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Résumé de l'article

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FREE TO LEARN? EDUCATION IN AUSTRALIA'S OFFSHORE IMMIGRATION DETENTION CENTRES

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"Learn from yesterday, live for today, hope for tomorrow."
Albert Einstein

Résumé

Les enfants qui cherchent asile font partie des groupes les plus vulnérables au monde. Arriver dans un pays de refuge devrait être synonyme de sécurité; ce n'est pas le cas en Australie. Les enfants non accompagnés arrivant en bateau sont transférés et détenus automatiquement dans le Centre de traitement régional de la République de Nauru, sans que personne défende leurs droits et leurs intérêts, y compris leur droit à une éducation adéquate. Placés sur la petite île et incertains de leur avenir, les enfants ont exprimé leur désespoir et leur impuissance, certains d'entre eux se tournant vers l'automutilation. En 2015, le gouvernement australien a décerné un contrat d'éducation à Broadspectrum, anciennement connu sous le nom de Transfield Services ltd, une entreprise impliquée dans les sévices et la négligence des enfants. Depuis lors, les taux d'absentéisme ont augmenté en raison de manque de sécurité, de mauvaises conditions structurelles dans les écoles et du manque d'enseignants qualifiés. Le fait de ne pas donner accès à l'éducation contrevient aux chances de vie de ces jeunes déjà sévèrement défavorisés et contrevient aux obligations internationales de l'Australie en matière de droits de la personne.

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Mots-clés : éducation, demandeurs d'asile, réfugiés, enfants, détention en mer, Australie.

Abstract
Children seeking asylum are among the most vulnerable groups in the world. Arriving in a country of refuge should be synonymous with safety; this is not so in Australia. Unaccompanied children arriving by boat are automatically transferred to and detained in the Regional Processing Centre on the Republic of Nauru with no one to advocate on their behalf of their rights and best interests, including their right to an adequate education. Trapped on the small island and uncertain of their futures, children overwhelmingly expressed despair and helplessness, many turning to self-harm. In 2015, the Australian government awarded the contract for education to Broadspectrum, formerly known as Transfield Services Ltd. – a company implicated in the abuse and neglect of children. Since then, truancy rates have increased due to fears for safety, poor structural conditions in schools and lack of qualified teachers. Failing to provide access to education thwarts the life chances of youth who are already severely disadvantaged and contravenes Australia's international human rights obligations.

Keywords: education, asylum seekers, refugees, children, offshore detention, Australia.

1. Introduction

Access to adequate education is essential for children to fully develop their abilities, skills, and talents. Protected under numerous international human rights treaties, realization of the right to education often correlates with marriage at a later age, fewer children, better economic opportunities,[1] and lower rates of violence and crime.[2] Investing in education fosters "economic growth, enhanced productivity, reduced socioeconomic inequalities… [and] personal and social development."[3] This paper details the meaning and content of the right to education under international human

rights law and applies it to the situation of asylum seeking children in Australia's offshore detention facilities, revealing gross inadequacy and neglect inconsistent with Australia's international obligations.

2. The Right to Education under International Law

The right to education is set out and defined in a number of international human rights treaties, including the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)[4], *International Convention on the Rights of the Child* (CRC), and *International Convention against Discrimination in Education* (CADE). Under ICESCR, a State party must satisfy the following provisions regarding the right to education:

(a) Primary education shall be compulsory and available free to all;[5]
(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.[6]

Education should promote the "full development of the human personality," a sense of dignity, and "strengthen respect for human rights and fundamental freedoms."[7] ICESCR likewise provides that education should enable everyone to "participate effectively in a free society, promote understanding, tolerance and friendship," and foster peace across all races, ethnicities or religious groups.[8] The decision to leave educational content broad was likely deliberate to allow room for culturally relative school curricula without imposing universalistic perspectives. In its thirteenth general comment, the Committee on Economic, Social and Cultural Rights, which evaluates State compliance with ICESCR, refers to the requirements

of a basic education set out under Article 1 of the *World Declaration on Education for All*. The basic learning needs and content extend beyond the ambiguous learning aims set out in Article 13(1) of the Covenant to include "literacy, oral expression, numeracy, and problem solving … [and] knowledge, skills, values and attitudes required by human beings to be able to survive, to develop their full capacities, to live and work in dignity and to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning."[9] Although the Declaration is not legally binding on States, its reference by the Committee in a general comment connotes it should now be read into the meaning of the Covenant, which is legally binding on state parties.

General comment 13 clarifies that, in order to be considered adequate, the right to education must be available, accessible, acceptable and adaptable.[10] Available education refers to the quantity of educational institutions and access to programs operating at a functioning level. However, what constitutes functionality is dependent on the developmental context of the country concerned. For instance, most educational institutions should have physical structures, clean drinking water, sanitation facilities, teaching resources and trained teachers with competitive salaries. General comment 13 acknowledges that only some educational institutions will have "a library, computer facilities and information technology;"[11] this is meant to account for variances by country according to developmental context, not excuse vast variances in accessing the right to education within a country based on prohibited grounds of discrimination.

Further, in order to be considered accessible, the right to education must operate according to three principles: non-discrimination, physical accessibility, and economic accessibility. Only when education is accessible to all, including for vulnerable groups without distinction based on any of the prohibited grounds,[12] does education meet the threshold of not being discriminatory. Second, schools must be available to students within safe physical reach or allow for long distance learning. Lastly, as echoed in Article 13 of the Covenant, primary education must be free to ensure it is economically accessible to all children, irrespective of socio-economic status, with the progressive introduction of "free secondary and higher education."[13]

Acceptability is the third principle set out by the Committee, requiring education to be "relevant, culturally appropriate and of good quality," while meeting the educational objectives set out under Article 13. This principle leaves a lot of room for interpretation, entrusting the State with the discretion to set minimum standards.[14] The danger here is that some States, with no intention to advance meaningful action to realize the right to education, may take advantage of the nebulous nature of these protections. The Committee does clarify, however, that education must be flexible and "adapt to the needs of changing societies and communities, and respond to the needs of students within their diverse social and cultural settings."[15]

Over a decade after the Covenant entered into force, the Human Rights Commission drafted the CRC,[16] which has become the most widely ratified international human rights treaty. The Convention mirrors many of the rights set out in the ICESCR and ICCPR. While addressing the unique vulnerabilities children face in accessing existing rights, the Covenant creates rights tailored to champion the best interests of the child, though there are instances where fewer protections are provided for the right to education.

Whereas the Covenant provides for the "progressive introduction of free higher education,"[17] the Convention calls for making "higher education accessible to all on the basis of capacity by every appropriate means."[18] In the latter case, this does not necessarily mean the State will strive to make higher education progressively free. Moreover, whereas the Covenant encourages fundamental education for those who have not completed or received fundamental education, the Convention only addresses the need to prevent existing students from dropping out by encouraging regular attendance. The Convention also omits reference to the continual improvement of "the material conditions of teaching or staff," found under the Covenant.[19] Failing to provide adequate compensation could impact the quality of teachers available and thus lower education standards as a whole.

These regressions are concerning, as the Convention is intended to create new rights directed at the best interests of the child and reaffirm existing rights, not scale them back. Another glaring limitation of the Convention is that it does not establish the quantity, quality or level of education, which differs widely across the international community. Without a clear minimum standard, how can the right to education be

implemented, measured, monitored, and evaluated? A lack of clear benchmarks adds another layer of ambiguity, rendering it difficult to secure accountability when the right to education is violated.

