

## Research Brief

# THE AUSTRALIA-CAMBODIA REFUGEE DEAL

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## The Cambodia Agreement in brief

On 26 September 2014, Australia and the Kingdom of Cambodia (Cambodia) signed an agreement providing for the relocation of refugees from the Republic of Nauru (Nauru) to Cambodia. The 'Cambodia Agreement' was set out in a Memorandum of Understanding (MOU) and Operational Guidelines for its implementation (Operational Guidelines).<sup>1</sup>

After being a refugee-producing country for so many years, it was commendable that Cambodia expressed a desire 'to show the world it is ready to take... refugees in a humanitarian manner' and contribute to finding durable solutions for some of the world's refugees.<sup>2</sup> However, the Cambodia Agreement was negotiated in secrecy without consultation with parliament or civil society in Australia or Cambodia, and received widespread criticism from the United Nations High Commissioner for Refugees (UNHCR) as well as from politicians, lawyers, refugees and human rights advocates in both countries.<sup>3</sup> There were concerns that the Cambodia Agreement set 'a disturbing precedent' that undermined the integrity of the international system for sharing responsibility for refugees.<sup>4</sup> As stated by then UN High Commissioner for Refugees, António Guterres, the Cambodia agreement signified 'a worrying departure from international norms'.<sup>5</sup>

These negative reactions followed deep concerns about the agreement which had already been expressed prior to its signing, including by Cambodia's opposition leader, the Cambodian Human Rights Action Committee, the Cambodian Centre for Human Rights, the Jesuit Refugee Service, and Human Rights Watch.<sup>6</sup>

Although purportedly an agreement to facilitate refugee resettlement in a non-traditional resettlement country and advance the goals of regional cooperation and responsibility sharing, the Cambodia Agreement proved to be very different in practice. At the expiry of the agreement on 26 September 2018,<sup>7</sup> only seven refugees had been relocated from Nauru to Cambodia, of which just three remained. The minimum standards and conditions that must ordinarily be met for a country to be considered a viable resettlement country were not in place, and Cambodia's willingness and capacity to provide protection to refugees more generally did not improve as a result of the agreement. Indeed, the first years of the Cambodia Agreement coincided with a deterioration in Cambodia's treatment of Montagnard asylum seekers from Vietnam.

## Key terms of the Cambodia Agreement and its implementation

### Who were the parties to the Cambodia Agreement?

The Cambodia Agreement was a bilateral agreement between Australia and Cambodia, to which Nauru was not a party. The Secretary of the Australian Department of Immigration and Border Protection (DIBP) explained Australia's involvement by stating:

Australia undertook intergovernmentally through the agreement we have made with Nauru to assist that jurisdiction with eventual resettlement and/or removal of persons, depending on whether or not they were found to be refugees. That behoves us to undertake discussions, consultations and eventually negotiations with what are known as third country resettlement destinations.<sup>8</sup>

The Cambodia Agreement was supported by various other arrangements that comprised Australia's offshore processing policies, including the Memorandum of Understanding between the Republic of Nauru and Commonwealth of Australia, Relating to the Transfer to and Assessment of Persons in Nauru, and Related Issues, signed on 3 August 2013.<sup>9</sup> Australia also had contractual arrangements with the International Organization for Migration (IOM), which Australia paid to provide settlement and integration services to refugees relocated to Cambodia.<sup>10</sup> In August 2016, Australia engaged a second organisation, Connect Settlement Agency (CSA), to provide additional refugee settlement support in Cambodia, despite the fact that there was only one refugee there under the agreement at the time.<sup>11</sup> Various rumours circulated about why a second settlement service provider had been engaged, but no full explanation was provided publicly.

### **Who was relocated from Nauru to Cambodia?**

Although not explicitly set out in the MOU, the Cambodia Agreement applied to people who originally sought protection in Australia but were forcibly transferred to Nauru to undertake refugee status determination (RSD) there. From this group, Cambodia would offer 'permanent settlement' to those who:

- had undergone RSD and been determined to be refugees in Nauru;
- met Cambodia's entry and settlement requirements;
- had been provided with further information by Cambodian officials on the living conditions, customs, tradition, culture and religion in Cambodia; and
- voluntarily accepted an offer of settlement as evidenced by written consent, and travel to Cambodia voluntarily.<sup>12</sup>

At the time the Cambodia Agreement was signed, it was unclear how many people meeting these criteria would be relocated or when the first relocations would occur. The MOU itself stated only that decisions about the number and timing of relocations would be 'subject to the consent of the Kingdom of Cambodia'.<sup>13</sup> Then Australian Minister for Immigration and Border Protection, Scott Morrison, stated that it would be an 'ongoing arrangement' with 'no caps', and it was widely reported that as many as 1,000 refugees would be relocated.<sup>14</sup> By contrast, Cambodian Minister of the Interior, Sar Kheng, reportedly said Cambodia would accept only 'three to four' refugees at first as 'a trial'.<sup>15</sup>

Over the following years, only seven refugees were relocated from Nauru to Cambodia. A first group of four refugees – a man from Myanmar, a married Iranian couple and another Iranian man – were flown to Australia in May and then to Cambodia in June 2015.<sup>16</sup> Despite having been determined to be refugees, all four asked to leave Cambodia and returned to

their countries of origin in October 2015, March 2016 and April 2016 respectively.<sup>17</sup> In August 2015, a spokesperson for the Cambodian Ministry of the Interior told Reuters: 'We have no plans to receive more refugees from Nauru. With the situation of our country like this, we can't receive hundreds or thousands of them. I think the less we receive the better'.<sup>18</sup> Australian Foreign Minister Julie Bishop denied the agreement had collapsed,<sup>19</sup> and Immigration Minister Peter Dutton flew to Cambodia in September, reportedly to salvage it.<sup>20</sup> A Rohingya man from Myanmar subsequently arrived in Cambodia in November 2015,<sup>21</sup> but told Australian media in June 2016 that he would leave Cambodia if he could.<sup>22</sup> A further two refugees – both Syrian men – arrived in Cambodia in November 2016 and May 2017.<sup>23</sup> At the expiry of the agreement on 26 September 2018, these final three arrivals remained in Cambodia.

