

Keynote Speech to the

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Dr. Alice Jill Edwards

UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

“Outward-Inward Misalignment? Australia’s Place and Performance in the Global Struggle Against Torture”

*Check against delivery*

**Introduction**

Ladies and gentlemen,

It is a true honour to be joining you at Australia’s preeminent human rights conference organised by the Castan Centre for Human Rights, a platform for meaningful dialogue on crucial national and global matters. I am grateful to Melissa Castan for the kind invitation and to all of you for your participation today.

I acknowledge the Traditional Custodians of the land and their Elders past and present. I also pay my respects to Aboriginal and Torres Strait Islander peoples attending today.

Ladies and Gentlemen,

I am speaking to you at a particularly dangerous time in world affairs. There are more conflicts in the world than at any time since 1945, and multilateral affairs are split and heavy. The unlawful armed attack by Russia into the territory of Ukraine suggests an existential crisis for the United Nations, which was built as a forum of diplomacy to prevent such threats to international peace and security, and to protect our rights. The escalation in that conflict – and lack of resolution - is a big red mark. As the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, I have observed a corresponding rise in torture and other violence being perpetrated in many places. I have observed torture and other cruel treatment in the conflicts in Haiti, Mali, Sudan, Yemen and elsewhere. I’m particularly concerned by the prevalence of allegations of sexual violence. I recently sent inquiries to the Russian Federation regarding information I have received which appears to show a consistent pattern – and potentially state authorization - of torture by Russian military forces.

Elsewhere we see police violence, sometimes fatal, fuelled by a dangerous mix of heavily armed and technologically equipped police and increasing mobilisation of social movements. Incidents have taken place in Chad, France, Iran, Kazakstan, Nicaragua, Peru, Senegal, Tajikistan, and so on. Deaths at the hands of police in a number of countries, including in the United States of America, continue to raise alarm and call for a review of police leadership, recruitment, training and responsibilities. The demands on police in some countries – including in Australia - to respond to call-outs for mental health emergencies have resulted in what appear to be unnecessary fatalities and serious injuries to persons with mental illness or dementia.

The growing rate of incarceration in many parts of the world is also pre-occupying for my mandate, for which I will be dedicating my next report to the UN Human Rights Council.

In this era of conflict and upheaval what can those of us who respect human rights do?

Turning now to Australia specifically, I wanted to today investigate further into Australia’s record on prohibiting and preventing torture and other ill-treatment, at home and abroad. Australia has long cast itself in the role as a good international citizen.

So as a starting point, let’s ask what makes a country a good international citizen?

Gareth Evans, former Australian Foreign Minister – and one-time candidate for UN Secretary General – described the concept involving a moral imperative based on our common humanity. Evans identifies three key returns that come with being a good international citizen. First, it provides an opportunity for progress on global and regional issues that require collective international action, even if they may not directly impact a nation’s security or economic interests. Second, it fosters reciprocity, creating a collaborative environment where countries are more willing to help one another. And finally, being a good international citizen enhances a nation’s reputation, attracting investment, trade, and partnerships based on trust and shared values. The last of course, a self-interested perspective that is part of the real politik.

To assess a country's record as a good international citizen, Evans proposed four benchmarks: foreign aid generosity, response to human rights violations, reaction to conflict and mass atrocities, and contribution to addressing global existential threats.[[1]](#footnote-1)

From my perspective, there is an additional criterion, such that being a good international citizen requires an internal and external alignment of commitments. That means, concretely, that when a State undertakes human rights obligations - which are accepted voluntarily through agreements with other States yet also applicable domestically – there should not be a mismatch between words and deeds.

International standards set benchmarks against which States can assess their own performance as well as the performance of other countries. Participating in international fora – for example through the Universal Periodic Review - requires a degree of self-reflection and self-awareness, it requires humility and admission when fault is found, and it also involves participation by also calling out wrong-doing by other governments and offering technical assistance as needed. Failures at home lead to a loss of credibility and standing abroad. People in glass houses, and all that …

Only when both of those aspects are fulfilled – the internal and external – can one gain the title of being a good international citizen.

