if they were committed on or after July 1, 2002, and if the conduct was committed by a state party, the conduct occurred on the territory of a state party, or in a state that accepted the jurisdiction of the Court. 123 countries are state parties to the Statute as of 2021.

The ICC has temporal jurisdiction over this case, as the crimes were committed after July 1, 2002. Additionally, the ICC has territorial jurisdiction over Australia and Nauru as both countries are state parties to the Statute. The ICC also has nationality jurisdiction over PNG due to Australian officials orchestrating and developing the offshore detention regime, as well as physically working on Manus Island (the Communiqué, page 96-102).

**III. Failure of domestic legal systems to provide adequate remedies**

According to Article 17(a) of the *Rome Statute*, the ICC's jurisdiction can only be invoked if the state is unwilling or unable to genuinely carry out the investigation or prosecution. Migration control is not usually thought of in the international criminal law context, but it may be an important last resort to hold perpetrators accountable (Costello & Mann, at page 327). In Australia, domestic courts have consistently justified the harsh and unlawful detention of refugees and asylum seekers (the Communiqué, page 19). For example, the High Court of Australia in 2004 held that a non-citizen who was stateless, who did not have a visa, and who was refused protection, could remain in detention for the rest of his or her life (the Communiqué, page 19). In 2016, the same court held that Nauru, not Australia, was responsible for the treatment in the offshore facilities even though Australia had considerable control over the facilities (the Communiqué, page 19). No one has ever been criminally prosecuted for crimes committed in the detention facilities in Australia, Nauru, or PNG (the

Communiqué, pages 21-22).

**IV. The OTP's Findings**

In October 2014, Andrew Wilkie first wrote to the OTP at the ICC to request the investigation and prosecution of Tony Abbott and his 19 cabinet ministers. Wilkie alleged that the Australian government violated Article 7 of the *Rome Statute*, committing crimes against humanity. However, the OTP wrote to Andrew Wilkie on February 12, 2020, stating in their four page letter that there was no basis to proceed with an investigation into Australia at that time.

The OTP admitted that some of the conduct in the offshore detention facilities on Nauru and Manus Island appeared to meet the underlying act of Article 7(1)(e) of the Rome Statute, namely the act of imprisonment or other severe deprivations of physical liberty. Yet, the OTP wrote that the conditions of detention or treatment were not of a severity to be qualified as the crime against humanity of torture under Article 7(1)(f) of the Statute, nor did the conditions meet the nature and gravity to be qualified as the crime against humanity of other inhumane acts under Article 7(1)(k). The OTP also did not find that the act of deportation under Article 7(1)(d) of the Statute was met, as the asylum seekers were not "lawfully present" in the area from which they were displaced. In terms of the crime against humanity of persecution under Article 7(1)(h), the OTP did not find that the conduct of imprisonment or severe deprivation of physical liberty were committed on discriminatory grounds.

Although the OTP acknowledged that the underlying acts of Article 7(1)(e) might be met, they found some of the contextual elements to be missing, as they did not believe that the acts of imprisonment or severe deprivation of liberty were committed pursuant to or in furtherance of a state or organizational policy to commit an attack. The OTP wrote that the failure on the part of the Australian government to take adequate measures to address the conditions in the detention centres was not deliberately aimed at encouraging an "attack" within the meaning of Article 7. Although the OTP acknowledged that the offshore detention regime pursued a policy of deterrence, the information did not support a finding that "cruel, inhuman, or degrading treatment was a deliberate, or purposefully designed aspect of this policy." The OTP also did not find that there was a state or organizational policy to commit the acts described by the governments of Nauru and PNG or other private actors.

**V. What is a Crime Against Humanity?**

To make out a crime against humanity, the Prosecutor has to establish the contextual elements as well as the underlying act itself. The contextual elements can be broken down into five parts, which are: 1) an attack directed against any civilian population, 2) a state or organizational policy, 3) the widespread or systematic nature of the attack, 4) a nexus between the individual act and the attack, and 5) knowledge of the attack (see here). There are eleven enumerated acts, but the five acts that were described in the OTP's letter will be focused on, which are: deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty, torture, persecution, and other inhumane acts.

