**Submission to the Australian Human Rights Commission concerning the Inquiry into Children in Immigration Detention 2014**

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There is a strong case that the mandatory detention of unlawful non-citizen children, which is the current policy of the Australian Government, meets the relevant criteria to be deemed a crime against humanity in violation of article 7(1)(e) of the Rome State (*and* section 268.12 of the Commonwealth Criminal Code).

**The Rome Statute**

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.

Article 7(2) further provides that:

For the purpose of paragraph 1:

1. ‘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 population, pursuant to or in furtherance of a State or organizational policy to commit such attack.

**The Elements of the Offence**

For the practice of mandatory detention to amount to a crime against humanity:

1. it must be committed as part of a widespread or systematic attack directed against a civilian population;
2. it must be directed against a civilian population;
3. there must be knowledge of the attack; and
4. it must result in severe deprivation of liberty in violation of the fundamental rules of international law.
5. **Is the policy of mandatory detention part of a widespread or systematic attack?**

The International Criminal Tribunal for the Former Yugoslavia (‘ICTY’) summarised the characteristics of a systematic attack as follows:

* the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is to destroy, persecute or weaken a community;
* the repeated and continuous commission of inhumane acts linked to one another;
* the preparation and use of significant public or private resources, whether military or other;
* the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.[[1]](#footnote-1)

In a similar vein, the trial chamber of the International Criminal Tribunal for Rwanda held in *Prosecutor v Akayesu* 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.[[2]](#footnote-2)

Significantly, the approach adopted under article 7(2) of the Rome Statue appears to be *less demanding* than that of the ICTY, providing simply that:

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 population, pursuant to or in furtherance of a State or organizational policy to commit such attack.

Thus there is no explicit requirement that acts must be motivated by a particular ideology or intended to weaken or destroy a community. Nor is there any requirement that the acts use significant resources or involve the continuous commission of inhumane acts. A systematic attack need only consist of:

* the commission of multiple acts referred to in article 7(1) of the Rome Statute (the relevant act for present purposes, being the deprivation of liberty in violation of the fundamental rules of international law, per aricle 7(1)(e) of the Rome Statute); and
* a motivation to further a state or organisational policy.

Whether mandatory detention violates the fundamental rules of international law is discussed below. At this point it is sufficient simply to note that the practice is being carried out pursuant to a State policy[[3]](#footnote-3) and has been consistently promoted as a core policy of several Australian Governments, including the current Federal Government.[[4]](#footnote-4) Moreover, significant resources have been allocated to its implementation.[[5]](#footnote-5)

1. **Is the attack directed against a civilian population?**

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. Clearly, asylum seekers and refugees are not combatants. They therefore fall within the category of civilians. Moreover, the fact that Australia is not involved in an armed conflict does not mean that the Rome Statute is irrelevant since the definition of ‘crimes against humanity’ in article 7(1) of the Rome Statue specifically excludes any reference to the relevant acts being committed during wartime. As such, the commission of crimes against humanity under the Rome Statute is not confined to situations of armed conflict and can occur at any time. This has been confirmed by Antonio Cassese, a leading scholar in the field of international criminal law, who has noted that:

After 1945, the link between crimes against humanity and war (armed conflict) gradually disappeared … [and] … led to the abandonment of the nexus between crimes against humanity and war: at present, customary international law bans the crimes at issue whether they are committed in time of war or peace.[[6]](#footnote-6)

Case law also 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’.[[7]](#footnote-7) As the ICTY in *Prosecutor v Kunarac* held,

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.[[8]](#footnote-8)

With respect to the practice of mandatory detention, it is clear that a distinct civilian population is being targeted, namely, unlawful non-citizens.

