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International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2749/2016*, **

Communication submitted by:	M.I. et al. (represented by counsel, Katherine Wrigley, of Refugee Advice and Casework Service)
Alleged victims:	The authors
State party:	Australia
Date of communication:	12 January 2016 (initial submission)
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 21 March 2018 (not issued in document form)
Date of adoption of Views:	31 October 2024
Subject matter:	Extraterritorial application of the Covenant; detention conditions for asylum-seekers in Australia and in Nauru; non-refoulement
Procedural issues:	Admissibility – substantiation of claims; *ratione materiae and loci*; abuse of submission
Substantive issues:	Mandatory immigration detention of minors in Australia and their forcible transfer to Nauru; freedom from torture or cruel, inhuman or degrading treatment or punishment; arbitrary detention
Articles of the Covenant:	7, 9 (1) and (4), 10 (1), 12, 13, 17, 19 (2), 21, 23, 24 and 26
Articles of the Optional Protocol:	2, 3 and 5 (2)

1.1 The authors of the communication are M.I. and 23 other authors. Twenty-two of the authors are nationals of Afghanistan, the Islamic Republic of Iran, Iraq, Pakistan and Sri Lanka, and two are stateless persons coming from Myanmar. At the time of submission of the communication, all authors were unaccompanied minors born between 1996 and 1998. The 24 authors claim violations by Australia of their rights under articles 7, 9 (1) and (4),

* Adopted by the Committee at its 142nd session (14 October–7 November 2024).

** The following members of the Committee participated in the examination of the communication: Wafaa Ashraf Moharram Bassim, Rodrigo A. Carazo, Yvonne Donders, Mahjoub El Haiba, Carlos Gómez Martínez, Marcia V.J. Kran, Bacre Waly Ndiaye, José Manuel Santos Pais, Soh Changrok, Tijana Šurlan, Kobayashi Tchamdja Kpatcha, Teraya Koji and Imeru Tamerat Yigezu.

10 (1), 12, 13, 17, 19 (2), 21, 23, 24 and 26 of the Covenant. The Optional Protocol entered into force for the State party on 25 December 1991. The authors are represented by counsel.

1.2 On 9 June 2016, the State party requested examination of the admissibility of the communication separately from the merits. On 19 June 2018, the Committee, acting through its Special Rapporteurs on new communications and interim measures, decided to examine the admissibility of the communication together with its merits.

Facts as submitted by the authors

2.1 The authors submit that they were fleeing persecution in their home countries and decided to travel to Australia. While they were en route to Australia by sea, Australian authorities intercepted them and brought them to Christmas Island between mid-2013 and early 2014.[1] The authors were mandatorily detained until their forcible transfer to the Nauru offshore Regional Processing Centre by Australian authorities. The transfers to the Regional Processing Centre occurred in 2014 at different dates over several months. The authors were transferred to Nauru under the memorandum of understanding of 29 August 2012 between Nauru and Australia, which provides for the transfer by Australia to the Regional Processing Centre of asylum-seekers who arrive in Australia by sea.[2]

2.2 In Nauru, the authors were forcibly detained at the Regional Processing Centre in unacceptable living conditions and with uncertainty surrounding their fate and the duration of their detention. After their transfer, the authors applied for asylum in Nauru, and all but one applicant (who appealed the decision) were granted refugee status in or around September 2014. All authors resided in Nauru at the time the communication was submitted to the Committee.

2.3 The authors claim that Nauru is a difficult place to live, especially without adequate provisions for clothing and footwear, strong eye protection and hats, some of which are not available for children. The "camp" that houses families and children is in a geographic depression that receives little breeze or shade. The accommodations consisted of temporary vinyl tents housing up to 26 people separated by tarpaulins, with limited or no privacy. In addition, owing to crowding and the inadequacy of facilities such as air conditioning, the temperatures inside the tents could reach up to 30°C. Furthermore, the high humidity made it difficult to get adequate rest and participate in recreational activities. There was insufficient water and sanitation. In addition, access to telephones and the Internet was limited because of the limited services available in Nauru, impacting the communication needs of detainees.

2.4 The authors add that almost all of them started to suffer from health problems in Nauru in the form of deterioration of physical and mental well-being, which was manifested as self-harm and threats of self-harm, depression, kidney problems, insomnia, headaches, memory problems, weight loss, physical manifestations of mental health issues, poor concentration and low self-esteem.

2.5 The authors assert that they are not statutorily able to challenge the legality of their forcible transfer from Australia to Nauru or subsequent detention in the offshore Regional Processing Centre before the courts of Australia or Nauru. Any possible remedy would be ineffective since the courts of Australia and Nauru are incapable of rendering a binding decision with effective relief to protect and enforce the authors' human rights, as the Covenant has not been domestically implemented. Moreover, the remedies sought by the authors are not achievable under habeas corpus proceedings in Nauru, as they are located in Nauru but the violations alleged predominantly concern the responsibility of Australia.

[1] The authors were not traveling together, and the dates of arrival to Christmas Island and transfer to the offshore Regional Processing Centre vary.

[2] A second memorandum of understanding between Nauru and Australia relating to the transfer to and assessment of persons in Nauru and related issues entered into force on 3 August 2013. Available at https://www.dfat.gov.au/geo/nauru/memorandum-of-understanding-between-the-republic-of-nauru-and-the-commonwealth-of-australia-relating-to-the-transfer-to-and.

Complaint

3.1 The authors claim violations of their rights by Australia under articles 7, 9 (1) and (4), 10 (1), 12, 13, 17, 19 (2), 21, 23, 24 and 26 of the Covenant owing to their transfer to and treatment in the offshore Nauru Regional Processing Centre. The authors contend that Australia is responsible for their treatment while in detention in the Nauru Regional Processing Centre.

3.2 The authors claim that Australia has jurisdiction and effective control over them from the time of interception at sea, during their detention and refugee status determination in the Nauru Regional Processing Centre, and in the event that they are resettled in a third country. The State party is responsible under international human rights law for the treatment of asylum-seekers, which it cannot avoid by transferring them to third States or by transferring and detaining them outside its territory.[3] The State party intercepted the authors and decided after some time to transfer them to Nauru; the transfer happened under Australian law and policy. Australia did not request adequate safeguards from Nauru to prevent the authors from being subjected to human rights violations in Nauru. The Regional Processing Centre in Nauru was established, built and funded by Australia, which controls service delivery at the Centre by managing service provider contracts and maintaining a staff presence. Australia exerts significant influence over the Centre through its service contractors. The State party also trained Nauruan officials on refugee status determination. Should the Committee find that Australia does not have effective control over the Centre, the authors submit that Australia failed to exercise due diligence. It did not take reasonable steps to prevent the authors from being subjected to human rights violations at the Centre.

