



Ms Kate Allingham
Office of Andrew Wilkie MP

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

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Dear Madam,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Yours sincerely,



Phakiso Mochochoko

Director

Jurisdiction, Complementarity and Cooperation Division

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