1. **Is there knowledge of the attack?**

The *mens rea* for a crime against humanity under the Rome Statue consists of:

1. awareness of the broader context into which this crime fits, that is, knowledge that the offences are part of a systematic policy or of widespread and large-scale abuses. This is a requirement which is established, *a fortiori*, by the participation of the perpetrator in either the planning, organisation, or execution of a policy characterised by massive acts of inhumanity or in the execution of a large-scale commission of vicious acts of inhumanity; and
2. the specific intent required for the underlying crime, for example, murder, extermination, torture, etc.[[9]](#footnote-9)

In the case of mandatory detention, the Australian Government has the awareness of the broader context into which the context fits, that is, being part of a systematic policy of detaining unlawful non-citizens. It also has the specific intent required for the underlying crime, being, the intention to deprive unlawful non-citzens of their physical liberty. Moreover, as the European Court of Human Rights has held, a practice or act can still be characterized as inhumane even if the perpetrator lacked a specific intention to cause inhumane suffering.[[10]](#footnote-10) Thus it would appear that the *mens rea* for a crime against humanity is satisfied with respect to the practice of mandatory detention.

1. **Is there a severe deprivation of liberty in violation of the fundamental rules of international law?**

The Rome State does not define the term ‘severe deprivation of liberty in violation of the fundamental rules of international law’. The principle of external system coherence demands,[[11]](#footnote-11) however, that this phrase be interpreted consistently with international human rights standards concerning the deprivation of an individual’s liberty. In this respect, article 9 of the International Covenant on Civil and Political Rights (‘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.[[12]](#footnote-12)

Significantly, the relevance of article 9 is explicitly affirmed in section 268.12 of the Criminal Code, which provides that:

A person commits an offence if the perpetrator imprisons or otherwise severely deprives one of more persons of physical liberty and the *perpetrator’s conduct violates article 9, 14 or 15 of the Covenant* and the perpetrator’s conduct is committed intentionally or knowingly as part of a widespread of systematic attack directed against a civilian population.

Critically, the United Nations Human Rights Committee has repeatedly held that mandatory detention violates article 9 of the ICCPR.[[13]](#footnote-13) A strong argument can therefore be made that this element of the offence is also satisfied.

**A challenging finding**

On balance, it therefore appears that each of the elements required for the commission of a crime against humanity under article 7(1) of the Rome Statute (and indeed section 268.12 of the Criminal Code, which mirrors article 7) are satisfied. This view is likely to be strongly resisted by the Australian Government (and its agents, who are responsible for implementing the practice of mandatory detention) on the following grounds:

1. An assumption that crimes against humanity can only occur during wartime. This wartime nexus may have informed the definition of crimes against humanity under the Nuremburg Charter[[14]](#footnote-14) but the ICTY in *Tadić* resolved that there was no longer a ‘logical basis for this requirement … [which] has been abandoned in subsequent state practice’.[[15]](#footnote-15) Moreover, as outlined above, there is no requirement under the Rome Statute that a crime against humanity can only occur during armed conflict.
2. Australia’s policy of mandatory detention has been upheld by the Australian High Court and is therefore lawful under domestic law. The status of the practice under domestic law, however, is irrelevant to its status under international criminal law and international human rights law.
3. The practice of mandatory detention has a legitimate aim (to deter people smugglers or to save asylum seekers from drowning at sea) and is therefore justifiable. However, this response fundamentally misunderstands the process for assessing the reasonableness of any interference with a human right. It is insufficient merely to assert that an interference with a fundamental human right such as personal liberty is justified because the interference furthers a legitimate aim. The inference will only be justified if it is proportionate. This requires consideration of: (a) whether there is rational connection between the aim being sought and the means being employed to achieve that aim; and (b) whether there an alternative measure is available that would minimise the inference with the right to liberty.[[16]](#footnote-16) When these questions have been considered by the United Nations Human Rights Committee, as noted above, it has consistently found that Australia’s policy of mandatory detention is unjustifiable on the grounds that it is arbitrary and unreasonable.[[17]](#footnote-17) Similarly, although the Parliamentary Committee on Human Rights acknowledged that the aims of deterring people smugglers and preventing deaths at sea may be legitimate,[[18]](#footnote-18) it was unable to find a rational connection between the measures and the outcome.[[19]](#footnote-19)
4. The practice of mandatory detention is not motivated by a desire to cause harm to unlawful non-citizen children. Such a claim is debateable. However, even if it were accepted, as noted above, it remains irrelevant to the determination of whether the practice amounts to a crime against humanity under the Rome Statute.