3.3 The State party violated article 7 of the Covenant, as the effects of unacceptable detention conditions at the Nauru Regional Processing Centre, the indefinite nature of the detention and the uncertainty surrounding the authors' fate amount to cruel, inhuman or degrading treatment.

3.4 The authors claim that their rights under article 9 (1) have been violated, since mandatory immigration detention is arbitrary per se when detention is not based on an individualized assessment.[4] They were subjected to mandatory detention by Australia and transferred to Nauru for further detention without adequate individual assessment regarding the need for immigration detention, including whether less restrictive measures were appropriate, and without an opportunity to appeal such decision. Their personal security was also violated since they faced threats of physical and emotional harm in an unsafe environment, lack of privacy, overcrowding and prison-like conditions that were inadequate for children. The Nauru police also failed to adequately protect the authors and prevent violence against them. It failed to investigate and bring the aggressors to trial.

3.5 The State party also violated the authors' rights under article 9 (4), as their entitlement to court proceedings, to seek a decision on the legality of their detention and to be released if the detention is found to be unlawful was not respected.

3.6 The State party violated article 10 (1). Given the conditions at the Regional Processing Centre, the authors have not been treated with humanity and with respect for their inherent dignity.

3.7 The authors' rights under article 12 were also violated by the State party, as they were detained at the Christmas Island from the time that they were intercepted at sea until their transfer to the Regional Processing Centre in Nauru. In Nauru, they were granted a regional processing visa under Nauruan law, which entailed mandatory detention pending health and security clearance, curfew, being accompanied by a service provider outside the Centre and

[3] See European Court of Human Rights, *Al-Skeini and others v. the United Kingdom*, Application No. 55721/07, Judgement, 7 July 2011; Australian Human Rights Commission, *Asylum Seekers, Refugees and Human Rights: Snapshot Report* (2013), p. 15; and European Court of Human Rights, *Hirsi Jamaa and others v. Italy*, Application No. 27765/09, Judgment, 23 February 2012, para. 129.

[4] See *A. v. Australia* (CCPR/C/59/D/560/1993); Office of the United Nations High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum Seekers and Alternatives to Detention* (2012), para. 18; and Human Rights Committee, general comment No. 35, para. 18.

residing in notified premises. Those whose protection applications were denied remained in the Centre. The management of the Centre as an "open" facility, together with the lack of police protection, put the authors at risk of harm from the local community. In practice, they were not able to leave the Centre and were forced to remain inside, limiting their freedom of movement. Once they were recognized as refugees, the authors were required to await transfer and resettlement to a third country or to the Nauruan community, and they were unable to choose their place of resettlement.

3.8 The authors further contend that their rights under article 13 were violated, as they had no access to a procedure for the determination of their status in Australia and the lawfulness of their expulsion therefrom.

3.9 The State party violated the authors' rights under article 17 by subjecting them to arbitrary or unlawful interference with their privacy and family life. The authors claim that their detention amounted to unlawful interference in their family life, and that the conditions within the Regional Processing Centre were not conducive to a safe, nurturing and healthy environment for unaccompanied minors.

3.10 As regards article 19 (2), the authors were prevented from seeking, receiving and imparting information and ideas of all kinds, through any media of their choice, and from being in contact with their relatives via telephone or Internet.

3.11 The State party also violated article 21 of the Covenant. The restrictions imposed at the Regional Processing Centre were not in conformity with the law or necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals, or the rights and freedoms of others.

3.12 At the time of their detention, the authors were unaccompanied minors who still needed and depended on family support and relationships. The State party failed to comply with its obligations under article 23 of the Covenant.

3.13 In addition, Australia discriminatorily denied the authors right to protection required by their status as minors under article 24. There is no comprehensive legal and policy framework, nor is there adequate capacity, to provide child protection, including effective social services and a criminal justice system, in Nauru. The authorities should have considered the authors' best interests as children and the adverse effects of their detention.

3.14 Finally, the authors claim the State party violated its obligations under article 26 by not ensuring them equal treatment before the law. They were discriminated against on grounds of their nationality and social origin, and vis-à-vis other asylum-seekers who did not arrive in the State party by boat. There is also disparate treatment of unaccompanied minors located in Australia and those offshore in the Regional Processing Centre.

State party's observations on admissibility

4.1 On 9 June 2016, the State party submitted its observations, in which it requested the Committee to examine the admissibility of the communication separately from the merits and to find the communication inadmissible.

4.2 The State party submits that the authors make general allegations about the circumstances of their detention in Australia prior to their transfer to Nauru, without submitting substantiating evidence to constitute a prima facie case. The authors failed to sufficiently substantiate that the conduct of Australian officers prior to their transfer amounted to a violation with respect to individual authors under articles 9 (1) and (4), 12 and/or 13 of the Covenant.

4.3 The State party argues that the authors' claims under article 7 are inadmissible *ratione materiae* under article 3 of the Optional Protocol and that they are insufficiently substantiated as they are not supported by evidence, pursuant to article 2 of the Optional Protocol. The implied non-refoulement obligation under article 7 of the Covenant is triggered when there is a real risk of irreparable harm. Officers of the Department of Immigration and Border Protection assessed the personal circumstances of each of the authors before their transfer to Nauru, in the context of pre-transfer assessment, and concluded that there was no risk of irreparable harm. As the assessments concerned unaccompanied minors, they were

conducted in the presence of an independent observer, and the recommendations for transfer to Nauru were also reviewable by a senior official. The assessments also considered whether the authors had made any protection claims against Nauru and whether they had special circumstances to mitigate transfer. This procedure is in conformity with article 3 of the Convention on the Rights of the Child.

4.4 The State party holds that its measures complied with the memorandum of understanding with Nauru of 3 August 2013. Nauru provides assurances through the memorandum of understanding to treat all persons consistent with human rights standards and not to transfer individuals to a third country that would pose a real risk of torture or cruel, inhuman or degrading treatment or punishment, deprivation of life or imposition of the death penalty.[5] Based on the assessment done by the State party and the undertakings of Nauru, the State party asserts that the transfer of the authors posed no real and foreseeable risk of harm under article 7 of the Covenant.