### **Were all relocations 'voluntary'?**

The terms of the Cambodia Agreement specified that refugees would only be relocated if they 'voluntarily' accepted an offer of settlement, and some of the seven refugees who went to Cambodia may indeed have done so. However, there were concerns about the pressure asylum seekers and refugees on Nauru felt to consider relocation, and questions about whether the conditions on Nauru allowed for truly informed and voluntary decisions.

At the time the Cambodia Agreement was signed, the Australian government faced an immense political difficulty: it insisted that no refugees would ever be settled in Australia from Nauru or PNG but had limited other resettlement options. PNG had indicated a willingness to settle some of the men determined to be refugees on Manus Island, and Nauru had agreed to the possibility of settling some refugees subject to further agreement. However, neither country offered permanent settlement to all people found to be in need of international protection through their respective RSD processes. In February 2013, New Zealand offered to resettle 150 refugees per year from Nauru and PNG,<sup>24</sup> but this offer was not taken up by Australia. Other attempts to find resettlement countries in the region proved unsuccessful. Meanwhile, the first people were determined to be refugees on Nauru in May 2014. As the question of where they would go became increasingly urgent, the Cambodia Agreement appeared to be the Australian government's best and only option to avoid backtracking on its position not to settle refugees in Australia (where they had first sought asylum).

However, when the Cambodia Agreement was first announced, many asylum seekers and refugees on Nauru indicated that they would not volunteer for relocation. In the immediate aftermath of the announcement, which coincided with the news that temporary protection visas (TPVs) would be made available for refugees in Australia but not in Nauru or PNG, refugees in Nauru expressed 'high distress'.<sup>25</sup> Seven teenage asylum seekers reportedly attempted suicide, other asylum seekers (including children) sewed their lips shut in protest, and a group of refugees already settled in Nauru held a protest march with signs reading 'only our corpse [sic] might go to Cambodia'.<sup>26</sup> Refugees also wrote a letter to the Australian government saying, 'they can send us to Cambodia but only our dead bodies'.<sup>27</sup>

Despite these protests, pressure to accept the Cambodia Agreement (or return to countries of origin) was applied in a number of ways over the following months and years. In September 2014, Scott Morrison filmed a video message to asylum seekers and refugees in Nauru and elsewhere warning that ‘processing and resettlement in Australia will never be an option for those who have been transferred to regional processing centres’, and that there were ‘no exceptions’.<sup>28</sup> In 2015, his successor as Minister for Immigration and Border Protection, Peter Dutton, filmed a similar video message encouraging refugees to seize the ‘great opportunity ... to move forward and begin the next phase of their lives in a country that is free from persecution’.<sup>29</sup> He warned that there was ‘no guarantee’ that the same level of settlement support would be provided to refugees who waited and relocated to Cambodia later, and that Cambodia was their ‘only long term settlement option’ since settlement in Australia was ‘not an option that the Australian government will ever present to you’.

The possibility of family reunion (which was not available in Nauru) and cash incentives were offered as inducements to encourage refugees to go to Cambodia. Meanwhile, harsh conditions, ongoing and indefinite detention, the return-oriented environment and the lack of future prospects in Nauru were factors pressuring asylum seekers and refugees to leave. It is questionable whether any decision made in these circumstances, either about relocating to Cambodia or returning to a country of origin, could have been genuinely ‘voluntary’, in the sense of ‘fully informed, truly voluntary, and not prompted by harsh detention conditions or uncertainty and protracted detention’, and without refugees having been ‘reduced to a psycho-social state of hopelessness and despondency’.<sup>30</sup>

### **How much did the Cambodia Agreement cost?**

When the Cambodia Agreement was first signed, and in the following months,<sup>31</sup> its exact forecasted costs were yet to be determined. The MOU and Operational Guidelines did not mention specific amounts, but rather a list of costs that Australia would cover, including:

- costs of travel of Cambodian officials to Nauru to provide information to refugees who may be relocated, and of refugees relocating to Cambodia;
- costs associated with the temporary accommodation of refugees upon arrival in Cambodia, including the costs of transporting refugees from the airport, temporary accommodation, daily meals, clothes, health services, translation services, security services and meeting the other basic needs of relocated refugees;
- ‘direct costs of the settlement arrangements’, including:
  - packages for refugees’ daily subsistence, language and vocational training, materials and loans for starting a small business, private accommodation and other services for a period of 12 months from the refugees’ dates of departure from temporary accommodation; and
  - health services commensurate with local community standards for a period of five years from the refugees’ dates of departure from temporary accommodation; and
- an unspecified amount of ‘additional development assistance’ to Cambodia, including to ensure benefits to local communities where refugees are settled.<sup>32</sup>

In time, it emerged that the Cambodia Agreement involved two financial components:

- up to \$15 or \$15.5 million for direct resettlement costs, to be paid ‘on performance’ (ie. depending on the costs accrued, rather than all at once) and ‘through service providers’.<sup>33</sup> By December 2017, \$6.76 million of this amount had been spent<sup>34</sup>; and
- \$40 million over four years provided to Cambodia by the Australian Department of Foreign Affairs and Trade (DFAT) as part of its Official Development Assistance (ODA) program. These funds were not directly related to resettlement, but rather were part of a commitment to provide capacity building and development assistance (in addition to Australia’s existing annual aid allocation for Cambodia).<sup>35</sup>

### **What rights, support and services did refugees enjoy in Cambodia?**

The Cambodia Agreement set out a range of rights, support and services to which refugees relocated from Nauru should be entitled. However, when the agreement was first signed, there was considerable doubt about the reception conditions and settlement support that would be provided in practice. As set out in the following sections, the implementation of the Cambodia Agreement showed there to be great differences between the arrangements envisioned in the agreement and those available to refugees in reality.

