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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. 3663/2019*,**,***

Communication submitted by:	Mona Nabhari, represented by counsel, Alison Battisson, of Human Rights for All
Alleged victim:	The author
State party:	Australia
Date of communication:	9 October 2019 (initial submission)
Document references:	Decision taken pursuant to rules 92 and 94 of the Committee's rules of procedure, transmitted to the State party on 25 October 2019 (not issued in document form)
Date of adoption of Views:	25 October 2024
Subject matter:	Immigration detention in Australia and Nauru; bilateral offshore arrangement for the transfer and processing of migrants
Procedural issues:	Exhaustion of domestic remedies; *ratione loci*; *ratione materiae*; same matter; substantiation of claims; victim status
Substantive issues:	Administrative detention; arbitrary arrest/detention; arbitrary/unlawful interference; family rights
Articles of the Covenant:	9 (1), 17 (1) and 23 (1)
Articles of the Optional Protocol:	1, 2, 3 and 5 (2) (a) and (b)

1.1 The author of the communication is Mona Nabhari, a national of the Islamic Republic of Iran born in 1986. She alleges that the State party has violated her rights under articles 9 (1),

* 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, Laurence R. Helfer, Marcia V.J. Kran, Bacre Waly Ndiaye, Hernán Quezada Cabrera, José Manuel Santos Pais, Soh Changrok, Tijana Šurlan, Kobauyah Tchamdja Kpatcha, Teraya Koji, Hélène Tigroudja and Imeru Tamerat Yigezu.

*** An individual opinion (partially dissenting) by Committee member Hélène Tigroudja is annexed to the present Views.

17 (1) and 23 (1) of the Covenant.[1] The Optional Protocol entered into force for Australia on 25 December 1991. The author is represented by counsel.

1.2 On 25 October 2019, pursuant to rule 94 of its rules of procedure and acting through its Special Rapporteurs on new communications and interim measures, the Committee requested the State party to immediately release the author from closed detention and to take all necessary measures to prevent physical or psychological irreparable harm to her, in particular with respect to separation from family members under the State party's jurisdiction, while the case was being examined.

1.3 On 4 November 2019, the State party transferred the author and her husband to community detention. They currently reside in the community in Melbourne. The State party maintains that the author has accessed mental health services and community medical practitioners who were able to monitor her well-being.

Factual background

2.1 In 2012, the State party signed memorandums of understanding with Nauru and Papua New Guinea. Under those bilateral accords, Nauru and Papua New Guinea agreed to serve as regional (offshore) processing countries for the protection claims of individuals who had arrived in Australia by boat without authorization. In July 2013, the State party began sending all asylum-seekers who arrived by boat without authorization to either Nauru or Papua New Guinea. Those individuals would not be permitted to apply for asylum in Australia or be permanently resettled in Australia.[2] On 3 August 2013, the State party signed an updated memorandum of understanding with Nauru concerning the same matter. Nauru agreed to enable transferees who it determined required international protection to settle in Nauru, subject to an agreement with Australia regarding arrangements and numbers. Transferees who could not be settled in Nauru would be transferred to a third safe country, with the assistance of Australia.

2.2 On 19 August 2013, the author arrived by boat on Christmas Island, a territory of the State party, in the company of her husband, stepfather, stepsister and male cousin. They did not have valid visas. The State party's authorities detained the author and her husband on Christmas Island under section 189 (3) of the Migration Act 1958.

2.3 On 11 March 2014, the author and her husband were transferred to Nauru under section 198AD of the Migration Act 1958. The author states that upon arrival, they were detained at the Regional Processing Centre. On 28 April 2017, the authorities of Nauru recognized the author as a refugee.

2.4 On 22 May 2018, the author was admitted to a support accommodation area in Nauru, where she received healthcare services. She states that while she was there, on 7 June 2018, she harmed herself by hitting her head against a wall. On 17 June 2018, she was discharged. She maintains that in July 2018, she reported to a psychologist that guards had grabbed her hand, twisted it behind her back and threatened to call the police if she did not behave.[3]

2.5 On 20 November 2018, the author and her husband were transferred from Nauru to an immigration detention facility on mainland Australia, following the author's request for specialist medical treatment for tinnitus, vertigo and mental health issues. Transitory persons brought to Australia from Nauru for a temporary purpose are held in immigration detention under section 189 of the Migration Act 1958, unless they are granted a visa or are released into the community owing to the discretionary intervention of the Minister of Immigration and Border Protection. Section 196 (3) of the Migration Act 1958 provides that even a court cannot release an unlawful non-citizen from detention unless the person has been granted a visa.

[1] The author cites article 21 (1) of the Covenant but quotes the text of article 23 (1) of the Covenant. It is therefore presumed that she intended to invoke the latter provision.

[2] Sect. 198AB of the Migration Act 1958.

[3] The author provided a report of a clinical nurse, dated 24 December 2018, in which the nurse reported the author's statements to that effect.

2.6 On 4 March 2019, the author and her husband were transferred to an immigration facility in Adelaide owing to capacity issues at their previous accommodation. In early 2019, the author's stepsister, who was a minor, and the author's stepfather were placed in a Melbourne community after being transferred to Australia for medical reasons.

2.7 Section 197AB of the Migration Act 1958 permits qualifying individuals to be released from immigration detention and placed in the community. The Minister of Immigration and Border Protection is not obligated to release qualifying individuals under that section and is not required to provide reasons for decisions. On 31 March 2019, the Minister for Immigration and Border Protection declined to exercise his discretionary power to enable the author and her husband to reside in the community in Brisbane. Having considered all of the relevant factors, the Minister did not consider that it was in the public interest to exercise his discretionary power.

2.8 On 1 May 2019, the author requested to be transferred from Adelaide to Melbourne. On 7 May 2019, she and her husband were transferred to Melbourne. The author asserts that the transfer was executed because of capacity issues. The State party maintains that the transfer was also executed because the author's stepfather and stepsister were in Melbourne and the authorities had taken into account her family ties and the benefit that her transfer would have for her mental health.

