Offshore processing: Australia’s obligations with respect to asylum seeker children who may be sent to Nauru

This factsheet sets out Australia’s responsibilities under international law with respect to asylum seeker children who may be sent to Nauru to have their protection claims processed. It should be read together with the factsheet on Australia’s responsibility under international law for asylum seekers and refugees in Nauru and Papua New Guinea. These two factsheets are part of a series on offshore processing, which also includes factsheets on conditions in the offshore detention centres, refugee status determination in Nauru and PNG, and an In Focus brief on the resettlement of refugees from Nauru to Cambodia.

Executive Summary

Prior to removing a child from Australia, the relevant authorities must consider whether removal is consistent with Australia’s international law obligations, including its non-refoulement obligations, its obligation to take the best interests of the child into account as a primary consideration, and its particular obligations with respect to unaccompanied asylum seeker children.

Australia’s non-refoulement obligations require that:

- the principle of non-refoulement be respected whenever the movement of an asylum seeker to another State’s territory is contemplated;
- all decisions about removing an asylum seeker from Australia be made on a case-by-case basis, after proper consideration of all the facts as they stand at the time the decision to remove is made;
- in deciding whether an asylum seeker can be removed from Australia, consideration be given to whether the asylum seeker will face a risk of: (a) persecution or significant harm (including cruel, inhuman or degrading treatment) in the regional processing country; and/or (b) being sent on from there to a country where such harm is feared; and
• **non-refoulement** obligations not be overridden by invoking national security, the integrity of Australia’s migration system or any other general policy objective.

Australia must take ‘all appropriate legislative, administrative, and other measures’\(^3\) to ensure that the best interests of the child are treated as a primary consideration in all actions concerning children (and/or their families). This obligation requires at a minimum that:

- the requirement to consider the best interests of asylum seeker children as a primary consideration is reflected and implemented in all national laws and regulations, rules governing the operation of private or public institutions providing services to or impacting on children, and judicial and administrative proceedings at every level;\(^4\)
- a ‘best interests assessment’ (BIA) is conducted whenever a decision will impact on a child.\(^5\) The BIA must:
  - be performed on a case-by-case basis for each child;
  - identify a child’s best interests before they are weighed against other considerations; and
  - be supported by reasons explaining the decision;
- there are formal mechanisms to appeal and revise decisions concerning children whenever the requirements for a BIA do not appear to have been met, or when there appears to have been a procedural or substantive error in the decision regarding the child;\(^6\) and
- the best interests of children be assessed on an ongoing basis wherever a child continues to be affected by decisions or actions taken by Australian authorities.

Australia has other human rights obligations concerning children, and must act in good faith in a way that is consistent with these obligations. Australia may be responsible for human rights violations outside of its territory if it is ‘a link the causal chain’ that makes those violations possible.\(^7\) Accordingly, it is incumbent upon Australia to consider both the relevant human rights standards and the circumstances that children will face in Nauru as part of the decision about whether or not to send them there. In particular, Australia should have regard to its obligations to:

- ensure that children have a standard of living adequate for their physical, mental, spiritual, moral and social development, and are not subjected to torture or other cruel, inhuman or degrading treatment or punishment;\(^8\)
- protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse and all other forms of exploitation prejudicial to any aspect of their welfare;\(^9\)
- promote the physical and psychological recovery and social reintegration of all children who are victims of any form of neglect, exploitation, abuse, torture or any other form of cruel, inhuman or degrading treatment or punishment;\(^10\) and
- ensure that children are only detained as a measure of last resort, for the shortest possible time, and never in circumstances where the detention is unlawful or arbitrary.\(^11\) In this regard, it is relevant to note that since all asylum seekers transferred to Nauru are detained while they await the determination of their
protection claims, Australia’s decisions to transfer asylum seekers to Nauru are, in effect, decisions to detain.

Australia has additional obligations with respect to unaccompanied asylum seeker children (UACs). In particular, as the guardian of UACs in Australia, the Immigration Minister has a duty to act with the best interests of each UAC as his or her ‘basic concern’, and to treat their best interests as the primary consideration in decisions affecting them.

As the following analysis demonstrates, Australia’s practice of removing asylum seeker children to Nauru raises a number of concerns about its compliance with these obligations.