#### ***Accommodation***

The Cambodia Agreement stated that ‘temporary accommodation’ would be provided in Phnom Penh for some time (‘until they have achieved basic Khmer language skills and have passed a medical examination’), and that subsequent ‘settlement services’ would be provided to refugees outside of Phnom Penh.<sup>36</sup> Despite a commitment that refugees would enjoy freedom of movement in Cambodia while at the temporary accommodation,<sup>37</sup> various groups initially expressed concern that any provisional housing would be accompanied by a strong police presence and restricted movement.

The Cambodian government originally described the accommodation that would be provided to refugees on arrival as a ‘temporary camp’ or ‘provisional centre’, and later claimed there had been plans to build a refugee centre in Cambodia ‘controlled by the Australian embassy’.<sup>38</sup> Following the arrival of the first refugees in Cambodia, little information was publicly available about their accommodation, as they were reported to have been ‘kept away from the media’ in a house outside the Phnom Penh city centre.<sup>39</sup> It was later reported that the fifth arrival, the Rohingya refugee, wanted to live at the IOM office, and the sixth arrival, from Syria, spent the first four months in a compound run by the IOM before moving into his own apartment in Phnom Penh.<sup>40</sup> While the living conditions in these properties may have been satisfactory, and refugees generally enjoyed freedom of movement, their dependence on Australian funding left their longer-term accommodation prospects uncertain.

#### ***Employment***

The Cambodia Agreement granted refugees the right to apply for jobs and run businesses, and indeed reflected an expectation that they would become self-sufficient and no longer be supported by Australian funds within a year of arrival.<sup>41</sup> Australia was responsible for

covering the costs of at least 12 months of settlement services, which may have included language and vocational training and materials and loans for starting a small business. After this period, 'an assessment will be made on a case-by-case basis of any further need for settlement services'.<sup>42</sup>

Despite these commitments, the Cambodian job market remained difficult, with many young Cambodians entering the market each year and working in the 'informal sector' (ie. jobs that are not recognised, protected or regulated by public authorities, including self-employed and small business operators, and workers without formal contracts, such as street vendors, motorbike-taxi drivers, garbage collectors, construction workers and domestic workers). Many workers earned very low and irregular incomes, had little or no access to formal lending institutions or banks to get credit, and lacked the protection and support of social security and labour laws. Other Cambodian job-seekers migrated to neighbouring countries to find work, an experience which could be fraught with risks, including unsafe, abusive and exploitative working conditions, sub-standard living conditions and pay, abuse and detention by the authorities and human trafficking and slavery.<sup>43</sup>

In the past, refugees in Cambodia have faced additional difficulties in accessing the job market. They have often depended on non-profit organisations and charities to help them earn a living, with employment in the formal sector almost impossible. Refugees (like other regular migrants) must hold a work permit to work legally, which may be revoked on a number of grounds, including if they are 'competing with Cambodian job-seekers'.<sup>44</sup> Even if a refugee does hold a valid work permit, Cambodian law imposes many restrictions on the hiring of foreign workers and requires employers to give priority to Cambodian citizens when hiring.<sup>45</sup> As such, former Immigration Minister Morrison's comments that 'those who have come on boats [are] quite innovative and entrepreneurial and I think there would be opportunities for people with those sorts of skills and enthusiasms' did not necessarily reflect the reality of the labour market in Cambodia generally, and for refugees in particular.<sup>46</sup>

Despite these hurdles, at least one of the three refugees left in Cambodia in January 2018 established a restaurant in Phnom Penh.<sup>47</sup> While a welcome achievement, refugee advocates in Cambodia cautioned that refugees need to be 'very motivated' to make a living in Cambodia and require financial support from Australia to establish businesses.

### **Health care**

Under the Cambodia Agreement, Australia agreed to cover both the cost of health services for relocated refugees while they were residing at the temporary accommodation, and the cost of health insurance 'commensurate with local community standards' for a period of five years from the date of departure from the temporary accommodation.<sup>48</sup> In practice, the provision of health services may not have been so straightforward. In March 2016, the Rohingya refugee complained that he could not understand the doctors at the Soviet-Khmer Friendship Hospital in Phnom Penh, and that the facilities there were very poor.<sup>49</sup> Moreover, access to specialist medical care, including for chronic conditions and mental health services, is limited within Cambodia.

### **Family reunification**

The possibility of family reunion in Cambodia was one of the incentives used to encourage refugees to volunteer for relocation, and the Cambodia Agreement stated that relocated refugees have the right ‘to guarantee dependent family members to reside in Cambodia as regular migrants’.<sup>50</sup> In practice, it remained unclear whether family reunion in Cambodia would be permitted, and how any costs would be apportioned between Cambodia and Australia.

In November 2016, the *Phnom Penh Post* reported that the Australian government was pushing Cambodian officials to allow the families of three refugees due to arrive from Nauru in the coming month to join them in the country.<sup>51</sup> The refugees were men from Pakistan, Afghanistan and Sri Lanka. A representative from the Cambodian Refugee Department within the Ministry of the Interior said the request was for visitation only, and that if the family members wanted to stay they would need to apply as migrants. He also commented that ‘the Cambodian side has not discussed deeply on this’. Ultimately, the three refugees did not accept relocation to Cambodia. Some of the three remaining refugees in Cambodia also requested for their families to join them in the country, either as a condition of or subsequent to their relocation from Nauru. As at July 2018, this family reunion had not occurred.<sup>52</sup>

### **Identity and travel documents**

Under the Cambodia Agreement, refugees relocated to Cambodia were to be issued with a Refugee Recognition Certificate (or ‘Prakas’), a refugee resident card, and a refugee identity card in accordance with Sub-Decree No. 224,<sup>53</sup> the Cambodian legislation governing recognition of refugee status and the grant of asylum.<sup>54</sup> However, neither the distinction between these types of identity documents nor the rights attaching to each was clarified. The need for clarity on these matters is particularly acute in Cambodia, where the lack of a single, centralised system for issuing or recognising identity documents may prevent refugees and others from exercising their legal rights and accessing services.<sup>55</sup>

The Cambodian government also committed to facilitating the issuance of travel documents to refugees.<sup>56</sup> The refugees who chose to return to their countries of origin after relocation from Nauru may have been issued travel documents to facilitate their departure from Cambodia, but it is not clear whether and in what circumstances the remaining three refugees might acquire a passport allowing them to move freely between countries.

