



## **UNHCR monitoring visit to Manus Island, Papua New Guinea 23 to 25 October 2013**

UNHCR undertook a visit to Manus Island from 23 to 25 October 2013 to assess the progress by Australia and Papua New Guinea (PNG) in implementing their commitments under the 1951 Refugee Convention since UNHCR's June 2013 visit and to review the reception conditions at the Regional Processing Centre (RPC).

### **Summary of key findings**

UNHCR welcomes some positive developments since its June 2013 visit. These include the commencement of refugee status determination (RSD) assessments, the transfer of children and their families back to Australia, the accommodation of asylum-seekers in hard-walled buildings rather than tents and the on-going development of excursions and activities available to asylum-seekers. However, UNHCR notes that there has been little or no progress in addressing fundamental concerns identified in UNHCR's June report.

Overall, UNHCR was deeply troubled to observe that the current policies, operational approaches and harsh physical conditions at the RPC do not comply with international standards and in particular:

- a) constitute arbitrary and mandatory detention under international law;
- b) do not provide a fair, efficient and expeditious system for assessing refugee claims;
- c) do not provide safe and humane conditions of treatment in detention; and
- d) do not provide for adequate and timely solutions for refugees.

Further, the 'return-orientated environment' observed by UNHCR at the RPC is at variance with the primary purpose of the transfer arrangements, which is to identify and protect refugees and other persons in need of international protection.

UNHCR has the following serious concerns about the current transfer arrangements relating to the following issues:

#### **I. The legal and regulatory framework for processing asylum claims**

At present, there is no clear and adequate legal or regulatory framework for conducting RSD in PNG. UNHCR is of the view that changes to PNG's laws and regulations need to be implemented as a matter of urgency to ensure that a fair, efficient and transparent process is in place, which meets international standards.

## **II. Refugee status determination procedures and capacity and expertise of decision-makers**

UNHCR notes that no RSD decision has been finalized and handed down since the first transfer of asylum-seekers from Australia to PNG commenced in November 2012. The capacity of PNG officials to conduct RSD assessments of complex caseloads presented in PNG and expertise to make decisions is limited at this time, due to a lack of experience and training. UNHCR considers that the RSD system which is in place does not currently provide a fair and efficient procedure for assessing asylum claims.

## **III. Legal and physical conditions of detention**

The current PNG policy and practice of detaining all asylum-seekers at the closed RPC, on a mandatory and open-ended basis, without an individualized assessment as to the necessity, reasonableness and proportionality of the purpose of such detention, amounts to arbitrary detention that is inconsistent with international law.

The legal framework and physical conditions for the detention and treatment of asylum-seekers remain below international standards and, overall, do not provide for a safe, fair and humane standard of treatment for asylum-seekers transferred under the bilateral arrangements to the RPC.

Cumulatively, the harsh conditions for asylum-seekers at the RPC, the slowness of RSD processing and the lack of clarity regarding RSD processes and approximate timeframes for durable solutions for refugees, create a deterrent effect that is punitive in nature for those affected, rather than promoting fair and efficient humanitarian outcomes for transferred asylum-seekers and recognized refugees.

## **IV. Assisted voluntary returns**

UNHCR supports programmes for assisted voluntary returns of asylum-seekers if decisions by asylum-seekers to return are fully informed and voluntary.

Some asylum-seekers at the RPC, who may be *bona fide* refugees or in need of complementary protection, may contemplate returning to their country of origin as a result of the uncertainty around RSD processing in PNG, the prospect of lengthy delays in accessing a durable solution, the harsh conditions at the RPC, and the prospect of settling in PNG where there are high levels of insecurity and significant challenges around local integration.

UNHCR observed a 'return-orientated' environment at the RPC rather than one promoting safe, fair and humane conditions, and identifying and protecting refugees in accordance with the 1951 Refugee Convention.

## **V. Mental and physical health**

Within the current policy settings and physical environment at the RPC, the situation of vulnerable people, particularly survivors of torture and trauma, is likely to be an issue of growing concern. These concerns are heightened due to the uncertainty and delays of RSD processing and the current arbitrary and mandatory detention framework.

## **VI. Durable solutions**

UNHCR is very concerned by the policy introduced by the Governments of Australia and PNG to settle recognized refugees in PNG. From UNHCR's first-hand experience in supporting Melanesian and non-Melanesian refugees in PNG for nearly 30 years, it is clear that sustainable integration of non-Melanesian refugees in the socio-economic and cultural life of PNG will raise formidable challenges and protection concerns.

Until safe and sustainable durable solutions are found in PNG or elsewhere, the safety and protection of refugees must remain the shared responsibility of the two States in accordance with the 1951 Refugee Convention.

## **VII. Pre-transfer arrangements**

The current pre-transfer policies and procedures raise a number of serious concerns.

UNHCR's view is that the pre-transfer assessments that are conducted in Australia within a targeted '48 hour' timeframe do not permit an adequate individualized assessment of health concerns or vulnerabilities (particularly for torture and trauma survivors), nor a considered assessment as to whether the nature of the facilities and services available at the RPC would be appropriate for the individual concerned or whether transfer should occur at all.

At the time of UNHCR's visit, it was particularly concerned by the presence of at least two unaccompanied children and, subsequent to the visit, more recent reports of others who claim to be under 18 years of age. This highlights the need for, and importance of, accurate and effective pre-transfer assessments.