Introduction

Since August 2012, asylum seekers who have arrived in Australia by boat have been subject to ‘offshore processing’ in Nauru and on Manus Island in Papua New Guinea (PNG). Australian authorities conduct identity and health screening of these asylum seekers in Australia, and make a determination in each case as to whether asylum seekers are fit to be sent offshore. While all asylum seekers who have arrived by boat since August 2012 have been liable to removal, in practice some have been exempted and kept in Australia due to a lack of space in the offshore facilities or other reasons. At various times asylum seekers have been brought back from Nauru or PNG and permitted to remain in Australia, either temporarily or on an ongoing basis.

Asylum seeker children were previously sent to both Nauru and PNG. However, in June–July 2013, all women and children who had been transferred to PNG were returned to Australia and permitted to remain there while their claims were processed. When a new arrangement was announced on 19 July 2013 – from which date all asylum seekers arriving by boat would not only be sent offshore, but would be denied the possibility of being settled in Australia – children and families were only sent to Nauru.

While asylum seekers are being processed in Nauru and PNG, they must reside in immigration detention centres, which the Australian Government refers to as ‘Regional Processing Centres’ (RPCs). After their claims have been processed, those recognized as refugees are permitted to settle temporarily in the community (since May 2014 in Nauru and since January 2015 in PNG).

This factsheet focuses on Australia’s obligations with respect to asylum seeker children prior to their removal from Australia to the Nauru RPC.

Non-refoulement obligations

Australia’s obligations under international law

Under international refugee and human rights law, Australia has obligations to ensure that it does not expel, extradite, deport or otherwise remove from its territory or jurisdiction anyone who has a well-founded fear of persecution or who faces a real risk of significant harm either in the country to which s/he is removed, or any other place to which that country might send
him or her. Significant harm includes the risk of being exposed to arbitrary deprivation of life, torture, or cruel, inhuman or degrading treatment or punishment. These obligations form part of Australian law and are reflected in section 36 of the Migration Act 1958 (Cth) (Migration Act).

The UN Committee on the Rights of the Child has also emphasized the non-refoulement obligations that bind States parties to the UN Convention on the Rights of the Child (CROC) (including Australia). According to the Committee:

in fulfilling obligations under the Convention, States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 and 37 of the Convention, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed.18

These obligations, which sit at the ‘core’ of international refugee and human rights law,19 require that:

- the principle of non-refoulement be respected whenever the movement of an asylum seeker to another State’s territory is contemplated;
- all decisions about removing an asylum seeker from Australia be made on a case-by-case basis, after proper consideration of all the facts as they stand at the time the decision to remove is made;
- in deciding whether an asylum seeker can be removed from Australia, consideration be given to whether the asylum seeker will face a risk of: (a) persecution or significant harm (including cruel, inhuman or degrading treatment) in the regional processing country; and/or (b) being sent on from there to a country where such harm is feared; and
- non-refoulement obligations not be overridden by invoking national security, the integrity of Australia’s migration system or any other general policy objective.20

Australia’s compliance with its obligations in law and practice

Although Australia has incorporated certain of its non-refoulement obligations into domestic law,21 in most cases the Migration Act precludes asylum seekers who arrived by boat after 19 July 2013 from accessing those protections against refoulement.22 Australian law also expressly authorises the transfer of asylum seekers intercepted at sea to any place, including Nauru, even in circumstances that would amount to refoulement.23 This is contrary to international law.24

In the absence of effective domestic legal protections against refoulement for asylum seekers being considered for transfer to Nauru (and PNG), the Australian Government seeks to give effect to its non-refoulement obligations by conducting a 'pre-transfer assessment' (PTA) for each asylum seeker prior to removing him or her to a regional processing country. The Department of Immigration and Border Protection (DIBP) has described the PTA as being 'used to consider whether appropriate support and services are available at the [offshore processing centre] and confirm that there are no barriers to the transfer occurring.’25
Despite the PTA process, however, in practice asylum seekers appear to have been (and may be at risk of being) transferred to Nauru in breach of Australia’s non-refoulement obligations. PTAs have been described as focusing more on an asylum seeker’s ‘fitness’ for travel and placement in a regional processing country, rather than on whether the asylum seeker will face risks of: (a) persecution or significant harm (including cruel, inhuman or degrading treatment) in the regional processing country; and/or (b) being sent on from there to a country where such harm is feared. Previously, pressure from the DIBP to complete PTAs within 48 hours reportedly affected their quality. In light of these issues, the UN High Commissioner for Refugees (UNHCR) expressed concern in December 2012 and again in November 2013 about the effectiveness of PTAs as a mechanism for ensuring that asylum seekers, especially vulnerable asylum seekers such as children, were not transferred to Nauru in breach of Australia’s international obligations.