2.9 Thereafter, the author and her husband were asked whether they would be willing to share their accommodation (a three-bedroom unit) with other detainees, owing to capacity issues. They declined to do so. Thus, on 30 May 2019, they were transferred to Melbourne Immigration Transit Accommodation facility, where they were initially housed in different rooms in the same building. On 31 July 2019, they were placed together in the same accommodation in a facility in Melbourne consisting of 10 townhouse-style units which were fitted with full kitchens.

2.10 On 18 July 2019, the author's case was again referred for assessment under section 197AB of the Migration Act 1958. On 29 October 2019, the Minister for Immigration and Border Protection intervened to allow the author and her husband to reside in the community under a residence determination in Melbourne. They were therefore transitioned to community detention on 4 November 2019 and are currently living in the community in Melbourne.

2.11 The author states that she has experienced psychological and physical health issues since her detention in Nauru. Those problems include back pain, knee pain, a chronic infection of her left ear, digestive issues and subclinical hypothyroidism. She was given hormonal medication for polycystic ovarian disease but states that she did not receive adequate care for that condition for a long period. The author maintains that her health deteriorated significantly during her subsequent detention in Australia, even though she had been transferred there to receive medical treatment for vertigo and mental health problems. She suffers from anxiety, detention fatigue, insomnia, stress and hypervigilance.

2.12 The author has stated that she feels ready to die because she has no rights and doesn't feel human anymore. She states that she feels frustrated that she has spent five of the six years of her marriage in detention and has been separated from her stepsister and stepfather since their placement in community detention.

2.13 According to various medical records provided by the author, in 2018 and 2019 she suffered from various psychological difficulties. In a medical assessment form dated 14 July 2018, a clinician reported that the author was living in a tent in Regional Processing Centre 3. In a statement dated 9 November 2018, a psychiatrist reported the author's statement that she and her husband had been placed in the community a few months earlier. In a medical record of 27 August 2018, a psychologist reported that the author and her husband were moving into community housing on that date. In a record of 29 August 2018, a psychologist who treated the author reported that she and her husband had transitioned to community housing a few days earlier, having been offered housing in the area of Anibare Ponds.

Complaint

3.1 The author submits that the State party has violated her rights under articles 9 (1), 17 (1) and 23 (1) of the Covenant. She is administratively detained under section 189 of the Migration Act 1958, under which so-called "unlawful non-citizens" must be detained until they are removed or receive a visa. The removal of the author would constitute refoulement, and the author is not eligible for a visa because she is subject to the regional processing arrangement between Australia and Nauru.

3.2 In violation of article 9 (1) of the Covenant, the State party's authorities have failed to provide individualized justifications for administratively detaining the author despite the fact that she was granted refugee status in Nauru in 2017. Section 195A of the Migration Act 1958 authorizes the Minister for Immigration and Border Protection to grant a visa to a person in immigration detention, on a discretionary basis and in certain circumstances. The author could also be released from a closed detention facility through the residence determination procedure set forth under section 197AB of the Migration Act. Her application for such discretionary release was rejected for undisclosed reasons.

3.3 The length of the author's detention has not been reasonable, necessary or proportionate. She has been detained for more than six years. She cannot challenge the lawfulness of her detention before a judicial authority. It is expressly stated in the Migration Act 1958 that even a court may not release an unlawful non-citizen from detention unless that person has been granted a visa. The High Court of Australia has found that the mandatory detention of non-citizens does not violate the Constitution of Australia.[4]

3.4 In an annexed statement, the author claims that the State party controls, both in law and in fact, asylum-seekers whom it has transported to Papua New Guinea and Nauru and who are detained in those countries.[5] The State party funds the facilities where asylum-seekers in those countries are housed. The facilities are staffed by employees of companies which have contracted with the State party to provide garrison, security, construction, health and other services. The State party also provides capacity-building support to those countries. A number of officials of the State party are present in those countries to manage the centres on a day-to-day basis. Locals of Nauru have complained about the lack of control they have over the detention centres and the lack of knowledge they have of the contract provisions between the Department of Immigration and Border Protection and its contract service providers. The present role of the Government of Nauru in operating those detention centres is unclear.

3.5 Although the author is not detained pursuant to a criminal sentence, her detention has nonetheless been punitive. She has committed no crime and presents no danger. The criminalization of her act of seeking refuge in Australia is unfounded. It exceeds any legitimate interest of the State party in protecting its people and regulating migratory flows.

3.6 In addition, the separation of the author from her family, especially her stepsister, violates her rights under articles 17 (1) and 23 (1) of the Covenant.

State party's observations on admissibility and the merits

4.1 In its observations of 27 August 2020, the State party explains that its border protection policy was implemented in response to a dramatic increase in the number of people attempting to migrate to Australia, without authorization and by boat, between 2008 and 2013. During that period, more than 1,200 people drowned while attempting to reach Australia on small and often unseaworthy vessels. Under the policy, unauthorized maritime arrivals are returned to their departure points or homes or are transferred to a regional processing country. They will thus not settle permanently in Australia. Consistent with the Migration Act 1958, unauthorized maritime arrivals arriving in Australia after 13 August 2012 have been taken to a regional processing country, either Papua New Guinea or Nauru, to have their protection

[4] High Court of Australia, *Al-Kateb v. Godwin* (2004) 219 CLR 562.

[5] Australia, Australian Senate, "Review into recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru", part 2 (6 February 2015); and Office of the United Nations High Commissioner for Refugees (UNHCR), "Monitoring visit to the Republic of Nauru, 7–9 October 2013" (2013).

claims assessed. The policies have succeeded in stemming the flow of boats, disrupting the people-smuggling business model and preventing loss of life at sea. Since December 2013, there have been no known deaths at sea as a result of people smuggling.

4.2 The State party works closely with the Government of Nauru to support the provision of health, welfare and support services, including extensive physical and mental healthcare, free community accommodation and utilities, and allowances, to transitory persons. There are no restrictions on the movement of transitory persons in Nauru. The health and welfare of transitory persons is of paramount importance to both Governments. The State party has contracted professionally trained and experienced service providers to support Nauru in meeting the health needs of refugees and asylum-seekers. The State party provides extensive related details.