The Convention does add several salient points to the aims of education not found in the Covenant, including full development of talents and abilities, both mental and physical, "respect for the natural environment" and "respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own."[20] The Convention also includes peoples of Indigenous origins in the section on friendship among all peoples, reinforcing the "spirit of peace, understanding and tolerance" born in ICESCR.[21]

ICESCR's sister Covenant, the ICCPR, adds that States should enable parents or legal guardians "to ensure the religious and moral education of their children in conformity with their own convictions."[22] This language is mirrored in Article 12(4) of the *International Convention on the Protection of Migrant Workers and Their Families* (MWC);[23] however, the protections provided under the MWC do not extend to certain groups, including refugees. Children to whom the MWC applies "shall have the basic right of access to education on the basis of equality of treatment with nationals of the State concerned," irrespective of whether the child's parent(s) are in the State irregularly.[24]

3. Non-discrimination in Education

Now that we have identified the scope of the right to education as defined by the core international human rights treaties, let us revisit a key principle—non-discrimination in education. Systemic or case specific discrimination can have a significant impact on the learning outcomes of students. Multiple studies demonstrate that "where teachers hold negative or discriminatory attitudes, students affected receive lower grades, and leave school earlier than their peers."[25] The principle of non-discrimination in education is so integral to meeting the right to education, the *International Convention against Discrimination in Education* (CADE)[26] was drafted to ensure equal access regardless of group membership. Here we find the most detailed protection against discrimination in education

under international human rights law. This is particularly interesting considering CADE entered into force before the Covenant or Convention, yet both provide regressive protections in terms of non-discrimination. Building on the principle of non-discrimination identified under Article 2(2) of ICESCR,[27] the CRC adds two grounds for non-discrimination not found in the Covenant, including ethnic origin and disability.[28] However, both fail to include "economic condition or birth," as noted in CADE; Article 1 identifies discrimination as:

> any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular:
>
> a. of depriving any person or group of persons of access to education of any type or at any level;
> b. of limiting any person or group of persons to education of an inferior standard;
> c. subject to the provisions of Article 2 of this Convention, of establishing or maintaining separate educational systems or institutions for persons or groups of persons; or
> d. of inflicting on any person or group of persons conditions which are incompatible with the dignity of man.[29]

Under CADE, education "includes access to education, the standard and quality of education, and the conditions under which it is given" at all levels.[30] In other words, the right to education applies irrespective of group membership, including nationality of the child or parents. Article 24 of the CPRD fortifies the principle of non-discrimination in education found in CADE specifically in relation to those with a disability. Calling for inclusive education, the Convention requires States to provide reasonable

levels of accommodation and individualized support to foster full inclusion.[31] These protections are reaffirmed under Article 24 of the *International Convention on the Rights of Persons with Disabilities*.[32]

The same right to education outlined above extends to youth who are in detention. Over the course of nearly three decades, the language adopted by the United Nations (UN) setting out the standards on the right to education for children in detention remains unchanged. The *1990 UN Rules for Juveniles Deprived of Their Liberty* (hereinafter "The Rules") expressly state that all children of compulsory school age must have access to education, preferably provided outside of the detention facility and, if that is not an option, to be instructed by a qualified teacher as a minimum. This is a position shared by the UNHCR who in 1999 reported that "during detention, children have a right to education which should optimally take place outside the detention premises in order to facilitate the continuation of their education upon release. Provision should be made for their recreation and play, which is essential to a child's mental development and will alleviate stress and trauma."[33] This position is reaffirmed under the UNHCR Detention Guidelines of 2012, stating that "asylum-seekers should have access to education and/or vocational training, as appropriate to the length of their stay. Children, regardless of their status or length of stay, have a right to access at least primary education. Preferably, children should be educated offsite in local schools."[34] The Rules stress the importance of providing special attention to "juveniles of foreign origin or with particular cultural or ethnic needs,"[35] as well at those with cognitive or learning difficulties.

Options for continuing education for youth above the compulsory school age should likewise be available, along with vocational training of the youth's choosing.[36] While access to a library is interpreted in the context of a State's level of development under ICESCR, the Rules call for every detention facility to provide access to a library with instructional and recreational resources.[37] Finally, if certification is earned during detention, the detention facility should in no way be reflected on educational certificates.[38]

Having identified the scope and meaning of the right to education under international human rights law, let us explore Australia's treatment of refugees generally before turning to Australia's obligations towards refugee

children. Whereas the number of refugees arriving in Australia by boat has plummeted with the reintroduction of offshore processing sites in 2012, Australia once boasted a "significant and sustained record of support for the UNHCR, the acceptance of refugee and humanitarian settlers to the country, and the provision of special services to support those settlers in adjusting to life in Australia."[39] Australia has resettled over 800,000 refugees since 1945, and continues to allocate approximately 13,750 places to refugees per year, arranged through the Office of the High Commissioner for Refugees (UNHCR).[40]

Grappling with a growing influx of refugees arriving by boat from near non-existent figures in 2008 to over 20,000 above its annual allocation in 2013, the State imposed practices intended to deter asylum seekers from irregular entry.[41] According to the Australian Human Rights Commission, "asylum seekers who arrived in Australia by boat following the federal election on 7 September 2013 were sent offshore, many within 48 hours as per the new Coalition Government's policy."[42] Amnesty International has expressed concerns that "all asylum seekers who arrive by boat are either sent back to their country of departure (including by boat "turnbacks" at sea)" in violation of the principle of *non-refoulement* "or are transferred to offshore immigration detention centres"[43] in Papua New Guinea and the Republic of Nauru. With the institution of unwavering policies refusing resettlement and indiscriminately detaining asylum seekers who arrive irregularly by boat, the number of boat arrivals plummeted in 2014.[44] Though one could infer substandard conditions for those arriving irregularly had a deterrent effect, the drop in numbers is directly attributable to Australia's Navy vigilantly "guarding" the coast by turning back boats carrying asylum seekers.[45] No official statistics are available on the number of deaths occurring at sea as a result of this practice.

Australia has accepted or ratified numerous international human rights treaties containing provisions on the right to education, including the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), the *International Convention on the Rights of the Child* (CRC), and the *International Convention against Discrimination in Education* (CADE). Despite these legally binding commitments, its record of upholding the right to education for asylum seeking children is dismal, particularly for those who are unaccompanied and find themselves detained

in offshore facilities. Papua New Guinea and the Republic of Nauru both have agreements to accept the transfer of asylum seekers arriving in Australia irregularly by boat and detain them in regional processing centres pending a determination of their refugee status, each of which is detailed below.

4. Refugees Detained on Papua New Guinea (Manus Island)

While to some Manus Island is a tourist destination resembling paradise, the Lombrum naval base on adjacent Los Negros Island (commonly lumped together with Manus Island)[46] doubles as a prison for asylum seekers. This section addresses the legality of offshore detention centres, rather than the right to education for asylum seeking youth, as the Manus detention facilities are reserved for single adult men who arrived in Australia irregularly by boat.[47] Discussing the situation at Lombrum will help inform the reader about Australia's offshore detention facilities generally and provide context for offshore detention facilities in the Republic of Nauru where asylum seeking children are held and denied basic rights, including access to education.