Ladies and gentlemen,

The prohibition of torture is an *erga omnes* norm, belonging to a select group of international human rights that are owed to humanity as a whole. The prohibition of torture is a foundational principle upon which democratic societies are based, it forms part of the social contract for which in return for granting powers to govern, individuals are left to live freely and without interference, intimidation or fear of the state. The associated obligation to take all necessary measures to prevent torture and other ill-treatment demands more than mere rhetoric and promises. It requires legislation, regulations, procedures, training and capacity building, education and information, disciplinary measures, criminal proceedings, and practical action.

So, how does Australia fare against these benchmarks? Is the country living up to the principles of being a good international citizen vis-a-vis its obligation to prohibit and prevent torture and other ill treatment?

**External Facing International Commitments**

Let me turn to Australia's external-facing international commitments. In general, Australia presents as a strong participant and supporter of human rights.

Australia's contributions to UN agencies and programs reflect its commitment to international humanitarian efforts and willingness to support initiatives aimed at protecting and improving the lives of vulnerable populations around the world. In 2021, Australia contributed approximately 1.2 billion Australian dollars to the UN system in assessed, voluntary, and other contributions, making it the 16th largest donor globally.[[2]](#footnote-2) It is the 12th largest contributor to UN peacekeeping efforts.[[3]](#footnote-3) As of May 2023, Australia was serving in three different peacekeeping missions.[[4]](#footnote-4)

Australia is a party to almost all the main human rights treaties, including the Convention Against Torture and its Optional Protocol, as well as the International Covenant on Civil and Political Rights, and the 1951 Convention relating to the Status of Refugees[[5]](#footnote-5) – and was many times, actively involved in their drafting. Australia generally reports to the treaty monitoring bodies on time. And it is a sponsor of many resolutions. The country served on the Human Rights Council from 2018-2020 and was an original member of the International Court of Justice, having ratified the statute in 1945. Judge Hilary Charlesworth, replaced James Crawford, two eminent Australian jurists and Australia has had a continuous presence on the Court since 2014.

Australia is also active in the International Criminal Court. Australia was the Chair of the Like-Minded Group in negotiating the Rome Statute. It has helped States to ratify and implement the Rome Statute and was a lead advocate for the adoption of the crime of aggression.[[6]](#footnote-6)

Several Australians fulfil roles on the treaty bodies and special procedures. As mentioned by Melissa, I am the first Australian to occupy the position of Special Rapporteur on Torture which is the second oldest of all independent expert positions.

It is clear that Australia is an outward supporter of human rights, no matter the government of the day, and plays a constructive role, in international bodies alongside other countries. In my many prior positions to this one, when engaging at the diplomatic level, I have always found Australia’s diplomats to be highly skilled, articulate and helpful. There is a general commitment to ensure that international standards do not drop below previously agreed upon levels; and at times Australia has demonstrated leadership on specific global challenges.

However, like other states, it does not enjoy – and sometimes does not accept – criticisms by UN entities or from other countries.

**Internal Domestic Arrangements**

That is a good segue to turn to three particular areas touching on the international prohibition against torture albeit looked at from the perspective of Australia's domestic front. I will touch on three specific areas: First, Australia’s record of domestic prosecution for international crimes including torture; Second, its treatment of refugees and asylum-seekers; and third, its framework or lack of, in relation to independent inspection bodies as part of Australia’s obligation to the Optional Protocol to the Convention against Torture.

1. Domestic prosecution for international crimes

In my role as the UN’s lead expert on tackling torture I see the scale and extent of torture crimes being perpetrated by – and being ignored by – States every day, and everywhere. For this reason, one of my priorities as Special rapporteur and the subject of my most recent report to the UN Human Rights Council, in March this year, I focused on the duty to investigate crimes of torture at the domestic level. It is my opinion that only through national prosecutions can the cycle of impunity – the antithesis of accountable government – be broken. For too long, the burden of achieving justice has been pushed onto overloaded and inherently limited international courts and tribunals. Important as they are, international courts cannot be a substitute for national prosecutions. For investigating torture nationally is not only aimed at successfully establishing criminal liability in a handful of cases, it is also, and importantly, about healing for survivors and their devastated communities, about reforming accused arms of the state, and about re-establishing the State’s lost legitimacy.

Australia is one of 108 countries worldwide that has enacted an explicit crime of torture in its national law. Section 274 of the Commonwealth Criminal Code Act 1995 mirrors the definition in the Convention against Torture, with one notable exception that any crimes committed overseas require the consent of the Attorney General. A crime of torture is not simultaneously found in all state criminal codes, and I would encourage those affected states to rectify this deficit.