4.3 The author's claims relating to arbitrary detention in Nauru are inadmissible under article 2 (1) of the Covenant and article 1 of the Optional Protocol, because they relate to conduct that occurred outside of the territory and jurisdiction of Australia. The State party does not exercise effective control in Nauru. Nauru is a sovereign State with jurisdiction over the regional processing arrangements and individuals within their territory. The State party expands upon this argument in detail. Two elements would be required to establish a State's responsibility for a wrongful act: the act must be attributable to the State and must breach an international obligation of the State.[6] The treatment of the author in Nauru is not attributable to the State party. Moreover, the threshold that must be met for a State to have directed or controlled the conduct of private entities is very high.[7] The State would have had to have effective control over the activities or operations in the course of which the alleged violations were committed.[8] In addition, the instructions, direction or control must relate to the conduct which is said to have amounted to an internationally wrongful act.[9] That is, even a general situation of dependence and support is insufficient to justify attribution to the conduct of State. Once individuals are transferred to Nauru pursuant to the memorandum of understanding, the Government of Nauru has responsibility for them. Such transfers cannot occur without the consent of the Government of Nauru. While the State party may in certain circumstances provide support to the Government of Nauru, it is only to give effect to the formal arrangements.

4.4 The author's claims with respect to her detention and family rights are also inadmissible and meritless because they are not sufficiently substantiated. The author's detention was lawful. She stated that she was held for a period of six years but did not state which period or periods of detention were the subject of her allegations. She provided only brief assertions, without supporting evidence or analysis. Her detention was lawful under sections 189, 198AD, 198B (1) and 189 (1) of the Migration Act 1958.[10] She was an unlawful non-citizen who had entered the State party's territory without a valid visa.

4.5 The author's detention was reasonable, necessary, proportionate to legitimate aims and subject to regular review, which included consideration of whether less restrictive alternatives were available. There is no rule that detention for a particular length of time is necessarily arbitrary. The determining factor is not the length of the detention but rather the justification of the grounds for detention. The aims served by the author's detention on

[6] Articles on responsibility of States for internationally wrongful acts (General Assembly resolution 56/83, annex), art. 2; and *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 3, para. 29.

[7] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, I.C.J. Reports 1986*, p. 14.

[8] Ibid., para. 86.

[9] Articles on responsibility of States for internationally wrongful acts, para. 7.

[10] Under sect. 189 (1) of the Migration Act, if an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain that person. Under sect. 198AD of the Migration Act, an officer must, as soon as reasonably practicable, take an unauthorized maritime arrival to a regional processing centre. Under sect. 198B (1) of the Migration Act, an officer may, for a temporary purpose (including medical assessment or treatment), bring a transitory person to Australia from a country or place outside Australia. Each transfer is assessed on a case-by-case basis and, where applicable, consideration of the need for family or other support persons is also considered as part of the process.

Christmas Island were to stem the flow of people-smuggling ventures, prevent people from risking their lives on dangerous boat journeys to Australia, stop unnecessary deaths at sea, disrupt people-smuggling operations in the region, prevent unlawful non-citizens from entering the Australian community after travelling to Australia by irregular means, ensure that the author was available for transfer to a regional processing country and remained available for transfer once she was no longer required to be in Australia for the temporary purpose, ensure the integrity of Australia's migration programme and assess the identity and security risk of unlawful non-citizens. The author's detention on Christmas Island from 19 August 2013 to 11 March 2014 was for the shortest period possible while she awaited transfer to a regional processing country. She was transferred as soon as practicable once the availability of accommodation and services in the processing country were confirmed. Her place of detention was chosen based on several factors, including the safety of both the author and the Australian community, the capacity of facilities in the immigration detention network and the suitability of the accommodation to the author's medical and other needs. She was housed on Christmas Island in accommodation that was an alternative to a place of detention. Her detention was reviewed by, for example, department officers under individual management plans. Her detention was also subject to welfare oversight measures, which were conducted at least seven times between 5 October 2013 and 18 February 2014.

4.6 The author's detention on mainland Australia from 20 November 2018 to 4 November 2019 also complied with article 9 of the Covenant. She was transferred to and detained in Australia for the temporary purpose of receiving medical treatment. Her presence in Australia was not intended to be permanent. Transitory persons are required to return to a regional processing country upon the completion of the temporary purpose for which they were transferred to Australia. Her places of detention were chosen based on the same factors as for her detention on Christmas Island. Her detention became less intrusive over time and was reviewed in early 2019. She was transferred to a facility to accommodate her medical needs in Australia, and then to Melbourne to accommodate her request of 1 May 2019 and in recognition of her family ties and health assessments that she would benefit from family support. Within Melbourne, she was transferred between facilities to accommodate her preference to live in a room separately from her husband, rather than share a three-bedroom unit with her husband and another person. Finally, she was released into the community.

4.7 While the author maintains that she could have been released earlier on a discretionary basis, the relevant laws and guidelines do not require such release. The Department of Immigration and Border Protection conducts formal monthly reviews in an effort to resolve the status of persons held in detention. The purpose of the reviews is to ensure, inter alia, that the detention remains lawful and reasonable. If the detention is no longer appropriate to an individual's circumstances, or if there are identified vulnerabilities, the case may be referred for discretionary consideration by the Minister for Immigration and Border Protection. There is no legal requirement to refer the case to the Minister, and the Minister is not required to release the individual or provide reasons for a decision not to release a person into the community.

4.8 Detention of an unlawful non-citizen is not inconsistent per se with article 9 of the Covenant. Individualized assessments were conducted as to the appropriateness of the author's immigration detention, including the length and conditions of detention and the appropriateness of both accommodation and services provided. The State party has the right to decide whom it will admit to its territory. The Covenant provides significant scope for States parties to enforce their immigration policies and require departure of unlawfully present persons.

4.9 The author may challenge the lawfulness of her detention before a court. She could seek judicial review of her detention under section 75 (v) of the Australian Constitution, which provides that the High Court has original jurisdiction in relation to every matter where a writ of mandamus, prohibition or injunction is sought against an officer of the Commonwealth. She could also file a writ of habeas corpus before a court. Under section 256 of the Migration Act 1958, the Department of Immigration and Border Protection must provide to immigration detainees all reasonable facilities to take legal proceedings in relation to their immigration detention.