4.5 As to the authors' claims of violations of articles 9 (1) and (4), 10 (1), 12, 13, 17 (1), 19 (2), 21, 23 (1), 24 (1) and 26 owing to their transfer to Nauru, the State party holds that such claims are without legal basis as they are outside the scope of its obligations and inadmissible *ratione loci*, under article 3 of the Optional Protocol. As concerns the authors' alleged treatment in Nauru, they have failed to substantiate prima facie that Australia exercises effective control or is otherwise jointly responsible or has the obligation of due diligence. The Committee does not have competence to examine the authors' claims under these articles, since Australia does not exercise effective control in Nauru in respect to any transferee, including the authors, and the rights under the Covenant do not apply extraterritorially to the authors under these circumstances. The alleged violations did not occur within Australia's jurisdiction. The facts described in the communication involve Nauru, regarding alleged violations in Nauru. Pursuant to article 2 (1) of the Covenant, the State party is obliged to respect and ensure the rights recognized in the Covenant within its territory and subject to its jurisdiction. Although exceptionally it may have obligations beyond its territory, there is a high threshold to be met. The authors have failed to meet that threshold.

4.6 The State party recognizes the independence of the legal framework of Nauru. The operation of the Regional Processing Centre is regulated by the memorandum of understanding, and the authors are subject to the law of Nauru. According to the memorandum of understanding, Nauru oversees the process for determining if transferees are entitled to protection as persons in need of international protection. In this regard, the authors have failed to substantiate their claim of Australia's effective control over them. Moreover, they were found by Nauru to need protection and were given residence permits in Nauru.

4.7 The State party may not be considered jointly responsible with Nauru for the alleged violations in Nauru, as that is not consistent with international law.[6] Under article 1 of the Optional Protocol, the Committee does not have competence to receive and consider a communication related to alleged violations of the Covenant with respect to individuals in Nauru, which is not a party to the Optional Protocol.

Authors' comments on the State party's observations on admissibility

5.1 On 1 August and 27 September 2016, the authors reiterated that their rights under the Covenant were violated by the State party prior to and while being forcibly transferred to Nauru, as well as during their detention in Nauru.

5.2 They maintain that the offshore Regional Processing Centres established by Australia with other States systematically violate international human rights obligations. The legal basis for Australia's responsibility is non-refoulement obligations, extraterritorial application of the Covenant and the effective control of Australia over the authors while they were detained in Nauru.

[5] Memorandum of understanding between Nauru and Australia, para. 19 (c).

[6] Articles on the responsibility of States for internationally wrongful acts, including arts. 6 and 16–18 thereof.

5.3 Australia violated its non-refoulement obligations to the authors, as they were intercepted at sea as asylum-seekers by Australian authorities, taken to Christmas Island and subsequently transferred to Nauru, exposing them to foreseeable and real risks of irreparable harm, such as those contemplated in articles 6 and 7 of the Covenant.

5.4 Australia failed to fulfil its obligations to adequately assess the needs and best interests of each individual author as a child on a continuing basis, when in immigration detention, during transfer to the Regional Processing Centre and during detention thereafter in Nauru. While the State party argues that there were no special circumstances preventing the authors' transfer to Nauru, it does not specify what "special circumstances" would have mitigated their transfer. In addition, the assessments made by its authorities are not subject to a review independent from departmental officers. The authors also claim that the reliance of Australia on the memorandum of understanding is insufficient to comply with its obligations under the Covenant, and that the diplomatic assurances of Nauru are inadequate. In evaluating risks in Nauru, Australia also failed to perform due diligence, as it did not consider factual issues such as the general human rights situation of Nauru.[7]

5.5 The authors claim that the conditions they continued to face in detention, the risks they faced in Nauru, together with their involuntary transfer, amount to a violation of their rights under article 7. As a result of their transfer to Nauru and the conditions they face in the country, they have experienced a deterioration of their mental health, personal security problems, a decline in school attendance, limited contact with family, and poor accommodation and privacy conditions, among other serious hardships.

5.6 The State party's obligations under the Covenant apply extraterritorially. After their transfer to Nauru, the authors remained within the power or effective control of the State party. Their claims are related to the obligations of Australia under the Covenant and not the obligations of Nauru. The essential causal link for the extraterritorial violations was the conduct of Australia in transferring the authors to Nauru.[8]

5.7 The authors also point to the effective control over the authors by way of the State party's influence over Nauruan law and the management and operations of the offshore Regional Processing Centre. First, the State party's argument that it cannot interfere with Nauruan law is not accurate, as, among other things, Australia contributed to the drafting of legislation of Nauru establishing the Centre. The authors refer to a monitoring visit by the United Nations High Commissioner for Refugees to Nauru in October 2013, during which he observed that Australia had retained a high degree of control and direction in almost all aspects of the bilateral transfer agreements. The authors also contend that Australia "procured" and caused the creation of the Centre by requesting Nauru to host it and entering into the memorandum of understanding. The Asylum Seekers (Regional Processing Centre) Act 2012 (Nauru) further establishes Australian practical participation and powers in the operations and management of the Centre, including the Operational Manager, who has been given responsibilities by the State party, and other officers who could be Australian. Australia has sufficient ability under Nauruan law to determine the conditions at the Centre. The State party is also involved in the practical management of operations and administration at the Centre through contracts with service providers, such as security services. Australia also bears administrative and other costs, and appoints a Programme Coordinator in Nauru assigned under the Australian Department of Immigration and Border Protection to oversee the management of all Australian officers at the Centre, with an office allocated at the Centre.

State party's additional observations

6.1 On 31 July 2019, the State party submitted its observations, arguing that the complaint should be considered inadmissible *ratione materiae* or as manifestly unfounded. Alternatively, it should be considered without merits.

6.2 The claims that the authors' detention in Australia violated articles 9 (1) and (4), 12 and 13 are not sufficiently substantiated, as they are not supported by any information about

[7] *Mohammed Alzery v. Sweden* (CCPR/C/88/D/1416/2005), para. 11.3.

[8] Concluding observations on the sixth periodic report of Australia (CCPR/C/AUS/CO/6), paras. 35 and 36.

the authors' circumstances during that period. The authors merely provided the dates of their arrival on Christmas Island and transfer to Nauru. The authors' further information and annexes thereto are incapable of substantiating their claims.

6.3 The State party objects to the authors' argument that "Australia's policy of mandatory immigration detention in Australian territory has been consistently found by this Committee to be contrary to article 9 (1) of the Covenant". The references to the Committee's views do not relate to the facts of the present authors' interception at sea or their detention on Christmas Island prior to their transfer to Nauru. The authors asserted that the Committee had considered it "per se arbitrary to detain individuals requesting asylum". That is a mischaracterization. The State party notes that the Committee expressly rejected that proposition in the case of *A. v. Australia*.[9] The authors were detained on Christmas Island for a period of between 2 and 12 months and no longer than was necessary to make the assessments and arrangements for their transfer to the offshore Regional Processing Centre in Nauru.