**A Need for Serious Reflection**

The challenge for the current Australian Government and indeed politicians of all persuasions is to recognise that the current approach to the treatment of unlawful non-citizens has become completely detached from Australia’s obligations under international law. This submission has sought to highlight only one potential violation of the Rome Statute. The evidence emerging from the Commission’s inquiry, however, suggests that there may well be other violations. For example, article 7(1) of the Rome Statute extends the concept of a crime against humanity to include:

Persecution 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;

Critically, unlawful non-citizens arguably constitute a group recognised as deserving of protection under international law. Moreover, persecution is defined under article 7(2)(g) as ‘the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.’

Evidence provided to the Commission thus far indicates that current Australian Government policy intentionally and severely deprives unlawful non-citizen children of their rights to health, education and housing.[[20]](#footnote-20) Moreover, as I argued in a submission to the Commission in its original inquiry into children in immigration detention in 2002, the practice of mandatory detention may violate the prohibition against discrimination and could potentially amount to inhuman treatment in violation of the prohibition against torture, cruel, inhuman and degrading treatment. A copy of this original submission is attached and I believe it remains relevant to the current practice of mandatory detention of unlawful non-citizen children). I would therefore urge the Commission to give due regard to these issues during its fact-finding activities.

**Attachment**

Submission

TO: Human Rights and Equal Opportunity Commission

RE: National Inquiry into Children in Immigration Detention

DATE: 3 May 2002

FROM: John Tobin, Senior Fellow, Faculty of Law, University of Melbourne

# Introduction

In his report to the UN Special Session on Children, UN Secretary General Kofi Annan declared that:

There is no task more important than building a world in which all of our children can grow up to realise their full potential in health, peace and dignity.[[21]](#footnote-21)

The realisation of these goals is threatened by a myriad of factors – terrorism, global poverty, the spread of HIV/AIDS. But none more so than the predicament of refugees, described by one commentator as ‘the greatest human catastrophe of the twentieth century outside war and ethnic cleansing…’[[22]](#footnote-22) The UNHCR estimates that there are over 21 million refugees worldwide.[[23]](#footnote-23) How the international community responds to the plight of these people represents one the greatest challenges of the 21st century.

It is this context that Australia’s treatment of refugee children must be assessed. Not just against our own obligations under international law but in the context of Australia’s contribution to the world to which Kofi Annan aspires. Listed among the purposes of the United Nations are respect for the principle of equal rights and the observance of human rights and fundamental freedoms for all without distinction.[[24]](#footnote-24) An assessment of Australia’s treatment of refugee children reveals not only a flagrant disregard for the obligations it has assumed under international law but also the values and purposes for which the United Nations was created.

# Violations of Australia’s obligations under international law

The background papers prepared by the Human Rights and Equal Opportunity Commission (‘Commission’) provide a comprehensive list of the various treaties Australia has ratified and need not be listed here. Suffice to say that the obligations assumed by Australia under these treaties are binding under international law. As article 26 of the *Vienna Convention on the Law of Treaties* provides, ‘every treaty in force is binding upon the parties to it and must be performed by them in good faith.’ Moreover article 27 provides that a State cannot invoke its internal law as justification for the failure to perform its treaty obligations.

In Australia a treaty ratified by the executive does not become part of domestic law unless it has been incorporated by legislation. In spite of this limitation it is important to recall the edict of the High Court in *Teoh*  that:

… ratification by Australia of an international convention is not to be

dismissed as a merely platitudinous or ineffectual act, particularly when

the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights

affecting the family and children. Rather, ratification of a convention is a

positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention…[[25]](#footnote-25)

The statutory and executive actions that sanction the mandatory detention and treatment of refugee children while in detention arguably deny any refugee child from forming a legitimate expectation that his or her rights under the Convention on the Rights of the Child (‘Convention’) will be taken into account.

Notwithstanding this gloomy prediction, Australia remains bound by its obligations under international law. Moreover the Government of Australia remains intent on asserting that its detention and treatment of refugee children is consistent with these obligations. Even the barest analysis reveals this claim to be seriously flawed.

I do not intend to identify each right to which a refugee child is entitled under international law and assess whether the Government has taken the appropriate steps to secure the enjoyment of each right. Nor do I intend to address the specific questions raised by the Commission in these papers. No doubt the cumulative effect of many submissions will provide the Commission with such information. Rather I intend to comment on 2 key rights which appear to be the subject of violation: the prohibition against discrimination and the prohibition against torture and other cruel, inhuman and degrading treatment or punishment. [Unfortunately time constraints prevented me from undertaking a comprehensive legal analysis of the issues and these comments are, at best, a brief overview.]