4.10 The author did not explain how any of the alleged facts constituted a violation of articles 17 or 23 of the Covenant. The brief factual assertions that her counsel provided do not substantiate those claims. Her stepfather and stepsister are not family within the meaning of the State party's migration legislation,[11] and the author has not substantiated that they are family within the meaning of articles 17 or 23 of the Covenant, nor that any separation constituted interference by the State party, nor that it was unlawful or arbitrary. The facts do not support any such claims. The State party's laws prioritize consideration of the nuclear family (spouses/partners and families with minor children). The State party also considers, where appropriate, the unity of families consisting of adult siblings or adult children who are not dependants. However, the State party is entitled to afford nuclear families a greater level of protection in accordance with its obligations under the Covenant. Any interference in non-nuclear families is likely to involve a much lower level of hardship than for nuclear families. During her detention, the author was with her husband. Although they were separated for a period of two months, that did not constitute interference, nor was it unlawful or arbitrary. They now reside together in the community in Melbourne, where the author's stepsister and stepfather live.[12]

Author's comments on the State party's observations on admissibility and the merits

5.1 In her comments of 11 January 2021, the author clarifies that the communication does not concern any period from 4 November 2019 onwards, as she was released from detention on that date.

5.2 In other cases, the Working Group on Arbitrary Detention has considered that Australia and regional processing countries bear joint responsibility for migrants in a similar situation to that of the author.[13] She was deported to a remote island from which she could not leave.

5.3 The State party's laws permit arbitrary detention. The quality of accommodation at one of the author's places of detention on mainland Australia does not address the fact that she could not leave it.

5.4 With respect to articles 17 and 23 of the Covenant, it may be argued that stepfamily members who have been involved in an individual's life for a significant period are family. That is the case for the author. There is no reason why she could not have been brought to Melbourne immediately after being evacuated from Nauru.

5.5 As an alternative to detaining asylum-seekers in Nauru, the State party could use other means of managing them in an orderly manner. For example, the State party could fly them from Indonesia and Malaysia to Australia. A small island of 21 km^2, Nauru is not a durable settlement solution. It is heavily impacted by climate change, its fish stocks are depleted, and sea level rise threatens its existence. One of the largest contributors to the economy of Nauru is the detention centre itself. The centre is unlikely to employ the author, and she is unlikely to work there given her negative experiences there. While she may have been able to move around the island at times, she could not leave it. It was an island prison.

State party's further observations on the admissibility and merits

6. In its further observations of 10 June 2021 the State party reiterates that the author's claims under the Covenant are not sufficiently specified and are without merit. The State party disagrees with the findings of the Working Group on Arbitrary Detention in its opinion No. 20/2018, in which it did not apply the high standard that must be met in order to establish that a State may be considered to exercise effective control abroad.[14] In the memorandum of understanding, the Government of Nauru assured the State party that persons transferred to Nauru would be treated in accordance with relevant human rights standards. Nauru is meeting that commitment. The size of Nauru has no bearing on whether it constitutes a durable settlement solution. The author's claim that Nauru is an island prison is unclear. Her assertion

[11] Australia, Migration Regulations 1994, regulations 1.05A and 1.12.

[12] The State party expands at length on its arguments in relation to articles 9, 17 and 23 of the Covenant.

[13] See A/HRC/WGAD/2018/21.

[14] See para. 4.3 of the present document.

that the State party did not consider her personal circumstances in detaining her is incorrect for the reasons previously mentioned. Regarding relevant policy objectives, since December 2013, in the State party's waters there have been no known deaths at sea resulting from people smuggling.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 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.

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

7.3 Article 5 (2) (b) of the Optional Protocol requires that authors avail themselves of all effective and available domestic remedies before submitting a communication to the Committee.[15] The Committee recalls its jurisprudence that although there is no obligation to exhaust domestic remedies if they have no chance of being successful, authors of communications must exercise due diligence in the pursuit of available remedies, and mere doubts or assumptions about their effectiveness do not absolve the authors from exhausting them.[16] The State party maintains that the author could have challenged her detention before a court by applying for a writ of mandamus under section 75 (v) of the Constitution, or for a writ of habeas corpus. The Committee observes that it has not been demonstrated that either of those remedies was available and effective to challenge the author's detention in Nauru. The Committee also observes that the State party's Migration Act 1958 required the detention and removal from Australia of "unlawful non-citizens", and that the exceptions under which such an individual may be released from detention did not apply to the author. The Committee observes that according to the jurisprudence of the High Court which applied at the time of the detention of the author in the present case (*Al-Kateb v. Godwin*), indefinite detention of an unlawful non-citizen who could not be deported was lawful.[17] The Committee also recalls that when the highest domestic court has ruled on the matter in dispute in a manner eliminating any prospect that a remedy before domestic courts may succeed, authors are not obliged to exhaust domestic remedies for the purposes of the Optional Protocol.[18] In its previous jurisprudence, the Committee stated that the possibility that Australia's highest court could someday overrule its precedent upholding indefinite detention of unlawful non-citizens did not suffice to indicate the availability of an effective remedy.[19] The Committee also previously established, regarding review of detention of non-citizens without valid entry documentation in Australia, that the scope of domestic judicial review of immigration detention was insufficiently broad to examine an individual's detention in substantive terms.[20] Similarly, in the present case, the Committee considers that the State party has not demonstrated that the courts in Nauru or Australia had the authority to make an individualized ruling on the justification for the author's detention.[21] In the light of the above circumstances, the Committee considers that the author's failure to apply for a writ of mandamus or habeas corpus to challenge her detention does not constitute an obstacle under article 5 (2) (b) of the Optional Protocol to the admissibility of the communication.