In 2002, the Commonwealth Parliament passed the International Criminal Court (Consequential Amendments) Act 2002 (Cth) to amend the Criminal Code Act 1995 (Cth) (‘Criminal Code’) in order to incorporate international crimes recognised by the International Criminal Court (‘ICC’) into Australian law (namely war crimes, crimes against humanity and genocide) of which torture belongs.

With the exception of the trial of 807 Japanese troops at the conclusion of World War II and the (unsuccessful) trial of three ex-Nazis in the early 1990s, Australia has had a poor record of prosecuting persons for international crimes.[[7]](#footnote-7)

In terms of universal jurisdiction, Australia does have provisions in the Criminal Code that allow for the prosecution of international crimes committed anywhere in the world. However, the decision to exercise such jurisdiction requires the consent of the Attorney-General, and there is a lack of clear guidelines guiding his decision, which raises concerns about accountability and potential future accusations of politicization of decision-making in regards to particular cases.

Elsewhere in the world, more countries than ever before are seeing the utility of universal jurisdiction as a way to ensure that torturers and other war criminals do not evade justice by hiding out in other countries. At the beginning of 2023, US President Joe Biden signed into law the Justice for Victims of War Crimes Act, opening the door in the US to investigations of war crimes committed overseas, even in cases where neither the accused nor the victims are US citizens. Following my report to the Human Rights Council, Denmark sent a bill on international crimes to parliament.

In May this year, France's highest court ruled that the country could try foreign suspects under the universal jurisdiction principle, greenlighting inquiries into two Syrians accused of war crimes and crimes against humanity. A German court in Koblenz has convicted a suspect in relation to the grotesque violence perpetrated against Yazidi women and girls in Iraq.

Meanwhile, Canada and The Netherlands this year instituted proceedings before the International Court of Justice against Syria, for failing to implement the Convention against Torture – a pathway to a form of inter-state justice for victims via article 30(1) of the Convention against Torture. This is only the second time this has been attempted in the ICJ’s history.

War crimes of torture are not limited to foreign perpetrators. And frankly, only when states are able to prosecute their own citizens for crimes will justice be fully done.

Recent revelations of war crimes committed by Australian soldiers in Afghanistan may have shocked Australia, but I’m sure they did not shock Afghans. The Brereton Report, released in November 2020, recommended investigations into war crimes committed by Australian soldiers. Defamation proceedings brought and lost by Ben Roberts-Smith reinforces the view that there are cases to answer. So far, however, I’m disappointed that only one soldier has been charged.

The failure to hold public officials responsible for their actions sends a distressing message, undermining the very foundations of justice and perpetuating a culture of impunity including in the Australian case of armed services.

I call on Australia to take immediate action to investigate, prosecute, and provide reparations to the victims of these grave human rights violations.

1. Treatment of refugees

Moving now to Australia’s record on refugees. Australia, as a liberal democracy, stands out not for its presence but for its absence of a human rights act or a constitutional charter of rights. The dualist approach to treaty implementation requires incorporation into domestic legislation for international obligations to hold domestic legal force. While some states, notably Victoria, Queensland, and the Australian Capital Territory, have their own human rights acts, these acts do not apply to the Commonwealth government, including federal officials involved in running immigration and refugee and security detention centres.

I have long campaigned for the end to the policy of indefinite detention for asylum seekers and refugees. Now, as Special Rapporteur on torture, I am speaking out against prolonged and unreviewable detention as enduring degrading or inhumane punishment, or even psychological torture. The Committee Against Torture has expressed similar concerns regarding Australia's mandatory immigration detention, including the detention of children, overcrowding, inadequate healthcare, restrictions on access to social services, high rates of mental health problems among detainees, and reports of excessive use of force and physical restraint. The Committee has emphasized the need for Australia to implement its international human rights obligations fully and provide sufficient safeguards against arbitrary detention. A range of cases have been brought before the UN’s Working Group on Arbitrary Detention.

The use of regional processing arrangements in Papua New Guinea and Nauru, has drawn criticism from many international bodies over the years. They have been found to establish harsh and dangerous conditions.