Although Australia and Papua New Guinea (PNG) have ratified the *1951 Convention relating to the Status of Refugees* (hereinafter "Refugee Convention"), the latter has made a number of reservations, including to "Article 17(1) (wage earning employment); Article 21 (housing); Article 22(1) (public education); Article 26 (freedom of movement); Article 31 (non-penalisation of refugees for illegal entry or stay); Article 32 (expulsion) and Article 34 (naturalization)."[48] Such reservations are manifestly "incompatible with the object and purpose of the treaty" and thus prohibited by the *Vienna Convention on the Laws of Treaties* of 1969, but were permissible when Papua New Guinea advanced them in 1951 and remain in effect due to the principle of non-retroactivity.[49] It is likely Australia identified Papua New Guinea as a destination to transfer asylum seekers arriving irregularly to circumvent its obligations not to expel a refugee,[50] penalize asylum seekers who arrive irregularly,[51] and/or discriminate in the application of Convention protections.[52]

Upon arrival in PNG, asylum seekers are automatically detained pending a review of their applications for refugee status, many of whom have reported neglect and abuse by security guards during their detention.[53]

Following a mission to Manus Island in 2013, the UNHCR found that the detention of asylum seekers awaiting determination of their refugee status reaches the gravity of arbitrary detention. The UNHCR reported:

> The current PNG policy and practice of detaining all asylum-seekers at the closed Centre, on a mandatory and indefinite basis without an assessment as to the necessity and proportionality of the purpose of such detention in the individual case, and without being brought promptly before a judicial or other independent authority amounts to arbitrary detention that is inconsistent with international human rights law.[54]

While the Government of Australia at no point conceded to its policies and practices amounting to arbitrary detention, the PNG Supreme Court ruled that "the detention of the asylum seekers on Manus Island in Papua New Guinea…is unconstitutional and illegal."[55] The Court called on the governments of PNG and Australia to "take all steps necessary to cease and prevent the continued unconstitutional and illegal detention of the asylum seekers or transferees at the relocation centre on Manus Island and the continued breach of the asylum seekers or transferees [sic] Constitutional and human rights."[56] The Court's rationale for reaching this decision points to a violation of PNG's Constitution, which provides that "no person shall be arbitrarily deprived of his liberty." A legitimate limitation of liberty to prevent "unlawful entry of a person" or to effect the "expulsion, extradition or other lawful removal of a person" from the country does not apply to asylum seekers detained without access to judicial review. Importantly, the Supreme Court further clarified that a memorandum of understanding (MOU) between Australia and PNG does not nullify or diminish the rights of asylum seekers.[57] In a subsequent ruling issued less than a year later, the Supreme Court accepted that asylum seekers were no longer being arbitrarily detained,[58] as they were permitted to leave the Lombrum naval base during the day, though living conditions remain strikingly similar and their movements continue to be subject to restrictions.[59]

Following the initial decision, law firm Slater and Gordon launched a class action civil suit against the Australian government on behalf of 1905

individuals who were arbitrarily detained on Manus Island, amounting to the largest immigration detention class action in history. Whether the Australian government exercises *de facto* control over the detention facilities rests at the heart of the case.[60] If affirmative, this may impact Australia's policies and practices on the transfer and detention of asylum seekers to the remaining offshore detention centres. Regardless of whether this complex case is successful, hundreds of thousands of documents relating to treatment of asylum seekers within the detention facilities will be reviewed and made public. It has the potential to reveal information vital to ending the practice of offshore detention altogether. In addition, although this is a civil case, it does not preclude the courts from laying criminal charges against those contracted to provide services who are implicated in the physical and psychological abuse of detainees.

Not only are asylum seekers being arbitrarily detained and treated inhumanely, the process for refugee status determination (RSD) is unclear and untimely, calling the fairness of assessments into question. Since the first cohort of asylum seekers arrived on Manus Island in November 2012, PNG had not rendered a single decision until months after a riot had erupted in one of its regional processing centres.[61] Though the PNG government has since issued convoluted guidelines regarding the RSD process, there is no review mechanism in place after the Minister has made a final determination.[62]

Additionally, the criteria for denying refugee status to an applicant extends beyond that provided under the *Refugee Convention*. Under the Convention, a State may legitimately reject a claim even when the applicant meets the definition of a refugee if he or she "has committed a crime against peace, a war crime or a crime against humanity,"[63] a "serious non-political crime"[64] or an act "contrary to the purposes and principles of the United Nations."[65] Papua New Guinea extends these limitations to prevent granting refugee status to anyone who "has, during the period of his or her residency at the regional processing centre anywhere or within Papua New Guinea, exhibited a demeanor incompatible with a person of good character and standing."[66] Good character and standing is an abstract concept and the process for arriving at a determination of whether this threshold has been met is arbitrary. The PNG government has a vested interest in ascribing a

broad definition to exclude as many applicants as possible, as those granted refugee status may remain in PNG or be resettled.

In the meantime, the government of Australia is offering asylum seekers pending RSD review and those whose claims have been rejected substantial financial incentives, some up to $20,000,[67] to return voluntarily. If this pressure is wrongly applied to those with legitimate refugee claims who were not properly assessed, returning them to their country of origin where they face well-founded fear of persecution violates the *Refugee Convention's* most fundamental tenant—the principle of *non-refoulement* – which is non-derogable, regardless of circumstance. Under the Convention

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.[68]

In other words, a State party to the *Refugee Convention* is prohibited from returning a refugee to the country from which they are fleeing a well-founded fear of persecution.

What this payment further demonstrates is that the Australian government has funds available to meet the basic human rights of asylum seekers, yet instead allocates funds toward preventing their entry, transferring them to offsite detention centres, and paying off foreign nations to keep them there, or outright attempts to send them home. This trend is mirrored in the treatment of asylum seekers detained in the Republic of Nauru.

5. Children in Detention on the Republic of Nauru

With an area of 21 square kilometers inhabited by approximately 10,000 people, Nauru is the smallest independent republic in the world.[69] Following its independence from Germany in 1968, it enjoyed one of the highest GDPs per capita, preceded only by Saudi Arabia, due to its abundance of phosphate. Less than half a century later, the source of its

wealth is depleted, leaving behind soil unsuitable for agriculture or much else. The Republic of Nauru's situation causes it to rely heavily on aid and support from other countries, rendering it susceptible to manipulation.[70]

Similar to its MOU with Papua New Guinea to transfer asylum seekers arriving by boat to the Manus Island detention facility, Australia entered into an MOU with the Republic of Nauru.[71] This MOU provides that Nauru will agree to accept "transferees" from Australia who have been intercepted at sea or have arrived via irregular means,[72] provided Australia incurs all costs.[73] As of January 2017, the DIBP reported 380 individuals were held in immigration detention in the Republic of Nauru, 45 of whom are children.[74]

The *Refugee Convention* opposes restricting the movement of refugees unless necessary, and only until regularized as residents or upon admission to another country.[75] Affirming this principle, the UNHCR holds that:

> the detention of asylum-seekers is… inherently undesirable. This is even more so in the case of vulnerable groups such as single women, children, unaccompanied minors and those with special medical or psychological needs. Freedom from arbitrary detention is a fundamental human right and the use of detention is, in many instances, contrary to the norms and principles of international law.[76]

Given "well-documented deleterious effects of detention on children's well-being, including on their physical and mental development,"[77] detention should only be employed in exceptional circumstances "as a measure of last resort and for the shortest period of time."[78] Every reasonable effort should be made to prevent the detention of children for reasons related to immigration or irregular entry into a country, and it should never be used as an option for children who are unaccompanied. According to the CRC, "the best interests of the child shall be a primary consideration" guiding all action taken "by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies,"[79] including in regard to finding alternatives to immigration detention. Alternative measures should be exercised unless no other option

is available. If other options are not pragmatic, then the child's living arrangements while in detention should be optimal, making every effort to meet the best interests of the child.

