28 February 2026

Mr Gehad Madi
UN Special Rapporteur on the human rights of migrants
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By email: hrc-sr-migrant@un.org

Dear Mr Reid,

CONTRIBUTION TO THE REPORT ON EXTERNALIZATION

Thank you for the opportunity to provide input into your upcoming thematic report on new trends and specific aspects of externalization of migration governance.

I am a Lecturer at the University of New South Wales (UNSW), Sydney and an affiliate and doctoral candidate at the Kaldor Centre for International Refugee Law. I also teach international refugee law and principles of international law at UNSW. Prior to commencing my academic career, I acted as a lawyer representing refugees[1] who had been subjected to Australia's offshore processing system.

This submission builds on my submission of June 2025, using the example of Australia's externalization arrangements with Nauru.[2] The focus is on points 1, 2, 5 and 7 of your call for input. Headings are numbered in line with these points.

1. Recent trends and human rights violations

Australia has recently adopted a concerning new mode of externalization. As noted in my submission of June 2025, **enclosed**, in 2024 Australia legislated to remove non-citizens to a third country when they could not be deported to a country of citizenship or former residence, and an arrangement with Nauru to receive such people was subsequently entered. Concerns outlined in my June 2025 submission remain.

The Federal Court of Australia has accepted that removals under this policy are valid under Australian law, even where 'medical services available in Nauru are inadequate' to manage transferees' potentially life-threatening health conditions.[3] This case has been appealed to the High Court of Australia and judgment is pending. Australia continues to seek to remove the applicant in this matter, however, even while accepting that removal to Nauru could put his

[1] In this submission, I use the term 'refugee' to refer to both refugees and people seeking asylum, in recognition of the fact that refugee status is declaratory.
[2] While Australia also sent asylum seekers to Papua New Guinea for this purpose, the examples provided herein are from Nauru.
[3] *TCXM v Minister for Immigration* [2025] FCA 540, para 90. In this case, the applicant suffered from severe asthma which requires periodic hospitalisation and could prove life-threatening without treatment.

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life at imminent risk. Such removal could contravene Australia's obligations under the right to life or the right to be free from ill-treatment. The UN Human Rights Committee, for example, has held that removal of a refugee to a third country where the applicant would not have access to treatment for heart disease (combined with other factors) would amount to ill-treatment.[4]

This policy significantly expands migrant externalization to include people who may have long-standing ties in the externalizing State. People now at risk of removal to Nauru under this policy may have resided in the Australian community for many years, and some are parents of Australian children. In addition to the human rights implications for the person concerned, therefore, this policy also impacts on the rights of children who may be permanently deprived of access to a parent.[5]

2. Laws and the responsibility vacuum

Access to justice, adequate healthcare, adequate security and, ultimately, durable solutions including travel documents, can all be compromised by externalization.

Access to justice

Refugees have a right to access courts under both the Refugee Convention[6] and international human rights law.[7] Externalization, however, inevitably gives rise to difficulties accessing courts in the externalizing and receiving States, undermining migrants' access to justice and capacity to secure their rights. The receiving State's courts may be more accessible but lack the power to make orders that would secure the individual's rights, especially if those rights require action by the externalizing State. Respect for the rule of law has also been identified as lacking in at least one receiving State.[8] Externalizing States' courts, in turn, may be less accessible due to geographical hurdles.

Depending on arrangements between the externalizing State and the receiving State, the externalizing State may retain control, and therefore jurisdiction, over the person concerned, including arranging and paying for housing, healthcare and other support services. In such cases, where that person's rights are violated or they have suffered harm due to the actions of the externalizing State, the only court orders that will be effective are those that can bind the externalizing State: that is, courts of that State or a supranational court with the power to make binding rulings in respect of that State.

In litigation conducted in Australia in 2017-2019, for example, individuals who needed urgent medical care not available in Nauru or Papua New Guinea could not access that care without

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[4] *RAA v Denmark* (2016) UN doc CCPR/C/118/D/2608/2015, para 7.9. The additional factors related to the fact that the applicant and his partner had a one-year-old child and that they were at risk of homelessness, meaning that the family was 'particularly vulnerable': para 7.8.

[5] Potentially breaching Australia's obligations under the *Convention on the Rights of the Child*, articles 3(1), 5, 8(1), 9(1), 16(1).