Recent developments have shown some progress. The implementation of the "Medevac law" in 2019 provided a legislative pathway for refugees and asylum seekers in offshore detention to be transferred to Australia for urgent medical care.

Latest reports are not clear, but I understand that all asylum seekers have been now evacuated from Nauru, although I’m disappointed to learn that the government still plans on keeping Nauru open as a deterrent. What we know is that dissuasive policies such as these are in violation of obligations under the Convention against Torture.

You may have seen that only this week the United Kingdom passed its Illegal Migration Bill, which foresees a similar “stop the boats” regime to Australia – with the plan to send irregular migrants and asylum-seekers to the African landlocked country of Rwanda. Already the courts are clogged with affected cases. Just last month the Court of Appeal deemed the policy unlawful. The United Kingdom should learn from the Australia’s experience – that such these arrangements, as you know too well, lead to long term heartache for refugees, and enduring headaches for policy makers and operators, and eventually need to come to an end.

Other onshore concerns involve a lack of adequate safeguards for detainees with an adverse character finding or security assessment to meaningfully challenge their detention. And while the Federal Court may have ruled that the practice of detaining refugees and other unlawful noncitizens in hotels is within the bounds of Australian migration law[[8]](#footnote-8), I am here to tell you that long-term detention – or conditions not suitable to the length of stay – rub up against the obligations not to mistreat persons deprived of their liberty. As of April 2023, I’m informed that there are still over 1100 people held in immigration detention facilities. A welcomed positive is that there are no longer any children in these facilities, as I understand it.

Over a decade ago I was commissioned by UNHCR to prepare a study on alternatives to immigration detention – in which I visited Melbourne and classed the commendable work being done there that allowed refugees and asylum seekers to live in the community, as world leading. I was always confused by how a country with such effective programmes that had very low absconding rates could simultaneously have no-entry policies and such a harsh detention regime.[[9]](#footnote-9)

Refugees are humans too. And not just that, 30-40% of refugees are estimated to be victims and survivors of torture. Many more are secondary witnesses of it. With the ending of refugees on Nauru, it is high time for the government to revaluate its approach. Will the Government’s proposed Human Rights Act include a right to seek and enjoy asylum from persecution, mirroring article 14 of the Universal Declaration of Human Rights? I wonder.

1. Independent inspection of places of detention and the Optional Protocol to the Convention against Torture

Finally, I turn to the last area that I wanted to touch on today. As I’ve already mentioned, signing up to international treaties is one thing. But such acts are only meaningful when accompanied by direct implementation. The struggles of a few Australian states to establish national preventive mechanisms as per obligations under the Optional Protocol to the Convention against Torture, ratified by Australia in 2017, has been widely reported.

Just to clarify for those not familiar, NPMs are independent visiting bodies established at the domestic level, with the goal to prevent torture and other ill treatment in places where persons are deprived of their liberty – and to make recommendations with a view to improving conditions and procedures. The Optional Protocol also establishes an international Sub-Committee which visits states and makes unannounced visits to any place of detention. It carries out 8-10 country visits per year.

Even with various extensions, Australia has yet to complete its implementation of this one aspect of the Protocol. I congratulate those states that have, in fact, established their NPMs – The Commonwealth itself, as well as ACT, WA, NT, Tasmania. For other states, you have to wonder what they have to hide?

Australia signs international treaties all the time – as I started with saying it is party to most of the core global human rights treaties. Never before have I seen such a standoff between the federal and state governments over a human rights norm of such international significance.

A blow to Australia’s international reputation, the visit by the Sub-Committee in February this year was suspended whilst it was still in progress for what they describe as a “lack of cooperation”.[[10]](#footnote-10) They called out Australia for violating a procedural obligation of the Convention. When I refer to suspension, what that means in reality is that the four esteemed independent experts of the SPT left Australia without completing their mission. Since then, the Sub-Committee has decided to declare the visit a total cancellation. This is another strike against Australia’s international reputation. As a cancelled visit, Australia is now alone alongside … ah the irony of it … Rwanda, the country where the United Kingdom is planning to send its asylum-seekers.

There are many issues in Australia’s prisons and detention network too. Too many to mention in this speech. But they point out the importance of monitoring as a preventive dimension and in particular, I do want to mention a few areas, in particular, abuses that continue to occur at juvenile detention centres.

