



UNHCR

United Nations High Commissioner for Refugees

Haut Commissariat des Nations Unies pour les réfugiés

Submission by the Office of the United Nations High Commissioner for Refugees to the Senate Select Committee on the Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Centre in Nauru

EXECUTIVE SUMMARY

UNHCR is of the view that:

- As a matter of international law, the physical transfer of asylum-seekers from Australia to Nauru does not extinguish Australia's legal responsibility for the protection of asylum-seekers, refugees or stateless persons affected by the transfer arrangements.
- Each of Australia and Nauru has responsibility to ensure that the treatment of all transferred asylum-seekers, refugees or stateless persons to Nauru is fully compatible with their respective obligations under the 1951 Convention and other applicable international instruments.
- Australia has a duty of care to all asylum-seekers, refugees and stateless persons transferred to Nauru, which requires that appropriate legal and procedural safeguards are in place to ensure that each individual is protected from harm.
- The transfer arrangement, viewed as a whole, raises serious concerns about Australia's fulfilment of its obligations under international refugee law, human rights law and the terms of the MOU.

I. INTRODUCTION

1. The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to provide a submission to the *Senate Select Committee on the recent Allegations relating to Conditions and Circumstance at the Regional Processing Centre in Nauru* (Committee).

II. UNHCR'S STANDING TO COMMENT

2. Australia is a party to the *1951 Convention relating to the Status of Refugees* and its *1967 Protocol relating to the Status of Refugees* (together, the 1951 Convention).¹
3. UNHCR makes this submission pursuant to its supervisory role established by Article 35 of the 1951 Convention and the *1950 Statute of the Office of the United Nations High Commissioner for Refugees*.²

¹ The term '1951 Refugee Convention' is used to refer to the *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, [1954] ATS 5 (entered into force for Australia 22 April 1954) as applied in accordance with the *Protocol Relating to the Status of Refugees*, opened for signature on 31 January 1967, [1973] ATS 37 (entered into force for Australia 13 December 1973).

² UN General Assembly, Resolution 428 (V), *Statute of the Office of the United Nations High Commissioner for Refugees* (1950), Annex.

4. UNHCR's submission addresses the following two matters that the Committee is examining as part of its inquiry into the responsibilities of Australia in connection with the management and operation of the offshore processing centre in Nauru³ (Centre):
 - a) Australia's duty of care obligations and responsibilities with respect to the Centre (see part III below)⁴;
 - b) Australia's fulfilment of its obligations under the *Memorandum of Understanding between The Republic of Nauru and the Commonwealth of Australia relating to the transfer to and assessment of persons in Nauru, cost and related issues* Centre entered into bilaterally with the Government of Nauru on 4 August 2013 (MOU)⁵ (see part IV below).⁶

III. THE AUSTRALIAN GOVERNMENT'S DUTY OF CARE OBLIGATIONS AND RESPONSIBILITIES

5. The Governments of Nauru and Australia signed the *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues* on 29 August 2012 (2012 MOU) to allow for the transfer from Australia to Nauru of asylum-seekers who had arrived by sea to Australia without prior authorization, to have their asylum claims assessed in accordance with Nauruan law.
6. Subsequently, the Government of Australia announced on 19 July 2013 that any asylum-seeker who arrived by sea on or after 19 July 2013 without prior authorization would not be settled in Australia if found to be a refugee. As a consequence, the Australian and Nauruan Governments signed the MOU to supersede the 2012 MOU. Under the MOU, Nauru undertakes to enable individuals found to be in need of international protection to settle in Nauru, "subject to agreement between the Participants on arrangements and numbers."⁷
7. The MOU contains commitments on the part of Nauru in relation to *non-refoulement* obligations under international refugee law and international human rights law.⁸ Nauru commits to making a refugee status assessment or permitting such an assessment to be made.⁹ The Governments jointly commit to treating asylum-seekers with dignity and

³ Note, the offshore processing centre is referred to as the "Regional Processing Centre" by Nauruan officials, but it often referred to as the "Offshore Processing Centre" by Australia officials. UNHCR prefers to adopt the latter as it reflects more appropriately the current arrangements.

⁴ See the Committee's Terms of Reference 1. c. available at

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Role_of_the_Committee

⁵ See *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Nauru, and related issues*, 3 August 2013, available at: <https://www.dfat.gov.au/geo/nauru/nauru-mou-20130803.pdf>.

⁶ See the Committee's Terms of Reference 1. a. available at

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regional_processing_Nauru/Role_of_the_Committee

⁷ See *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Nauru, and related issues*, 3 August 2013, Clause 12, available at: <https://www.dfat.gov.au/geo/nauru/nauru-mou-20130803.pdf>.