UNHCR’s concerns remain relevant to the current situation in the Nauru RPC. Conditions of detention there may amount to cruel, inhuman or degrading treatment, especially when the cumulative impact of the physical conditions and uncertainty about the future is considered. Further, detention may have a particularly severe impact on vulnerable asylum seekers, including children, pregnant women, families, survivors of torture, and those with physical or mental health conditions that cannot properly be treated in Nauru. If conditions in the Nauru RPC meet the threshold for being cruel, inhuman or degrading – either specifically for individuals within these vulnerable groups or generally for all asylum seekers – then the transfer of these individuals to Nauru will constitute removal to a place where they risk significant harm, and will therefore violate Australia’s non-refoulement obligations. In such cases, a suspension of transfers to Nauru (either generally or in relation to specific vulnerable individuals such as children) is required to bring Australia into line with its international obligations.

Obligations to consider the best interests of the child

Australia’s obligations under international law

Under the CROC, Australia is required to make the ‘best interests of the child’ a primary consideration when taking action that affects them, including decisions that affect children and their families. Article 3(1) of the CROC states:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

How should the best interests of the child be assessed?

The best interests of the child is a flexible and dynamic concept. As such, neither international law nor Australian law prescribes what is in the best interests of a particular child in a given situation. However, international law does provide guidance on how the best interests of a child should be assessed. Notably: (a) a ‘best interests assessment’ (BIA) must be performed on a case-by-case basis; (b) a child’s best interests must be identified
first, before they can be weighed against other considerations; and (c) reasons for the decision must be given. These criteria are set out in more detail in the following sections.

a) Best interests must be assessed on a case-by-case basis

The first criterion for a BIA is that a child’s best interests are determined individually, on a case-by-case basis. Since each child is different, a BIA should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs. It should not be presumed that an action or decision will affect all children in the same way, and determining what is in the best interests of the child should start with an assessment of the specific circumstances that make the child unique. Further, since not all vulnerable children will have the same special needs, the relevant authorities and decision makers need to take into account the different kinds and degrees of vulnerability of each child, as each child is unique and each situation must be assessed according to the child’s uniqueness.

b) Best interests must be identified first, then weighed

The second criterion of a BIA is that it is performed in two stages. First, the decision maker must identify what is in the child’s best interests. Then, he or she must assess whether those interests are outweighed by any other consideration (or the cumulative effect of other considerations). This two-stage process has been affirmed by Australian courts.

The words ‘shall be a primary consideration’ in Article 3(1) of the CROC place a strong legal obligation on States and mean that States may not exercise discretion as to whether children’s best interests are to be assessed and ascribed the proper weight as a primary consideration in any action undertaken. Accordingly, when weighing the best interests of the child against other factors in the second stage of this process, ‘a larger weight must be attached to what serves the child best.’ As the UN Committee on the Rights of the Child has explained:

The expression ‘primary consideration’ means that the child’s best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child: dependency, maturity, legal status and, often, voicelessness. Children have less possibility than adults to make a strong case for their own interests and those involved in decisions affecting them must be explicitly aware of their interests. If the interests of children are not highlighted, they tend to be overlooked.

Courts in Australia and comparable jurisdictions have affirmed that while the best interests of the child need not always outweigh other primary considerations (or the cumulative effect of other considerations), a decision maker must not treat any other consideration as inherently more significant than the best interests of the child.

c) Reasons must be provided for the decision
In order to ensure that a BIA meets the two criteria set out above, decision makers must give reasons for their findings. These reasons:

should state explicitly all the factual circumstances regarding the child, what elements have been found relevant in the best-interests assessment, the content of the elements in the individual case, and how they have been weighted to determine the child’s best interests. If the decision differs from the views of the child, the reason for that should be clearly stated. If, exceptionally, the solution chosen is not in the best interests of the child, the grounds for this must be set out in order to show that the child’s best interests were a primary consideration despite the result.\textsuperscript{44}