### **Citizenship**

While a refugee with permanent resident status could live in Cambodia permanently without acquiring Cambodian nationality, citizenship is an important part of permanent protection because many rights and freedoms are by law guaranteed only to Cambodian citizens. In its terms, the Cambodia Agreement purported to give relocated refugees the right to apply for Cambodian citizenship by naturalisation.<sup>57</sup> In practice, however, refugees may find the path to citizenship frustrated by various legal and administrative obstacles. Under Cambodian law, they will only be eligible to apply for naturalisation if they fulfil certain conditions, including:



- living in Cambodia and holding a resident card continuously for at least seven years;
- holding a paper issued by the local authorities certifying that they have ‘good behaviour and moral conduct’;
- never having been convicted of any criminal offence;
- speaking Khmer, knowing Khmer scripts, having some knowledge of Khmer history, and providing evidence that they ‘can live in harmony in Khmer society as well as can get used to good Khmer custom and tradition’; and
- having a ‘mentality and physical aptitude which will cause neither danger nor burden to the nation’.<sup>58</sup>

Even if a refugee did fulfil all the conditions for citizenship, naturalisation is ‘not a right ... but only a favour of the Kingdom of Cambodia’ and the government may reject an application at its discretion.<sup>59</sup> Accordingly, it is not certain that refugees relocated to Cambodia will be given the right to acquire Cambodian citizenship.

### ***Other support and services***

Australia agreed to assist Cambodia to establish appropriate arrangements and assistance for relocated refugees. However, there were two main concerns with the support envisioned by the agreement. First, it suggested that after an initial period, settlement services would be delivered outside of Phnom Penh,<sup>60</sup> meaning refugees might be forced out of the capital to rural areas where adequate support and access to international and non-governmental organisations is not available. Second, it only guaranteed settlement services for 12 months from the date of each refugee’s departure from the temporary accommodation provided on arrival, after which an assessment of any further need for settlement services would be made on a case-by-case basis.<sup>61</sup> For refugees who were not able to become completely self-sufficient in 12 months, there was a risk that they might be left without necessary support.

Given previous refugees’ experiences in Cambodia, there was concern that relocated refugees would require significantly more than 12 months of settlement support to become established and might be left in a difficult situation if Australia decided to withdraw funding.

### **Was relocation under the Cambodia Agreement permanent?**

In most of its terms, the Cambodia Agreement appeared to provide for permanent relocation from Nauru, with the Cambodian government agreeing to ‘provide safe and permanent settlement opportunities’ for refugees relocated from Nauru.<sup>62</sup> However, it was not clear whether these commitments would translate to permanent settlement in practice. Critically, as set out above, refugees relocated to Cambodia may not have access to a path to citizenship. Moreover, the Cambodia Agreement stipulated that:

Within 12 months of the date of departure from temporary accommodation of each Refugee, Australia will help facilitate the process of voluntary repatriation of the Refugees under the MOU to their country of nationality, or to another country where

the Refugee has a right to enter and reside, as consented or requested by the Refugee.<sup>63</sup>

This provision could be read as requiring Australia to repatriate or relocate all refugees transferred to Cambodia from Nauru within one year of their departure from temporary accommodation. Alternatively, it could mean Australia's obligations to assist with repatriation and relocation were limited to the first year following departure from temporary accommodation, after which any such efforts became the sole responsibility of Cambodia. This confusion caused some concern that the Cambodia Agreement might never have been intended to provide long-term solutions for refugees, and that they might feel pressured to return to their countries of origin.

## **Analysis of the Cambodia Agreement**

### **Was there any precedent for the Cambodia agreement?**

No. An agreement of this nature is not part of general international practice on refugee protection. At various times, the Cambodia Agreement was likened to an arrangement for 'resettlement', 'responsibility-sharing' or 'capacity-building'. However, as the following sections explain, it was very different from these kinds of arrangements.

### **Why were refugees 'relocated' rather than 'resettled' in Cambodia?**

UNHCR promotes three durable solutions for refugees as part of its core mandate: voluntary repatriation, local integration and resettlement. Resettlement typically involves identifying refugees who cannot return home and who have protection needs that cannot be met in their country of asylum and transferring them to third countries that have agreed to admit them and offer permanent settlement.<sup>64</sup> By their very nature, resettlement arrangements involve countries with a greater capacity to host refugees accepting them from countries that are less able to do so. It is unprecedented for a resettlement country like Australia to relocate refugees to a non-traditional resettlement country like Cambodia.