⁸ See *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Nauru, and related issues*, 3 August 2013, Clause 19, available at:

<https://www.dfat.gov.au/geo/nauru/nauru-mou-20130803.pdf>.

⁹ See *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Nauru, and related issues*, 3 August 2013, Clause 19, available at:

<https://www.dfat.gov.au/geo/nauru/nauru-mou-20130803.pdf>.

respect and in accordance with relevant human rights standards.¹⁰ The Governments further commit to developing special arrangements for vulnerable cases, including unaccompanied minors.¹¹

8. UNHCR acknowledges the complex challenges of mixed migration maritime movements faced by States in the region. In particular, UNHCR has long advocated for stronger regional and international cooperation to address mixed migration maritime movements in a way that respects the legitimate concerns of States, but also the individual protection and humanitarian needs of those who resort to dangerous travel by sea.
9. UNHCR's general position is that asylum-seekers and refugees should ordinarily be processed in the territory of the State where they arrive, or which otherwise has jurisdiction over them, which is in line with State practice.¹² The primary responsibility to provide protection rests with the State where asylum is sought.¹³
10. Nonetheless, where bilateral transfer arrangements are implemented between States, the legality and/or appropriateness of those arrangements need to be assessed on a case-by-case basis, subject to their particular modalities and legal provisions. In particular, any transfer arrangement must guarantee that each individual:¹⁴
 - a) is individually assessed as to the appropriateness of the transfer, subject to procedural safeguards, prior to transfer.¹⁵ Pre-transfer assessments are particularly important for vulnerable groups, including unaccompanied and separated children. The best interest of the child must be a primary consideration;¹⁶
 - b) is admitted to the proposed receiving State;
 - c) is protected against *refoulement*;
 - d) has access to fair and efficient procedures for the determination of refugee status and/or other forms of international protection;¹⁷
 - e) is treated in accordance with applicable international refugee and human rights law standards, for example, appropriate reception arrangements; access to health, education and basic services; safeguards against arbitrary detention; identification and assistance of persons with specific needs; and
 - f) if recognised as being in need of international protection, will be able to enjoy asylum and/or access a durable solution within a reasonable time.¹⁸

¹⁰ See *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Nauru, and related issues*, 3 August 2013, Clause 17, available at: <https://www.dfat.gov.au/geo/nauru/nauru-mou-20130803.pdf>.

¹¹ See *Memorandum of Understanding between the Republic of Nauru and the Commonwealth of Australia, relating to the transfer to and assessment of persons in Nauru, and related issues*, 3 August 2013, Clause 18, available at: <https://www.dfat.gov.au/geo/nauru/nauru-mou-20130803.pdf>.

¹² See UN High Commissioner for Refugees (UNHCR), *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, [1]; and UNHCR, *Protection Policy Paper: Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing*, November 2010.

¹³ See UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, [1].

¹⁴ See UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, [3 (vi)].

¹⁵ See, e.g., UN High Commissioner for Refugees, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12

¹⁶ See, e.g., Article 3, Convention on the Rights of the Child, 1577 U.N.T.S 3, entry into force 2 September 1990; UN High Commissioner for Refugees, *UNHCR Guidelines on Determining the Best Interests of the Child*, May 2008, See also, e.g., UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6.

¹⁷ ExCom Conclusion No. 8 (XXVIII) (Determination of Refugee Status) (1977); UN High Commissioner for Refugees, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12,

11. The obligation to ensure such guarantees and conditions are met in practice rests with the transferring State, in this case Australia, prior to entering into such arrangements.¹⁹ It is not sufficient to merely assume that an asylum-seeker, refugee or stateless person will be treated in conformity with these standards.²⁰
12. Under international law, Australia thus continues to have legal responsibility for the protection of those asylum-seekers, refugees and stateless persons who are transferred to Nauru. The extent of such responsibility can be assessed, *inter alia*, against the extent to which reception and/or processing of asylum-seekers is effectively under the control or direction of Australia as the transferring State.²¹ UNHCR has previously observed a high degree of effective control at the Centre, including Australia's financing and appointing of the service providers at the Centre and the numerous Australian Government officials who are present to assist with the management and day-to-day running of the Centre, as well as Australia's close involvement and mentoring of Nauruan officials in respect of refugee status determination (RSD) processing.²²
13. In summary, UNHCR is of the view that the physical transfer of asylum-seekers, refugees and stateless persons from Australia to Nauru does not extinguish the legal responsibility of Australia for their protection.²³
14. Each of Australia and Nauru has responsibility to ensure that the treatment of all transferred asylum-seekers, refugees and stateless persons is fully compatible with its respective obligations under the 1951 Convention and other applicable international instruments.