# *The prohibition against discrimination*

The prohibition against discrimination is a fundamental principle of international human rights law. It is restated in article 2 of the Convention and is to be enjoyed by each child within the jurisdiction of a State.[[26]](#footnote-26) Thus refugee children whether they arrive by authorised or unauthorised means are entitled to the full panoply of rights enumerated under the Convention (and other the other human rights treaties to which Australia is a party).

Discrimination under international law means any distinction, exclusion, restriction or preference based on any of a number of specified grounds or any other status (which would refugee status) which has the purpose or effect of nullifying or impairing the recognition or enjoyment or exercise by a child on equal footing of any right under the Convention.[[27]](#footnote-27) There is no requirement that discrimination be intended.

The treatment of refugee children *prima facie* falls foul of this definition in a number of respects. In the first instance there is discrimination in the treatment of children who seek asylum. Those who arrive by authorised means and seek asylum are not detained whereas those who arrive by unauthorised means are subject to mandatory detention. There is also further discrimination against authorised refugee children on the basis of their mode of arrival as they may only receive a three year temporary protection visa when recognised as a refugee. In contrast refugee children who arrive by authorised means and are recognised as refugee receive permanent residency.

Refugee children subject to mandatory detention are also subject to further discrimination relative to other Australian children as a consequence of their detention in a number of respects. Based on reports by the Commission the enjoyment of their right to education (article 28) is significantly diminished relative to children in the general community. As is their right to be free from arbitrary deprivation of liberty, to be detained only as a measure of last resort and have prompt access to legal and other appropriate assistance as well as the right to challenge the legality of their deprivation of liberty (art 37).

In many respects the suggestion that refugee children are subject to differential treatment may be uncontentious and the real issue is whether such treatment amounts to unlawful discrimination. Importantly differential treatment will not be considered lawful unless the criteria for the differentiation are reasonable, objective and the aim is to achieve a purpose that is legitimate under international law.[[28]](#footnote-28)

The Australian Government would therefore seek to defend its differential treatment of refugee children on the basis that it is a well accepted proposition of international law that a sovereign State has the power to defend its borders and regulate the entry and exit of persons into its jurisdiction.[[29]](#footnote-29) Seen from this perspective it could be argued that the mandatory detention of unauthorised refugee children and the differential treatment in the provision of their visas, is a necessary and reasonable measure to achieve a legitimate aim. In other words, in the absence of such a policy Australia would have no effective means of achieving the legitimate aim of deterring asylum seekers.

A closer analysis however reveals significant defects in this assertion. First, while detention may be warranted initially, ongoing and non-reviewable detention is not a reasonable measure to achieve the legitimate aim of deterrence. This much is clear from the decision of the Human Rights Committee in *A v Australia,[[30]](#footnote-30)* the UNCHR Guidelines on the Detention of Refugees,[[31]](#footnote-31) and judicial pronouncements in other jurisdictions.[[32]](#footnote-32) It is also clearly at odds with article 37(b) of the Convention which requires that detention of a child shall only be used as a measure of last resort and for the shortest appropriate time.

No doubt the Government would seek to further defend its policy on the basis that detention is a measure of last resort and for the shortest appropriate time. But the experience of other nations demonstrates that this claim is unsustainable. Australia is not the only State to be plagued with the problem of how to deal with authorised asylum seekers. Indeed in numerical terms many other nations are faced with a far greater problem. However no other State has found it necessary to resort to a policy of mandatory detention of children seeking refugee status. In short, the experience of other States demonstrates that far from being a measure of last resort, there are other options which must be pursued. If after having tried these options the Government could demonstrate that they proved to be an ineffective means of deterring asylum seekers it may have a claim that detention is a measure of last resort. Until such time however the Government has not satisfied its onus of demonstrating that the current policy of mandatory detention is a measure of last resort.

