NATIONS UNIES
LE HAUT COMMISSAIRE
POUR LES RÉFUGIÉS

UNITED NATIONS
THE HIGH COMMISSIONER
FOR REFUGEES

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5 September 2012

Sir, Dear Friend

I have the honour to thank you for your letter of 4 September 2012, seeking UNHCR's views on the possible designation of the Republic of Nauru as a 'regional processing country' and its consideration of what role it might play in Australia's proposed processing arrangements in that country.

My Office fully recognizes the current challenges faced by Australia and other countries in the region in addressing the complex dimensions of the irregular movement of people by sea into and through the South-East Asia region, including towards Australia. We appreciate the many challenges this presents to States in responding to both the security and the humanitarian dimensions of this problem. We share your view that constructive efforts need to be taken, in concert with other similarly affected States in the region, to reduce the tragic loss of so many lives at sea.

Indeed, it has long been UNHCR's view that cooperative approaches in the region, which build and complement effective national asylum procedures and promote responsibility-sharing, can help asylum-seekers and refugees find viable protection options other than through dangerous and exploitative boat journeys. We believe that measures which enhance the quality of protection and improve the availability of solutions for refugees in South-East Asia will serve to expand the 'asylum space' for refugees in those places and reduce the need for onward movements by sea towards Australia, with all the dangers this entails.

In this regard, the creation of the Regional Cooperation Framework (RCF) in March last year, and your efforts, which have led to the setting up of a Regional Support Office (RSO) in Bangkok, are significant and welcome contributions. I am also pleased to note your Government's positive endorsement of the Expert Panel on Asylum-Seekers' recommendations regarding a deeper investment in protection activities in South-East Asia. These will enhance the opportunities for UNHCR, States and other actors, to work together to improve the quality of refugee protection in that region.

Your Government's announcement on 23 August 2012 in which it outlined the increase in Australia's annual Humanitarian Programme to 20,000 places, together with the intention to invest an initial $10 million in capacity-building activities in the region, is also - from UNHCR's perspective - a welcome development. I deeply appreciate Australia's substantial increase in resettlement capacity, which constitutes an important boost globally. I am aware that constructive discussions have already begun on how these generous commitments can be best employed.

The Hon. Chris Bowen MP
Minister for Immigration and Citizenship of Australia

With respect to your specific request for UNHCR's views on the possible designation of Nauru under section 198AB of the Migration Act 1958, they are based on the information available to us at this time and I recognize that many of the important practical aspects of the arrangements are under active discussion between the Governments of Australia and Nauru and have yet to be finalized. For that reason, UNHCR's observations are necessarily general and subject to review as the operational arrangements become clearer.

First, as a general principle, asylum-seekers arriving at the frontier of a Convention State fall within the responsibility of that State, which includes their access to a fair and effective process. This general practice is elaborated in more detail in the policy paper, to which you specifically refer in your letter, concerning maritime interception and the processing of international protection claims. The paper additionally notes that "claims for international protection made by intercepted persons are, in principle, to be processed in procedures within the territory of the intercepting State."

Following the Expert Panel's recommendation, we note your Government's intention to transfer certain asylum-seekers from Australia to Nauru, which is designed as a 'circuit breaker to reduce the current surge in irregular migration to Australia'.

As a significant exception to the normal practice, arrangements to transfer asylum-seekers to another country should normally only be pursued "as part of a burden-sharing arrangement to more fairly distribute responsibilities and enhance available protection space," and involve countries where appropriate protection safeguards are in place. When it comes to the protection safeguards, they should include the following:

- respect for the principle of *non–refoulement*;
- the right to asylum (involving a fair adjudication of claims);
- respect for the principle of family unity and best interests of the child;
- the right to reside lawfully in the territory until a durable solution is found;
- humane reception conditions, including protection against arbitrary detention;
- progressive access to Convention rights and adequate and dignified means of existence, with special emphasis on education, access to health care and a right to employment;
- special procedures for vulnerable individuals with clear pre-transfer assessments by qualified staff (including best interest determinations for children, especially unaccompanied and separated children) and support for victims of torture/trauma or suffering from disabilities (including aged/disabled); and,
- durable solutions for refugees within a reasonable period.