IV. THE AUSTRALIAN GOVERNMENT'S FULFILMENT OF ITS OBLIGATIONS UNDER THE MOU

15. Following a visit to the Centre by UNHCR between 7-9 October 2013, UNHCR issued a report welcoming some positive developments since earlier missions, but expressed that it was deeply troubled to observe that the policies and procedures in relation to RSD processing, reception conditions and the prospect of realizing a durable solution for refugees did not comply with settled international standards.
16. UNHCR expressed serious concern that the transfer arrangement did not provide a safe and humane environment for asylum-seekers or refugees and that the harsh conditions and lack of privacy, particularly for vulnerable people within the Centre such as women, children and persons with mental and physical health issues, were of grave concern.

¹⁸ See ExCom Conclusion No. 85 (XLIX) (Conclusion on International Protection) (1998), para. (aa); ExCom Conclusion No. 58 (XL) (Problem of Refugees and Asylum-Seekers who move in an irregular manner from a country in which they had already found protection) (1989), para. (f); UNHCR, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002)*, February 2003.

¹⁹ See UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, [3 (viii)].

²⁰ See UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, [3 (viii)]; and UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12; See UN High Commissioner for Refugees, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002)*, February 2003.

²¹ See UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, [4].

²² See UNHCR, *UNHCR monitoring visit to the Republic of Nauru*, 26 November 2013, [4] available at

<http://www.refworld.org/docid/5294a6534.html>

²³ See generally UNHCR, *UNHCR monitoring visit to the Republic of Nauru*, 26 November 2013, available at

<http://www.refworld.org/docid/5294a6534.html>

UNHCR, in assessing the transfer arrangement in totality, observed that it did not comply with international standards and in particular:²⁴

- a) constituted arbitrary detention under international law;
- b) despite a sound legal framework, did not provide a fair, efficient and expeditious system for assessing refugee claims;
- c) did not provide safe and human conditions of treatment in detention; and
- d) did not provide for adequate and timely solutions for refugees.

17. Indeed, UNHCR shared its view, which it maintains, that due to the significant shortcomings at the Centre, no child, whether unaccompanied/separated or accompanied, should be transferred to Nauru from Australia.
18. UNHCR has conducted subsequent visits to the Centre and although there have been some improvements, the harsh conditions, lack of privacy for individuals, uncertainty regarding durable solutions remain largely unchanged.
19. As has been set out above, UNHCR maintains the position that, in the context of bilateral transfer arrangements to Nauru, Australia has a shared responsibility with Nauru to ensure appropriate legal standards are met for individuals transferred to Nauru. Further, UNHCR is of the view that Australia's responsibilities under applicable international instruments to which it is party remain engaged and cannot be extinguished by the physical transfer of asylum-seekers, refugees or stateless persons to Nauru.
20. Indeed, as a matter of international law, Australia is obliged to ensure certain refugee and human rights standards are met under the transfer arrangement, which is referred to in the MOU.
21. UNHCR's view is that the transfer arrangement, viewed as a whole, raises serious concerns about Australia's fulfilment of its obligations under international refugee law, human rights law and the terms of the MOU.

V. CONCLUSION

22. As a matter of international law, the physical transfer of asylum-seekers from Australia to Nauru does not extinguish Australia's legal responsibility for the protection of asylum-seekers, refugees or stateless persons affected by the transfer arrangements.²⁵
23. Each of Australia and Nauru has responsibility to ensure that the treatment of all transferred asylum-seekers, refugees or stateless persons to Nauru is fully compatible with their respective obligations under the 1951 Convention and other applicable international instruments.
24. Australia has a duty of care to all asylum-seekers, refugees and stateless persons transferred to Nauru, which requires that appropriate legal and procedural safeguards are in place to ensure that each individual is protected from harm.

²⁴ See UNHCR, *UNHCR monitoring visit to the Republic of Nauru*, 26 November 2013, available at <http://www.refworld.org/docid/5294a6534.html>

²⁵ See UNHCR, *UNHCR monitoring visit to the Republic of Nauru*, 26 November 2013 available at <http://www.refworld.org/docid/5294a6534.html> and UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013.

25. UNHCR's view is that the transfer arrangement, viewed as a whole, raises serious concerns about Australia's fulfilment of its obligations under international refugee law, human rights law and the terms of the MOU.

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