There are certain criteria that should generally be met for a country to be considered a viable resettlement country, which Cambodia did not appear to meet. In brief, such a country should have an effective resettlement programme, established and maintained by the government, which ensures the delivery of services and support to assist refugees integrate into new communities. This programme should include:

- a legal and policy framework, including legislation to provide resettled refugees with a secure legal status on arrival, access to fundamental rights without discrimination, and the prospect of acquiring citizenship;
- an institutional framework to support resettlement;
- an adequately resourced reception and integration programme to deliver essential services, including reception, orientation, housing, financial assistance, medical care,

language classes, employment preparation, and education, and to support community engagement;

- guarantees against *refoulement*; and
- procedures to provide and support family reunification.<sup>65</sup>

Relevantly, Cambodia committed to facilitating the lawful entry into Cambodia of any refugee who accepted an offer of relocation, granting them permanent residence status, and treating them in accordance with Cambodia's obligations under the 1951 Convention relating to the Status of Refugees (Refugee Convention).<sup>66</sup> There was also anecdotal evidence that members of Cambodian society, and other foreigners in Phnom Penh, made refugees feel welcome there. However:

- as set out above, it was not certain that relocated refugees would be able to enjoy in practice the full range of rights to which they were entitled under international law and the Cambodia Agreement, especially after the initial period of their 'temporary accommodation';
- Cambodia did not have an established and adequately resourced integration programme which provided the necessary services and support to refugees. All services and support were provided by private contractors (IOM and CSA) and fully funded by Australia, or by charities and other non-governmental organisations in Cambodia;
- there was no evidence that Cambodia would be able or willing to sustain the provision of services to relocated refugees if Australia were to discontinue its support for the programme;
- family reunification was not provided to those who requested it; and
- it was not clear whether refugees relocated from Nauru would ever be able to obtain Cambodian citizenship, either for themselves or their children.

As such, Cambodia did not appear to have established, or to be able or willing to maintain, an effective resettlement programme at this time. Its ongoing dependence on Australian support differentiated the Cambodia Agreement from a resettlement arrangement.

### **Why was the Cambodia agreement not a 'responsibility-sharing' arrangement?**

There are an estimated 9.5 million people of concern to UNHCR in the Asia-Pacific region alone, including 4.2 million refugees, 2.7 million IDPs, and an estimated 2.2 million stateless persons.<sup>67</sup> These figures demonstrate that it is crucial for all countries in the region to cooperate and share responsibility for providing protection to those who need it. However, despite the Cambodia Agreement purporting to 'expand protection opportunities and durable solutions for refugees in the Asia-Pacific region',<sup>68</sup> it was better characterised as part of a suite of measures to shift Australia's responsibility for refugees arriving in its territory by boat.

Responsibility-sharing, as the name suggests, usually involves two or more countries sharing between them responsibility for processing and/or resettling refugees, even if those

refugees did not originally seek asylum in their territories. By contrast, successive Australian governments have pursued arrangements with other countries in the region to accept *all* of the refugees who arrive by boat and seek asylum in Australia, repeatedly stating that none will ever receive permanent protection in Australia.

The fact that Australia selects a certain number of refugees to be resettled from other parts of the world each year does not change the nature of the agreement with Cambodia. Resettlement is an important voluntary commitment Australia makes, but it does not negate Australia's legal obligations under the Refugee Convention and international human rights law towards those who arrive spontaneously seeking protection.

### **Why was the Cambodia agreement not a capacity-building arrangement?**

While the Cambodia Agreement stated that 'Australia will provide capacity-building and necessary assistance to Cambodian officials to support the successful implementation of the MOU',<sup>69</sup> it did not provide any information about what this 'capacity-building' or 'assistance' might be. The agreement made no provision for specialised training, formal knowledge-transfer initiatives, joint projects, the secondment of officials from one country to the other, or any other commonly recognised form of capacity-building. Indeed, there was nothing in the terms of the agreement or subsequent public statements by either government to suggest that capacity-building with respect to refugee protection was a primary objective. It is also relevant to note that while the Cambodian government received increasing criticism for its treatment of Montagnard asylum seekers since late 2014, the Australian government made no public statement on the matter and did not appear to take steps to ensure that Cambodia acted in accordance with its international obligations with respect to these refugees.

## **Refugee protection in Cambodia: a general overview**

### **Introduction**

Cambodia acceded to the Refugee Convention, its 1967 Protocol, and various other human rights instruments in 1992. The Cambodian government established a Refugee Office within the Ministry of Interior's Department of Immigration in 2008, passed legislation establishing a procedure for determining refugee status in 2009, and began to register asylum seekers and conduct RSD in 2010.<sup>70</sup> Despite these efforts, however, a number of concerns remain about Cambodia's capacity and willingness to provide protection to refugees in its territory.

### **RSD in Cambodia**

#### ***Legislation***

Sub-decree No. 224 on a Procedure for Recognition as a Refugee or Providing Asylum Rights to Foreigners in the Kingdom of sets out detailed procedures for the grant of refugee status or asylum to foreigners, sets time limits within which decisions must be made, and provides for review of negative decisions. It also guarantees asylum seekers access to

interpreters free of charge, and states that a representative or legal guardian must be provided to work in the best interests of asylum seekers who are children or have disabilities. UNHCR may assist, facilitate or provide recommendations during the RSD process. According to this law, once a person has been recognised as a refugee they become entitled to the same rights and subject to the same obligations as a 'legal immigrant foreigner', including the rights to a residence card, to work or run a business, to sponsor family members to come to Cambodia, and to all other rights set out in the Refugee Convention.

Article 23 provides that 'a refugee shall not be expelled or returned in any manner whatsoever to the frontiers of territories where his or her life, freedom or rights would be threatened on account of his or her race, religion, nationality, membership of a social group or particular political opinion.' However, Article 7 permits the government to deny certain people entry into Cambodia, meaning asylum seekers may be turned away without having their claim heard contrary to UNHCR's recommendation that, given the grave consequences of exclusion, such decisions should generally be made within the context of a regular RSD procedure with rigorous procedural safeguards.<sup>71</sup> Further, even if a person is excluded from refugee status, they should not be returned or turned away to any place where they would face a real risk of significant harm on account of Cambodia's complementary protection obligations under the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Other concerning provisions of Sub-decree No. 224 include: article 11, which permits officials to reject an application for refugee status immediately if the asylum seeker does not cooperate with the official in clarifying information, or commits any activity that could endanger national security or public order during the RSD process; and article 5, which provides that recognition, cessation and cancellation of refugee status shall be determined by proclamation of the Minister of the Interior, with the risk that this power may be arbitrary and unreviewable.