6.4 The State party also disagrees with the authors' claims that their transfer to Nauru violated the principle of non-refoulement, including articles 6 and 7. While "irreparable harm" is not limited to violations of the right to life and freedom from torture,[10] the State party argues that the obligation of non-refoulement is not established in relation to rights other than those under articles 6 and 7 of the Covenant,[11] and that the authors in fact erroneously conflate the obligation of non-refoulement with a separate issue of extraterritorial application of the Covenant.[12] The authors' further submissions also mischaracterize the non-refoulement obligation in asserting that Australia had an ongoing obligation to assess human rights risks, which continued after their transfer to Nauru. Such assertions are not supported by international law, since the time for assessing the applicability of a non-refoulement obligation is prior to, or at the time of, transfer of the individual.

6.5 As regards non-refoulement, the State party maintains that by transferring the authors to Nauru, the authors' rights, even as minors, were not violated. The background materials on the asserted risks in the context of transfers to Nauru do not change that conclusion, as the authors did not demonstrate that they were personally at risk of arbitrary deprivation of life, torture or other ill-treatment as a necessary and foreseeable consequence of their transfer to Nauru in 2014.

6.6 The State party also disagrees with the authors' statement that Australia's reliance on Nauru's undertakings in respect of human rights of transferees was "misplaced" because the memorandum of understanding is not legally binding and "the value of any diplomatic assurances is questionable". It considers that diplomatic assurances are relevant to the fulfilment of non-refoulement obligations, and that this position is consistent with international law.[13] Factors of assessment will include the content of the diplomatic assurance and its reliability and credibility in the specific context of the individual in respect of whom the assurance is sought.

6.7 As regards the authors' circumstances in Nauru and the allegations concerning jurisdiction or effective control, the State party reiterates that the authors' treatment in Nauru occurred outside Australian territory, pointing to the lack of jurisdiction, pursuant to article 2 (1) of the Covenant. Therefore, such claims should be considered inadmissible, in accordance with article 3 of the Optional Protocol. It opposes the authors' argument that its approach to jurisdiction is "simplistic, outdated and contradicted" by the *travaux*

[9] CCPR/C/59/D/560/1993, para. 9.3.

[10] Human Rights Committee, general comment No. 31, para. 12.

[11] See *Judge v. Canada* (CCPR/C/78/D/829/1998), individual opinion of Hipólito Solari-Yrigoyen.

[12] The Committee's views in *Mohammad Munaf v. Romania* (CCPR/C/96/D/1539/2006), para. 14.2, *A.R.J. v. Australia* (CCPR/C/60/D/692/1996), para. 6.9, *Judge v. Canada* (CCPR/C/78/D/829/1998), para. 10.6, and *Alzery v. Sweden* (CCPR/C/88/D/1416/2005), para. 11.3, do not support the contention that Australia should be responsible for extraterritorial violations of the Covenant.

[13] *Alzery v. Sweden* (CCPR/C/88/D/1416/2005), para. 11.3. See also Committee against Torture, *Attia v. Sweden* (CAT/C/31/D/199/2002), para. 12.3; or *Agiza v. Sweden* (CAT/C/34/D/233/2003), para. 13.4.

preparatoires, [14] the consistent practice of the Committee and other international jurisprudence, and that its approach to the question of effective control is "unnecessarily narrow and legalistic". While the State party accepts that certain obligations under the Covenant may apply extraterritorially, in the present circumstances Australia does not exercise jurisdiction or effective control over the authors in Nauru, in law or in fact.

6.8 The State party disagrees that the regional processing arrangements in Nauru would indicate that Australia exercises jurisdiction or effective control with respect to the Regional Processing Centre. The provision of funding or other forms of assistance to Nauru does not amount to an exercise of jurisdiction over the authors' alleged treatment in Nauru and does not establish the high degree of control over such matters that would be required for a State's human rights treaty obligations to apply extraterritorially. Nor does the presence of Australian officers in Nauru, or the involvement of Australia in contracting service providers equate to jurisdiction or effective control. As submitted, the involvement of Australia in the Centre is based on the memorandum of understanding, which relies on the laws of Nauru to regulate the status and detention of transferees. The authors' conclusion that Australia has the ability under Nauruan law to determine the conditions prevailing at the Nauru Regional Processing Centre is inaccurate and does not follow from their analysis of the Asylum Seekers (Regional Processing Centre) Act 2012 (Nauru). That an Australian official may perform roles such as the Operational Manager is not relevant; it does not alter the fact that the appointment of personnel to those positions, their powers and duties, and the operation of the Centre more generally, are governed by Nauruan law and are within the jurisdiction and control of the Government of Nauru.

6.9 The State party also responded to the claim that Australia may be jointly responsible with Nauru for alleged violations occurring in Nauru, even if Australia did not exercise effective control over the authors' circumstances in Nauru. The authors invoked the articles on responsibility of States for internationally wrongful acts, including article 6 (Conduct of organs placed at the disposal of a State by another State). Since the authors' claims do not fulfil the requirements for the exercise of the Committee's jurisdiction under the Covenant and the Optional Protocol, the articles are not relevant; the scope of the Committee's jurisdiction cannot be augmented by reference to the articles. The authors have also held that Australia will be liable for internationally wrongful acts which are properly attributable to it, citing articles 16 to 18 of the articles.[15] Referring to article 2 (1) of the Covenant, the State party argues that articles 16 to 18 of the articles on responsibility of States for internationally wrongful acts are not relevant insofar as the violations alleged did not occur within the State party's jurisdiction or territory, or under the State party's effective control. The articles on responsibility of States for internationally wrongful acts also do not alter the preconditions for the Committee's exercise of jurisdiction pursuant to the Optional Protocol (article 1).

Authors' further comments

7.1 On 12 February 2020, the authors recalled that their detention in Australia involved violations of their rights under articles 9 (1) and (4), 12 and 13 of the Covenant and that such claims had been substantiated since the State party's policy of mandatory detention in Australian territory led to arbitrary detention.