7.4 The Committee notes the State party's position that the communication is inadmissible because it is insufficiently substantiated. With respect to the author's claim that

[15] See, for example, *Falzon v. Australia* (CCPR/C/140/D/3646/2019), para. 6.3.
[16] See, for example, *M.L. v. Croatia* (CCPR/C/127/D/2505/2014), para. 6.6.
[17] See High Court of Australia, *Al-Kateb v. Godwin*.
[18] See, for example, *X et al. v. Greece* (CCPR/C/126/D/2701/2015), para. 8.5.
[19] *F.K.A.G. et al. v. Australia* (CCPR/C/108/D/2094/2011), para. 8.4; and *F.J. et al. v. Australia* (CCPR/C/116/D/2233/2013), para. 9.3.
[20] *F.K.A.G. et al. v. Australia* (CCPR/C/108/D/2094/2011), para. 9.6; *A.K. et al. v. Australia* (CCPR/C/132/D/2365/2014), para. 8.7; and *F.J. et al. v. Australia* (CCPR/C/116/D/2233/2013), para. 10.5.
[21] See *A.K. et al. v. Australia* (CCPR/C/132/D/2365/2014), para. 7.3.

her family rights under articles 17 and 23 (1) of the Covenant were violated when she was separated from her stepsister, stepfather and male cousin, the Committee notes the State party's information that the author was not separated from her husband while on Christmas Island, Nauru and mainland Australia. At an unspecified time, the author's stepsister and stepfather were transferred from Nauru to mainland Australia for medical reasons. Following the author's request of 1 May 2019 for transfer to Melbourne, where her stepfather and stepsister were residing, she was transferred to Melbourne on 7 May 2019 and was released with her husband into community detention in November 2019. The Committee also considers that the author has not provided sufficient elements to establish the applicability of articles 17 or 23 (1) of the Covenant, and that those claims are therefore insufficiently substantiated and are inadmissible under article 2 of the Optional Protocol.

7.5 The Committee notes the State party's position that the author's claim under article 9 (1) of the Covenant is inadmissible with respect to her detention in Nauru because Nauru is a sovereign State over which the State party does not exercise jurisdiction or effective control. The Committee recalls its position that under article 1 of the Optional Protocol, it has the competence to receive and consider communications from individuals subject to the jurisdiction of States parties. States parties are required by article 2 (1) of the Covenant to respect and to ensure the Covenant rights to all persons who might be within their territory and to all persons subject to their jurisdiction. That means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State party.[22] This is in line with the *travaux préparatoires* to the Covenant, which indicate that the drafters did not intend to allow States parties to escape from their obligations when they exercise jurisdiction outside of their national territory.[23] Moreover, enjoyment of most Covenant rights must be available to both citizens and aliens.[24] A State party may be responsible for extraterritorial violations of the Covenant in cases such as those involving extradition or deportation, if extradition or deportation is a link in the causal chain that would make possible violations in another jurisdiction, where the risk of an extraterritorial violation is a necessary and foreseeable consequence judged based on the knowledge the State party had at the time.[25]

7.6 The Committee proceeds to assess whether the author was within the power or effective control of the State party when she was detained in Nauru. In 2014, pursuant to domestic laws and a bilateral agreement, the State party transferred the author from Australia to the custody of the authorities in Nauru, where she was immediately detained in a regional processing centre.[26] Her transfer to Nauru was required by the State party's laws. In a memorandum of understanding of 3 August 2013, Australia and Nauru agreed that Nauru would accept to host transferees, either at a regional processing centre or under community-based arrangements and would provide them with settlement opportunities (in Nauru or in a third safe country) if they required international protection. The Committee considers that the author's initial placement in detention in Nauru was a necessary and foreseeable consequence of the State party's transfer of the author, at a minimum during the processing of her asylum claim.

7.7 In evaluating whether the State party had effective control over the conduct of the detention operations in Nauru, the Committee notes that the formal arrangements authorized the State party to exercise significant involvement. In the memorandum of understanding of 2013, it was stated that the two Governments would communicate regarding the day-to-day operation of activities undertaken in accordance with the memorandum and would establish

[22] General comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 10. See also *A.S. v. Malta* (CCPR/C/130/D/3042/2017), para. 7.4; and *D.O. et al. v. Russian Federation* (CCPR/C/139/D/2871/2016), para. 8.4.

[23] E/CN.4/SR.194, para. 46; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, para. 109.

[24] General comment No. 15 (1986) on the position of aliens under the Covenant, paras. 1 and 2.

[25] *Lopez Burgos v. Uruguay* (CCPR/C/13/D/52/1979), para. 12.2; and *A.S. et al. v. Italy* (CCPR/C/130/D/3042/2017), para. 7.5, citing *Munaf v. Romania* (CCPR/C/96/D/1539/2006), para. 14.2.

[26] The Committee has recourse to official information published by both Governments.

a joint committee to oversee related practical arrangements.[27] According to the memorandum, the State party also maintained the ability to jointly decide with Nauru which individuals required international protection to settle in Nauru,[28] and would assist Nauru in removing those who were found not to require such protection.[29] The Committee notes the State party's observation that its courts have found that Nauru, not the State party, is responsible for the treatment of detainees in offshore processing facilities.[30] Nevertheless, the Committee notes that under section 198AHA of the Migration Act 1958, the State party's authorities may take, or cause to be taken, any action in relation to the arrangement or the regional processing functions of a country with which it has entered into a regional processing arrangement. In addition, 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. Under rule 3.1 of the Regional Processing Centre Rules 2016, all persons residing at the Centre shall, at all times, comply with all reasonable orders and directions from an Operational Manager or a service provider that are in the interests of the safety, good order and maintenance of the Centre. According to the definitions set forth in section 3 of the Asylum-Seekers (Regional Processing Centre) Act, the Operational Manager is the person who has been given responsibility by Australia or by a Minister of Nauru for managing operations at the Centre. The Act also defines a "service provider" as a body that has been engaged by Nauru or Australia to provide services of any kind at a regional processing centre or in relation to protected persons. Rule 11.5 of the Regional Processing Centre Rules 2016 stipulates that all breaches of the rules of the Centre will be brought to the attention of the Operational Managers. Accordingly, the law in Nauru permitted the State party to direct and oversee operations at the place where the author was detained for over four years.

