

Submission by the United Nations High Commissioner for Refugees (UNHCR)

For the Office of the High Commissioner for Human Rights' Compilation Report

Universal Periodic Review: *Fourth Cycle, 43rd Session*

KINGDOM OF TONGA

I. BACKGROUND INFORMATION

The Kingdom of Tonga (hereinafter 'Tonga') is not a State party to the *1951 Convention relating to the Status of Refugees*, nor to the *1967 Protocol* (hereinafter jointly the '*1951 Convention*'). The Kingdom of Tonga is not a State party to the *1954 Convention relating to the Status of Stateless Persons*, nor to the *1961 Convention on the Reduction of Statelessness* (the '*Statelessness Conventions*').

Tonga acceded to the *International Convention on the Elimination of All Forms of Racial Discrimination* on 16 February 1972 and to the *Convention on the Rights of the Child* on 6 November 1995, but it is not a State party to any of the other core international human rights treaties. Tonga has signed, but not acceded to, the *International Convention on the Rights of Persons with Disabilities* on 15 November 2007.

Having regard to the small number of individual cases, the situation of asylum-seekers, refugees, stateless persons and internally displaced persons have not been prominent concerns in Tonga. To UNHCR's knowledge, at least one recognized refugee (recognized by UNHCR under its mandate) has been identified in Tonga in 2022. A permanent solution was found for this refugee by way of resettlement to another State.

Tonga's international borders were reopened on 1 August 2022, after the Government of Tonga announced that it would close the country's borders in response to the COVID-19 pandemic on 23 March 2020. Over that two-year period, asylum-seekers and refugees could not access Tongan territory to seek international protection.

Tonga is highly susceptible to natural disasters—the rates and severity of which have been exacerbated by climate change—as well as other climate change impacts. Consequently, this increases the risks of displacement in Tonga and the Pacific more generally.

II. ACHIEVEMENTS AND POSITIVE DEVELOPMENTS

Linked to 3rd cycle UPR recommendation no. 93.25: "Adopt concrete measures to protect vulnerable groups to assist them in being more resilient to the impact of climate change and natural disasters (Republic of Korea)"

UNHCR welcomes Tonga's ongoing participation in a range of initiatives and projects, and its consultation with regional and international bodies, with a view to protecting and enhancing the resilience of persons at risk of displacement due to climate change and natural disaster impacts. In particular, UNHCR notes the Government of Tonga's engagement with the State-led Platform for Disaster Displacement initiative. This initiative aims to support Tonga to develop, strengthen and integrate internal displacement policies in national plans and strategies in the context of climate change and disaster related displacement. The Government of Tonga's involvement as part of the Pacific Response to Disaster Displacement is similarly viewed as a positive step to protect those who are—or may become—internally displaced in Tonga.

UNHCR is of the view that Tonga's sustained involvement at the regional and international levels will assist its efforts to respond—through national and regional frameworks, plans, agreements and other mechanisms—to the pressing issues of internal and cross-border displacement in the country and Pacific region. This engagement will better position the Government of Tonga to provide effective protection interventions, and to safeguard the lives and livelihoods of those displaced.

III. KEY PROTECTION ISSUES, CHALLENGES AND RECOMMENDATIONS

Issue 1: Accession to the 1951 Convention and establishment of a national legal framework governing the treatment of asylum-seekers and refugees

Accession to the *1951 Convention* greatly facilitates UNHCR's task of mobilizing international support to address refugee situations that may arise in any country. UNHCR believes that it is necessary to broaden the base of State support for these refugee instruments, ensuring that the protection provided to refugees is more universal in scope and the burdens and responsibilities of governments are equitably distributed and consistently applied.

Notwithstanding the relatively small number of cases, and competing domestic priorities, accession to the *1951 Convention*, and establishment of a national legal framework would provide a clearer basis for the Government of Tonga to provide refugees with international protection, and a mechanism that enables the appropriate engagements of relevant international organisations like UNHCR and IOM.

In addition, UNHCR remains particularly concerned by the absence of key procedural safeguards ensuring the protection of persons from *refoulement*. Tonga's *Immigration Act* generally renders any non-citizen who has entered or remained in Tonga without a valid visa liable to removal from the country, including asylum-seekers and refugees.¹ UNHCR is aware of at least one case in which an individual with protection claims was ordered to leave Tonga. The current legislative and policy settings severely limit the capacity of asylum-seekers to present their claims for assistance and protection in Tonga.