### ***RSD and refugee protection in practice***

In addition to the deficiencies in the text of Sub-decree No. 224 identified above, other problems arise as a result of the law not being implemented in practice and general limitations in Cambodia's willingness or capacity to perform RSD and provide protection to people determined to be refugees. General issues include:

- deportation of asylum seekers to their countries of origin before they have had an opportunity to apply for status, or before they have completed RSD;
- refusal to accept applications for refugee status (particularly from Montagnards);
- lengthy delays at all stages of the RSD process;
- restrictions on asylum seekers being accompanied by legal representatives at key stages of the process;
- summary rejection of applications from asylum seekers who appear *prima facie* to have international protection needs; and
- the lack of independent review of negative decisions made by the Refugee Office.

The Cambodian government's treatment of asylum seekers from China and Vietnam in particular has raised questions about its willingness and capacity to provide refugee protection, and the appropriateness of Australia having entered into a refugee relocation arrangement with Cambodia. For example:

- since late 2014, Cambodia has failed to acknowledge Montagnards from Vietnam as asylum seekers (rather than 'illegal immigrants'), refused to accept applications for asylum from the majority of them, and deported others back to Vietnam without conducting RSD. This treatment echoes previous responses by the Cambodian government to earlier groups of Montagnard asylum seekers arriving since 2001; and
- there have been cases of Uighur asylum seekers being forcibly deported to China, despite ongoing protection concerns. For example, in December 2009, 20 Uighur asylum seekers were labelled 'illegal immigrants' and deported via chartered plane to China. The following day, Chinese Vice President Xi Jinping arrived in Cambodia and signed approximately US\$1.2 billion worth of contracts for aid and loans. China 'thanked the government of Cambodia for assisting in sending back these people', who were described by the Chinese authorities as 'criminals'. In February 2012, reports from China suggested that a number of the Uighurs were facing life sentences or sentences in excess of 10 years.<sup>72</sup>

## **Treatment of Montagnard asylum seekers in Cambodia**

### **Introduction**

The terms 'Montagnards', 'Degar' or 'Central Highlanders' are used to describe a collection of indigenous, predominantly Christian minority groups from the mountainous central highlands region of Vietnam. While these groups are mainly concentrated in Vietnam, some also live across the border in north-eastern Cambodia, especially in Ratanakiri province.<sup>73</sup>

For more than a decade, Montagnards have faced a series of crackdowns by the Vietnamese government, which in turn have triggered mass demonstrations by Montagnards against their religious repression and confiscation of their ancestral lands.<sup>74</sup> Some protesters have called for self-rule or autonomy in the region. Montagnard asylum seekers have periodically fled into neighbouring Cambodia, in relatively small numbers. A new series of arrivals in late 2014 and 2015 highlighted serious limitations in the Cambodian government's willingness to process their claims and afford them protection.

### **Arrival and treatment of Montagnard asylum seekers: 2014–2018**

Around October 2014, an initial group of 13 Montagnard asylum seekers crossed into Cambodia from Vietnam and hid for almost two months in the jungles of Ratanakiri province.<sup>75</sup> Members of the ethnic Jarai tribe in Cambodia and Cambodian human rights group Adhoc reported that the Montagnards were hungry, living in squalid conditions and faced the risk of diseases, but feared being returned to Vietnam and would not emerge from hiding until they could meet with UN representatives. After reports that local police were

blocking UN access to the group, a team from the UN Office of the High Commissioner for Human Rights (OHCHR) finally located the group in December 2014 and escorted them to Phnom Penh to lodge their applications for refugee status.<sup>76</sup> The people in this initial group were recognised as refugees by the Cambodian government in March 2015 and relocated to the Philippines in May 2016 to await resettlement in a third country.<sup>77</sup>

Montagnards who arrived in Cambodia after this initial group, in late 2014 and the first half of 2015, received very different treatment. Local police and authorities in Ratanakiri reportedly continued to block OHCHR access to the area and refused to cooperate with UN efforts to negotiate safe passage to Phnom Penh.<sup>78</sup> They conducted a door-to-door search of Jarai homes, looking for Montagnard asylum seekers and threatening locals.<sup>79</sup> At least 50 people (including children) were summarily deported back to Vietnam before being able to reach Phnom Penh and lodge an application for refugee status.<sup>80</sup> In one particularly concerning case, a group of 36 Montagnards and their Cambodian driver disappeared on the way from Ratanakiri to Phnom Penh in late February 2015. The Cambodian man reappeared a week later, claiming the Cambodian police had arrested him with the group and forced them to walk through a checkpoint into Vietnam, where he had been arrested and detained for several days before being handed back to Cambodian authorities.<sup>81</sup> Wan-Hea Lee, country representative for the UN Office of the High Commissioner for Human Rights in Phnom Penh, condemned the mass deportation, saying: 'OHCHR deplores these deportations – a sad reflection of Cambodia's commitment to abide by the Refugee Convention and the United Nations Convention against Torture, both of which are legally binding on Cambodia.'<sup>82</sup>

The Montagnards who did manage to reach Phnom Penh, either independently or with UN assistance, were not permitted to register their claims with the Ministry of the Interior in 2015 and faced the risk of arrest and deportation. From July 2015, UNHCR began facilitating the return of several groups of Montagnard asylum seekers to Vietnam 'at their request and on an exceptional basis', and in September the Cambodian government set a three-month deadline for the more than 200 Montagnards who had entered Cambodia in the past year to return to Vietnam 'voluntarily', or face being forcibly expelled.<sup>83</sup> After a two-day meeting in Vietnam in October, the Cambodian government extended these deadlines, announcing that UNHCR had until 10 January 2016 to resettle the initial group of 13 Montagnards who had been recognised as refugees, and until 6 February 2016 to return the remaining asylum seekers to Vietnam.<sup>84</sup>

