Mr Gehad Madi
UN Special Rapporteur on the human rights of migrants

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Dear Mr Madi, Special Rapporteur,

Externalization of Migration and the Impact on the Human Rights of Migrants

Thank you for the opportunity to provide input into your forthcoming report to the 80th session of the UN General Assembly on the externalization of migration and the impact on the human rights of migrants. This submission contains an abridged version of two longer reports by the authors on 'offshore processing' in Australia.[1] It addresses questions 1-4, 6 and 7 of your call for input.[2]

Offshore processing is a method of border control that involves Australia rescuing or intercepting asylum seekers at sea, bringing them to Australia, and then forcibly transferring them to the Pacific Island nations of Nauru and Papua New Guinea (PNG) to have their asylum claims processed there.[3] Offshore processing was previously viewed as 'a significant exception to the normal practice'.[4] More recently, Australia's policies have generated considerable political interest elsewhere, with other countries considering their replication. International interest is often based on misunderstandings or misinformation about offshore processing in Australia.

Australia's offshore processing policies do not deter irregular maritime migration, 'stop the boats' or 'break the business model' of people smuggling networks. Nor do they 'save lives at sea' or achieve any other humanitarian objective. Among other policy failures, they violate fundamental rules of international law, entail systemic cruelty and involve enormous financial costs for Australian taxpayers.

Description of the Australian policy

Offshore processing has been implemented in Australia in two separate periods. It was first introduced in 2001 as the 'Pacific solution'. At this time, asylum claims were processed by either the UN High Commissioner for Refugees (UNHCR) or Australian immigration officials in Nauru and PNG, and people found to be in need of international protection were settled back in Australia or elsewhere.[5] This policy was dismantled in 2008 on the basis that it had been 'a cynical, costly and ultimately unsuccessful exercise'.[6] Four years later, Australia reintroduced offshore processing in August 2012. This submission focuses on this second period of offshore processing.

Within this second period, five distinct policy phases can be identified.

1. First, between 13 August 2012 and 18 July 2013, all asylum seekers arriving in Australia by boat were liable to transfer to Nauru or PNG. However, of the more than 24,000 people who arrived in this period, only around 1,050 were ever transferred.[7] The rest remained in Australia. People sent offshore were detained on arrival in highly securitised, closed detention centres (operated by private companies contracted by Australia), in cruel, inhuman and degrading

[1] Madeline Gleeson and Natasha Yacoub, '"Offshore processing" in Australia', *Externalizing Asylum* (2024); Madeline Gleeson and Natasha Yacoub, 'Cruel, costly and ineffective: The failure of offshore processing in Australia', Policy Brief 11, *Kaldor Centre for International Refugee Law* (August 2021).
[2] This submission complements separate submissions by Madeline Gleeson and Anna Talbot.
[3] Offshore processing is factually and legally distinct from the transfer of asylum seekers to remote parts of a State's territory, such as Christmas Island, since the latter does not involve the transfer of people between States.
[4] Letters from UN High Commissioner for Refugees António Guterres to Australian Minister for Immigration and Citizenship Chris Bowen (5 September 2012 and 9 October 2012).
[5] Janet Philips, 'The 'Pacific Solution' revisited: a statistical guide to the asylum seeker caseloads on Nauru and Manus Island', Parliament of Australia (4 September 2012) 2-4, 16.
[6] Chris Evans, 'Last refugees leave Nauru', press release (8 February 2008).
[7] Gleeson and Yacoub, 'Cruel, costly and ineffective' (n 1) 2.

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conditions. Their asylum claims were supposed to be processed by Nauru and PNG, but neither country had the relevant experience or legal frameworks to conduct refugee status determination, resulting in lengthy delays, uncertainty, and indefinite, arbitrary detention.[8]

2. Second, on 19 July 2013, Australia announced a significant policy change. All asylum seekers currently offshore would be transferred back to Australia, and the detention centres would be refilled with asylum seekers arriving from that day forward. Anyone in this second cohort found to be entitled to international protection would be subject to a new ban on settlement in Australia. It was anticipated that refugees would integrate locally in Nauru and PNG, or be resettled elsewhere. UNHCR raised concerns with this proposal, noting that neither country had the conditions necessary for effective and large-scale settlement of refugees.[9]

3. Offshore processing entered a third phase following the election of a new government in September 2013. Within days of taking office, the government launched Operation Sovereign Borders (OSB) – a military-led border security operation described as 'the government's response to stopping the flow of illegal boat arrivals to Australia'.[10] Intercepting and turning back boats became the primary mechanism for deterring irregular maritime migration, while offshore processing was initially retained as part of a 'broad chain of measures end to end … designed to deter, to disrupt, to prevent' asylum seekers travelling by boat from obtaining protection in Australia.[11] The bar on refugee settlement in Australia continued.