Though the Supreme Court of Papua New Guinea ruled that detaining asylum seekers pending a determination of refugee status amounted to arbitrary detention, that decision has no bearing on the detention facility in Nauru. Even so, pressure mounts as a number of international and national human rights experts have called on Australia to put an end to human rights abuses against those detained. Noting "that conditions of detention and offshore processing do immense damage to physical and mental health," the UNHCR called for "refugees and asylum seekers [to be] immediately moved to humane conditions with adequate support and services."[80] This plea followed the self-immolation of two refugees on Nauru, one fatal and the other causing serious burns. These incidents are part of a larger pattern of self-harm among detainees.[81] Among over 2,000 incident reports filed at the immigration detention centre on Nauru, known as the Nauru files, are "seven reports of sexual assault of children, 59 reports of assault on children, 30 of self-harm involving children and 159 of threatened self-harm involving children."[82] The issue of inhumane conditions at these offshore detention centres is known to the Australian government and its failure to denounce the substandard treatment of asylum seekers connotes not only complacency, but adoption of this practice as a matter of policy.[83]

Rather than ensuring the basic needs and human rights of asylum seekers are met, the Australian government works indefatigably to conceal further evidence of broken human rights obligations from surfacing. Despite the Senate Select Committee's recommendation to "increase transparency of conditions and operations…by ensuring the provision of reasonable access…as necessary, by the Australian Human Rights Commission and by the media,"[84] the Government of Australia has tightened the muzzle on Nauru by banning Facebook and smartphones with cameras at the detention facility.[85] The Australian and Nauruan governments are attempting to crack down on future reports regarding the wellbeing of those detained on Nauru, including by requiring media outlets to apply for a visa at a non-refundable cost of $8,500 in order to gain access to the Island, effectively limiting reporting to Australian television program *A Current Affair* and the Australian newspaper.[86] Another measure put in place to silence reporting

on human rights abuses against asylum seekers and refugees on Nauru is imposing a two-year prison sentence on detention facility workers who speak to members of the media about treatment of detainees as per the *Australian Border Force Act 2015*.[87]

Facing ongoing vilification of its inhumane practices by national and international human rights organizations and bodies, Australia continues investing inordinate funds into the maintenance of offshore sites. In 2014-15 alone, the Government spent the equivalent of $314 million (US) on the Nauru facility, amounting to just under $350,000 per person.[88] Australia has committed a further $40 million to Cambodia to resettle refugees from Nauru Island.[89] Though settling in Cambodia appears to be the sole avenue for refugees to leave Nauru, only six refugees have been settled in Cambodia at the time of writing, two thirds of whom have returned to their home countries saying "they felt unsafe and abandoned by officials."[90] An additional couple is being considered for admission to Cambodia. Given the amount of compensation promised to Cambodia, resettlement figures are negligible.

Yet, juxtaposed with excessive spending to cover the cost of detention, little is being invested into essential services mandated by the *1951 Refugee Convention*, including the right to education under Article 22. School life expectancy from primary to tertiary education in Nauru is only nine years, compared with 20 years for men and 21 for women in Australia.[91] In 2013, Australia ranked second in the Human Development Index indicator for education, whereas Nauru is starkly contrasted at 191th or 5th worst globally.

From 2014 to 2015, English language teacher Tracey Donehue was employed at the Nauru Regional Processing Centre. She told Australian television program *Four Corners* that "the majority of refugee and asylum seeker children on Nauru are not getting an education"[92] – a direct violation of Article 13(2)(a) of ICESCR and Article 28(1)(a) of the CRC, though it should be noted Nauru is only bound by the latter. Now more than ever, asylum seekers face barriers in accessing the right to education on offshore detention centres. While Australia's record for education consistently and significantly surpasses that of Nauru, it is important to note that children's access to education in immigration detention from mid-2013 until October 2015 was markedly better than at the time of writing. During this period,

Save the Children Australia provided "educational and child welfare services" including "formal education programmes in a classroom on site… coupled with extracurricular activities."[93] Save the Children also provided "recreation, child protection and welfare services" to asylum seekers.[94] The fact that an Australian-funded organization provided educational services in an offshore detention centre signifies acknowledgement of responsibility later reneged when education was contracted out to Broadspectrum, a private business formerly known as Transfield Services Ltd.

What is most troubling is that the Australian government disregarded multiple accusations of human rights abuses against asylum seekers by Transfield Services Ltd. Claims of physical and sexual abuse by non-profit organization No Business in Abuse were enough to cause investors to divest in the company,[95] and lead to a corporate name change to Broadspectrum. Instead of investigating serious allegations regarding the inhumane treatment of asylum seekers by Broadspectrum, the Australian government awarded the company an education contract, placing them in a position of authority over the defenceless group they are accused of victimizing. Education is meant to be "linked directly to the realization of the child's human dignity and rights;"[96] the Australian government is failing these children on every front.

Rather than investigating Transfield Services / Broadspectrum, the Australian government went after Save the Children—a reputable international non-governmental organization dedicated to advancing the best interests of the child through its programs on "rights and protection, health and nutrition, clean water, education, sustainable livelihoods, emergency relief and survival."[97] In the month Broadspectrum was awarded the contract, Nauruan police raided Save the Children's offices in the presence of Australian Border Force officers. Phones and computers were confiscated.[98]

The previous year, ten Save the Children employees were deported from Nauru after being accused of coaching children to fabricate stories of abuse and leaking confidential information about the detention centres.[99] All ten Save the Children employees were later cleared.[100] Former Immigration Minister Scott Morrison argued "If people want to be political activists, that's their choice but they don't get to do it on the taxpayers' dollar and working in a sensitive place like Nauru."[101] The present author contends

that if the Australian government is concerned about using tax payer's money effectively, it should revisit its allocation of $9.6 billion over three years towards deterring asylum seekers from arriving by boat[102] – "a figure higher than the UNHCR's total *global* budget for programs" in 2016."[103] The use of public funds at issue compounds the importance of ensuring they are not used to perpetrate human rights abuses against children, and if such egregious action has taken place, to expose it and hold those responsible accountable at once.