When providing these reasons, ‘[i]t is not sufficient to state in general terms that other considerations override the best interests of the child.’\textsuperscript{45}

**What are Australia’s obligations in relation to the best interests of asylum seeker children?**

Australia must take ‘all appropriate legislative, administrative, and other measures’\textsuperscript{46} to ensure that the best interests of the child principle is properly respected and implemented in each decision and action that concerns children. To do so, Australia is required at a minimum to ensure that:

- the requirement to consider the best interests of asylum seeker children as a primary consideration is reflected and implemented in all national laws and regulations, rules governing the operation of private or public institutions providing services to or impacting on children, and judicial and administrative proceedings at every level;\textsuperscript{47}
- a BIA meeting the criteria set out in the section above is conducted whenever a decision will impact on a child;\textsuperscript{48}
- there are formal mechanisms to appeal and revise decisions concerning children whenever the requirements for a BIA do not appear to have been met, or when there appears to have been a procedural or substantive error in the decision regarding the child;\textsuperscript{49} and
- the best interests of children be assessed on an ongoing basis wherever a child continues to be affected by decisions or actions taken by Australian authorities. In the asylum context, BIAs meeting the criteria set out above should be conducted for each asylum seeker child at _all stages of the asylum process_, including, at a minimum, each time a child is to be transferred (or transferred back) to Nauru, and each time new information becomes available about the conditions for children in the Nauru RPC.\textsuperscript{50} It is not sufficient to perform a single BIA when a child is first considered for transfer to Nauru and not to review this assessment on a continuous basis.\textsuperscript{51}

**Australia’s compliance with its obligations in law and practice**

**General concerns**
Australian law contains no requirement that the best interests of the child be taken into account as a primary consideration when deciding whether to remove asylum seeker children from Australia. This position is in contrast to the position in comparable jurisdictions, such as the United Kingdom and Canada.

In the absence of any legal requirement, the Australian Government seeks to give effect to its obligations regarding the best interests of asylum seeker children by requiring a version of a BIA to be performed as part of the PTA in some circumstances. However, this purported BIA is insufficient to meet Australia’s obligations for the following reasons:

- it does not meet the criteria for a BIA set out above (see below for more information);
- it does not appear to be performed for children in Australia who have already been to Nauru previously, and whose transfer back there is being considered; and
- it is manifestly inappropriate in cases involving unaccompanied asylum seeker children (see below for more information).

These deficiencies have led UNHCR to conclude that ‘children have been transferred [to the Nauru RPC] without an assessment of their best interests and without adequate services in place to ensure their mental and physical well-being.’

These failures to consider the best interests of children in transfers to the Nauru RPC reflect broader deficits in Australia’s implementation of the best interests of the child principle. In its most recent review of Australia’s compliance with the CROC, the UN Committee on the Rights of the Child stated that it was:

> concerned that the principle of the best interests of the child is not widely known, appropriately integrated and consistently applied in all legislative, administrative and judicial proceedings and in policies, programmes and projects relevant to and with an impact on children. In this context, the Committee is particularly concerned at the inadequate understanding and application of the principle of the best interests of the child in asylum-seeking, refugee and/or immigration detention situations.

The Committee ‘stresse[d] the need for [Australia] to pay particular attention to ensuring that its policies and procedures for children in asylum seeking, refugee and/or immigration detention give due primacy to the principle of the best interests of the child’, and to ensure that ‘determinations of the best interests are consistently conducted by professionals who have been adequately trained on best-interests determination procedures’.

**Why is the assessment conducted prior to a child’s transfer to the Nauru RPC not a BIA?**

There is limited information publicly available about how the DIBP seeks to ensure that decisions to transfer children to the Nauru RPC comply with the best interests of the child principle. The following analysis is based on version 1.4 of the DIBP form entitled ‘Best Interests Assessment for transferring minors to an RPC’ dated 13 February 2014 (BIA Form), which is currently on the DIBP website and appears to be the relevant form.
According to the BIA Form, the PTA performed for each asylum seeker child must include a ‘best interests assessment’ conducted pursuant to the instructions on the BIA Form. The BIA Form acknowledges Australia’s obligations under Article 3(1) of the CROC, but states:

In so far as the requirement under section 198AD of the Migration Act 1958 to take unauthorised maritime arrivals to an RPC extends to unauthorised maritime arrivals who are children, the best interests of such children are outweighed by other countervailing primary considerations, including the need to preserve the integrity of Australia’s migration system and the need to discourage children taking, or being taken on, dangerous illegal boat journeys to Australia.