7.2 They reassert that before a person is detained, there is no individualized assessment as to the necessity, reasonableness and proportionality of such a measure to the aim of ensuring effective operation of the State party's migration system. While detention for immigration control purposes is not arbitrary per se, detention based on a mandatory rule for

[14] While not citing *travaux preparatoires*, the authors referred to the Committee's views in *Montero v. Uruguay* (CCPR/C/18/D/106/1981); *Guillermo Waksman v. Uruguay* (CCPR/C/OP/1), communication No. 31/1978; *Lopez Burgos v. Uruguay* (CCPR/C/13/D/52/1979); *Lilian Celiberti de Casariego v. Uruguay* (CCPR/C/13/D/56/1979); and *Munaf v. Romania* (CCPR/C/96/D/1539/2006), para. 14.2. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136; and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, ICJ Reports 2005*, p. 168.

[15] See the Committee's views in *Sarma v. Sri Lanka*, which included reference to article 7 of the articles on responsibility of States for internationally wrongful acts, and the case of *Hirsi Jamaa and others v. Italy*, in which the European Court of Human Rights considered the articles.

a broad category is arbitrary.[16] The Committee has reiterated its concerns about Australia's policy of mandatory detention in its recent concluding observations.[17] In its views, the Committee found that the State party's authorities had violated article 9 (1) of the Covenant, as it had been unable to show that the author's individual circumstances made it necessary to detain the author at a point in time, because it had detained the individual pursuant to its policy of mandatory detention, which did not permit individualized determination.[18] The State party's assertion that the authors' detention on Christmas Island was "no longer than was necessary to make the required assessments and arrangements for their transfer to the offshore Regional Processing Centre in Nauru" fails to identify, with any specificity, the ways in which the authors' detention was "no longer than was necessary".

7.3 In addition, as regards the non-refoulement obligations under the Covenant, in its case-law, the Committee has held admissible claims that a person transferred to a second country could be subject to a violation of articles 9, 10 and 14 (1) and (3) of the Covenant by the transferring State.[19] The authors dispute that they have mischaracterized the non-refoulement obligation, noting that in relation to bilateral agreements for the transfer of asylum-seekers between States, the Office of the United Nations High Commissioner for Refugees (UNHCR) has stated that in the post-transfer context at a minimum, and regardless of the arrangement, the transferring State remains, inter alia, subject to the obligation of non-refoulement and may retain responsibility for other obligations arising under international law.[20] Since the State party has effective control of the Nauru Regional Processing Centre, it has an obligation to continually consider whether the authors are at risk of irreparable harm in Nauru and in third countries. The authors also maintain that it was inappropriate for the State party to rely on the diplomatic assurances agreed with Nauru, as the Government of Australia was aware that there were substantial grounds for believing that transferees would be at risk of irreparable harm if sent to the Centre. Referring to the background information, the authors add that the Australian Human Rights Commission has found that the assessment conducted by the State party's authorities prior to sending specified children to Nauru failed to take the best interests of children into account as a primary consideration and that such assessments were inadequate.[21]

7.4 The authors' claims that their transfer from Australia to the Nauru Regional Processing Centre enlivened Australia's obligations under articles 9 (1) and (4), 10 (1), 12, 13, 17 (1), 19 (2), 21, 23 (1), 24 (1) and 26 of the Covenant have been substantiated and should therefore be considered admissible as compatible with the Covenant and article 3 of the Optional Protocol.

7.5 In their view, the State party exercises effective control over the treatment of the authors at the Nauru Regional Processing Centre or is otherwise jointly responsible with Nauru for the treatment of the authors there. The State party's requirement of a "high degree of control" does not correspond to the Committee's jurisprudence, and such test is more stringent than "effective control". While referring to the *travaux preparatoires*, the authors hold that the States parties to the Covenant are responsible also for the violations committed

[16] Human Rights Committee, general comment No. 35, para. 18. See also *Shafiq v. Australia* (CCPR/C/88/D/1324/2004), para. 7.2.

[17] CCPR/C/AUS/CO/6, para. 37.

[18] *A. v. Australia* (CCPR/C/59/D/560/1993), para. 9.4; and *Kwok v. Australia* (CCPR/C/97/D/1442/2005), para. 9.3.

[19] *G.T. v. Australia* (CCPR/C/61/D/706/1996), paras. 7.5 and 8.7; *A.R.J. v. Australia* (CCPR/C/60/D/692/1996), para. 6.6; and *Munaf v. Romania* (CCPR/C/96/D/1539/2006), paras. 7.5 and 8.

[20] UNHCR, "Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing", Protection Policy Paper, November 2010, para. 12.

[21] See CRC/C/NRU/CO/1; Parliament of Australia, Senate Legal and Constitutional Affairs References 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* (Canberra, 2017); and Australian Human Rights Commission, *Ms. BK, Ms. CO and Mr. DE on Behalf of Themselves v. Commonwealth of Australia (Department of Home Affairs): Report into the Practice of the Australian Government of Sending to Nauru Families with Young Children Who Arrived in Australia Seeking Asylum* (2018).

extraterritorially. The authors refer to the report of the Australian Senate Legal and Constitutional Affairs References Committee of 2017, which corroborates that the Government of Australia has effective control of the Nauru Regional Processing Centre. They submit that the State party bears all costs associated with the operation of the Centre and determines which individuals will be detained at the Centre. The State party engages all major contractors at the Centre, and Nauru is not a party to any of those contracts. The State party also directs and controls the major contractor, Transfield Services, which is responsible for the operations of the Centre. According to the authors, the State party has also negotiated resettlement options for refugees detained at the Nauru Regional Processing Centre with other countries.

7.6 The authors also refer, among other things, to a submission by a group of prominent international lawyers to the Prosecutor of the International Criminal Court in relation to crimes against humanity committed with respect to indefinite mandatory offshore detention and the forcible removal of asylum-seekers to Nauru by successive Australian Governments.

State party's further observations

8.1 On 8 June 2021, the State party submitted its rejoinder.

8.2 As to the authors' detention in Australia, the State party observes that the rights in articles 12 and 13 of the Covenant are expressly limited to persons who are lawfully in the territory of the State party, as determined under the domestic law of that State.[22] The rights under those articles are not applicable in cases of aliens who are unlawfully in the territory of a State. As the authors did not hold valid visas to enter or remain in Australia (unlawful non-citizens), articles 12 and 13 of the Covenant are not applicable to the case.

8.3 The State party does not consider the authors' further arguments to substantiate the claims that their detention in Australia involved violations of their rights under articles 9 (1) and (4), 12 and 13 of the Covenant. The interdiction of the authors at sea, based on border policies against illegal maritime arrivals, and their detention on Christmas Island prior to their transfer to Nauru, were necessary, reasonable and proportionate in regard to the serious risks associated with people-smuggling operations and the flow of illegal maritime ventures to Australia. The authors' immigration detention on Christmas Island accorded with Australian immigration laws. As submitted, the authors were detained on Christmas Island for a period of between 2 and 12 months, and no longer than was necessary to make the required assessments and arrangements for their transfer to the Nauru Regional Processing Centre. Transfer arrangements also include non-refoulement considerations, which can delay the transfer of a person, resulting in detention pending transfer.