7.8 In practice, on an operational level, the State party acknowledges that it supports the provision of accommodation, health and social services, utilities and allowances to "transitory persons" in Nauru. The Committee observes that various additional factors, as reported in official documents made available to the public, indicate that the State party was in fact significantly involved in the detention operations in Nauru while the author was detained there from 2014 to 2018. For example, according to a report published in 2015 by a Committee of the Australian Senate, the State party's authorities arranged for the construction and establishment of the Regional Processing Centre, hired contractors (who were accountable to the State party) to operate and manage it, controlled the delivery of services and the provision of infrastructure there, maintained a permanent staff presence there, had the power to cause or prevent any act or decision to be made there, and applied for the visas which were required for asylum-seekers to stay in Nauru.[31] 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 includes security, cleaning and catering services. Welfare services include individualized care to maintain health and well-being, such as recreational and educational activities.[32]

7.9 The Committee observes that while those contracts may have been with private entities, such entities were empowered by the State party – through the processing arrangements – to exercise elements of governmental authority in the detention centre. For

[27] Memorandum of understanding between the Republic of Nauru and the Commonwealth of Australia relating to the transfer to and assessment of persons in Nauru and related issues, 3 August 2013, paras. 21 and 22.

[28] Ibid., para. 12.

[29] Ibid., para. 14.

[30] High Court of Australia, *Plaintiff M68/2015 v. Minister for Immigration and Border Protection and Ors* (2016), HCA 1, paras. 102 et seq.

[31] 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, 2.175 and 1.202.

[32] 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.

example, according to the Australian National Audit Office, in August 2012, a private company approached Australia's Department of Immigration and Border Protection to enquire if it could assist in its operations in Nauru. In September 2012, the company began providing garrison (operational and maintenance) services in the Regional Processing Centre in Nauru.[33] The company subcontracted to a private security company in Australia, which agreed to provide security guards to the Centre until October 2017.[34] The security company was responsible, inter alia, for conducting a security risk assessment for each transferee, providing an induction for them, referring them for medical attention when needed, proactively managing issues relating to transferees as they arose, transporting them when needed, controlling entry to the centre,[35] ensuring that personnel levels at the centre were adequate, and engaging with the local community to employ local personnel or subcontract local businesses.[36] Moreover, it appears that the State party's authorities still maintained supervision over the Centre. In 2015, the Australian Senate was informed that Nauruan managers of the Centre had stated that they were not sufficiently informed about day-to-day matters at the Centre because service providers reported directly to the State party's Department of Immigration and Border Protection.[37]

7.10 The Committee takes note of reports that the State party provided capacity-building and training to the authorities in Nauru with respect to the detention operations. For example, when the author arrived in Nauru, the then-Commissioner of the Nauru Police Force was an officer who had been seconded from the Australian Federal Police; he was removed in July 2014.[38] When announcing the opening of the Regional Processing Centre on 5 October 2015, the State party noted that it had "supported the Government of Nauru in making the open centre arrangements possible by funding service providers and sharing Australian expertise with Nauruan law enforcement agencies".[39]

7.11 Regarding the financing of the detention operations, the Committee also notes that the State party agreed to bear all costs incurred under and incidental to the 2013 memorandum of understanding with Nauru.[40] In addition, during the years in which the author was detained in Nauru, the State party had contracts for the provision of accommodation to transferred migrants with a company owned by the Government of Nauru;[41] had contracts with private entities for managing construction, garrison and welfare services in Nauru;[42] stated that it was financing the medical assessment and treatment services required by transferees in Nauru;[43] paid fees of A$1,000 per month per person for visas for transferees and refugees in

[33] Ibid., paras. 2.20–2.28 and table 2.2.

[34] Subcontract agreement on general terms and conditions in relation to the provision of services on the Republic of Nauru between Transfield Services and Wilson Security, dated 2 September 2013, available at https://www.homeaffairs.gov.au/foi/files/2011-2014/FA140300149.PDF.

[35] Ibid., annexure 8, paras. 2.4.7, 2.4.9, 2.5.2, 2.5.6, 4.1 and 5.10.

[36] Ibid., annexure 8, para. 1.2.

[37] Parliament of Australia, Senate Select Committee, *Taking Responsibility*, para. 2.11.

[38] Ibid, para. 2.35.

[39] Australia, "Australia welcomes Nauru open centre", media release, 5 October 2015.

[40] Memorandum of understanding, para. 6.

[41] Nauru, Minister of Finance, "2014–15 budget – budget paper 2", p. 8, available at https://naurufinance.info/wp-content/uploads/2020/08/Budget-Paper-2-2014-15-Final.pdf.

[42] Contract notice identification Nos. CN1078292, CN2826282 and CN3460561, www.tenders.gov.au; and Parliament of Australia, Senate Select Committee, "Taking Responsibility", paras. 2.9 and 2.170–2.172.

[43] Australia, Department of Home Affairs, "Statement on temporary medical transfer policy from regional processing countries", 19 November 2019, available at https://www.homeaffairs.gov.au/news-media/archive/article?itemId=315.

Nauru from 2013 to 2015;[44] and was said to owe Nauru A$2.8 million for leasing the land on which the Centre was located from 2012 to 2014.[45]

7.12 The Committee also notes that in 2017, the Legal and Constitutional Affairs References Committee of the Australian Senate stated the following in a report on Nauru:

> First and foremost, the Australian Government must acknowledge that it controls Australia's [regional processing centres]. Through the [Department of Immigration and Border Protection], the Australian Government pays for all associated costs, engages all major contractors, owns all the major assets, and (to date) has been responsible for negotiating all third country resettlement options. Additionally, the [D]epartment is the final decision-maker for approving the provision of specialist health services and medical transfers (including medical evacuations) and the development of policies and procedures which relate to the operation of the [regional processing centres]. Incident reports are also provided to the [D]epartment, so it cannot claim that it was not aware of incidents that occurred in [regional processing centres] outside of Australia. The Australian Government clearly has a duty of care in relation to the asylum-seekers who have been transferred to Nauru or Papua New Guinea. To suggest otherwise is fiction.[46]

7.13 The Committee further notes that Australia's funding of the detention centres represented one of the primary sources of revenue for Nauru during the relevant time period and was a generator of significant economic growth in Nauru. [47] In 2014 and 2015, concern was expressed about the possible impact of a decrease in the number of arriving asylum-seekers on the medium- to long-term economic growth prospects of Nauru.