In January 2016, after lengthy and ongoing advocacy on behalf of the Montagnards, the Cambodia government abandoned its deadline for all Montagnards to be removed from Cambodia by February, and instead announced that it would finally begin to process the applications of the more than 170 asylum seekers in Phnom Penh awaiting registration.<sup>85</sup> Over the following months there was some confusion about the progress of this processing, with mixed reports from some that most of the group had been assessed and failed, and from others that registration had not even begun.<sup>86</sup>

In June, the Cambodian government facilitated a visit to the Montagnards in Phnom Penh by a Vietnamese delegation, including police officers from some of the villages the asylum seekers had fled, encouraging them to return home.<sup>87</sup> In July, Cambodian government officials said a group of 16 Montagnards had ‘volunteered’ to go back to Vietnam, after most had their applications for refugee status rejected.<sup>88</sup> In October, various spokespeople for the Ministry of the Interior made contradictory statements about the number of Montagnards who had been processed and the outcomes of those cases.<sup>89</sup> In December, a further group of 13 Montagnards returned to Vietnam after having failed or withdrawn their applications for asylum, leaving 156 asylum seekers in Phnom Penh awaiting a decision.<sup>90</sup> More returns were expected to follow after the *Phnom Penh Post* quoted a government official as saying the remaining 156 cases had been assessed and that ‘the majority of them, almost all, don’t have anything remarkable to make them eligible for refugee status’.<sup>91</sup>

In March 2017, after further negative decisions were handed down and a group of 6 Montagnards were returned to Vietnam, about 50 Montagnard asylum seekers fled Phnom Penh to Thailand, where they were reported to be living in difficult conditions.<sup>92</sup> By August, after additional allegedly ‘voluntary’ deportations, less than 40 Montagnards remained in Phnom Penh, of which just three had been granted refugee status. As Cambodian authorities prepared to forcibly deport one rejected asylum seeker, and a team from the Cambodian Ministry of the Interior reportedly travelled to Vietnam to pressure family members to write to Montagnard asylum seekers and ask them to return to Vietnam, Rhona Smith, Special Rapporteur on Cambodia, urged the government to cooperate with UNHCR by allowing the agency to find a solution outside of Cambodia for the remaining Montagnards.<sup>93</sup> In September, the *Cambodia Daily* reported that 29 of the remaining 36 Montagnards were due to be forcibly deported to Vietnam, despite the UNHCR offering a ‘valid alternative’ of relocating them in a safe third country.<sup>94</sup> Human Rights Watch criticised the Cambodian government for having wrongly denied their claims, failing to carry out a joint review process of the negative decisions with the UNHCR, and refusing to cooperate with UNHCR’s efforts to move the Montagnards to safe third countries.<sup>95</sup> The Asia Pacific Refugee Rights Network (APRRN) expressed ‘alarm’ at the decision, and urged the Cambodian government to protect the Montagnards.<sup>96</sup> Meanwhile human rights groups also called on Australia to use its influence over Cambodia as a refugee relocation partner to encourage the Cambodian government not to deport the asylum seekers.<sup>97</sup>

In March and April 2018, the few remaining Montagnard asylum seekers in Phnom Penh feared that a heightened police presence outside their home could signal imminent deportation to Vietnam.<sup>98</sup> However, by July 2018 they remained in the country, albeit with an uncertain future.

### **Cambodian government’s response to Montagnard asylum seekers**

The responses of local police in Ratanakiri province and the Cambodian government to the arrival and processing of Montagnard asylum seekers included worrying statements about Cambodia’s willingness and capacity to provide refugee protection.



During the period of arrivals from Vietnam, in late 2014 and the first half of 2015, local police and authorities defended the summary deportation of Montagnards back to Vietnam on the basis that the people sent back to Vietnam were not asylum seekers or refugees, despite the fact that they were afforded no opportunity to lodge a claim for asylum. General Khieu Sopheak, spokesman for the Ministry of the Interior, was repeatedly quoted describing the Montagnards as ‘illegal immigrants’ and was reported to have said that if Vietnamese authorities detained Montagnards deported from Cambodia that was ‘their business’, adding that ‘we have sent back hundreds or even thousands of illegal Vietnamese people.’<sup>99</sup>

In March 2015, Phay Siphon, spokesperson for the Cambodian Secretary of State, reportedly said his government would not allow ‘political refugees’ from Vietnam or China to ‘springboard into our country’, adding that ‘those people are not refugees, they are just getting away from the government ... We call it illegal immigration’.<sup>100</sup> A few months later, Phay Siphon expanded on these comments, stating that Cambodia would not accept more Montagnard asylum seekers from Vietnam because ‘stability is our number one goal’ and Cambodia did not want to ‘provoke relations with Vietnam by establishing a refugee camp [for Montagnards]’.<sup>101</sup> Cambodian Foreign Affairs Minister, Hor Namhong, also defended Cambodia’s initial refusal to register Montagnard asylum seekers by arguing that: ‘If we just received them when they enter Cambodia in terms of them being Montagnard refugees, from 500,000 to 1 million Vietnamese could enter’.<sup>102</sup>

In addition to the unwillingness of Cambodian officials to acknowledge Montagnards as asylum seekers, further comments indicated that even those found to be refugees would not be permitted to remain in the country. As early as February 2015, Minister of Interior, Sar Kheng, said: ‘if [the Montagnards] are found to be refugees, with sufficient documents and evidence, we have to find a partner—a third country—to send them to. [But if a third country] will not accept them, we cannot just set up a [refugee] camp in the Kingdom’.<sup>103</sup> These comments were supported by Khieu Sopheak who alleged it would be ‘unconstitutional’ for Cambodia to accept refugees, because: ‘The constitution states that Cambodia is a neutral country, not allied with any league. Therefore, taking refugees from any country... is against the Cambodian constitutional law.’<sup>104</sup> He also asked: ‘is the international law more important than the Cambodian laws and Cambodians?’, and said the government would reject refugees to preserve ‘happiness and harmony’ in the country.