Accordingly, while this assessment considers a range of factors to ensure that care, services and support arrangements are available to meet the needs of the individual child, it does not consider whether the best interests of the child would be served by the individual child being transferred to an RPC.\(^{59}\)

As noted by the Australian Human Rights Commission, the process of considering whether a child should be transferred to Nauru pursuant to this form is a best interests assessment ‘in name only’.\(^{60}\) The process does not meet Australia’s obligations under the CROC because:

- it makes a blanket statement that the best interests of children are outweighed by other factors, rather than identifying and weighing the best interests of children on an individual basis in accordance with the BIA criteria set out above;
- due to the Australian Government’s policy that all asylum seekers who arrived by boat after 19 July 2013 will be transferred to a regional processing country without exception, there is no possibility for an asylum seeker child to remain in Australia even if it were open to a decision maker to find that this was in the child’s best interests and outweighed other considerations; and
- decision makers may be limited in their ability to identify properly what is in the best interests of a child, because the BIA Form instructs them to take into account certain information about the availability and quality of ‘arrangements, support and services’ for children on Nauru which may not necessarily exist. It is unclear if they are permitted to take into account conflicting information and other evidence; and
- children do not appear to have an opportunity to appeal or seek independent review of any decision to take action that is not in their best interests.

**Other obligations with respect to children who may be sent to Nauru**

The prohibition on *refoulement* and the obligation to take the best interests of the child into account as a primary consideration are not the only international obligations relevant to Australia’s decisions to remove asylum seeker children to Nauru.

The UN Human Rights Committee has affirmed that ‘a State party [to the ICCPR] may be responsible for extra-territorial violations of [its obligations] if it is a link in the causal chain that would make possible violations in another jurisdiction’.\(^{61}\) Australia also has obligations to act in good faith in a way that is consistent with the obligations it has voluntarily assumed under international human rights treaties.
Accordingly, regardless of whether Australia continues to have obligations with respect to children after they have arrived in Nauru, it is incumbent upon Australia to consider both the relevant human rights standards and the circumstances that children will face in Nauru as part of the decision about whether or not to send them there.

In brief, Australia is required to:

- ensure that children are given such protection and care as is necessary for their well-being;
- ensure that children have a standard of living adequate for their physical, mental, spiritual, moral and social development;
- ensure to the maximum extent possible children’s survival and development;
- ensure that such children are not subjected to torture or other cruel, inhuman or degrading treatment or punishment;
- protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse and all other forms of exploitation prejudicial to any aspect of their welfare;
- promote the physical and psychological recovery and social reintegration of all children who are victims of any form of neglect, exploitation, abuse, torture or any other form of cruel, inhuman or degrading treatment or punishment;
- ensure that asylum seeker children receive appropriate protection and humanitarian assistance in the enjoyment of their rights under the CROC and other international human rights treaties to which Australia is a State party; and
- ensure that children are only detained as a measure of last resort, for the shortest possible time, and never in circumstances where the detention is unlawful or arbitrary.

Whereas the obligation to consider the best interests of the child under Article 3(1) of the CROC allows some leeway for other considerations to outweigh the best interests of the child, the obligations listed above are expressed in absolute terms. For example, as the UN Committee on the Rights of the Child notes in relation to the obligation to protect children against violence and abuse in all their forms:

‘Shall take’ is a term which leaves no leeway for the discretion of States parties. Accordingly, States parties are under strict obligation to undertake ‘all appropriate measures’ to fully implement this right for all children.

The UN Committee on the Rights of the Child also ‘emphasizes in the strongest terms that child protection must begin with proactive prevention of all forms of violence as well as explicitly prohibit all forms of violence.’ If mental, physical and/or sexual harm is a systemic and inherent part of the detention and processing framework in the Nauru RPC, ‘proactive prevention’ may require Australia to suspend all transfers of children to Nauru and bring those who are still there back to Australia to await resolution of their asylum claims in a safe environment.
Additional obligations with respect to unaccompanied asylum seeker children

Australia’s obligations under international law

Australia has additional obligations under the CROC with respect to the best interests of unaccompanied asylum seeker children (UACs). Under the CROC, ‘[a] child temporarily or permanently deprived of his or her family environment … shall be entitled to special protection and assistance provided by the State’, and ‘States Parties shall in accordance with their national laws ensure alternative care for such a child.’