7.14 In addition, the Committee notes that under section 42 of the Australian Border Force Act 2015, entrusted persons, including employees and subcontractors for the Department of Immigration and Border Protection, are, with certain exceptions, subject to two years of imprisonment for the crime of recording and disclosing information of the Department. That information includes information the disclosure of which would or could reasonably be expected to prejudice the security, defence or international relations of Australia. The Committee therefore observes that the State party has enacted laws intended to regulate the flow of information concerning regional processing detention operations in Nauru.

7.15 In sum, the Committee observes that the State party transferred the author to Nauru pursuant to section 198AD of the Migration Act 1958 and the arrangements set out in a memorandum of understanding. The State party funded the detention operations in Nauru, was authorized to 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 in the paragraphs above, the Committee considers that the State party exercised numerous elements of effective control over the detention operations at the Regional Processing Centre in Nauru while the author was detained there from 2014 to 2018. The Committee considers that those elements of control went beyond a general situation of dependence and support, and that the physical transfer of the author to Nauru did not extinguish the State party's obligations towards her under article 9 of the Covenant. The Committee considers that while she was detained at the centre, the author was subject to the jurisdiction of the State party, and that the fact of her

[44] Parliament of Australia, Senate Select Committee, *Taking Responsibility*, para. 2.175; Nauru, Minister of Finance "2013–14 budget – budget paper 2", p. 7, available at https://naurufinance.info/wp-content/uploads/2020/08/Budget-Paper-2-2013-14_12Sept2013_Final-Draft-9PM.pdf; and Nauru, Minister of Finance, "2014–15 budget – budget paper 2", p. 4.

[45] Nauru, Minister of Finance, "2013–14 budget and the estimates of revenue expenditure – budget paper 1", p. 10, available at https://naurufinance.info/wp-content/uploads/2020/08/Budget-Paper-1-2013-14-13Sept2013-12PM-3.pdf.

[46] 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), p. vi.

[47] See, for example, Nauru, Minister of Finance, "2014–15 budget – budget paper 2", pp. 35 and 36.

detention there is attributable to the State party. Accordingly, 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 author's claim under article 9 of the Covenant in relation to her detention at the Regional Processing Centre.

7.16 The Committee notes the State party's assertion that there are no restrictions on movement of individuals at the Regional Processing Centre in Nauru. In that regard, the Committee notes that according to information published by the Government of the State party, from February to October 2015, asylum-seekers and refugees at the Centre could leave at a designated exit point during agreed hours.[48] Since October 2015, the centre has been open 24 hours a day.[49] The Committee considers that for the purpose of article 9 (1) of the Covenant, the extent of restrictions on movement in an officially designated place of detention may be relevant to the reasonableness and proportionality of the detention but does not alter the fact of detention. Thus, the Committee considers that the opening of the Centre in 2015 does not constitute an obstacle under articles 1 or 2 of the Optional Protocol to the admissibility of the author's claim under article 9 (1) of the Covenant in relation to her detention at the centre.

7.17 The Committee considers that the author has not sufficiently substantiated her assertion that she was detained in Nauru during the period when she was settled in the community and living in a house in Nauru. The documentation she provided indicates that on 27 August 2018, she and her husband left the Regional Processing Centre and were moved into a community settlement in the area of Anibare Ponds (see para. 2.13 above). Thus, from 27 August 2018 until 20 November 2018, the date on which the author left Nauru, she was not in a detention centre. With respect to the author's claim that Nauru was an island prison, regardless of her individual conditions of detention, the Committee considers that she has not described with adequate specificity her living situation after her release from the Regional Processing Centre in Nauru. The Committee considers that that aspect of her claim under article 9 (1) of the Covenant is therefore insufficiently substantiated and is inadmissible under article 2 of the Optional Protocol.

7.18 In the Committee's view, the author has sufficiently substantiated, for the purpose of admissibility, her claim under article 9 (1) of the Covenant in relation to the periods during which she was detained on Christmas Island, in the Regional Processing Centre in Nauru and on mainland Australia until 4 November 2019. The Committee thus declares those aspects of the author's claim under article 9 (1) of the Covenant admissible and proceeds to examine them on the merits.[50]

Consideration of the merits

8.1 The Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5 (1) of the Optional Protocol.

8.2 The Committee notes the author's claim that the State party arbitrarily detained her in violation of article 9 (1) of the Covenant, pursuant to its policy of detaining migrants arriving by sea without authorization to enter Australia. It also notes the State party's position that the author was lawfully detained in Australia, that the period of that detention was reasonable and proportionate and served a legitimate purpose, and that the State party was not responsible for the author's detention in Nauru.

8.3 The Committee refers to its general comment No. 35 (2014) on liberty and security of person, in which it stated that an arrest or detention may be authorized by domestic law and nonetheless be arbitrary (para. 12). Detention in the course of proceedings for the control of

[48] Australia, "Australia welcomes Nauru open centre".

[49] Ibid.; and Nauru, Asylum-Seekers (Regional Processing Centre) (Amendment) Act 2015, sect. 8, relating to amendment of section 18C of the Asylum-Seekers (Regional Processing Act) 2012.

[50] The Committee notes that in additional comments of 30 June 2021, the author invoked articles 2 (1), 9 (4), 10 (1), 16 and 26 of the Covenant, and the State party subsequently raised a procedural objection on 7 October 2021, noting that the author had not sought and obtained prior permission from the Committee to submit those additional comments, as required by the Committee's rules of procedures. The Committee notes that because the author did not seek such permission and explain why those claims could not have been raised earlier, the Committee may not examine them.

immigration is not arbitrary per se, but must be justified as being reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. Asylum-seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security. The decision of detention must consider relevant factors on an individualized basis; must 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 (para. 18).[51]

8.4 The Committee notes that when the author arrived by boat on Christmas Island to seek asylum, the State party detained her for more than seven months (19 July 2013–10 March 2014), pursuant to section 189 (3) of the Migration Action 1958. After the State party transferred the author to Nauru, she was detained in the Regional Processing Centre from 11 March 2014 until 27 August 2018 and was then moved to a community settlement. Thus, in total, the author spent over four years and five months detained in Nauru. Upon transferring her to mainland Australia for medical reasons, the State party detained her for approximately 11 and a half months in various detention facilities (20 November 2018–4 November 2019).