# *The prohibition against torture and other cruel, inhuman and degrading treatment and punishment*

Like the prohibition against discrimination, the prohibition against torture and other cruel, inhuman and degrading treatment or punishment (‘the prohibition’) is also a fundamental principle of international human rights law from which no derogation is permitted. No justification or extenuating circumstances may be invoked to excuse a violation of the prohibition.[[33]](#footnote-33) Thus the Government cannot raise the right to defend its borders against unauthorised refugees as a defence to acts which violate the prohibition.

As a party to numerous instruments that include the prohibition, the Australian Government is required to take all necessary steps to protect everyone, including refugee children, against acts which violate the prohibition.[[34]](#footnote-34) Such acts relate not only to physical pain but also to acts that cause mental suffering to the victim.[[35]](#footnote-35)

Importantly the obligations of the Australian Government under the prohibition must be read in conjunction with the requirement under article 37(c) of the Convention to treat every child deprived of his or her liberty with humanity, respect for the inherent dignity of the human person and in a manner which takes account of the needs and age of a child.

The policy and length of mandatory non-reviewable detention and the conditions of refugee children while detained both raise issues under the prohibition. Not so much as incidents of torture (although this remains possible) but as potential violations of the prohibition against cruel, inhuman or degrading treatment. The Human Rights Committee has not offered much guidance about how to assess these different categories preferring to avoid sharp distinctions and focus on the nature, purpose and severity of the treatment applied.[[36]](#footnote-36) The European Court of Human Rights however provides tests against which the treatment of refugee children in Australia can be examined.

According the Court, ‘ ill treatment must attain a minimum level of severity if it is to fall within the scope of article 3 [the equivalent provision of the prohibition under the ECHR]. This assessment is relative: it depends on all the circumstances of a case including the duration of the treatment, the physical and mental effects and sometimes the sex, age and state of health of the victim.’[[37]](#footnote-37)

I am not in a position to draw any firm conclusions as to whether the experience of refugee children falls foul of this test other than to note that the sporadic media reports detailing the experience of refugee children suggests that it is very likely. Ultimately it remains for the Commission to evaluate the evidence it receives from medical practitioners and its own investigations against the legal test as to when treatment will amount to inhuman treatment.

In undertaking this assessment with respect to the length of detention, the Commission would be well advised to consider the decision of the Privy Council in *Pratt v Morgan[[38]](#footnote-38)* and subsequent cases, in which it was held that delay when facing the death penalty could amount to cruel, inhuman and degrading treatment. Such decisions could arguably be distinguished on the basis that the applicants were facing the prospect of execution. However it would be remiss not to canvass the possibility that the mental agony occasioned by indefinite detention for a child coupled with the prospect of deportation could not also amount to a violation of the prohibition.

It is also important to keep in mind the observation of Sir Nigel Rodley, the UN Special Rapporteur on Torture that ‘children are necessarily more vulnerable to the effects of torture [and other forms of ill treatment] and because they are in critical stages of physical and psychological development may suffer graver consequences than similarly ill treated adults.’[[39]](#footnote-39)

The Government is likely to protest loudly at the prospect of any adverse finding by the Commission that its detention and treatment of refugee children was never intended to amount to inhuman treatment. However it is irrelevant that the suffering be intended for the treatment to be inhuman.[[40]](#footnote-40)

# Conclusion

Refugee children especially those who are unaccompanied are among the most vulnerable members of an international community which has endorsed and ratified numerous international instruments that seek to protect and advance the rights of all children including refugee children. Australia purports to be a member not only of this community but a member committed to the ideals of equality and human rights. As a nation we pride ourselves on such virtues. The reality however has displaced the rhetoric.

It has been said that the refugee ‘puts to test the claims of universalisation of human rights.’[[41]](#footnote-41) The examination of Australia’s treatment of refugee children fails this test. They have become, to borrow the words of one commentator, ‘non subjects, they have no rights or entitlements; the law owes them nothing, their survival is at the discretion of state benevolence…’[[42]](#footnote-42)

In the face of this reality it serves well to recall the words of a child who speaks about the hope, desperation and fear that is likely to occupy the minds of the children in Australia’s detention centres:

So if you’re wondering whether its harder for the adults here than for the children, the answer is no, its certainly not. Older people have an opinion about everything and are sure of themselves and their actions. Its twice as hard for us young people to hold on to our opinions at a time when ideals are being shattered and destroyed, when the worst side of human nature predominates, when everyone has come to doubt truth, justice and God.