   Under the second and third phases, just over 3,100 asylum seekers who arrived in Australia by boat on or after 19 July 2013 were transferred offshore in an 18-month period. Certain groups were exempted from transfer as a result of political deals.[12] Beyond these limited cases, however, the policy made no exception for children (including unaccompanied minors), other groups with special needs, or people who had close family members in Australia. By 2014, however, the offshore detention centres had reached capacity, and the viability of offshore processing as an effective and sustainable policy was questionable.

4. Fourth, from late 2014 to late 2023, Australia stopped transferring new arrivals offshore entirely, and reoriented its border protection policies to maritime interception.[13] Australia went to extraordinary lengths to effect maritime pushbacks rather than transfer people offshore.[14]

   The people transferred offshore between July 2013 to December 2014 continued to be detained there for several years as they waited to be processed. Slowly, some people began to be recognised as refugees and released into the community, where they began the long wait for resettlement options. Spiralling mental and physical health crises eventually forced Australia to medically evacuate almost all asylum seekers and refugees back to Australia from 2018 onwards.[15] Australia's arrangements with PNG formally concluded at the end of 2021 (although a number of refugees remained there, awaiting a durable solution).[16] Also in 2021, as evacuations to Australia continued and the number of people left on Nauru gradually dwindled, Nauru and Australia reached a new agreement establishing an 'enduring regional processing capability'.[17] By mid-2023, all refugees had been removed from Nauru and either resettled in third countries or transferred back to Australia.[18]

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[8] Madeline Gleeson, 'Protection Deficit: The Failure of Australia's Offshore Processing Arrangements to Guarantee "Protection Elsewhere" in the Pacific' (2019) 31(4) *International Journal of Refugee Law* 415.
[9] UNHCR, 'UNHCR Monitoring Visit to the Republic of Nauru: 7 to 9 October 2013' (26 November 2013) 22-24; UNHCR, 'UNHCR Monitoring Visit to Manus Island, Papua New Guinea: 23 to 25 October 2013' (26 November 2013) 25-26.
[10] Scott Morrison, 'Operation Sovereign Borders', press conference (23 September 2013).
[11] Ibid.
[12] Gleeson and Yacoub, 'Cruel, costly and ineffective' (n 1) 3.
[13] Elibritt Karlsen, 'Australia's offshore processing of asylum seekers in Nauru and PNG: a quick guide to statistics and resources', Parliament of Australia (19 December 2016) 8–9. Summary returns at sea also risk violating international law.
[14] For example, Australia detained 157 asylum seekers at sea for more than three weeks while attempting to disembark them in India, has been accused of paying people smugglers to take asylum seekers back to Indonesia, and has admitted to making unauthorised incursions into Indonesian waters in its efforts to push back asylum seeker vessels.
[15] Anna Talbot and George Newhouse, 'Strategic Litigation, Offshore Detention and the Medevac Bill' (2019) 13 *Courts of Conscience* 85.
[16] Karen Andrews MP, 'Finalisation of the Regional Resettlement Arrangement' (6 October 2021).
[17] *Memorandum of Understanding between the Republic of Nauru and Australia on the Enduring Regional Processing Capability in Republic of Nauru* (24 September and 20 October 2021).
[18] Ben Doherty and Eden Gillespie, 'Last refugee on Nauru evacuated as Australian government says offshore processing policy remains', *Guardian* (25 June 2023).

5. While the removal of refugees from Nauru in mid-2023 appeared to signal the end of an active offshore processing policy, Australia began to transfer a small number of new arrivals offshore again in a fifth phase, since late 2023. These transfers marked the first time that new asylum seekers had been sent offshore, rather than intercepted at sea and summarily returned, in almost nine years. At the time of writing, little is known about the arrangements for processing their claims in Nauru, or the durable solutions which will be available to those found to be entitled to international protection. Separately but in parallel to this fifth phase, Australia has sought to transfer to Nauru other non-citizens who cannot be removed to their countries of origin (see the separate submission of Anna Talbot).