Asylum seekers have voiced concerns to the UNHCR regarding the impact of deteriorating mental health on their capacity to undertake educational activities, coupled with inadequate learning facilities.[104] Here too, the experience of asylum seeking children demonstrates the antithesis of the Committee on the Right of the Child's vision of education to "empower the child by developing his or her skills, learning and other capacities, human dignity, self-esteem and self-confidence."[105] These factors are amplified by the absence of qualified, caring staff trained to provide educational services to this already marginalized group. Following the withdrawal of Save the Children's contract, the provision of education to asylum seekers declined. An additional 800 refugees who live on Nauru in the community "face serious security risks and have inadequate access to healthcare, educational and employment opportunities."[106]

As part of a National Inquiry into Children in Immigration Detention, the Australian Human Rights Commission (AHRC) issued a report addressing the realization of the right to education on Nauru Island and Christmas Island, a part of Australian territory located 1,500 kilometers off the mainland. According to the report, primary school children on Nauru Island received "4 hours of class time within Offshore Processing Centre 3,"[107] but it is unclear how frequently this occurs each week. Even if four hours of class time are provided each weekday, this is still significantly below the number of hours children spend in class in Australia where children are generally in school from 9:00 a.m. to 3:30 p.m. on weekdays. In addition to fewer hours of class time, the "environment in detention is not conducive to learning on Nauru"[108] due to inadequate facilities. According to Save the Children employees, there were "high noise levels, not enough chairs…lack of air conditioning", 45 to 60 degree Celsius

temperatures, and inadequate access to "books, lesson plans, [and] writing implements".[109]

At the time of the report, there was a pilot program to send children to schools in Nauru. The AHRC indicated that "high school students studying at Nauruan schools are faring better and exhibited improved mental health and wellbeing;" however, the criteria used to reach this conclusion are unclear. This assertion is contradicted by protests from children and families following a move to close the on-site school in the Regional Processing Centre in mid-2015. Parents indicated that "this is the only good thing that we have on this island, this is the only thing that we look forward to, and as a consequence, taking that away from us means that we have nothing now, we have no hope, we have no future, we don't know what's happening."[110] "Improved mental health and wellbeing" is further inconsistent with the Commission's own assertions that there are "no classrooms, furniture or resources at Nauruan schools to support additional children from the Regional Processing Centres."[111]

In a country strategy paper on the Government of Nauru, the European Community identified low "teaching and learning standards," with truancy rates as high as 60%.[112] Truancy among asylum seekers and refugees at primary and secondary school levels is even greater, climbing from just 10% in the detention centre's now closed school to 85% or higher in Nauruan schools.[113] Even if students attend primary and secondary education and do well, "post-secondary vocational training does not exist and success rates for tertiary studies through the University of South Pacific (USP) Centre averages 10%,"[114] contravening Article 28(c) of the CRC calling for progressively free higher education. If the intention is not for asylum seeker and refugee children to remain on Nauru Island in the long-term, their chances of maintaining an adequate standard of living elsewhere plummet without adequate access to education. Quality of education for asylum seeking and refugee children also suffers because of the range in abilities among students. A teacher on Nauru indicated:

> because there is such a wide diversity of what level of education the students have enjoyed previously, it can at times be challenging to cater for everyone… I teach a group of

> students aged 14 to 18, most of whom are beginners in English and may be illiterate.[115]

Again, the evidence presented runs counter to international human rights laws and standards. The Committee has made clear that:

> …the curriculum must be of direct relevance to the child's social, cultural, environment and economic context and to his or her present and future needs and take full account of the child's evolving capacities; teaching methods should be tailored to the different needs of different children.[116]

Asylum seeking children represent a group of persons who are limited "to education of an inferior standard"[117] in violation of the CADE's non-discrimination in education provision. In its most recent concluding observations on Nauru's country report, the Committee on the Rights of the Child expressed deep concern at the "persistent discrimination against asylum seeking and refugee children in all areas, in particular with regard to access to water, sanitation, education, health care and adequate housing."[118]

Since the Regional Processing Centre school was closed, asylum seeking and refugee children say they are afraid to attend school on Nauru due to bullying, threats, sexual harassment, and violence. The Committee further acknowledged "refugee and asylum seeking children do not have adequate access to full-time education and those who initially attend school tend to drop out quickly owing to verbal and physical abuse from their peers and teachers."[119] In a similar vein, Save the Children reported "bullying, racism and widespread tensions between the refugee and Nauruan communities."[120] One five year old asylum seeker was surrounded by older Nauruan boys who all urinated on him. Another asylum seeker reported being offered sex in exchange for money by a classmate.[121] Are students learning to "make well-balanced decisions; to resolve conflicts in a non-violent manner; and to develop a healthy lifestyle, good social relationships…which give children the tools needed to pursue their options in life"?[122] The right to education for asylum seeking children in detention is not adequately available, acceptable, accessible or adaptable by any measure, as required under general comment 13 of the CESCR.

Though responsible for asylum seekers being sent from Australia to Nauru Island and being detained there, officials at the Department of Immigration and Border Protection (DIBP) deflect accountability by stating "school governance arrangements were a matter for the Nauruan government."[123] This approach ignores the underlying issue: "no child should be transferred from Australia to Nauru."[124]

Unfortunately, the High Court of Australia disagreed in a judgment rendered on whether Australia's transfer of asylum seekers to and financial support for offshore detention centres is legal. The plaintiff challenged the legal validity of her transfer to and detention on Nauru, arguing it was "funded, authorised, caused, procured and effectively controlled by… the Commonwealth."[125] Her claim was similar to that of 267 asylum seekers who had been detained on Nauru, but were temporarily transferred to the Australian mainland to seek medical treatment; this includes 37 infants born in Australia. In response, the judges ruled that retrospective amendment 198AHA under the *Migration Amendment Regional Arrangements Processing Bill 2015* withstood legal scrutiny. The amendment bestows the Commonwealth with the authority to:

> (a) take, or cause to be taken, any action in relation to the arrangement or the regional processing functions of the country;
> (b) make payments, or cause payments to be made, in relation to the arrangement or the regional processing functions of the country;
> (c) do anything else that is incidental or conducive to the taking of such action or the making of such payments.[126]

The amendment clarifies that action includes "exercising restraint over the liberty of a person…in a regional processing country or another country."[127] In addition to upholding the legality of this controversial amendment, the High Court further held that it is beyond the scope of their competency to determine whether actions taken by the Nauruan government contravene the Nauruan constitution. Disconcertingly, the majority opinion only mentions the *1951 Convention relating to the Status*

of Refugees and *Convention on the Rights of the Child* in a footnote of the dissenting judgment regarding the parameters of offshore processing. This omission suggests Australia's international human rights obligations were entirely omitted by the majority when considering the facts of the case and arriving at its decision. The birth of the plaintiff's daughter on the Australian mainland did not appear to factor into the court's decision, and was only mentioned once tangentially in setting out the facts of the case.