Moreover, as the guardian of UACs in Australia, the Immigration Minister has an additional duty under the CROC to act with the best interests of each UAC as his or her ‘basic concern’. The Australian Human Rights Commission has stated that in fulfilling this duty, ‘the best interests of an unaccompanied child must not only be a primary consideration (as suggested by article 3(1) of the Convention), but the primary consideration for the person acting as a child’s legal guardian.’ UNHCR and the UN Committee on the Rights of the Child have provided guidance as to how guardians in the position of the Minister should fulfil their obligations with respect to children in their care.

Australia’s compliance with its obligations in law and practice

There is an ‘unambiguous conflict of interest’ between the Minister’s dual roles of guardian and administrator of the Migration Act. As a result, UACs appear to have been transferred to Nauru without their best interests being taken into account as the primary consideration.

Moreover, the BIA Form used as part of the PTA for all asylum seeker children appears to be used to determine whether UACs should be transferred to Nauru, despite the fact that as the guardian of these children, the Minister should ensure that all decisions are made with their best interests as the primary consideration, not just a primary consideration that can be outweighed by others.

Further information

For further information about Australia’s international obligations with respect to asylum seekers and refugees transferred offshore, see the Kaldor Centre’s factsheet on Australia’s responsibility under international law for asylum seekers and refugees in Nauru and PNG. For more information about Australia’s obligations with respect to asylum seeker children who have already been removed to Nauru, see the Kaldor Centre’s Submission to the Senate Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru.

For other information or queries about State responsibility and offshore processing, please contact Madeline Gleeson, Director of the Protection of Children Project, at madeline.gleeson@unsw.edu.au.
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Endnotes


3 UN Convention on the Rights of the Child (CROC), art. 4 (emphasis added).

4 Ibid., [6(c)], [14(b)].

5 Ibid., [98].


7 CROC, arts. 27(1), 37(a).

8 Ibid., arts. 19, 24, 36.

9 Ibid., art. 39.

10 International Covenant on Civil and Political Rights (ICCPR), art. 9(1); CROC, art. 37(b). See also: Migration Act, s. 44A; UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012 (Detention Guidelines), Guideline 9.2.

11 Immigration (Guardianship of Children) Act 1946 (Cth), s. 6.

12 CROC, art. 18(1).


16 These obligations arise inter alia from the express prohibitions on refoulement in article 33(1) of the 1951 Convention Relating to the Status of Refugees (Refugee Convention) and article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Australia is also bound by an implicit prohibition on refoulement in articles 2, 6 and 7 of the ICCPR. According to the UN Human Rights Committee, ‘the article 2 obligation requiring that States Parties respect and ensure the [ICCPR] rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed’. UN
Human Rights Committee, General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004 (General Comment No. 31). [12].

18 UN Committee on the Rights of the Child, General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, CRC/GC/2005/6, 1 September 2005 (General Comment No. 6). [27] (emphasis added). Article 6 of the CROC affirms the inherent right to life of each child and establishes States’ obligation to ‘ensure to the maximum extent possible the survival and development of the child’. Article 37 prohibits the torture, cruel, inhuman or degrading treatment or punishment, and arbitrary detention of children, and guarantees rights to children deprived of their liberty.

19 At the Ministerial Meeting of States Parties to the Refugee Convention in 2001, States acknowledged ‘the continuing relevance and resilience of this international regime of rights and principles, including at its core the principle of non-refoulement’: Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees (Geneva, 12-13 December 2001), [4]. The principle of non-refoulement is also described as the ‘cornerstone’ of international refugee law: UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007, [5]; UNHCR Executive Committee, Conclusion No. 6 (XXVIII): Non-refoulement, 1977, [6].