While UNHCR believes that formal accession to the *1951 Convention* provides States with the best framework within which national laws and regulations can be developed, it also recognizes that this is not necessarily the first step that Tonga needs to take to develop effective, balanced and credible national systems for refugee protection.

Recommendations:

UNHCR recommends that the Government of Tonga:

- a) Accede to the *1951 Convention relating to the Status of Refugees* and its *1967 Protocol*;
- b) Enact laws and policies that explicitly provide for non-refoulement of asylum-seekers while their claims for protection are assessed, and for recognized refugees; and,
- c) Establish national laws and regulations that will govern the treatment of asylum-seekers and refugees in line with the *1951 Convention relating to the Status of Refugees* and its *1967 Protocol*.

Issue 2: Capacity-building and technical assistance

UNHCR reiterates its willingness to provide awareness and education programmes; technical support in drafting national refugee legislation and capacity building for Government officials; and to assist in contributing to the creation of the institutional capacity for the development of a national refugee status determination procedure.

¹ See parts III and VI of the *Immigration Act*. Also, section 9 of the Act furnishes the Principal Immigration Officer wide discretion to provide a permit, for reasons that could conceivably be based on humanitarian grounds.

UNHCR stands ready to provide the Government of Tonga with timely and relevant technical advice, practical guidance and operational support regarding the treatment of persons in need of international protection and the processing of asylum claims. Specifically, UNHCR can provide practical advice and training to relevant officials to integrate ‘good practices’ and international standards of refugee protection into operational guidelines and procedures, and provide induction training, mentoring and supervision to new immigration and border control officials, police and detention or prison officials and judiciary on fundamental principles for refugee protection and migration management and including internally displaced persons.

Recommendations:

UNHCR recommends that the Government of Tonga:

- a) Seek UNHCR’s technical support in drafting national refugee legislation, capacity building for Government officials and assistance in the development of a national refugee status determination procedure;
- b) Undertake capacity building efforts with UNHCR—including training—to relevant officials on integrating international standards on asylum refugee protection into operational guidelines and procedures; and,
- c) Further develop rights-based disaster management and mitigation plans and policies—within the regional and United Nations mechanisms—which emphasizes the process and adaptation of mitigation strategies, addressing as well potential internal and cross-border displacement.

Issue 3: The use and conditions of detention

UNHCR’s detention guidelines provide that the detention of asylum-seekers and refugees must be a measure of last resort.² This position is due to the severe hardship that the detention of persons fleeing harm entails, and it takes into account the right to asylum and the right to liberty and security of the person.

Further, it is essential that—where detention is necessary, reasonable and proportionate in the circumstances—conditions of detention are humane and dignified. In particular, asylum-seekers and refugees must be provided basic necessities, food of nutritional value, appropriate medical treatment, and the use of prison facilities should be avoided as far as possible.

Tonga’s *Immigration Act*, *Immigration Regulations* and *Criminal Offences Act* govern the entry, conditions of stay, and rights of asylum-seekers and refugees. A number of these laws—which are of general application—are not properly adapted to the special circumstances of persons fleeing persecution from another State.

For example, the *Immigration Act* provides that persons are only entitled to enter or remain in Tonga if they have obtained a valid permit, unless they fall within the narrow exception categories.³ It is an offence under the Act to enter or remain in Tonga without a valid permit. Further, the *Immigration Act* and the *Criminal Offences Act* both criminalize the possession or use of forged travel documents in connection with entering, remaining or departing Tonga.⁴ UNHCR is aware of at least one previous case in which an asylum-seeker was detained, prosecuted and convicted for his use of a fraudulent passport, which had, in

² See UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) available at: <https://www.refworld.org/docid/503489533b8.html>.

³ Sections 6 and 7 of the *Immigration Act*.

⁴ A person who contravenes section 33(1)(e) of the *Immigration Act* is subject to a penalty of imprisonment for a term not exceeding 2 years or to a fine not exceeding \$100 or to both such fine and imprisonment. A person who contravenes section 172 of the *Criminal Offences Act* is subject to a penalty of imprisonment for any period not exceeding 5 years.

practice, enabled him to seek international protection from his country of origin. UNHCR understands that the individual concerned was detained in a regular prison facility in poor conditions for some months, until his two-year sentence was suspended on condition that he depart Tonga as soon as possible.