Offshore processing does not deter irregular maritime migration to Australia

In recent years, Australia's offshore processing policies have been marketed internationally as an effective way to deter asylum seekers from travelling to host States by irregular means – either on their own, or as an integral part of a 'suite' of border policies, including maritime interception and pushbacks. However, Australian government data on boat arrivals does not support the claim that offshore processing is, in fact, an effective deterrent to irregular maritime migration. Between August 2012 and September 2013, when offshore processing was implemented as a standalone policy (i.e. before the introduction of maritime interception and boat pushback policies), the number of boat arrivals *increased*. 24,000 asylum seekers arrived by boat between 13 August 2012 and 18 July 2013[19] – a considerably higher number than at any other time since the 1970s, when boats of asylum seekers were first recorded in Australia.[20] Boats continued to arrive after the policy change on 19 July 2013. The number of people arriving by boat did not begin to drop until Australia began intercepting and turning back boats at sea with the launch of Operation Sovereign Borders in September 2013.[21]

Offshore processing is extraordinarily expensive

Australia has only ever provided a high-level and incomplete indication of the financial costs of establishing and maintaining offshore processing in Nauru and PNG. The available information shows that these costs are extraordinarily high – particularly for a policy that has not met its stated aim of deterrence. For example, during its peak operational years (2012 – 2021), offshore processing cost on average at least A$1 billion per year, and reached upwards of A$1.49 billion in 2017–18. This figure is significantly more than it would have cost to accommodate asylum seekers in Australia while their claims were processed.[22] These figures do not appear to include the additional costs of aid and development assistance to Nauru and PNG to secure their ongoing agreement to offshore processing; defending and settling legal claims with respect to offshore processing in Australian, Nauruan and PNG courts; and an agreement between Australia and Cambodia for the 'resettlement' of seven refugees who were held on Nauru (estimated to have cost up to A$55 million).[23]

Offshore processing is inhumane and involves systemic cruelty

The profoundly destructive effect of offshore processing on the physical and mental health of people subject to it has been consistently and extensively documented.[24] Since 2012, 21 people have died offshore (or in Australia, following medical evacuation).[25] In at least one case, an Australian coroner found that the death was 'preventable', and that the deceased would have survived had he been promptly evacuated to Australia for medical treatment.[26] As the UN High Commissioner for Refugees,

[19] Gleeson and Yacoub, 'Cruel, costly and ineffective' (n 1) 2.
[20] Janet Phillips, 'Boat arrivals and boat "turnbacks" in Australia since 1976: a quick guide to the statistics', Parliament of Australia (27 January 2017).
[21] Gleeson and Yacoub, 'Cruel, costly and ineffective' (n 1) 6-7; Kaldor Centre, 'Submission on the Nationality and Borders Bill 2021 to the UK Public Bill Committee' (15 October 2021) 4-9.
[22] Save the Children Australia and UNICEF Australia, 'At What Cost? The Human, Economic and Strategic Cost of Australia's Asylum Seeker Policies and the Alternatives' (2016) 43.
[23] Madeline Gleeson, 'The Australia-Cambodia refugee deal', Research Brief, *Kaldor Centre for International Refugee Law* (October 2019).
[24] Kaldor Centre, 'Submission No 53.1 to the Senate Standing Committee on Legal and Constitutional Affairs, *Migration Amendment (Repairing Medical Transfers) Bill 2019 [Provisions]*' (10 September 2019); Kaldor Centre (n 21) Appendix 3. See also the leaked cache of more than 2,000 incident reports from Nauru: 'The Nauru Files', *Guardian* (10 August 2016).
[25] Australian Department of Home Affairs, Answers to Questions AE24-731 and AE24-732 on Notice from the Senate Standing Committee on Legal and Constitutional Affairs' (February 2024).
[26] Coroners Court of Queensland, *Inquest into the death of Hamid Khazaei* (30 July 2018) [14].