20 Although the Refugee Convention contains an exception to the principle of non-refoulement in article 33(2), such that a refugee will not be protected against refoulement if there are reasonable grounds for regarding him or her as a danger to the security of Australia, or if he or she has been convicted by a final judgment of a particularly serious crime and constitutes a danger to the Australian community, Australia’s non-refoulement obligations under the ICCPR and CAT apply to all people without exception. In this respect, human rights law has, in effect, limited the application of the article 33(2) exception: Guy Goodwin-Gill and Jane McAdam, The Refugee in International Law, 3rd ed., Oxford University Press, Oxford, 2007, pp. 243-244.

21 Australia’s non-refoulement obligations are incorporated into domestic law to a limited extent through provisions of the Migration Act that allow for the grant of a protection visa to a person who is owed protection obligations under the Refugee Convention, or who would face a real risk of significant harm if removed from Australia (see, for example, s. 36 and the definition of ‘non-refoulement obligations’ in s. 5(1) of the Migration Act). For an analysis on how the incorporation of Australia’s non-refoulement obligations into domestic law is imperfect, and how the Migration Act may not provide protection to all those who are entitled to it under international law, see Part 5 of the joint submission of the Andrew & Renata Kaldor Centre for International Refugee Law and Associate Professor Michelle Foster to the Senate Legal and Constitutional Affairs Legislation Committee on the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth), available at: http://www.kaldorcentre.unsw.edu.au/sites/default/files/Final%20legacy%20caseload%20sub%2031%2010%2014%20SENT.pdf.

22 Under the Migration Act, all ‘unauthorised maritime arrivals’ and ‘transitory persons’ are barred from applying for a visa, including a protection visa, unless the Minister thinks that it is in the ‘public interest’ to lift this bar and exercises a non-compellable discretion to do so: ss. 46A, 46B. These sections effectively preclude asylum seekers who are in Australia having arrived by boat without a visa, or who have been transferred back to Australia from Nauru on a temporary basis, from accessing the visas that give effect to Australia’s non-refoulement obligations.

23 Under section 72 of the Maritime Powers Act 2013, Australian maritime officers are authorised to take any person found on a vessel in or outside of Australian waters to any place in or outside of Australia. Section 75A provides that the exercise of this power is not invalid even if (a) there has been a failure to consider Australia’s international obligations; (b) there has been a ‘defective consideration’ of those obligations; or indeed (c) the taking of a person to that place is inconsistent with these obligations.

24 For more information, see the joint submission of the Andrew & Renata Kaldor Centre for International Refugee Law and Associate Professor Michelle Foster to the Senate Legal and Constitutional Affairs Legislation Committee on the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth), available at: http://www.kaldorcentre.unsw.edu.au/sites/default/files/Final%20legacy%20caseload%20sub%2031%2010%2014%20SENT.pdf.


In December 2014, the UN Committee against Torture expressed concern about Australia’s policy of transferring asylum seekers to the regional processing centres in Nauru and Papua New Guinea, and noted that ‘[t]he combination of the harsh conditions, the protracted periods of closed detention and the uncertainty about the future [in both centres] reportedly creates serious physical and mental pain and suffering’: UN Committee against Torture, Concluding observations on the combined fourth and fifth periodic reports of Australia, CAT/C/AUS/CO/4-5, 23 December 2014, [17]. Similarly, in response to a complaint about escalating violence in the regional processing centre on Manus Island, Papua New Guinea, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment concluded in March 2015 ‘that the Government of Australia, by failing to provide adequate detention conditions; end the practice of detention of children; and put a stop to the escalating violence and tension at the Regional Processing Centre, has violated the right of the asylum seekers, including children, to be free from torture or cruel, inhuman or degrading treatment’: UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, A/HRC/28/68/Add.1, 6 March 2015, [19].


30 CROC, art 3(1).

31 UN Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/GC/14, 29 May 2013 (General Comment No. 14), [1].


33 The UN Committee on the Rights of the Child has noted that in a decision concerning an individual child, his or her interests should not be understood as being the same as those of children in general. Rather, ‘the best interests of a child must be assessed individually’: Ibid., [24], [32], [34].

34 Ibid., [32].

35 Ibid., [49].

36 Ibid., [76].

37 The UN Committee on the Rights of the Child has noted that ‘[t]he best interests of the child – once assessed and determined – might conflict with other interests or rights’: Ibid., [39] (emphasis added).