At Don Dale youth detention, there were reports of children being strapped to chairs and hooded, gassed in isolation cells and hogged tied by officers. At the Ashley centre, the commission of inquiry heard evidence that a former worker for whom the government paid compensation to his alleged physical and sexual abuse victims continued to work in Ashley for another decade. This is deeply troubling especially in light of the fact that the age of criminal responsibility across Australian states is set extremely low – age 10.

The use of spit hoods on children – now banned by the Australian Federal Police – are completely unacceptable and breach children’s rights under the Convention on the Rights of the Child and I consider spit hoods to be inherently degrading in violation of the Convention against Torture. Efforts shall be taken for police and other authorities to protect their staff, rather than hood the prisoners.

The high number of children in detention, both on remand and after sentencing, is also deeply concerning. This is especially so in light of the fact that in 2022, the government released statistics showing that over half of all young people in detention were Aboriginal or Torres Strait Islander people.

Overrepresentation of Indigenous people exists also in the general prisoner population. They account for 28% of the prisoner population in Australia, while making up just 3.3% of the general population.

Over-policing and subsequent higher arrest rates experienced by Indigenous communities contribute to their overrepresentation in the criminal justice system. Since the Royal Commission report on Aboriginal Deaths in Custody was released in 1991, it is a tragedy of unspeakable proportions that over 500 Indigenous people have died in custody.

All of these very serious issues would benefit from regular visits by independent state and federal visiting bodies and an occasional visit by the UN Sub-Committee. These visits are intended to prevent such violations which are caused by the concentration of power in the hands of prison officials and very few. And yet, here we are with a number of Australian states waiting to set up these vital bodies.

**Conclusion**

Let me conclude by saying that Australia – like all countries – must reconcile what it does on domestic soil with what it says on the international stage. Every country must be firmly committed to transparency in the pursuit of extinguishing torture. Ending torture is a worldwide goal, yet it cannot be achieved until every country plays their part and also addresses challenges at home.

To be a good international citizen, one must do more than throw stones at other states from inside the glass house, while hiding behind the sofa and pulling down the blinds, despite the wind and rain pouring in. Instead Australia must engage meaningfully and maturely at home and abroad, – that means reflecting on criticism, accepting shortcomings, building stronger, safer and more integrated communities based on human rights, and looking after our most vulnerable members.

END

1. Evans, Gareth. “Multilateral Engagement and Good International Citizenship. Keynote Address to Monash Model UN Conference 2021, Monash International Affairs Society”. 27 September 2021. <https://www.gevans.org/speeches/Speech734.html> [↑](#footnote-ref-1)
2. <https://unsceb.org/fs-revenue-government-donor> [↑](#footnote-ref-2)
3. <https://www.dfat.gov.au/international-relations/international-organisations/un/united-nations-un> or <https://unsceb.org/fs-revenue-government-donor> [↑](#footnote-ref-3)
4. <https://peacekeeping.un.org/en/troop-and-police-contributors> [↑](#footnote-ref-4)
5. These include the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention relating to the Status of Refugees, the Convention on the Rights of the Child (CRC), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the Convention on the Rights of Persons with Disabilities (CRPD). [↑](#footnote-ref-5)
6. <https://www.dfat.gov.au/international-relations/international-organisations/un/international-law> [↑](#footnote-ref-6)
7. Hood, Anna, and Cormier, Monique. “Prosecuting International Crimes in Australia: The Case of the Sri Lankan President”. Melbourne Journal of International Law, 13(1), (2012): 1-31. <https://law.unimelb.edu.au/__data/assets/pdf_file/0010/1687249/Hood-and-Cormier.pdf> [↑](#footnote-ref-7)
8. *Azimitabar v. Commonwealth of Australia*, [2023] FCA 760 (6 July 2023) [↑](#footnote-ref-8)
9. Edwards, Alice. “Legal and Protection Policy Research Series. Back to Basics: The Right to Liberty and Security of Person and ‘Alternatives to Detention’ of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants”. April 2011. <https://www.refworld.org/pdfid/4dc935fd2.pdf> [↑](#footnote-ref-9)
10. <https://www.ohchr.org/en/press-releases/2022/10/un-torture-prevention-body-suspends-visit-australia-citing-lack-co-operation> [↑](#footnote-ref-10)