*Anyone who claims that the old people have a more difficult time in the Annexee doesn’t realise that the problems have a far greater impact on us. We’re much too you to deal with these problems, but they keep thrusting themselves on us until, finally, we’re forced to think up a solution though most of the time out solutions crumble when faced with the facts. Its difficult in times like these: ideals, dreams and cherished hopes rise within us, only to be crushed by grim reality. It’s a wonder I haven’t abandoned all my ideals, they seem so absurd and impractical. Yet I cling to them because, in spite of everything, that people are truly good at heart.[[43]](#footnote-43)*

Anne Frank was not able to realise her dreams or freedoms and died while in detention. But she presents a challenge for the Australian Government in its treatment of refugee children. Are their dreams of a better life to be ‘crushed by the grim reality’ of mandatory detention or will an alternative solution carved from the principles of international human rights law affirm Anne’s faith that ‘in spite of everything … people are truly good at heart’?

1. *Prosecutor v Tihomir Bla[ki]*,case no IT-95-14-T (3 March 2000) [203]. [↑](#footnote-ref-1)
2. *Prosecutor v Akayesu*, case no ICTR-96-4-T (2 September 1998) [580]. [↑](#footnote-ref-2)
3. 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 14 August 2014. [↑](#footnote-ref-3)
4. See, e.g., *The Coalition’s* Operation Sovereign Borders *Policy* (July 2013) 7. [↑](#footnote-ref-4)
5. 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. [↑](#footnote-ref-5)
6. Antonio Casesse, ‘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) 353, 356. [↑](#footnote-ref-6)
7. *Prosecutor v Duško Tadić*, case no IT-94-1-T (7 May 1997) [644]. [↑](#footnote-ref-7)
8. *Prosecutor v Kunarac*, case nos IT-96-23 and IT-96-23/1-A (12 June 2002)[90]. [↑](#footnote-ref-8)
9. Cassese, above n 6, 363-4. [↑](#footnote-ref-9)
10. See eg: *Selcuk & Asker v Turkey* (1998) 26 EHRR 477 where the court held that the destruction of the applicant’s homes by security forces amounted to inhuman treatment. As regards the motive for the actions of the security forces, the court declared at [79]-[80] that:

    ‘even if it were the case that the acts in question were carried out without any intention of punishing the applicants but instead to prevent their homes being used by terrorists or as discouragement to others, this would not provide a justification for the ill treatment.’ [↑](#footnote-ref-10)
11. See, John Tobin, ‘Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation’ (2010) 23 *Harvard Human Rights Journal* 201, 234-234. [↑](#footnote-ref-11)
12. Also of relevance here is article 37(b) of the UN Convention on the Rights of the Child which imposes a higher standard than the ICCPR and provides 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. [↑](#footnote-ref-12)
13. 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 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). [↑](#footnote-ref-13)
14. See, Charter of the International Military Tribunal at Nuremburg, article 6(c) (available at <www.icrc.org/ihl/INTRO/350?OpenDocument>, accessed 14 August 2014). [↑](#footnote-ref-14)
15. *Prosecutor v Duško Tadić*, case no IT-94-1-T (7 May 1997) [140]. [↑](#footnote-ref-15)
16. See generally, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN4/1985/4, annex (1985). [↑](#footnote-ref-16)
17. It is conceded that the Human Rights Committee has not examined this question in the context of deterring people smugglers or saving lives at sea. It seems likely, however, that if it were to do so, the Human Rights Committee would still deem Australia’s immigration detention policies to be arbitrary and therefore unjustifiable. [↑](#footnote-ref-17)
18. Parliamentary Joint Committee on Human Rights, *Examination of legislation in accordance with the* Human Rights (Parliamentary Scrutiny) Act 2011, Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012 *and related legislation* (Commonwealth of Australia 2013) [2.98]. [↑](#footnote-ref-18)
19. Ibid [2.105]. [↑](#footnote-ref-19)
20. Witness Statements to the National Inquiry into Children in Immigration Detention, Sydney Public Hearing, Friday, 4 April 2014: Dr Sarah Mares (consultant psychiatrist; noting limited access to physical and mental healthcare for mothers, babies and children; limited access to educational and developmental opportunities for children in immigration detention); Professor Karen Zwi (paediatrician; noting inadequate access to healthcare for mothers and children, inadequate play opportunities for children, inadequate access to education for children in immigration detention); Ms Dorothy Hoddinot (a school headmistress; noting the difficulties experienced by children who have been detained once they leave immigration detention, including difficulties adjusting to educational institutions and educational standards/requirements and a distinct lack of trust in relationships with others); Bashir Yousufi (previously in immigration detention; noting self-harm and suicide amongst children in detention and that ‘If I was in Afghanistan … the Taliban will come and they just shoot at me and they just either kill straight away but the Australian Government they will kill you very slowly with your mind’); Mathew Tinkler (Director of Policy and Public Affairs at Save The Children; describing the role of Save the Children in providing services, particularly educational, for children and families on Nauru, highlighting a lack of access to books, computer and internet facilities, difficulties experienced by children whose first language is not English, difficult living conditions, limited options for recreation and indicators of developmental regression amongst children in immigration detention). [↑](#footnote-ref-20)
21. Cited in C Overington ‘Giving all children a world worth having’ *The Age* Thursday 2 May 2002, 15 [↑](#footnote-ref-21)
22. C Douzinas *The End of Human Rights* (Hart: Oxford 2000) 142. [↑](#footnote-ref-22)
23. See: [www.unhcr.ch](http://www.unhcr.ch) (2 May 2002). This figure includes both refugees as recognised under the 1951 Refugee Convention and internally displaced persons who have been placed under the mandate of the UNHCR. [↑](#footnote-ref-23)
24. See Charter of the United Nations, articles 1(2) and 55(c). [↑](#footnote-ref-24)
25. *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLRpara 34. [↑](#footnote-ref-25)
26. Although the prohibition against appears in numerous international instruments to which Australia is a party I make primary to the Convention as this is the most relevant in the context of children. [↑](#footnote-ref-26)
27. See: Human Rights Committee General Comment 18 para 7. [↑](#footnote-ref-27)
28. *Ibid* para 13. [↑](#footnote-ref-28)
29. See for example: *Abdulaziz et al v United Kingdom* (1985) 7 EHRR 471 at 497 (‘as a matter of well established international law and subject to its treaty obligations, a state has the right to control the entry of non-nationals into its territory’) [↑](#footnote-ref-29)
30. Communication No 560/1993 (detention *per se* not arbitrary but must be open to review so that grounds justifying detention can be assessed) [↑](#footnote-ref-30)
31. These are outlined in the Commission’s background papers and need not be repeated here. [↑](#footnote-ref-31)
32. See for example: *Saadi and Ors V Secretary of State for the Home Department* [2001] EWCA Civ 1512 (19 October 2001). [↑](#footnote-ref-32)
33. See Human Rights Committee General Comment 20 para 3. [↑](#footnote-ref-33)
34. *Ibid* para 2. [↑](#footnote-ref-34)
35. *Ibid* para 5. [↑](#footnote-ref-35)
36. *Ibid* para 4. [↑](#footnote-ref-36)
37. *Ireland v UK* 2 EHRR 25 (1978) *para 162.* [↑](#footnote-ref-37)
38. (1994) 2 AC 1. [↑](#footnote-ref-38)
39. E/CN4/1996/35 (9 January 1996) para 10. [↑](#footnote-ref-39)
40. Ibid para 167: See also: *Selcuk & Asker v Turkey* (1998) 26 EHRR 477 where the court held that the destruction of the applicant’s homes by security force amounted to inhuman treatment. As regards the motive for the actions of the security forces the court declared that:

    ‘… even if it were the case that the acts in question were carried out without any intention of punishing the applicants but instead to prevent their homes being used by terrorists or as discouragement to others, this would not provide a justification for the ill treatment.’ para 79-80. [↑](#footnote-ref-40)
41. C Douzinas above n 1, 358 [↑](#footnote-ref-41)
42. *Ibid* 362. [↑](#footnote-ref-42)
43. Anne Frank *Diary of a Young Girl* (Penguin Books England 2000) 329-330. [↑](#footnote-ref-43)