Filippo Grandi, observed: 'there is a fundamental contradiction in saving people at sea, only to mistreat and neglect them on land.'[27]

Medical experts with UNHCR found rates of mental illness offshore to be among the highest recorded in any surveyed population,[28] and Médecins Sans Frontières (MSF) reported that suffering on Nauru was among the worst it had encountered, including in victims of torture.[29] The UN Special Rapporteur on the Human Rights of Migrants observed in 2017 that mental health issues were 'rife' in Nauru, where 'many refugees and asylum seekers [we]re on a constant diet of sleeping tablets and antidepressants'.[30]

Women and girls exposed to rape and sexual assault in Nauru were denied appropriate medical treatment, had no access to justice and were exposed to repeated attacks because Australia refused to move them to places of safety.[31] Paediatricians reported that children transferred to Nauru were among the most traumatised they had ever seen.[32] Children as young as five reportedly attempted to kill themselves.[33] By 2018, children on Nauru were so traumatised that several began to present with a rare psychiatric condition known as traumatic withdrawal (or 'resignation') syndrome, involving progressive social withdrawal and reluctance to engage in usual activities. At the most serious stage of this disorder, children may fall unconscious or enter a comatose state.[34]

The exposure of asylum seekers and refugees to serious human rights violations appeared to be deliberate and systemic. UNHCR 'consistently and repeatedly warn[ed] of the severe, negative health impacts of "offshore processing" which are as acute as they are predictable',[35] and a team of medical experts warned in 2014 that there was 'a significant and ongoing risk of child abuse, including physical and sexual abuse, in the detention environment [in Nauru]…'.[36] The UN Special Rapporteur on the Human Rights of Migrants concluded in 2017 that 'Australia's responsibility for the physical and psychological damage suffered by these asylum seekers and refugees is clear and undeniable', and that the situation was 'purposely engineered by Australian authorities to serve as a deterrent for potential future unauthorized maritime arrivals'.[37]

Offshore processing violates international law

Every UN body, committee and special procedure that reviewed Australia's offshore processing regime expressed concern that Australia is contravening its obligations under international law.[38] The Office of the Prosecutor of the ICC determined that the conditions of detention offshore 'appear to have constituted cruel, inhuman, or degrading treatment … and the gravity of the alleged conduct thus appears to have been such that it was in violation of fundamental rules of international law'.[39]

The bilateral agreements underpinning Australia's offshore processing regime provided that each government would undertake all activities in accordance with their respective international obligations, and treat people transferred offshore 'with dignity and respect and in accordance with relevant human

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[27] UNHCR, 'UNHCR chief Filippo Grandi calls on Australia to end harmful practice of offshore processing' (Press release, 24 July 2017).
[28] UNHCR, 'Submission to the Senate Legal and Constitutional Affairs Committee: Serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre, and any like allegations in relation to the Manus Regional Processing Centre 2016' (12 November 2016) 9-15, 32.
[29] MSF, 'Indefinite despair: The tragic mental health consequences of offshore processing on Nauru' (December 2018) 4.
[30] UN Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru* (UN Doc A/HRC/35/25/Add.3, 24 April 2017) para 77.
[31] Refugee Council of Australia and Asylum Seeker Resource Centre, 'Australia's Man-Made Crisis on Nauru: Six Years On' (September 2018) 9–10.
[32] Elizabeth Elliott and Hasantha Gunasekera, 'The health and well-being of children in immigration detention: Report to the Australian Human Rights Commission, Monitoring Visit to Wickham Point Detention Centre, Darwin, NT, October 16th – 18th 2015' (4 February 2016) 18.
[33] Felicity Ogilvie, 'Five-year-old girl attempted suicide in fear of going back to Nauru, father says', *ABC News* (28 March 2015).
[34] Ben Doherty, 'Begging to die': succession of critically ill children moved off Nauru', *Guardian* (25 August 2018); Louise Newman, 'What is resignation syndrome and why is it affecting refugee children?' *The Conversation* (22 August 2018).
[35] UNHCR, 'UNHCR urges Australia to evacuate off-shore facilities as health situation deteriorates' (12 October 2018).
[36] Physical and Mental Health Subcommittee of the Joint Advisory Committee for Nauru Regional Processing Arrangements, 'Nauru site visit report: 16-19 February 2014' (2014) 3.See also: Ben Doherty and David Marr, 'The worst I've seen – trauma expert lifts lid on "atrocity" of Australia's detention regime', *Guardian* (20 June 2016).
[37] UN Human Rights Council (n 30) para 79.
[38] For a list of UN reports on offshore processing from 2012 to 2019, see: UNHCR, 'United Nations Observations: Australia's transfer arrangements with Nauru and Papua New Guinea (2012–present)' (undated).
[39] Letter from the Office of the Prosecutor of the ICC to Andrew Wilkie MP (12 February 2020) 2.