## VI. Contextual Elements

### i. An Attack Directed Against Any Civilian Population

With regard to the requirement of "attack," the *Elements of Crimes* clarifies that the act does not need to constitute a military attack. According to *Ntaganda*, "course of conduct" is meant to "cover a series or overall flow of events, as opposed to a mere aggregate of random or isolated acts" (para 662). In terms of the requirement of "civilian population," the Trial Chamber in *Katanga* stated that the "civilian population must be the primary object of the attack and not the incidental victim of the attack" (para 1104). Civilian population comprises all persons who are civilians as opposed to members of armed forces and other combatants (*Katanga*, para 1104).

Looking at the OTP's letter, they found that the failure on the part of the Australian government was not deliberately aimed at encouraging an "attack" within the meaning of Article 7. However, it can be argued that Australia's immigration offshore detention regime does constitute an attack. According to *Bemba*, the commission of the acts referred to in Article 7(1) constitutes the attack itself and no additional requirement for the existence of the attack should be proven (para 75). However, one single act of deportation, for example, cannot amount to an "attack," as it needs to involve "a series or flow of events" (*Ntaganda*, para 662). Over the years, thousands of asylum seekers have been systematically detained in the offshore detention facilities culminating in each of the prohibited acts (see here). Furthermore, the detained asylum seekers are neither members of the armed forces nor are they combatants (Chetail, page 923).

### ii. A State or Organizational Policy

The *Elements of Crimes* states that the "policy to commit such attack" requires that the state or organization actively promotes or encourages an attack against a civilian population. Regarding the element of policy, the attack should follow a regular pattern, although it does not have to be formalised (Bemba, para 81). The implementation of a policy can consist of a deliberate failure to take action, which is consciously aimed at encouraging such attack (*Ruto, Kosgey & Sang*, para 210).

Looking at the OTP's letter, although they acknowledged that the offshore detention regime pursued a policy of deterrence, they found that the information did not support a finding that "cruel, inhuman, or degrading treatment was a deliberate, or purposefully designed aspect of this policy." However, the offshore detention regime arguably does meet the state policy requirement, as the detention regime was formulated at the highest levels of the Australian government, in coordination with other state and non-state actors, as official immigration policy (see here). Although the OTP acknowledged that a policy of immigration deterrence was pursued, they attributed the conditions to being just a "failure" to act on the part of the Australian government. Even if it was a failure to act, the deliberate failure can form the policy for encouraging an attack (*Ruto, Kosgey & Sane*, para 210). Given the evidence of the deliberate nature of the offshore detention camps, it is hard to see how the detention conditions did not meet the state policy element.

**iii. Widespread or Systematic Nature of the Attack**

The prohibited act must either be or occur as part of a widespread or systematic attack (*Rome Statute*, Article 7(1)). Importantly, not each of the prohibited underlying acts needs to be widespread or systematic, but it is the overall attack that needs to be widespread or systematic (the Communiqué page 62). In *Bemba*, the Pre-Trial and Trial Chamber state that the element of an attack being widespread "connotes the large scale nature of the attack, which should be massive, frequent, carried out collectively with considerable seriousness, and directed against a multiplicity of victims" (Pre-Trial, para 83; Trial, para 163). In terms of "systematic," the *Gbagbo* Pre-Trial Chamber confirms that this element refers to "the organised nature of the acts of violence and the improbability of their random occurrence," which the *Katanga* and *Ntaganda* Trial Chambers adopt (*Gbagbo*, para 223; *Katanga*, para 96; *Ntaganda*, para 95).

