

Questions for UNHCR

1. I refer to clause 16 of the Malaysia –Australia Transfer Arrangement which states: “*This Arrangement represents a record of the Participants’ intentions and political commitments but it is not legally binding on the Participants*”.

What are the implications of the Transfer Arrangement not being legally binding on Malaysia in guaranteeing that the human rights of asylum seekers transferred under this agreement are actually protected?

UNHCR was aware that Malaysia was not a party to the 1951 Refugee Convention and had no domestic legal framework for dealing with refugees. This is precisely why, in the context of the detailed negotiations between the two sovereign states between May and August, that UNHCR tendered its advice that fundamental protection safeguards needed to be reflected both in letter of any written commitments made by the parties but also in the operational mechanisms that would ensure their practical implementation.

UNHCR always maintained that the critical test of the Arrangements would be whether the protection safeguards included in them were implemented in practice. In this respect, UNHCR undertook to monitor and review progress from a protection perspective as the Arrangement was implemented.

The core protection safeguards that UNHCR insisted must be built into any arrangements were: guarantees against *non-refoulement*; a right to legal stay; community, as opposed to detention-based, residence; rights to self reliance including access to health and education support, with a particular emphasis on the right to work; special arrangements for vulnerable individuals, particularly children; and, appropriate formal procedures to determine and protect the best interests of children both in Australia and Malaysia.

In this context, it is to be noted that many states signatory to the Refugee Convention do not meet these fundamental protection safeguards that were expected of Malaysia under the Arrangements. In particular, UNHCR notes that

Australia's mandatory detention policy, that denies the right to lawful stay and any opportunities for self-reliance in community-based settings, and is punitive on the basis of the method of entry to Australia, is arguably in contravention of Article 31 of the Refugee Convention and would fall well short of these criteria. UNHCR's concerns about the legal and severe and negative implications of long term mandatory detention in Australia are longstanding and well known.

2. I refer to the UNHCR's statement at Dot point 6 of its submissions that "*UNHCR also notes that its position is and remains conditioned upon the Arrangement being implemented with full respect for human rights standards*".
 - a. What do you mean by "full respect?"
 - b. What assurances can the UNHCR give this Committee that under an Agreement that is not legally binding there will be full respect for human rights standards given that in Malaysia there is the legal right to cane asylum seekers under the Malaysian Immigration Act 1959?
- a) **UNHCR insisted throughout its advice to both parties, that the fundamental human rights and protection safeguards for all transferees would have to be respected. The ordinary sense of this word means 'compliance' which is why UNHCR placed great emphasis not only on the terms of the Arrangements but their practical implementation for transferees.**
- b) **With respect to the Committee, it is for States to give the assurances that the Committee seeks. UNHCR is not a party to those Arrangements which has always maintained that its mandated role is to supervise and monitor the manner in which States implement their international obligations - as it does in relation to Australia under Article 35 of the Refugee Convention.**
- c) **UNHCR also wishes to point out a misperception that appears to underlie the question of caning under the Malaysian Immigration Act 1559. Judicial caning is a serious human rights violation but, to UNHCR's knowledge, is confined to those who are found to be illegally in Malaysia. It is precisely to avoid this**

possibility that the right to lawful stay for all transferees was seen as fundamental to the integrity of any transfer arrangements.

3. Can the UNHCR confirm that the role of the almost half a million Ikatan Relawan Rakyat (RELA) members in Malaysia is to seek out illegal immigrants and in the past have been bounty hunters, with a payment for each arrest that they make.

The broad question of ‘illegal immigrants’ falls outside UNHCR’s mandate, which relates specifically to refugees and asylum-seekers. However we would note that the activities of RELA have been scaled back and that the Malaysian Government is involved in a significant initiative (6P Programme) to regularise the legal status of all illegal migrants.

Many persons of concern to UNHCR stand to benefit from this Programme by having their status regularised. It would mean all refugees in Malaysia would, in addition to their registration and ID documents for UNHCR, be registered within the Government's immigration data base and thus protected from arbitrary arrest and detention. It would also mean that all refugees in Malaysia would have the right to work on a par with legal migrants in the country. This would also entitle them to the same insurance and health schemes as documented, legal migrant workers. This will be of considerable benefit to the more than 93,000 people of concern to UNHCR who would not have been covered by the transfer arrangements.