8.4 In regard to the Committee's criticism of mandatory immigration detention in its concluding observations of 2017,[23] the authors have not submitted evidence to substantiate that they personally experienced the use of force, poor conditions such as absence of healthcare, or violence while detained on Christmas Island. Furthermore, the State party notes that the cited previous case law of the Committee deals with different factual circumstances than those of the authors, and recalls that it is not arbitrary per se to detain unauthorized maritime arrivals upon interception and pending transfer to a regional processing country, under article 9 (1) of the Covenant. As to the assessment of reasonableness and proportionality, the authors did not face indefinite detention on Christmas Island, but a potential settlement in Nauru or a third country. The State party understands that 3 of the authors are currently settled in the community in Nauru, 16 have resettled in the United States of America, and 5 were transferred to Australia for medical treatment. Moreover, the authors did not substantiate that the detention of each author was longer than necessary and did not submit evidence of individualized circumstances.

8.5 As regards the transfer of the authors to Nauru, the State party objects to the expansive application of the non-refoulement obligation under the Covenant. The Committee has not found such obligation to have been breached, except with respect to articles 6 and 7 of the Covenant. Where it is asserted that non-refoulement applies in relation to other rights, the

[22] Human Rights Committee, general comment No. 27, para. 4, and general comment No. 15, para. 9.

[23] CCPR/C/AUS/CO/6, para. 37.

Committee has consistently declined to express a view on that argument. The authors' referred cases hence do not support their allegations.

8.6 As for the authors' circumstances in Nauru, the State party objects to the notion that its approach to jurisdiction would be contradicted by the *travaux preparatoires*, as no arguments to substantiate such a claim have been provided. The scope of the procedural protection afforded by the Optional Protocol cannot be wider than that of the substantive protection by the Covenant, including when exceptionally exercising extraterritorial jurisdiction due to effective control over territory or persons. Referring to *Lopez Burgos v. Uruguay*, the State party argues that it does not exercise a high degree of control or authority rising to the level of "effective control" over the authors in Nauru. The State party considers the authors' claims concerning their circumstances or treatment in Nauru to be inadmissible, adding that the background reports submitted do not contain findings of fact pertaining to the authors individually.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

9.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

9.3 The Committee notes that the State party has not objected to the exhaustion of all available effective domestic remedies by the authors. Accordingly, the Committee considers that it is not precluded from considering the authors' claims by the requirements of article 5 (2) (b) of the Optional Protocol.

9.4 As regards the authors' claims of violations of their rights under articles 12 and 13 of the Covenant while they were in detention on Christmas Island, the Committee considers that the authors have not sufficiently substantiated that they were lawfully present in the territory of the State party to be able to invoke those rights, as they were awaiting a determination of their legal status and issuance of entry visas. At that time, they were considered unlawful non-citizens by the State party. The Committee further considers that the authors' claims of violations of their rights under articles 10 (1), 17, 19 (2), 21, 23 (1), 24 (1) and 26 by the State party on its territory have not been specific and supported by adequate facts and evidence and have therefore been insufficiently substantiated; such claims are hence declared inadmissible, under article 2 of the Optional Protocol.

9.5 In addition, the Committee notes the State party's objection that the authors' claims with regard to the conditions of their detention in Nauru should be considered inadmissible *ratione loci*, as the authors have not been under the jurisdiction or effective control of the State party; the Regional Processing Centre has been governed by the laws of Nauru; and the Nauruan authorities have been taking decisions on the authors' asylum or refugee status, which attests to the exercise of jurisdiction by the authorities of Nauru. The Committee notes that the authors have been recognized by Nauru as refugees and were granted residence permits in Nauru in September 2014. In that context, the Committee notes the authors' claims that their transfer to Nauru was effectuated based on the State party's migration laws and the memorandum of understanding of 3 August 2013,[24] which had delegated parts of the State party's authority to Nauru, also evidenced by the deployment of the State party's service contractors and personnel to facilitate processing of asylum applications through the Regional Processing Centre in Nauru. Alternatively, the authors have argued that the State party failed to exercise due diligence to prevent the violations of the authors' rights when in detention in Nauru; that the State party's obligations under the Covenant have continued to apply extraterritorially to the authors after their removal to Nauru; and that the State party and Nauru bear shared responsibility for unlawful conduct that would amount to an

[24] See footnote 2.

internationally wrongful act under the articles on the responsibility of States for internationally wrongful acts.

9.6 The Committee further notes the State party's objection that it has not exercised a level of control over the Nauru Regional Processing Centre that would amount to the exercise of jurisdiction or effective control by the State party, and that the authors have not substantiated prima facie that Australia exercises effective control of Nauru or is otherwise jointly responsible or has the obligation of due diligence alleged. The Committee notes that the authors were transferred to Nauru in 2014[25] by the State party, pursuant to the section 198AD of the Migration Act 1958 and the memorandum of understanding of 3 August 2013, and that they were placed in immigration detention in the Regional Processing Centre in Nauru. The Committee considers that the authors' placement in detention in Nauru, pending the processing of their protection claims, was a necessary and foreseeable consequence of the transfer of the authors by the State party.

9.7 In addition, the Committee notes that the arrangements in the memorandum of understanding of 2013 authorized the State party to exercise significant involvement in the detention operations in Nauru, in coordination with the Nauruan authorities. The Committee observes that the authors have pointed to the State party's effective control over them by way of its influence over Nauruan law, and the management and operations of the Regional Processing Centre. The authors have argued that the State party contributed to the drafting of the legislation of Nauru establishing the Centre. The authors have also referred to a monitoring visit by the United Nations High Commissioner for Refugees to Nauru in October 2013, during which he observed that Australia had retained a high degree of control and direction in almost all aspects of the bilateral transfer agreements. The authors have also contended that the State party "procured" and caused the creation of the Centre by requesting Nauru to host it and entering into the memorandum of understanding. Moreover, the authors have submitted that the State party has sufficient ability under Nauruan law to determine the conditions at the Centre, and that the State party carries out the practical management of operations and administration at the Centre through contracts with service providers, such as the security services that monitored the authors' movements. The Committee notes the authors' argument that the Asylum Seekers (Regional Processing Centre) Act 2012 (Nauru) established the authority of the State party to participate in the operations and management of the Centre, including the appointment of the Operational Manager in Nauru[26] and other officers carrying out the responsibilities of the State party (see para. 5.7 above). The Committee further observes that several public background reports have shown that the State party bears administrative, service and other costs of the Centre.[27]

9.8 In addition, the Committee observes that pursuant to the Australian Senate Committees' reports of 2015[28] and 2017,[29] the State party's authorities arranged for the construction and establishment of the Regional Processing Centre in Nauru and contributed to its operation through financing, hiring staff who were accountable to the State party, and management. Consequently, the Australian Senate suggested that the Government of Australia acknowledge that it controls the Regional Processing Centre in Nauru. In 2016, the State party's National Audit Office reported that to underpin operations at the processing centres in Nauru and Papua New Guinea, the Department of Immigration and Border Protection entered into contracts for the delivery of garrison support and/or welfare services with a number of providers. Garrison support included security, cleaning and catering

[25] At different dates over several months.