## **General human rights situation in Cambodia**

The Cambodian Constitution recognises a range of fundamental rights and freedoms, at least for Cambodian citizens.<sup>105</sup> However, despite these protections and considerable progress towards democracy and development, certain features of the political, administrative and judicial systems continue to raise human rights concerns (which may impact the treatment of asylum seekers and refugees, either directly or indirectly).

The US State Department’s 2017 Human Rights Report on Cambodia, published in April 2018, identified a number of significant human rights issues including:

extrajudicial killings; at least one disappearance by local security forces; continued prisoner abuse in government facilities; arbitrary arrests by the government ...; increased restrictions on freedoms of speech, assembly, and association including on press freedom and online expression; the use of violence and imprisonment – both actual and threatened – to intimidate the political opposition and civil society as well as to suppress dissenting voices; corruption; violence against women and lesbian, gay, bisexual, transgender and intersex persons; child abuse; and forced labor.<sup>106</sup>

In July 2017, the UN Special Rapporteur on the situation of human rights in Cambodia also noted ongoing and long-standing issues with democracy and human rights in the country, including shortcomings in the treatment of vulnerable groups and a ‘deterioration in the democratic space’ as a result of restrictive policies against civil society and the media, and limitations on freedom of expression.<sup>107</sup>

In November 2017, the Cambodian Supreme Court handed down a ruling that dissolved the major opposition party, the Cambodian National Rescue Party, ahead of national elections in July 2018.<sup>108</sup> This decision meant that Prime Minister Hun Sen would run effectively unopposed in the election, and likely continue his 32-year rule of Cambodia. The Supreme Court decision also banned 118 members of the opposition party from engaging in any political activities for five years. The UN Special Rapporteur on the situation of human rights in Cambodia issued a statement expressing concern about these developments and calling for the ‘restoration of democracy and vibrant civil society’.<sup>109</sup>

Cambodia is classified as a ‘tier 2’ country in the US State Department’s 2018 Trafficking in Persons Report, meaning it ‘does not fully meet the minimum standards for the elimination of trafficking; however, it is making significant efforts to do so’.<sup>110</sup> Cambodia was ranked 161 of 180 countries in Transparency International’s Corruption Perceptions Index for 2017, one of the lowest rankings in the Asia Pacific region (ahead of only Afghanistan and North Korea).<sup>111</sup> While the Australian government reaffirmed its commitment to the Cambodia Agreement in December 2017, a DFAT spokesperson also commented that: ‘We remain deeply concerned with the series of troubling actions taken by the Cambodian government, including reduced access to free media, increased actions against civil society and the dissolution of Cambodia’s main opposition party.’<sup>112</sup>

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## Endnotes

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<sup>8</sup> Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Estimates*, Canberra, 19 October 2015, 120 (Michael Pezzullo).

<sup>9</sup> Available at <http://dfat.gov.au/geo/nauru/Documents/nauru-mou-20130803.pdf>.

<sup>10</sup> Samantha Hawley, 'International Organisation for Migration to facilitate transfer of refugees from Nauru to Cambodia', *ABC News* (online), 23 February 2015, <http://www.abc.net.au/news/2015-02-23/iom-facilitate-transfer-of-refugees-from-nauru-to-cambodia/6227870>.

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<sup>20</sup> Lindsay Murdoch, 'Peter Dutton, bearing gifts, hopes to salvage refugee deal with Cambodia', *Sydney Morning Herald* (online), 11 September 2015, <https://www.smh.com.au/world/peter-dutton-bearing-gifts-hopes-to-salvage-refugee-deal-with-cambodia-20150911-gjk8pf.html>.

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- <sup>33</sup> Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Estimates*, Canberra, 26 May 2015, 65 (Steven Groves); *Estimates*, Canberra, 19 October 2015, 121-122 (Michael Pezzullo); Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Estimates*, Canberra, 11 November 2016, 28 (Michael Pezzullo).
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- <sup>43</sup> For more information, see: Madeline Gleeson, *State of Migration: An Overview of Forced Displacement in Cambodia*, Jesuit Refugee Service Cambodia, 2012, ch 4; International Labour Organization, *TRIANGLE in ASEAN Programme Quarterly Briefing Note: Cambodia (October – December 2017)*, 18 December 2017, [http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/genericdocument/wcms\\_614380.pdf](http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/genericdocument/wcms_614380.pdf); US Department of State, *Trafficking in Persons Report 2018*, June 2018, <https://www.state.gov/documents/organization/282798.pdf>, 125-128.

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- <sup>64</sup> UNHCR, *Resettlement*, undated, <http://www.unhcr.org/en-au/resettlement.html>; UNHCR, *Frequently Asked Questions about Resettlement*, February 2017, <http://www.unhcr.org/en-au/56fa35b16>.
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<sup>71</sup> UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, <http://www.unhcr.org/3f7d48514.html>, para 31.

<sup>72</sup> Seth Mydans, 'After Expelling Uighurs, Cambodia Approves Chinese Investments', *New York Times* (online), 21 December 2009, [https://www.nytimes.com/2009/12/22/world/asia/22cambodia.html?\\_r=0](https://www.nytimes.com/2009/12/22/world/asia/22cambodia.html?_r=0); Gleeson, above n 43, 29; 'Life in prison for asylum seekers', *Radio Free Asia* (online), 26 January 2012, <https://www.rfa.org/english/news/uyghur/life-in-prison-01262012205722.html>.

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