The attack against asylum seekers is widespread because the number of refugees and asylum seekers held in the offshore detention facilities is longstanding and on a massive scale (the Communiqué, page 62). The attack is also systematic because the policy entailing the prohibited acts are thoroughly organised and follow a regular pattern involving substantial resources (the Communiqué, page 63).

**iv. A Nexus Between the Individual and the Attack**

The acts of the perpetrator must also be part of the attack, and the Trial Chambers in *Katanga*, *Bemba* , and *Ntaganda*, state that when determining whether the "part of" requirement is met, consideration should be given to the characteristics, aims, nature, or consequences of the act (*Katanga*, para 1124; *Bemba*, para 165; *Ntaganda*, para 695). The temporal and geographical proximity of the acts are also relevant (*Ntaganda*, para 695). Australian officials and their agents both geographically and administratively form part of the policy of deportation, detention, and mistreatment of asylum seekers ( the Communiqué, page 61). Australian officials physically work in the detention facilities in both Nauru and Manus Island and it is well known that Australia has extensive control over the facilities on both islands (the Communiqué, page 54).

**v. Knowledge of the Attack**

A mental element is required to elevate a crime to a crime against humanity. The *Elements of Crimes* note that, although the perpetrator must have known or intended the conduct to be part of a widespread or systematic attack against a civilian population, this "should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the state or organization." Australian officials have not been shy to expressly make their intention of deterring asylum seekers known (the Communiqué, page 14). Accounts from former employees at the detention facilities have stated that Australian officials, in coordination with corporate agents, designed conditions offshore to be cruel to deter arrivals (the Communiqué, page 14). Greg Lake, a former official at a processing centre, stated that the

government specifically interned children to display terrible conditions at the offshore facilities to deter others who are looking to seek refuge in Australia (the Communiqué, page 14). Mark Isaacs, another former employee, stated that cruelty and isolation was Australia's strategy to deterring migration, and that dehumanising treatment was the point (the Communiqué, page 15). This suggests that not only are officials aware of the harsh treatment of asylum seekers in these offshore processing centres, but they were implemented in order to deter additional migration (the Communiqué, page 14).

**VII. Specific Acts**

**i. Article 7(1)(d): Deportation or Forcible Transfer of Population**

The OTP did not find that a crime against humanity of deportation was committed, as they were not satisfied that the asylum seekers were lawfully present in the areas from which they were deported. Yet, while the right to seek asylum does not amount to lawful presence on the territory of which the asylum is sought, the lawfulness of the presence cannot be solely based on domestic law (Chetail, page 925). Even asylum seekers who are undocumented under domestic law can still be lawfully present under international law in circumstances such as where their undocumented status results from "arbitrary deprivation of nationality, illegal destruction or confiscation of entry/residence document, arbitrary refusal of family reunification or any other related measures in contradiction with international law" (Chetail, page 925). Additionally, under the principle of non-refoulement, undocumented asylum seekers are lawfully present on the territory as long as their claim to refugee status is still pending (Chetail, page 926).
Looking at the complexity that comes with the term "lawfully present," a blanket statement that deems all deportees to be "unlawful" and therefore not meeting Article 7(1)(d), should be reconsidered.

**ii. Article 7(1)(e): Imprisonment or Other Severe Deprivation of Physical Liberty**

The OTP in their letter acknowledged that the conditions of detention and treatment in the processing centres on Nauru and Manus Island appeared to meet the definition of Article 7(1)(e). They also accepted that the gravity requirement was met as the detention conditions constituted cruel, inhuman, or degrading treatment in violation of fundamental rules of international law. Additionally, there is evidence to suggest that the Australian government was aware of the gravity of their conduct, if not deliberate in their construction of it. Since the OTP accepted that the underlying act of Article 7(1)(e) have been met, and there are strong arguments to be made that the contextual elements were also met, this should have sanctioned a preliminary examination.