8.5 The Committee therefore observes that the author was not detained for a brief initial period to document her entry or verify her identity, but rather was held for approximately one and a half years in Australia and under the State party's mandatory immigration detention policy, and for more than four years in Nauru, including for several months after she obtained refugee status in 2017. It is undisputed that the sole reason for the author's administrative detention in Australia and Nauru was her unauthorized entry into Australia, by irregular maritime means, as an asylum claimant.

8.6 While the State party argues that it considered the author's individual needs in determining appropriate and successively less restrictive conditions of detention, the Committee considers that the State party did not identify individualized and specific reasons that would have justified the need to deprive the author of her liberty for such a protracted period of time, taking into account her prolonged detention in Nauru. The Committee notes that before releasing the author into the community in 2019, the State party had not explained any reason specific to the author for continuing to detain her. For example, the State party has not indicated that it had determined that the author posed a risk to public security, public order or safety, or a risk of absconding. Indeed, the State party has noted that under domestic law, the Minister for Immigration and Border Protection was not required to provide individualized reasons before declining in March 2019 to grant the author an alternative to detention under section 197AB of the Migration Act. The State party also did not demonstrate that a less restrictive measure could not have ensured the author's availability for removal. The State party has also not indicated why it did not transfer the author earlier to community detention, in particular given the refugee status granted to her in Nauru in 2017.

8.7 Whatever justification there may have been for an initial detention, such as for purposes of ascertaining identity and other issues, the State party has not, in the Committee's view, demonstrated on an individual basis that the author's prolonged and indefinite detention was justified. The Committee also notes that the author lacked legal safeguards allowing her to effectively challenge her indefinite detention.[52] In view of the foregoing elements, the Committee considers that the author's detention for approximately six years in Nauru and Australia was unreasonable, unnecessary and disproportionate to the State party's policy objectives.[53] The Committee therefore considers that the State party arbitrarily detained the author in violation of article 9 (1) of the Covenant.

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

[52] See *F.J. et al. v. Australia* (CCPR/C/116/D/2233/2013), para. 10.4; and *F.K.A.G. et al. v. Australia* (CCPR/C/108/D/2094/2011), para. 9.4.

[53] See *A v. Australia* (CCPR/C/59/D/560/1993), para. 9.4.

9. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the State party has violated the author's rights under article 9 (1) of the Covenant.

10. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author 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 the author with adequate compensation for the periods of her detention on Christmas Island, in the Regional Processing Centre in Nauru and on mainland Australia until 4 November 2019. 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.

11. 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.

Annex

Individual opinion (partially dissenting) by Committee member Hélène Tigroudja

1. I fully agree with the general conclusion reached by the Committee in the present case on the admissibility of the claims, on the merits and on the remedies. Nevertheless, my individual opinion aims at stressing some crucial elements regarding the effective control of Australia over offshore detention facilities in Nauru (para. 7.5 et seq.) and the guarantees of non-repetition decided by the Committee (para. 10), which go far beyond the present case and address a cynical and concerning trend of migration policies in many States parties to the Covenant.

2. On the first point (effective control of Australia over the detention of the author in Nauru), the argument used by the State party to challenge its jurisdiction was based on Nauru's sovereignty over its territory and on the fact that both States freely concluded a memorandum of understanding organizing the transfer to and detention of asylum-seekers in Nauru. However, as clearly stated by the Committee (para. 7.8), the detention operations were heavily controlled, supplied, funded and supported by Australian authorities. Some private security companies were involved in the process, but their activities remained under the control of the State party (para. 7.9). The Committee's analysis of the offshore policy of Australia raises two comments.

3. First, the Committee relied on public information made available by the Australian authorities themselves, that clearly acknowledged that they were the "decision-makers" in Nauru (para. 7.12). Second, the Committee also made an extremely careful and realistic analysis of the economic dimension of this sort of agreement. As stated in paragraph 7.13:

> …Australia's funding of the detention centres represented one of the primary sources of revenue for Nauru during the relevant time period and was a generator of significant economic growth in Nauru. In 2014 and 2015, concern was expressed about the possible impact of a decrease in the number of arriving asylum-seekers on the medium- to long-term economic growth prospects of Nauru.

4. This conclusion on the jurisdictional link between Australia and the offshore detention centres in Nauru conveys a clear message to all States parties to the Covenant that are concluding or wish to conclude such deals and "externalize" the treatment of asylum-seekers' requests for protection: such agreements might fall under the jurisdiction of the Committee and the States might be held accountable under the Covenant. This was already conveyed by the Committee in its concluding observations regarding Australia (2017)[1] and more recently regarding the United Kingdom of Great Britain and Northern Ireland (2024). In the latter concluding observations, the Committee expressed its deep concern over the so-called "Rwanda Bill" and the efforts of the United Kingdom to make arrangements with third countries to transport individuals seeking asylum to such countries, particularly through the memorandum of understanding between the United Kingdom and Rwanda".[2] The Bill has been repealed since then, but some European States expressed their willingness to follow the same kind of framework. Therefore, the present Views of the Committee are an important and timely reminder that such offshore policies do not render the States immune from their international responsibility under the human rights treaties they freely committed to respect.

5. This leads me to the second important element regarding the measures indicated by the Committee in the Views as a guarantee of non-repetition. In paragraph 10, it is affirmed that "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

[1] CCPR/C/AUS/CO/6, paras. 35 and 36.
[2] CCPR/C/GBR/CO/8, para. 40.

monitoring, to ensure their conformity with the requirements of the Covenant, including article 9".

6. This conclusion is in line with the concerns expressed by the Office of the United Nations High Commissioner for Refugees, which indicated indeed that "offshoring of asylum processing often results in the forced transfer of refugees to other countries with inadequate State asylum systems, treatment standards and resources".[3]

7. Therefore, should States parties to the Covenant, such as Australia, the United Kingdom or any European Union State, decide to keep on concluding similar memorandums of understanding for their so called "externalization of borders" policy in exchange for financial support, they remain accountable for human rights violations that would occur in the third country under those agreements.

[3] See https://www.unhcr.org/au/publications/externalisation.