

### *Aide-mémoire*

#### **UNHCR's Observations on the Final Draft of the Malaysia-Australia Arrangement on Transfer and Resettlement and Annexed Operational Guidance (dated 8 July 2011)**

- UNHCR's preference has always been an arrangement which would enable all asylum-seekers arriving by boat into Australian territory to be processed in Australia. This would be consistent with general practice.
- The current Arrangement worked out by both parties takes a different approach. It responds to the particular domestic and regional context of the asylum and migration situation in the Asia-Pacific region, which includes a people smuggling component. UNHCR understands the need to address the people smuggling challenges and in particular, seen from the perspective of an international protection agency, to prevent further loss of life at sea which has been a feature of this phenomenon in the region. Reducing the incidence of people smuggling and its associated protection threats is consistent with globally-endorsed objectives of the Agenda for Protection, as well as with UNHCR's 10-Point Plan of Action.
- UNHCR was heartened by the outcome of the Fourth Bali Ministerial Meeting in March 2011, which promoted adoption of a Regional Cooperation Framework, within which this Malaysia-Australia Arrangement has to be located.
- As UNHCR is not a signatory to the Arrangement, its endorsement is neither called for nor given. The Arrangement however involves issues that are at the core of UNHCR's mandate. Within this context, UNHCR assesses the current draft Arrangement, together with its operational guidance, as workable. In this connection UNHCR is appreciative of the efforts made by the two parties to provide fundamental protection safeguards for transferees, notably: respect for the principle of *non-refoulement*, the right to asylum, the principle of family unity and best interests of the child, humane reception conditions, including protection against arbitrary detention, and the realization of durable solutions.
- UNHCR notes that its position is and remains conditioned upon proper protection and vulnerability safeguards determining the pre-transfer/pre-removal assessment process in Australia, prior to the taking of any decisions on who will be transferred under the Arrangement and when. In this context, UNHCR places high importance on a prospective risk assessment, as well as recognition of the need to maintain family unity and respect family links militating against transfer. In the same vein, the pre-transfer process must, in UNHCR's view, be particularly sensitive to the best interests of the child, particularly when it comes to the circumstances of unaccompanied minors.
- UNHCR also notes that its position is and remains conditioned upon the Arrangement being implemented with full respect for human rights standards. UNHCR welcomes that asylum-seekers transferred under this Arrangement will be granted lawful status to remain in Malaysia until a durable solution is found, and that they will be able to

receive education, access to health care and a right to employment. It is also important that any detention found necessary will be [bar criminal prosecutions] only for the purposes of identity, health and/or security checks, and will respect strict time limits.

- UNHCR regards as positive the additional 4,000 resettlement places for refugees in Malaysia which will be realised through this Arrangement. It places equal importance on the realisation of durable solutions for *all* persons recognised as refugees coming within the ambit of the Arrangement.
- UNHCR appreciates the fact that the parties concerned have found it important to consult with the Office and have made efforts to integrate protection-sensitive approaches into the Arrangement, as advocated by UNHCR. In order to ensure that such approaches also guide the implementation of this Arrangement, UNHCR, consistent with its mandate responsibilities, will remain engaged with the parties as they move forward with bringing their Arrangement into effect.
- In this regard, the Office will continue to monitor and review progress of the Arrangement from a protection perspective. It is UNHCR's understanding that the Arrangement will with time deliver further protection dividends in the two countries, as well as the region including through the operationalization of the Regional Cooperation Framework