[26] The Operational Manager is assigned under the Australian Department of Immigration and Border Protection to oversee the management of all Australian officers at the Regional Processing Centre, with an office allocated at the Centre.

[27] *Mona Nabhari v. Australia* (CCPR/C/142/D/3663/2019), paras. 7.7–7.14.

[28] Parliament of Australia, Senate Select Committee on the recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru, *Taking Responsibility: Conditions and Circumstances at Australia's Regional Processing Centre in Nauru*," (Canberra, 2015), paras. 2.9 and 2.175.

[29] See Parliament of Australia, Senate Legal and Constitutional Affairs References Committee, *Serious allegations of abuse, self-harm and neglect of asylum seekers*.

services. Welfare services included individualized care to maintain health and well-being, such as recreational and educational activities.[30]

9.9 The Committee recalls paragraph 12 of its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, which defines the principle of "power or effective control" when establishing the exercise of jurisdiction. The Committee observes that the State party established policies to transfer unauthorized maritime arrivals who arrived in Australia after 13 August 2012 to be taken to a regional processing country, either Nauru or Papua New Guinea, to have their protection claims assessed. The State party funded the detention operations, was authorized to jointly manage them, participated in monitoring them, selected companies which would be responsible (directly or through subcontractors) for construction, security, garrison, health and other services at the detention centre, and provided police services to Nauru to help manage the detention operations. In light of all of the factors described above, the Committee considers that the significant levels of control and influence exercised by the State party over the operation of the Regional Processing Centre in Nauru amounted to such effective control during the period of 2014 when the authors were detained at the Centre. The Committee also considers that those elements of control went beyond a general situation of dependence and support, and that the transfer of the authors to Nauru did not extinguish the State party's obligations towards them under article 9 of the Covenant.[31] The Committee considers that while they were detained at the Nauru Regional Processing Centre, the authors were subject to the jurisdiction of the State party.[32] Therefore, the Committee considers that article 2 of the Covenant and article 1 of the Optional Protocol do not pose an obstacle *ratione loci* to the admissibility of the authors' claim under article 9 of the Covenant in relation to their detention at the Nauru Regional Processing Centre.

9.10 As regards the authors' claims of violations of their rights under articles 10 (1), 17, 19 (2), 21, 23 (1), 24 (1) and 26 by the State party when in detention in the Regional Processing Centre in Nauru, the Committee considers that those claims are not specific and have not been supported by adequate facts and evidence; they have therefore been insufficiently substantiated. Such claims are hence declared inadmissible under article 2 of the Optional Protocol.

9.11 The Committee considers that the authors have sufficiently substantiated their claims under article 9 (1) and (4) of the Covenant in the context of their immigration detention on Christmas Island and in the Nauru Regional Processing Centre as under the jurisdiction of the State party,[33] as well as their claims under article 7 in relation to their fear of being indefinitely detained in Nauru in unacceptable conditions, and declares those claims admissible pursuant to article 2 of the Optional Protocol.

9.12 The Committee accordingly decides that the part of communication raising claims under articles 7 and 9 (1) and (4) of the Covenant is admissible, and proceeds with its examination on the merits.

Consideration of the merits

10.1 The Committee has considered the communication in the light of all the information made available to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

10.2 The Committee notes that the authors arrived on Christmas Island between mid-2013 and early 2014. With regard to the authors' claims under article 9 (1) of the Covenant, the Committee notes the allegation that their immigration detention on Christmas Island was arbitrary and unreasonably prolonged and that the conditions of detention and facilities on Christmas Island were inadequate for their needs. The Committee notes the State party's argument that the authors' detention occurred in accordance with procedures established by

[30] Australia, Department of Immigration and Border Protection, Australian National Audit Office, *Offshore Processing Centres in Nauru and Papua New Guinea: Procurement of Garrison Support and Welfare Services* (Canberra, 2016), p. 7.

[31] CCPR/C/AUS/CO/6, paras. 35 and 36.

[32] See, for example, *Mona Nabhari v. Australia* (CCPR/C/142/D/3663/2019), para. 7.15.

[33] CCPR/C/AUS/CO/6, paras. 37 and 38.

the Migration Act and that their detention was as short as possible and regularly reviewed on an individual basis.

10.3 The Committee also notes that the authors do not argue that their detention on Christmas Island was unlawful under Australian law. At the same time, the notion of arbitrariness is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability and due process of law. Detention in the course of proceedings for the control of immigration is not arbitrary per se, but detention must be justified as being reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. The decision must consider relevant factors case by case, and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.[34]

10.4 In addition, the Committee recalls paragraph 18 of its general comment No. 35 (2014) on liberty and security of person, in which it stated that children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention, and also taking into account the extreme vulnerability and need for care of unaccompanied minors.[35] The Committee recalls that the authors were intercepted and brought to Christmas Island in 2013 and 2014 as unaccompanied minors. In accordance with the national policy at the time, they were all placed in immigration detention. They spent between 2 and 12 months in immigration detention before being transferred to the Nauru Regional Processing Centre in 2014. The Committee considers that the State party has not demonstrated on an individual basis that the authors' uninterrupted and protracted detention was justified for an extended period of time. The State party has also not demonstrated that other less intrusive measures could not have achieved the same end of compliance with the State party's need to ensure that the authors would be available for removal. Specifically, it has not been shown that the authors, who were minors at the time, could not have been transferred, for example, to community detention centres on the mainland, which are more tailored to meet the specific needs of vulnerable individuals. For all these reasons, the Committee concludes that placing the authors, as unaccompanied minors, in immigration detention on Christmas Island was arbitrary and contrary to article 9 (1) of the Covenant.