It is worth noting that days before the High Court delivered its judgment, the Australian and Nauruan governments opened the detention facility, allowing those detained to move freely on the island to negate the argument of arbitrary detention, similar to the approach used by Papua New Guinea to satisfy the Supreme Court's ruling regarding the unconstitutionality of such practices.[128] However, for reasons described above, asylum seekers fear leaving the facility due to the risk of threats, intimidation, and physical and sexual abuse. Although free of ongoing permanent detention in the immigration facility, strict curfews and monitoring continue to be imposed on asylum seekers.[129]

The High Court's decision was met with widespread opposition from civil society, human rights organizations, and the UN. Civil society promptly launched a public campaign using the hashtag #LetThemStay. Five of six premiers voiced their support for asylum seekers to remain in Australian communities, and ten church leaders offered sanctuary to those facing deportation.[130] These efforts were complemented by an open letter to Prime Minister Turnbull from a coalition of human rights organizations, calling for the closure of offshore detention camps:

> Successive Australian governments have managed and funded offshore detention camps on Manus Island and Nauru. The people detained there are clearly Australia's responsibility. This situation has reached crisis point, and immediate action must be taken… Many of these people have been recognised as refugees… We are calling on both major parties to form a bipartisan commitment to immediately evacuate the camps and bring these people to safety.[131]

The Committee on the Rights of the Child, which monitors State adherence to obligations under the CRC, indicated "This decision by the High Court greatly concerns us as these children and their families face a great risk in being sent to a place that cannot be considered safe nor adequate."[132] The Committee likewise called on the Australian government to recognize its duty under CRC Article 3(1) to maintain the best interests of the child as a primary consideration "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies." Rupert Coleville, Spokesperson for the High Commissioner for Human Rights, echoed this concern, stating that "children, regardless of their legal status, have the right to be treated as children first and foremost, and urge Australia to ensure that the principle of the best interests of the child takes precedence over migration management or administrative considerations."[133] Coleville pointed to "inadequate systems for child protection, education or social welfare"[134] that undermine multiple rights set out under the CRC, all circling back to the primacy of the best interests of the child.

Australia is the only country in the world operating offshore detention facilities where asylum seekers are transferred and detained. As such, there is a no comparable situation to look to to assess the legality of policies and practices employed or for workable solutions. Given the legal complexities and political motivations behind offshore detention centres, there are no quick or easy solutions for asylum seeking children transferred from Australia and detained in Nauru.

Since the depletion of its phosphate mines and a spat of poor investments, aggravated by government corruption, citizens of the Republic of Nauru have faced a steep decline in the standard of living over the last several decades. When the Regional Processing Centre was established in 2001, an influx of asylum seekers created jobs for locals, increased consumption of goods, and helped to support local businesses in a time of economic turmoil. "By 2007, revenues generated by the processing centre amounted to around a fifth of the country's GDP."[135] Its economy increasingly centres on the Regional Processing Centre and funding provided by Australia through the MOU. Consequently, Nauru faces enormous pressure to continue accepting asylum seekers from Australia

and has no incentive to ensure their treatment and living conditions are humane and respect international human rights standards.

The situation is legally complex, as the treatment of asylum seekers rests on an agreement between two sovereign nations with varying human rights obligations. Unlike Australia, Nauru is not a state party to the *International Covenant on Economic, Social and Cultural Rights* and has only signed (and not ratified) the *International Covenant on Civil and Political Rights*.[136] This means the UN treaty bodies corresponding with each instrument, intended to monitor state compliance with the provision contained therein, are powerless to review the situation in Nauru or issue legally binding recommendations. Nauru is likewise not subject to the strongest protections against discrimination in education based on protected grounds as set out under the *International Convention on Discrimination in Education*, given that it has not ratified the Convention. Though there is no corresponding treaty body for this instrument, it is still disconcerting to find an absence of international legal obligations.

What is promising, however, is that Nauru is a party to the *Convention on the Rights of the Child*, and thus must report to the Committee on the Rights of the Child on an ongoing basis. The Committee issues legally binding recommendations to Nauru, as it did in its October 2016 report. With regard to the right to education, the Committee recommended that Nauru:

> (a) Further strengthen its efforts to improve access to quality education for all children, including preschool, secondary and higher education;
>
> (b) Develop programmes, along with monitoring and evaluation of such programmes, to reduce dropout rates;
>
> (c) Ensure the full enjoyment of the right to education by asylum-seeking children on an equal basis with all other children in the country;

> (d) Establish campaigns within schools to prevent bullying and violence against all children.[137]

Prima facie, these recommendations represent a positive step forward, but a closer look reveals that they are not particularly forceful. For instance, language such as "further strengthen its efforts" is ambiguous and unmeasurable. How does one then determine the degree to which Nauru has implemented it? Secondly, given how high dropout rates are for students in Nauru, as detailed earlier in this paper, a slight reduction would still represent a position far below global standards. Another superfluous recommendation is the provision of education to asylum seeking children on the same basis as other children in the country. Yes, providing the same level of education to children in detention as those who are not detained is the standard provided for under international human rights law, but this disregards how low the standard of education is in Nauru compared to that of Australia. Finally, campaigns to reduce bullying within schools and to counter hate speech (found in the set of recommendations below) will not have a significant impact without addressing larger systemic causes of racism, discrimination and xenophobia against asylum seekers across the Island nation.

In terms of the protection of asylum-seeking and refugee children, the Committee urged Nauru to *immediately*:

> (a) Ensure that the best interests of the child are a primary consideration in all decisions and agreements in relation to the transfer of any asylum-seeking or refugee children from Australia;
> (b) Process cases involving unaccompanied asylum-seeking and refugee children in a positive, humane and expeditious manner…;
> (c) Prioritize immediate transfer of asylum-seeking children and their families out of the Regional Processing Centre, adopt permanent and sustainable resettlement options for refugees, particularly

> children and their families, to ensure that they are given lawful stay and reasonable access to employment and other opportunities;
> (d) Facilitate access to the asylum system for children in need of international protection…;
> (e) Develop comprehensive referral and case management frameworks for services to children, including in the fields of physical and mental health services, education and the police and justice sectors…;
> (f) Develop campaigns to counter hate speech against asylum seekers and refugees, particularly children…[138]

The first of these recommendations is based on a false premise. How can the forcible transfer of a child from Australia to Nauru be in their best interests? Based on countless reports of abuse and neglect and the impact it has on the wellbeing of children, use of the word "transfer" is euphemistic and stands in direct opposition to protecting the best interests of the child.

Whereas "positive, humane and expeditious" processing of claims for asylum and facilitated "access to the asylum system" are indeed useful, no recommendation is made regarding the fact that unaccompanied children have no one to advocate on their behalf and likely are unaware of the scope of their rights or how to bring them to effect. If the Minister of DIBP is their *de facto* guardian and likewise bears responsibility for the determination of refugee status, there is a clear conflict of interest.

Adopting "permanent and sustainable resettlement options" is the most potentially impactful of the recommendations provided; however, this is not something Nauru can accomplish without support from other States and it is a process with which Australia should take the lead by resettling refugees in its mainland or pursuing resettlement options with other countries. An option for asylum seekers whose refugee claims for status are recognized may be a refugee swap between Australia and the United States (US). In exchange for resettling 1,250 refugees from Manus Island and

Nauru in the US, Australia would resettle refugees from Central America.[139] At the time of writing, no MOU is available, and it remains to be seen whether such an exchange would take place with any success.[140] If the rationale for refusing to provide refuge for asylum seekers arriving irregularly is to deter smugglers, announcing a deal of this nature may have the opposite effect with smugglers marketing a chance to move to the US to groups fleeing persecution.[141]

Regrettably, there is no enforcement mechanism in place to ensure Nauru (or any other UN member state) follows through with the recommendations it receives from any UN treaty body, including the Committee on the Rights of the Child. The recommendations are, however, considered authoritative and prompt continual evaluation and reflection of the human rights situation in a State party. It would not be surprising to see many of the recommendations outlined above mirrored in the Committee's next report in 2020 due to inaction and lack of implementation.