rights standards'.[40] In practice, however, offshore processing poses a threat to life, involves torture or cruel, inhuman or degrading treatment or punishment, exposes people to prolonged, indefinite and arbitrary detention, constitutes an unlawful interference in family and private life, exposes women to gender-based violence and discrimination, and violates many obligations owed to children.

Offshore processing also risks violating the principle of *non-refoulement* in various ways. First, there is inadequate screening for individual protection concerns in the offshore processing country.[41] Second, transferring asylum seekers to countries with ineffective asylum systems creates a risk of chain *refoulement* to their countries of origin. Third, the creation of a 'return-oriented environment' offshore places considerable pressure on people to return to their countries of origin, even if they fear persecution or other serious harm there, amounting to 'constructive *refoulement*'.[42] Finally, the denial of durable solutions and family reunion to people recognised as refugees may compel them to return to serious harm to reunite with or rescue family members still in danger.

Offshore processing creates domestic and international legal challenges

The UN Human Rights Committee affirmed in 2017 that 'the significant levels of control and influence exercised by [Australia] over the operation of the offshore regional processing centres' amount to effective control such as to establish Australia's jurisdiction and engage its obligations.[43] The Special Rapporteur on the Human Rights of Migrants also concluded that 'the Government of Australia is ultimately accountable for any human rights violations that occur in the regional processing centres' in Nauru and PNG.[44] Between 2014 and 2017, at least six communications to the ICC have argued that Australia's offshore processing policies constitute multiple crimes against humanity.[45]

At the domestic level, Australia has also faced a series of legal challenges.[46] Since most of Australia's international human rights obligations are not enshrined in national law, domestic challenges have largely involved questions of constitutional law, rather than human rights.[47] Additionally, Australia and the private companies which have been involved in offshore processing have been sued for exposing asylum seekers and refugees to physical and psychological harm offshore and for false imprisonment, as well as for wrongful death.[48] One class action resulted in a settlement figure of A$70 million, plus almost A$20 million in legal costs.[49] Former staff have also sued Australia and their employers alleging they suffered trauma and other psychological harm as a result of their unsafe working environments.

Yours sincerely,

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[40] These agreements are available at Kaldor Centre, 'Bilateral agreements' (undated). It is worth noting that the agreements are MOUs and do not have the status of international treaties.
[41] For example, men who fled persecution on the basis of their sexual orientation in their home countries were knowingly sent to PNG, where consensual same-sex acts between men are criminalised: Amnesty International, *This is Breaking People: Human Rights Violations at Australia's Asylum Seeker Processing Centre on Manus Island, Papua New Guinea* (2013) 73–74.
[42] UNHCR Monitoring Visit to the Republic of Nauru (n 9) para 140; UNHCR Monitoring Visit to Manus Island (n 9) para 119; UNHCR, 'Australia should not coerce vulnerable people to return to harm' (29 August 2017); UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, UN Doc CCPR/C/AUS/CO/6 (1 December 2017) para 35(a).
[43] UN Human Rights Committee (n 42) para 35.
[44] UN Human Rights Council (n 30) para 73.
[45] Natalie Hodgson, 'International criminal law and civil society resistance to offshore detention' (2020) 26(3) *Australian Journal of Human Rights* 449.
[46] For a full discussion of these domestic and other international legal challenges, see Kaldor Centre (n 21) 9-16.
[47] See e.g. *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42.
[48] *Kamasaee v Commonwealth of Australia & Ors,* S CI 2014 6770; Human Rights Law Centre, 'Settlement reached over the murder of asylum seeker Reza Berati on Manus Island' (14 August 2023).
[49] Supreme Court of Victoria, 'Manus Island Detention Centre class action: Court approves $70M settlement' (6 September 2017); 'Australia agrees to pay A$70m to Manus Island detainees', *BBC News* (14 June 2017).