10.5 The Committee also notes the authors' claims that they did not have any effective domestic remedy to challenge the legality of their detention before domestic courts, contrary to requirements of article 9 (4) of the Covenant. The Committee notes the State party's argument that the authors' arguments were not specific and that they had access to a judicial review of the legality of their detention in accordance with domestic law.

10.6 The Committee recalls that judicial review of the lawfulness of detention under article 9 (4) is not limited to mere compliance of the detention with domestic law, but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant, in particular those of article 9 (1). The Committee further recalls its previous jurisprudence concerning review of the detention of non-citizens without valid entry documentation in Australia.[36] In particular, it previously established that the scope of domestic judicial review of immigration detention was insufficiently broad to examine an individual's detention in substantive terms. The State party has not provided relevant legal precedents showing the effectiveness of an application before the national courts in similar situations. Moreover, it has not demonstrated the availability of this remedy for the authors and has not shown that national courts have the authority to make individualized rulings on

[34] *A.K. et al. v. Australia* (CCPR/C/132/D/2365/2014), para. 8.4.

[35] Moreover, in its concluding observations on the sixth periodic report of Australia (CCPR/C/AUS/CO/6, para. 37), the Committee expressed its concern about what appeared to be the use of detention powers as a general deterrent against unlawful entry rather than in response to an individual risk, as well as the continued application of mandatory detention in respect of children and unaccompanied minors, despite the reduction in the number of children in immigration detention.

[36] *F.K.A.G. et al. v. Australia* (CCPR/C/108/D/2094/2011), para. 9.6. See also *F.J. et al. v. Australia* (CCPR/C/116/D/2233/2013), para. 10.4.

the justification for each author's detention. Recalling its jurisprudence, the Committee therefore considers that the facts in the present case also involve a violation of article 9 (4) of the Covenant.

10.7 As regards article 7 of the Covenant, the Committee notes the authors' claim that the State party did not respect its non-refoulement obligations and has exposed them to the effects of unacceptable detention conditions at the Nauru Regional Processing Centre, the indefinite nature of the detention and the uncertainty surrounding their fate, which have amounted to cruel, inhuman or degrading treatment or punishment. The authors have also asserted that the State party had an ongoing obligation to assess human rights risks, which continued after their transfer to Nauru.[37] The Committee notes the State party's objection that the authors' claims under article 7 are inadmissible *ratione materiae* and insufficiently substantiated, as the authors have not supported with evidence the existence of a real risk of irreparable harm after their transfer, pursuant to article 2 of the Optional Protocol. The State party has argued that the officers of the Department of Immigration and Border Protection performed assessments of the personal circumstances of each author before their transfer to Nauru, in the context of pre-transfer assessment, which concluded objectively that there was no foreseeable and real risk of irreparable harm under article 7. The State party added that as the assessments concerned unaccompanied minors, they were conducted in the presence of an independent observer; the recommendation to transfer to Nauru was reviewable by a senior official; and the pre-transfer assessments also considered whether the authors had made any protection claims against Nauru and if any of them had special circumstances to mitigate transfer, in line with the best interests of the child. The State party considers the authors' transfer to Nauru legally permissible and in accordance with the undertakings of Nauru in the memorandum of understanding, including the diplomatic assurances that the authors' rights would be respected.

10.8 Furthermore, the Committee notes the authors' response that the State party has not specified which special circumstances would have mitigated their transfer to Nauru; that the State party's pre-transfer assessments were not subject to an independent review; and that they were exposed to substandard living conditions in the Nauru Regional Processing Centre, in which their health and well-being had started to deteriorate (see para. 5.5 above).

10.9 The Committee recalls that, in paragraph 12 of its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, it referred to the obligation of States parties not to extradite, deport, expel or otherwise remove a person from their territory where there were substantial grounds for believing that there was a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant. The Committee has indicated that the risk must be personal and that there is a high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists. The Committee recalls that it is generally for the organs of States parties to examine the facts and evidence of the case in question in order to determine whether such a risk exists, unless it can be established that the assessment was clearly arbitrary or amounted to a manifest error or denial of justice.[38]

10.10 As regards the claims of a violation of non-refoulement obligations by transferring the authors to Nauru, the Committee observes that the State party's immigration authorities considered individual claims by the authors. The Committee considers that while the authors generally disagree with the conclusions of the pre-transfer assessments, they have not supported with evidence that such assessments by the State party's authorities were clearly arbitrary or amounted to a manifest error or a denial of justice. The Committee hence finds that the authors did not establish that they were personally at risk of arbitrary deprivation of life, torture or other ill-treatment, which would have amounted to an irreparable harm as a necessary and foreseeable consequence of their transfer to Nauru in 2014. Accordingly, the Committee concludes that the available information does not disclose that the authors' transfer to Nauru amounted to a violation of article 7 of the Covenant.

[37] The authors added that the State party also had an obligation to assess a risk that the authors would be found not to be owed protection as refugees.

[38] *V.K. v. Australia* (CCPR/C/140/D/3129/2018), para. 9.5.

10.11 As regards the authors' claims under article 9 (1) and (4) of the Covenant due to their detention conditions in the Regional Processing Centre in Nauru and lack of access to a judicial remedy to seek a decision on the legality of their detention and to be released if the detention is found to be unlawful, the Committee notes that the State party limited its observations to the arguments of inadmissibility of such claims *ratione loci*. In that regard, the State party asserted that it lacked jurisdiction or effective control over the authors when they were in the Nauru Regional Processing Centre. It is undisputed that the sole reason for the authors' administrative detention in Nauru was their unauthorized entry into Australia, by irregular maritime means, as asylum-seekers. Given the background reports on mandatory immigration detention, without an individualized assessment, including whether less restrictive measures were appropriate, the prevalence of an unsafe environment, including violence,[39] overcrowding and prison-like conditions, and the absence of opportunity for the authors, as unaccompanied minors, to appeal such decision on mandatory immigration detention, the Committee considers that the authors were detained arbitrarily in violation of their rights under article 9 (1) and (4) of the Covenant while they were in detention in the Nauru Regional Processing Centre.

11. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation by the State party of article 9 (1) and (4) of the Covenant.

12. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated to provide adequate compensation to the authors for the violations suffered during the periods of their detention on Christmas Island and in the Regional Processing Centre in Nauru. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future. In this connection, the State party should review and modify its migration legislation and policies and any bilateral offshore transfer arrangements for migrants as to their content, implementation and monitoring, to ensure their conformity with the requirements of the Covenant, including article 9.

13. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the language of the State party.

[39] CCPR/C/AUS/CO/6, paras. 35 and 36.