It is imperative that the use, and conditions of, detention of persons fleeing persecution accords with accepted international human rights laws and standards. In particular, governments must have regard to the special circumstances of asylum-seekers and refugees in this process, including the needs of survivors of torture, violence and trauma.

Recommendations:

UNHCR recommends that the Government of Tonga:

- a) Accede to the *International Covenant on Civil and Political Rights* and the *Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment*;
- b) Amend the *Immigration Act*, *Criminal Offences Act* and any other laws that have the effect of penalising asylum-seekers and refugees for entering or being present in Tonga unlawfully, which may infringe on their right to seek asylum; and,
- c) Undertake capacity building efforts—including training—to ensure that judicial officers, police officers, and immigration and government officials treat the detention of asylum-seekers as a measure of last resort, and that conditions of detention are consistent with international human rights law and standards.

Issue 4: Disclosure of personal information

The right to privacy and confidentiality is of pronounced importance to asylum-seekers and refugees, given that they have a fear persecution in their country of origin. Personal information and data—including, of course, protection claims—relating to asylum-seekers should not be communicated to their country of origin or in a public forum.⁵

In particular, the disclosure of an asylum-seeker's personal information or claims for protection may increase their risk profile and enhance their claims to the extent that they become a refugee *sur place*⁶. Moreover, disclosure of this nature may expose the person's family, friends or associates to a risk of harm in the country of origin from the national authorities.

UNHCR is aware of at least one case in which the personal information of a refugee—including name, country of origin, and protection claims—was published by the Government of Tonga in a legal judgment. The Government also communicated bilaterally with the refugee's country of origin to conduct a criminal record check.

Recommendations:

UNHCR recommends that the Government of Tonga:

- a) Develop privacy and personal data laws and policies which would have the effect of ensuring that the identity and protection claims of asylum-seekers and refugees are not revealed publicly or to their country of origin; and,
- b) Undertake capacity building efforts—including training—to ensure that judicial officers, immigration and government officials refrain from disclosing asylum-seekers' and refugees' confidential information.

Issue 5: Preventing and reducing statelessness

⁵ See UNHCR Representation in Japan, *Advisory opinion on the rules of confidentiality regarding asylum information* (31 March 2005) available at: https://www.refworld.org/publisher_UNHCR/42b9190e4_0.html.

⁶ A person who was not a refugee when they left his country, but who becomes a refugee at a later date, is called a refugee "sur place". A person becomes a refugee "sur place" due to circumstances arising during their absence.

Accession to the Statelessness Conventions would establish a framework to prevent and reduce statelessness, in order to avoid the detrimental effects that this can have on individuals and society, and ensure minimum standards of treatment of stateless persons, providing such persons with stability and security, and ensuring that certain basic rights and needs are met.

The *1954 Convention* ensures minimum standards of treatment of stateless persons in respect to a number of economic, social and cultural rights. These include, but are not limited to, the right to education, employment, housing, and public relief. Importantly, this Convention also guarantees stateless persons a right to identity and travel documents and to administrative assistance.

The *1961 Convention* establishes an international framework to ensure the right of every person to a nationality by establishing safeguards to prevent statelessness at birth and later in life. Stateless persons are often discriminated against in their enjoyment of economic, social and cultural rights. An increase in the number of States parties is essential to strengthening international efforts to prevent and reduce statelessness and ensuring full enjoyment of a number of these rights.

Pursuant to Tonga's *Nationality Act*, children born in Tonga can only acquire nationality if one of their parents is also Tongan.⁷ This means that if a child is born in Tonga to parents who are stateless or to foreigners who are unable to pass on their nationality to the child, the child will be stateless.

Recommendations:

UNHCR recommends that the Government of Tonga:

- a) Accede to the *1954 Convention relating to the Status of Stateless Persons* and the *1961 Convention on the Reduction of Statelessness*; and,
- b) Consider amending Tonga's *Nationality Act* to provide access to Tongan nationality for children born in the territory who would otherwise be stateless.

UNHCR
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⁷ Section 2 of the *Nationality Act*.