Against the above background, it is not clear from the information available to us that transfer of responsibilities for asylum-seekers to Nauru is fully appropriate. Whilst UNHCR welcomes steps taken by the Government of Nauru to accede to the 1951 Refugee Convention last year, at present, there is no domestic legal framework, nor is there any experience or expertise to undertake the tasks of processing and protecting refugees on the scale and complexity of the arrangements under consideration in Nauru. Barring receipt of information to the contrary, it is difficult to see how Nauru might meet the conditions set out in UNHCR's paper on maritime interception and the processing of international protection claims.

From the language of the Memorandum of Understanding itself, which you attach to your letter, it seems that the common intention is "that all persons entering Nauru...will depart within as short a time as is reasonably necessary...", "that transferees will be treated with dignity and respect and that relevant human rights standards are met", and for "the oversight of practical arrangements required to implement this MOU". These are welcome acknowledgements which go some way to addressing the issue of protection safeguards. This indicates that both Australia and Nauru accept that they have shared and joint legal responsibility for the protection of refugees identified in the processing arrangements under discussion.

However, from the information available to UNHCR at this time, it is not clear how this responsibility will be apportioned between the two contracting States. This is important because all operational and ancillary details will be predicated necessarily on how the question of legal responsibility is framed. In UNHCR's view, it would be prudent for the legal responsibilities of both the transferring and receiving State to be very clearly and unambiguously set out in the formal arrangements, and that oversight mechanisms exist to ensure their full implementation in practice.

This said, we also note the indications received from your officials to the effect that Australia does not see itself as having any legal responsibilities under the Convention after an asylum-seeker has been physically transferred to the territory of Nauru. If, indeed, regardless of the tenor of the MoU, it is the intention of the parties for full legal responsibility to pass to Nauru, it raises questions about whether the aforementioned protection safeguards are in place and in addition, whether Nauru has presently the ability to fulfill its Convention responsibilities. I welcome Australia's undertaking to "provide Nauru with the capacity and resources necessary to ensure Nauru is able to meet its Convention obligations."

The issue of timely durable solutions for refugees needs very careful consideration. In particular, the 'no-advantage' test endorsed by your Government contemplates a time-frame that is assessed against and consistent with the period a refugee might face had s/he been assessed 'by UNHCR within the regional processing arrangement'. The practical implications of this are not fully clear to us. The time it takes for resettlement referrals by UNHCR in South-East Asia or elsewhere may not be a suitable comparator for the period that a Convention State whose protection obligations are engaged should use. Moreover it will be difficult to identify such a period with any accuracy, given that there is no 'average' time for resettlement. UNHCR seeks to resettle on the basis of need and specific categories of vulnerability not on the basis of a 'time spent' formulation. Finally, the 'no advantage' test appears to be based on the longer term aspiration that there are, in fact, effective 'regional processing arrangements' in place. We share this aspiration. However, for the moment, such regional arrangements are very much at their early conceptualization. In this regard, UNHCR would be concerned about any negative impact on recognized refugees who might be required to wait for long periods in remote island locations.

In response to your request for consideration of what role UNHCR might play in the proposed arrangements, I am conscious that a number of important questions still need to be clarified which would inform the degree to which UNHCR might be involved.

Our preliminary view is that the arrangements being contemplated are essentially between two Convention States and that UNHCR would not have any operational or active role to play in their implementation. However, as we have already indicated, UNHCR has a statutory role under Article 35 of the 1951 Refugee Convention which requires the Office to supervise implementation of the Convention by States parties. This role is adaptive to the context of particular situations and we would be pleased to discuss how, in the specific context of the current arrangements, this can be most usefully employed.

Allow me to reiterate my appreciation for the opportunity to provide this advice in relation to the possible designation of Nauru under section 198AB of the Migration Act 1958. My Office remains at your disposal to discuss any of these matters in greater detail, should you find this to be of value. I look forward to continuation of our ongoing positive and very fruitful cooperation on refugee protection, both in your region and globally.

Please accept, Sir, the assurances of my highest consideration.

with my warmest personal regards and deep appreciation

António Guterres