[6] *Convention Relating to the Status of Refugees* (1951) article 16. This access must be 'effective' according to Emma Dunlop, *Access to Courts for Asylum Seekers and Refugees: State Obligations under the 1951 Refugee Convention* (2024, OUP), 211.

[7] *International Covenant on Civil and Political Rights* (1966) articles 9(4) protects the right to challenge one's detention before a court of law.

[8] The Hon. Geoffrey M Eames AM QC, former Chief Justice of Republic of Nauru, *Submission No. 70 to the Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru*, https://www.aph.gov.au/DocumentStore.ashx?id=1c235c65-51bc-4979-93f3-320175ad7c9e&subId=352831, 1.

Australia's consent and support. Australia withheld that support from some people with serious health conditions, forcing them to resort to court action in Australia to get access to the care they needed. These individuals were forced to seek mandatory injunctions to compel Australia to take action to prevent imminent, foreseeable harm, such as death or serious and long-term health consequences.[9] This high threshold meant courts were reticent to go beyond the minimum necessary in making orders to compel action which. These limited orders resulted in family separation which, as described below, caused or exacerbated severe mental illness.[10]

5. Transparency

When people are removed from the externalizing State's territory, oversight of that State's compliance with its human rights obligations toward those people becomes more difficult. Domestic oversight bodies may be unable to monitor conditions, for example, due to geographic or administrative hurdles. These challenges may combine with transferees' fears that reporting concerns could have negative consequences for them.

Journalistic scrutiny is also essential to ensure accountability and identify apparent or actual corruption. When migrants are externalized, however, journalists from the externalizing State may have difficulty in accessing them due to geographical and administrative barriers, such as visa restrictions.[11] The media landscape in the receiving State is also relevant: where freedom of expression is stifled, the externalizing State's obligations to ensure transparency is heightened.

Where reports of misconduct are received by officials, the lack of oversight may mean that no or inadequate action is taken and systemic harm can become entrenched. The Australian Senate, for example, expressed deep concern 'about a situation in which this level of reported misconduct can occur and… apparently [be] accepted'.[12]

7. Persons in vulnerable situations and intersectional discrimination

Externalization can both increase risks of harm, as well as decrease the likelihood that risks will be identified and addressed. Three key areas of risk are threats of or actual violence and access to adequate healthcare and housing.

Risk of violence

Under Australia's externalization arrangement with Nauru, service providers reported that transferred women and children had been raped, sexually assaulted and sexually exploited,

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[9] Anna Talbot and George Newhouse, 'Strategic Litigation, Offshore Detention and the Medevac Bill', (2019) 13 *Court of Conscience*, 85. The court had to be satisfied that the applicant was at risk of harm 'for which damages [would] not be an adequate remedy' before it would make a court order that would force the Australian government to take action that it was unwilling to take voluntarily, namely transfer the applicant to a place where they would have access to adequate medical care: *DWE18 as litigation representative for DWD18 v Minister for Home Affairs* [2018] FCA 1121 (Federal Court of Australia) (hereafter *DWE18*), para 27.

[10] See, for example, *DWE18*, para 36, in which an adolescent girl was separated from the majority of her family members so that she could secure urgent lifesaving medical care in Australia, despite evidence that such a separation would compromise recovery, para 17.

[11] In Nauru, for example, journalists were required to apply for a Business visa (Media) at a cost of $8,000, Immigration Regulations 2014 (Nauru), Sch 2, Table 1. In practice these visas were rarely granted.

[12] Senate Select Committee on the Recent Allegations Relating to the Conditions and Circumstances at the Regional Processing Centre in Nauru, *Final Report* (2015) (hereafter, *Nauru Report*), para 5.29. Concern was also expressed at the inability to protect at-risk children, who instead of being provided with safe living conditions, were forced to remain in situations of risk with 'safety plans'.

sometimes in exchange for benefits.[13] Allegations of threats of rape, indecent assault and sexual harassment were also reported.[14] These reported assaults and threats were allegedly committed by centre guards, other refugees[15] and community members in Nauru.[16] Children were also exposed to distressing situations and reported to have exhibited 'inappropriate sexual behaviour'.[17]

Verifying these accounts was difficult, however, as transferees could be unwilling to lodge official complaints for family or cultural reasons,[18] a lack of faith that complaints would have any impact, or fear of retaliation from authorities or others detainees.[19] The Australian Senate found that incidents of assault for transferees in Nauru were likely to be significantly under-reported.[20]