38 For example, the Full Court of the Federal Court of Australia in Wan held that the Administrative Appeals Tribunal ‘was required to identify what the best interests of Mr Wan’s children required … and then to assess whether the strength of any other consideration, or the cumulative effect of other considerations, outweighed the consideration of the best interests of the children understood as a primary consideration’: Wan v Minister for Immigration and Multicultural Affairs (2001) 107 FCR 133 (Wan), [32] (emphasis added). This passage was approved by Lady Hale giving the leading judgment for the Supreme Court of the United Kingdom in ZH (Tanzania) (FC) v Secretary of State for the Home Department [2011] UKSC 4 (ZH), [26].

40 UN Committee on the Rights of the Child, General Comment No. 14, [36].

41 Ibid., [39].

42 Ibid., [37].
For example, the Full Court of the Federal Court of Australia held in *Wan* at [32] that '[p]rovided that the tribunal did not treat any other consideration as inherently more significant than the best interests of the children it was entitled to conclude, after proper consideration of the evidence and other material before it, that the strength of other considerations outweighed the best interests of the children.' See also Lady Hale in *ZH*, [26] and [33].

UN Committee on the Rights of the Child, *General Comment No. 14*, [97].

Ibid.

CROC, art. 4 (emphasis added).

UN Committee on the Rights of the Child, *General Comment No. 14*, [15(a)].

Ibid., [6(c)], [14(b)].

Ibid., [98].


In the United Kingdom, this rule is recognised in the UK Home Office’s guidelines about processing asylum applications from children, which state that the best interests principle requires ‘a continuous assessment that starts from the moment the child is encountered and continues until such time as a durable solution has been reached’: United Kingdom Border Agency, *Asylum Process Guidance: Processing an Asylum Application From a Child*, 16 April 2013, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257469/processingasylumapplication1.pdf, [1.3].

Section 55 of the *Borders, Citizenship and Immigration Act 2009* (UK) provides inter alia that the Secretary of State must make arrangements for ensuring that a range of functions relating to immigration and customs ‘are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom’. Statutory guidance in relation to this provision also states: ‘in accordance with the UN Convention on the Rights of the Child the best interests of the child will be a primary consideration (although not necessarily the only consideration) when making decisions affecting children’: UK Border Agency, *Every Child Matters: Statutory Guidance to the UK Border Agency on Making Arrangements to Safeguard and Promote the Welfare of Children*, November 2009, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257876/change-for-children.pdf, [2.7].

Section 25(1) of the *Immigration and Refugee Protection Act* (Canada) provides that the Minister may exercise a discretion to grant permanent residence status to a foreign national ‘if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected’ (emphasis added).

UNHCR, *UNHCR Monitoring Visit to the Republic of Nauru - 7 to 9 October 2013*, 26 November 2013, [105].


Ibid., [32].

Ibid., [81(b)].


DIBP, BIA Form, p. 1. (emphasis added)


For more information about these obligations, see: Andrew & Renata Kaldor Centre for International Refugee Law, ‘Submission to the Senate Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru’, 30 April 2015, http://www.kaldorcentre.unsw.edu.au/sites/default/files/Select%20Committee%20-%20Kaldor%20Centre%20submission%20-%2030.04.15%20-%20FINAL.pdf.

CROC, art. 3(2).

Ibid., art. 27(1).

Ibid., art. 6(2).

Ibid., art. 37(a).

Ibid., arts. 19, 24, 36.

Ibid., art. 39.

Ibid., art. 22.

ICCPR, art. 9(1); CROC, art. 37(b). See also: Migration Act, s. 4AA; UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012 (Detention Guidelines), Guideline 9.2.

UN Committee on the Rights of the Child, General comment No. 13 (2011) on the right of the child to freedom from all forms of violence, CRC/C/GC/13, 18 April 2011, [37].

Ibid., [46].

In determining what is a safe environment, regard should be had to Australia’s obligation to ensure that children are only detained as a measure of last resort, for the shortest possible time, and never in circumstances where the detention is unlawful or arbitrary.

CROC, art. 20(1) and (2).

Immigration (Guardianship of Children) Act 1946 (Cth), s. 6.

CROC, art. 18(1).


UNHCR, Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum, February 1997; UN Committee on the Rights of the Child, General Comment No. 6. [33].


For more information, see: Ibid.; Australian Human Rights Commission, The Forgotten Children, [10.5] and [12.9].