Nauru also ratified the *1951 Refugee Convention* and its *1967 Protocol* in 2011 and is thus obliged to provide protections to asylum seekers, including upholding the principles of *non-refoulement*, non-discrimination and non-penalization. Again, there is no enforcement mechanism to investigate, document, assess or enforce compliance. The most reviewing States can do this pose recommendations to Nauru during its Universal Periodic Review, which Nauru has the discretion to reject. During its second cycle of review, Nauru received 120 recommendations, with 8.5% addressing the situation of asylum seekers and refugees; of these, only two recommendations were accepted. All others were "noted", conveying no official position on part of Nauru to implement those recommendations. Referring to the "noted" recommendations *en masse*, Nauru released a separate report to the Human Rights Council in March 2016 positing that the government already satisfies those recommendations. According to Nauru, examples of recommendations already implemented,[142] include calls to, *inter alia*:

> Take immediate measures to improve the physical conditions and security situation in detention and processing centres for asylum seekers, especially for women and children.

> Invest in finding timely, adequate and durable solutions for refugees (Germany);[143]
>
> Review the regional resettlement arrangement with a view to ending or reforming the offshore processing and offshore detention of asylum seekers; and to release asylum seekers from detention while their claims are being processed, priority being given to releasing children and families as soon as possible; and, in the interim, to provide adequate safeguards for the detainees in detention, including providing reasonable standards of security and hygiene (Kenya);[144]
>
> Ensure that minors have access to education in a safe environment in line with its obligations under the Convention on the Rights of the Child and other international human rights instruments (Ireland).[145]

Based on the evidence relied on this paper drawn from reports prepared by Human Rights Watch, Amnesty International, the Australian Human Rights Commission, the Kaldor Centre, the United Nations High Commissioner for Refugees and other reputable entities, these recommendations are not being met. Rather than Universal Periodic Review acting as a platform to enhance protection of human rights at the ground level, Nauru is using it as a vehicle for denial.

Another option for addressing the situation of asylum seekers rests with the UN Special Procedures (UNSP) of the Human Rights Council, which can be either country-specific or thematic. At present, there are 12 country mandates chosen by the Human Rights Council, and Nauru is not one of them. Directly applicable UNSP thematic mandates include the Special Rapporteur on the Rights of Migrants, the Working Group on Arbitrary Detention, and Special Rapporteur on the Right to Education.[146]

UNSPs investigate a human rights issue, report on abuses, and put forward non-binding recommendations. UNSPs also have the ability to enter a country to investigate the human rights situation, subject to

agreement from the State concerned. Though the above UNSPs could intervene, it is unlikely the Republic of Nauru would admit a Special Rapporteur or Working Group into its territory in light of the restrictions it places on freedom of speech and access to information. If Nauru were to admit independent experts, it would likely supress the publication of resultant reporting, as it did following a visit by the Sub-Committee on Prevention of Torture in 2015.

To date, the Working Group on arbitrary detention has never conducted a country visit to Nauru, and although the Special Rapporteur on migrants recently reported on the situation in Nauru, it only mentions arbitrary detention once. This is a cross-cutting issues Special Procedures should work to address. When it comes to the right to education for asylum seeking children on Nauru, this is not something that appears to be on the agenda of the Special Rapporteur on the right to education, though the mandate holder published a report on the right to education for migrants generally in 2010.

The road to prevention and accountability is through recognizing Australia's direct culpability for the abuses of asylum seekers in the Republic of Nauru. Challenges associated with the force of UN human rights monitoring mechanisms mentioned above would extend to Australia, albeit the State recognizes the competence of the Committee on Economic, Social and Cultural Rights, adding a layer of public scrutiny to their practices related to education.

Mirroring recommendations advanced by the Committee on the Rights of the Child to Nauru, treaty body recommendations directed to Australia are relatively weak. For instance, the Committee on the Rights of the Child has called for Australia to "reconsider its policy of detaining children who are asylum-seeking refugees and/or irregular migrants; and, ensure that if immigration detention is imposed, it is subject to time limits and judicial review."[147] The Committee then calls on Australia to "ensure that its migration and asylum legislation and procedures have the best interests of the child as the primary consideration."[148] If Australia merely needs to *reconsider* its policy, it could theoretically just think about advancing change it has no intention to implement and still be seen to have satisfied the recommendation. Secondly, how can the best interests of the child be advanced when placed in detention for no reason other than seeking asylum from persecution as per their right? Further, there is no mention of services

necessary to uphold the best interests of the child provided to asylum seeking and refugee children in offshore detention, such as the right to education. Though education is addressed in the report, it is done with regard to identifying inequities between Aboriginal and non-Aboriginal children.[149]

Promisingly, the Committee did urge Australia to:

> adhere to its High Court ruling in Plaintiff M70/2011 v. Minister of Immigration and Citizenship, and, inter alia, ensure adequate legal protections for asylum seekers and conclusively abandon its attempted policy of so-called "offshore processing" of asylum claims and "refugee swaps"…[150]

A similar recommendation was advanced by the Committee on Economic, Social and Cultural Rights to repeal "the mandatory immigration detention system…"[151] Again, recommendations regarding education focus primarily on the disparity in levels between indigenous and non-indigenous children as well as those with disabilities. The Committee on the Rights of the Child issued its legally binding recommendations in 2012, three years after the Committee on Economic, Social and Cultural Rights advanced its report in 2009. Australia has had ample opportunity to implement their contents, yet continues its practice of offshore detention as of five years later. Disregard of the Committee's more action-oriented, directive recommendations illustrates how States who violate their international human rights obligations and are held to account by the treaty bodies can choose to ignore recommendations and carry on with behaviour vilified by applicable monitoring mechanisms.

6. Accountability without Enforcement?

Due to the limitations of international human rights monitoring and enforcement mechanisms, compounded by the principle of State sovereignty, not much else can be done on a regional or international level regarding the protection of the best interests of the child, including the right to education under the existing international framework. In addition, the Inter-American, African and European regions have regional human rights courts; however, there is none for the Asian region, which would have

included Nauru, while a regional court for the continent of Australia would be moot. The force and impact of pursuing these options as long-term workable solutions are thus limited and must be coupled with alternate strategies to prevent future human rights abuses, expose past violations, and hold perpetrators accountable.

When looking to options for securing accountability, Nauru and Australia can be held accountable for perpetrating crimes against humanity against asylum seekers and refugees, as both have ratified the *Rome Statute of the International Criminal Court* and are subject to its jurisdiction. This is an avenue being pursued by a multitude of lawyers and academics in a communication submitted to the Court alleging the following acts of crimes against humanity under the Statute:

a) Australian officials and their agents knowingly imprisoned a civilian population in contravention of the fundamental rules of international law within the meaning of Article 7(1) (e)[152]
b) Australia and its agents tortured refugees and asylum seekers within the meaning of Article 7(1)(f)[153]
c) Australian government officials and their agents knowingly committed other inhuman acts within the meaning of Article 7(1)(k)[154]
d) Australian officials and their agents committed the crime of deportation within the meaning of Article 7(1)(d)[155]
e) Australian officials and their agents committed the crime of persecution within the meaning of Article 7(1)(h)[156]

Through an international human rights law lens, the allegations are well-founded and supported by ample evidence. Should the case proceed for investigation and charges be laid against those accused, the charges could reasonably result in convictions. Sadly, the crimes against humanity committed against asylum seekers and refugees are "competing" against all other crimes against humanity, war crimes and genocides around the world

for the attention of an office with limited resources. Prosecutor of the International Criminal Court Fatou Bensouda has been more pro-active and less politically selective than her predecessor Luis Ocampo, but resource limitations remain, cases are necessarily time consuming, and unfortunately few have resulted in convictions as compared to the international criminal tribunals.