Racial, ethnic, cultural and religious discrimination can be a source of risk between host communities and migrants, and among different migrant groups. This can lead to threats of and actual violence.[21] In Nauru, for example, refugee children were reportedly discriminated against by local children at school, including having rocks thrown at them or headscarves pulled. This led to widespread disengagement from education for refugee children.[22] There were also reports that local Nauruan police would not investigate crimes against refugees, perpetuating risk and impunity.[23]

Access to healthcare

Access to adequate healthcare can be compromised by externalization. Health facilities in receiving States may be less accessible, of a lower standard or offer less support for culturally and linguistically diverse patients. This can impact migrants' right to adequate healthcare, to be free from ill-treatment and, in extreme circumstances, their right to life,[24] potentially giving rise to *non-refoulement* obligations on the part of the externalizing State. According to the European Court of Human Rights, for example, if there is a real risk that the individual 'on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy',[25] removal could amount to ill-treatment.

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[13] Philip Moss, *Review into recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru* (2015), prepared on request of the Australian Minister for Immigration and Border Protection (hereafter, Moss Report).
[14] Moss Report, paras 3.27-3.42; *Nauru Report* 5.29.
[15] Moss Report, paras 3.25, 3.19.
[16] *Plaintiff S99/2016 v Minister for Immigration* [2016] FCA 483; 243 FCR 17 (hereafter, *S99*).
[17] Moss Report, para 3.113; *Nauru Report* para 4.96.
[18] Moss Report, para 3.134
[19] Moss Report, paras 3.15-3.24.
[20] *Nauru Report* para 5.29.
[21] It is important to note that many members of receiving State communities are very welcoming and supportive of refugees. Occasionally individual members of those communities can pose risks.
[22] Human Rights Watch "Australia: Appalling Abuse, Neglect of Refugees on Nauru" (2016) Australia: Appalling Abuse, Neglect of Refugees on Nauru | Human Rights Watch.
[23] The Hon. Geoffrey M Eames AM QC, former Chief Justice of Republic of Nauru, *Submission No. 70 to the Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru*, 7-8.
[24] In *S99*, for example, the Federal Court of Australia acknowledged that Australia's refusal to provide the applicant with the healthcare that she needed posed a risk to her life: para 387.
[25] *Paposhvili v Belgium* (European Court of Human Rights (Grand Chamber)) application no. 41738/10, para 183.

Lack of access to adequate healthcare can have a gendered impact, especially in relation to reproductive and other gender-specific matters. It is particularly important that this type of healthcare is culturally sensitive, especially where women have been circumcised, subjected to gender-based or sexual violence or have other 'mental health vulnerability'.[26] These issues should form a part of pre-departure screening as a part of externalizing States' due diligence obligations.

Australia's restrictive approaches to facilitating healthcare for people it had sent to Nauru, for example, repeatedly led to family separation, having devastating psychological impacts for all concerned. In one case, a father was taken from Nauru to Australia for medical care while his wife and child were forced to remain in Nauru, leading to years of separation. The mental health impacts on the child (who also needed medical treatment not available in Nauru) were severe, with the child engaging in self-harm soon after his father's removal, and repeatedly attempting suicide at the age of 10.[27] Threatened family separation may lead children who need urgent medical care to choose to remain with their families, rather than to access the care that they need, for fear of never seeing family members again.[28]

Access to adequate housing

The quality and location of housing can increase risks of gender-based violence. Women and girls transferred by Australia to Nauru, for example, were initially detained in tents that could not be secured, with male guards periodically entering the tents without notice. When they were relocated into the community, some women reported not being able to lock the housing that they were provided, or that housing was in a poorly lit location without access to safe transport after dark. Some women reported being raped or harassed in this insecure or poorly lit housing. Where migrants are provided housing with no choice as to its location, it is incumbent on the responsible State(s) to ensure that it does not unacceptably increase risks of harassment or gender-based violence.

Please do not hesitate to contact me if you would like any further information on the above.

Your sincerely,

Anna Talbot

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[26] *DCQ18 v Minister for Home Affairs* [2018] FCA 918 (Federal Court of Australia), para 22.
[27] *AYX18 by his litigation representative AYY18 v Minister for Home Affairs* [2018] FCA 283 (Federal Court of Australia), paras 1, 16.
[28] Ben Doherty, 'Critically ill refugee child flown from Nauru to Australia with family', 21 August 2018 *The Guardian Australia*.