**iii. Article 7(1)(f): Torture**

The OTP in their reasoning simply said that the conditions of detention or treatment were not of a severity to be appropriately qualified as a crime against humanity of torture (see descriptions of conditions here and here). However, as Professor Heller argues, how can the OTP's reasoning be reconciled with their own acknowledgement that "the duration and conditions of detention caused migrants and asylum seekers – including children – measurably severe mental suffering..." Not only

are asylum seekers being kept indefinitely and arbitrarily in the detention camps, which are controlled by the Australian government in cooperation with state and non-state actors, they are denied access to medical care and subjected to abuse perpetrated by the staff.

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

The range of denials of fundamental rights that can constitute persecution is broad as persecution is an act that is done "against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court" (Rome Statute, Article 7(1)(h)). However, the charges by the ICC have currently been limited to ones which have been charged separately as other crimes against humanity listed in the *Rome Statute* (see here).

The OTP stated that the act of imprisonment or severe deprivation of liberty were not committed on discriminatory grounds. However, Kalpouzos and Mann argue that asylum seekers arriving by boat without authorization could constitute a ground that is universally recognized as impermissible under international law under "other grounds" (page 17). Another approach would be to take a wide interpretation of "political ground," where discrimination has taken place pursuant to a political agenda against a group which itself may not hold any political views (Kalpouzos and Mann, page 17). The Trial Chamber at the Extraordinary Chambers in the Courts of Cambodia in *Nuon* accepts this wide interpretation (para 430).

**v. Article 7(1)(k): Other Inhumane Acts**

Inhumane acts are considered to be serious violations of international customary law, which takes into account all the factual circumstances (*Katanga and Ngudjolo*, paras 448-449). The OTP said that the conditions of detention or treatment were not of a nature and gravity to be qualified as the crime against humanity of other inhumane acts.

In comparing the wording of Article 7(1)(k) to the act of torture, it is apparent that Article 7(1)(k) is given a slightly lower threshold (Iris Haenen, para 816). Torture requires "severe pain or suffering, whether physical or mental," whereas other inhumane acts requires "great suffering, or serious injury to body or to mental or physical health." Therefore, the OTP did not think that the detention conditions and treatments met even the slightly lower threshold under Article 7(1)(k). At the International Criminal Tribunal for the Former Yugoslavia, the Trial Judgement in *Krstic* determined that "serious harm does not need to cause permanent harm, but must go beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a long-term disadvantage to a person's ability to lead a normal and constructive life" (para 513).

The suffering of asylum seekers in the offshore detention facilities arguably meets this threshold. Considering the horrific conditions that have been reported inside the detention facilities and the specific population that is being subjected to these conditions, the harm arises above temporary

unhappiness and amounts to grave suffering. The asylum seekers who are being subjected to these conditions are those who have fled violence, who have been tortured by repressive regimes, and who have already experienced unimaginable journeys, just to end up in arbitrary detention (see here).

**Conclusion**

Looking at the history of Australia's migration policies throughout the years, it is evident that it has culminated into one of the worst forms of migration control, that is, the arbitrary and indefinite detention of asylum seekers. With the failure of the domestic courts in Australia, Nauru, and PNG in criminally prosecuting their officials and non-state actors for migration violations, accountability measures are seriously lacking. The ICC is a last-resort mechanism that has been created to hold perpetrators accountable for crimes that are so egregious to the international community as a whole, they arise to the level of genocide, war crimes, crimes against humanity, and the crime of aggression. Looking at the elements that constitute crimes against humanity, including the contextual requirements and the underlying act itself, a discrepancy appears in the OTP's reasoning for declining to investigate Australia and the factual and legal elements of the crimes. Examining the conditions and treatment of asylum seekers in the offshore detention facilities and the deliberate nature of the migration policy, it is clear we are not dealing with "just" human rights violations, but with international crimes that warrant an investigation by the ICC (Costello & Mann, page 315). Unfortunately, the failure of the OTP to open an investigation into Australia undermines the ability of the ICC to prosecute perpetrators who have committed grave crimes and to hold powerful states accountable.

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