Aiming to overcome these challenges, the seventeen experts advancing the Communication crafted the "most comprehensive submission on crimes against humanity outside the context of war,"[157] distinguishing it from the countless other submissions for the Prosecutor's consideration. Scholars such as Kalpouzos and Mann have advocated for the International Criminal Court to shift from exclusively pursuing cases of "radical evil" to also include "banal crimes against humanity…rooted in the social and economic inequalities of the international system."[158] Kalpouzos and Mann point to the situation of asylum seekers in Greece, though this stream of logic can be extended to the treatment of asylum seekers in offshore detention.

To be clear, the International Criminal Court only has jurisdiction over the most grave human rights violations, including war crimes, crimes against humanity, genocide and crimes of aggression. Violation of the right to education is not something the Prosecutor would investigate. However, exposing documented crimes against humanity in Australia's offshore detention centres could result in their closure or the development of alternate strategies that would likewise address gaps in the provision of the right to education. To illustrate this point, if the Court found crimes against humanity were taking place against asylum seekers in offshore detention sites, the Australian government could respond by transferring asylum seekers and refugees to the mainland where youth would receive a level of education comparable to non-asylum seeking children.

As the wealthier, more powerful country driving the offshore agreement, Australia has greater capacity and ability to instill change than Nauru, but lacks will. Australia's policies and practices are politically motivated and will continue in this direction until its populace mobilizes opposition by shifting from emotionally-charged prejudices towards a logical consideration of the facts. There are four primary reasons why someone may support transfer of asylum seekers to offshore detention centres.

The first is economic based on the presumption refugees will sink the economy by draining resources due to a reliance on social services. In reality, billions of taxpayers' money is being directed towards deterring asylum seekers from arriving by boat by implementing practices that refuse them admission to the Australian mainland. Revisiting the figure that Australia has spent more money detaining asylum seekers in Nauru over a three year period than the annual UNHCR budget demonstrates gross overspending. Detention is not necessary, save for the most exceptional circumstances and when employed should be periodically reviewed. A fraction of that cost could be used to instead integrate asylum seekers into temporary residencies in the community in Australia pending a review of their applications for refugee status. The provision of essential services, such as access to the right to water, food, housing, and education, as required by the *Refugee Convention* and other applicable international human rights instruments, would likewise fall well below this inordinate benchmark. In addition, community integration would help stimulate the economy by increasing demand for goods and services, generating employment opportunities in these sectors.

Another justification for the use of offshore detention centres is to preserve the cultural integrity of the Australian mainland. This argument ignores the colonial history of Australia; only 15.8% of its population of approximately 23 million people is of indigenous ancestry.[159] In other words, preserving Australia's existing cultural integrity is predicated on the destruction of its previous cultural composition and upholding that of successive generations of predominantly white, Christian immigrants. Even if we set this ethnocentric paradigm aside, permitting all asylum seekers currently residing in Papua New Guinea's Manus Island and the Republic of Nauru to live on the Australian mainland would not make an insignificant impact on the overall demographics of the country, which would increase merely by 0.00005%.[160] The change in demographics would be so negligible, it would be difficult to register any impact on existing cultures and ways of life in Australia.

If it is not about money or preserving Australian culture, those who support mandatory transfer and offshore detention may argue such practices are necessary to maintain peace and security. A 2016 study conducted by the Australian National University found that an overwhelming 70% of

Australians feared a rise in Islamic terrorism, with eight in ten Australians agree[ing] that current border control policies are necessary to protect the country from Islamist extremism and terrorism."[161] With the majority of those seeking refuge in Australia identifying as Muslim,[162] members of the public who fear a rise in terrorism may make the misinformed assumption that offshore centres will lower this risk, reflected by 80% of respondents indicating that they "either 'strongly agree' or 'agree' that current [border protection] policies are necessary."[163] Over the course of two decades, four people died and three were injured as a result of terrorism in Australia, exemplifying a low threat to personal safety.[164] When it comes to more direct threats to personal safety or property, "asylum seekers living in the community on bridging visas are about 45 times less likely to be charged with a crime than members of the general public."[165] In short, public fear of threats to security is divorced from reality.

Finally, support may rely on humanitarian grounds, contending that turning boats away will decrease the occurrence of human smugglers exploiting asylum seekers and thus prevent deaths at sea. Human smuggling is characterized by financial or material gain from procuring "illegal entry or residence of a person into a country (of which that person is not a national or permanent resident)."[166] It is distinct from human trafficking, though the two terms can overlap, based on the voluntary nature or willingness to be smuggled and the absence of exploitation present in trafficking.[167] Though human smuggling takes place via sea and air in Australia, the former requires a less onerous degree of sophistication in terms of securing false documentation and is thus pursued more frequently, yet carries significantly higher risk of death. Between 2001 and 2012 alone, the Australian government reported 964 deaths at sea.[168] Curiously, government figures are unavailable for deaths at sea since Australia instituted its policy of boat turnbacks as a deterrent mechanism, meaning there is no systematic way to determine whether this dangerous practice is effective at achieving its aims. Challenging this position, *The Conversation's* expert panel on asylum seekers has called for Australia to

> …reject deterrence as the governing framework as being both unethical in relation to persecuted people and unworkable in relation to discouraging an illicit market in

> irregular migration. It must recognise that the continual increase in border security measures can enhance the likelihood of death for the most vulnerable groups, including women and children.[169]

Alternative measures could be pursued, such as developing coordinated regional strategies with other Commonwealth countries to meet an international challenge with an international response, with Australia assuming primary responsibility for refugees from the Asia Pacific region. In this vein, opportunities for asylum seekers to arrive via regular means and apply for refugee status are a more attractive option than a life-threatening journey by sea, removing the need to resort to human smuggling. Pursuing these options provides Australia with an avenue for meeting its international human rights obligations, along with a source for sustaining its immigrant-dependent population without imposing an unmanageable strain on its resources.

Despite misinformed arguments in favour of offshore detention centres, there is widespread opposition to the transfer, detention and treatment of asylum seekers. In 2016, a poll by the Australia Institute revealed that 63% of 1,400 respondents opposed offshore detention and believed those with valid refugee claims should be settled in Australia. Respondents were likewise against restrictions imposed on freedom of speech and access to information when preventing medical personnel from disclosing the nature of conditions in offshore detention centres.[170] Disregarding the will of those they are elected to represent, both dominant political parties in Australia – the ruling Liberal-National Coalition and the opposition Labour Party – adopt similar policies towards the treatment of refugees, including turnbacks at sea and offshore detention. Given the unlikelihood of a fringe political party with differing policies and practices on this issue to become the ruling party, members of the public who oppose these practices must unite with relevant stakeholders to continue to place pressure on government. Political and economic interests do not negate Australia's responsibilities under international human rights law. Rather than allocating an inordinate amount of public funds towards deterrence, imprisonment, and oppression of vulnerable asylum seeking children, the Australian government should redirect that money to meeting its

international human rights obligations, including the right to education and other fundamental rights inextricably linked with the primacy of the best interests of the child.

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