For present purposes, the Arrangements would have involved a legal status (and documentation proof) for transferees and this, subject to adequate monitoring and other safeguards, would have served as a significant safeguard against any exposure to RELA or arbitrary arrest.

4. Whilst asylum seekers sent to Malaysia will not be illegal entrants and Immigration Minister Mr Bowen has “promised” they can't be caned – isn't it the case that RELA's powers are so wide that if there is a dispute with asylum seekers paperwork, they could be arrested and subjected to caning?

The Arrangement provided that transferees would have the right to remain legally in Malaysia and that the Government of Malaysia made a commitment that transferees would not be arrested for being in Malaysia. It was UNHCR's expectation that the transferees would be provided with a suitable and accredited form of identification that recorded the person's lawful status in Malaysia and access to important entitlements such as the right to work. As with other protections provided for under the Arrangement, there needed to be adequate safeguards and protections in place to ensure that these safeguards were implemented in practice.

5. I refer to the report by Amnesty International entitled "A Blow to Humanity – Torture by Judicial Caning in Malaysia" in which it states:

"Across Malaysia, government officials regularly tear into the flesh of prisoners with rattan canes, travelling up to 160 kilometres per hour. The cane shreds the victim's naked skin, turns the fatty tissue into pulp and leaves permanent scars that extend all the way to the muscle fibres. Blood and flesh splash off the victim's body, often accompanied by urine and faeces. This gruesome spectacle is kept hidden from public view".

Given that the Malaysia-Australia Transfer Agreement is not legally binding, can the UNHCR provide this Committee with a guarantee that asylum seekers sent by Australia to Malaysia will not under any circumstances be caned. Is the UNHCR satisfied with the so called assurances that the Government has obtained in this regard? If so why? If not, why not?

This is answered in Response 2 above.

6. Why is the UNHCR not a signatory to the Malaysia-Australia Transfer Arrangement? Can the UNHCR confirm that it has not officially endorsed the Malaysia-Australia Transfer Arrangement?

The Arrangements were negotiated between the two sovereign states and UNHCR was neither asked nor was it ever envisaged that UNHCR would be a signatory to

the arrangement. As such, UNHCR was neither called upon, nor would it have been appropriate, to 'endorse' or otherwise formally sanction the Arrangements. There is nothing unusual about this and no inference can reasonably be drawn from this. Under Article 8 of its founding Statute UNHCR is mandated to promote and advocate for measures that improve the situation for refugees which, in this instance, it has steadfastly done through its advice to both parties. UNHCR's views on the Arrangement are more fully set out in its Aide-Memoire which was submitted to the Committee.

7. Does the UN Refugee Convention, cover torture, cruel punishment or conditions in detention centres that are dealt with under other international covenants and UN guidelines? What then are the implications of this for the asylum seekers transferred under this Agreement given it is not legally binding?

The Refugee Convention provides protection for refugees against *refoulement* to persecution. Complementary human rights preventing *refoulement*, in situations where a person might face serious human rights violations, such as torture, or cruel or degrading punishment or treatment, are found in both customary principles of international law (*jus cogens* and binding on all states) and in specific treaties such as the UN Convention against Torture and the International Covenant on Civil and Political Rights. Non-derogable principles of international law apply to all states, including in all places of detention.

In this context it is worth recalling that a number of United Nations treaty bodies have found, over many years, that Australian mandatory detention policies and their practical implementation, are not compatible with Australia's obligations under international law.

In the context of the Malaysian arrangements, the assurances of legal stay and community-based reception for all transferees can be seen as a more positive protection environment than protracted – and in some cases indefinite – detention that many face here in Australia, provided the assurances are carefully monitored and implemented.

Other aspects of the question are answered in Response 1.

8. How much is the Government paying the UNHCR to support the arrangements under the Transfer Agreement? What is the money for? Is it tied to any programs? What about the provision of health care and education? How much for those programs?

The Arrangement may or may not proceed. At the time of this response, there are no additional funds provided by Australia to UNHCR as a result of the Arrangement. UNHCR is not yet aware of whether the resettlement of an additional 4,000 persons will take place if the transfer arrangements do not proceed and is therefore not able to speculate on the resource implications for the Office if this were to proceed.

UNHCR

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