## I. Introduction

1. From 23 to 25 October 2013, a two-person UNHCR team visited the 'Regional Processing Centre' (RPC)<sup>1</sup> located at Lombrum Naval Base, Manus Island in Papua New Guinea (PNG). The visit followed two earlier visits by UNHCR on 15 to 17 January 2013 and on 11 to 13 June 2013.<sup>2</sup>
2. UNHCR undertook the visit pursuant to its supervisory role under Article 35 of the *1951 Convention relating to the Status of Refugees* and Article II of the *1967 Protocol relating to the Status of Refugees* (together the '1951 Refugee Convention'), to which both PNG and Australia are parties.
3. The core objectives of UNHCR's visit were to: assess the extent to which Australia and PNG are implementing their obligations under the 1951 Refugee Convention and other related international law obligations; review the reception conditions for asylum-seekers at the RPC; and meet with officials, service providers and asylum-seekers to hear any concerns they may have in relation to the transfer arrangements and circumstances at the RPC.
4. During the visit, UNHCR met with senior officials from the Governments of PNG (PNG Immigration and Citizenship Services Authority – PNG ICSA) and Australia (Department of Immigration and Border Protection – DIBP), as well as senior staff of the key service providers: G4S (security and logistics); International Health and Medical Services (IHMS) (health and medical services); The Salvation Army (case management and welfare); Survivors of Torture and Trauma Assistance and Rehabilitation Service (STTARS) (torture and trauma counsellors); and the International Organization for Migration (IOM) (assisted voluntary returns).
5. At the time of the visit, UNHCR met with asylum-seekers who had been chosen to represent the countries of origin of the asylum-seekers present within each compound at the RPC. UNHCR also inspected the facilities available at the main compounds that were being used to accommodate the asylum-seekers.
6. UNHCR expresses its appreciation to the PNG Government for facilitating this visit and giving full access to all areas and persons at the RPC. UNHCR also appreciates assistance provided by Australian officials and staff of the service providers, all of whom were helpful and forthright in ensuring that UNHCR was able to achieve the objectives of the visit.
7. As at 28 October 2013, there were 1,093 asylum-seekers at the RPC. 1,091 of the asylum-seekers were single adult males, and two asylum-seekers were unaccompanied children. The breakdown by country of origin of the asylum-seekers was as follows: the Islamic Republic of Iran (503), Afghanistan (103), Iraq (84), Pakistan (60), Sudan (83), Stateless (79), Bangladesh (53), Lebanon (42), Sri Lanka (29), Nepal (15), Myanmar (16), Somalia (14), Viet Nam (3), the Syrian Arab Republic (4), Egypt (2), Albania (1), Algeria (1) and Kuwait (1).

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<sup>1</sup> During UNHCR's visit, the RPC was referred to as the "Offshore Processing Centre" (OPC) by Australian immigration staff and service providers, notwithstanding that the PNG Government refers to it as the RPC. For the purposes of this report, the term RPC will be used.

<sup>2</sup> The Report on UNHCR's 15 to 17 January 2013 visit was published on 4 February 2013 and the Report on its 11 to 13 June 2013 visit on 12 July 2013. These reports are available online at: [www.unhcr.org.au](http://www.unhcr.org.au)

8. This represents a sharp increase in the number of asylum-seekers in the RPC since UNHCR's visit in June, but without any significant expansion of the RPC's external boundaries.
9. UNHCR acknowledges that, within a very short timeframe, the numbers of asylum-seekers who have been transferred to the RPC has increased rapidly, creating significant operational and practical challenges in a remote and isolated location. In this regard, UNHCR appreciates that, within the current policy and operational constraints in which staff at the RPC work, significant efforts are being made by staff to expand their services and capacity to try to ensure that the needs of asylum-seekers are met.
10. The team reviewed progress in relation to UNHCR's recommendations made in the two reports that were published respectively in February and July 2013.

## **II. Legal framework for transfer arrangements**

### **i) Recent policy developments**

11. Since UNHCR's visit to the RPC in June 2013, the Governments of Australia and PNG entered into a Regional Resettlement Agreement (RRA) on 19 July 2013, agreeing (among other things), that Australia would transfer asylum-seekers who have arrived by boat to PNG for processing of their asylum claims and that PNG, not Australia, would settle, on a permanent basis, those asylum-seekers that are determined to be refugees.
12. On 6 August 2013, the Governments of Australia and PNG entered into a new Memorandum of Understanding<sup>3</sup> (New MOU), which supports the RRA and supersedes the Memorandum of Understanding dated 8 September 2012<sup>4</sup> (2012 MOU).<sup>5</sup>
13. At the time of UNHCR's visit, all but six of the asylum-seekers at the RPC had been transferred under the arrangement of the New MOU. All asylum-seekers transferred under the 2012 MOU had been returned to Australia for processing, other than six who had been involved in criminal proceedings and were on good behaviour bonds.

### **ii) International legal standards for transfer arrangements**

14. UNHCR acknowledges the complex challenges of irregular maritime movements faced by States. In particular, UNHCR has long advocated for stronger regional and international cooperation to address irregular maritime movements in a way that respects the legitimate concerns of States, but also

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<sup>3</sup> *Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the Transfer to, and Assessment and Settlement in, Papua New Guinea of Certain Persons, and Related Issues*, signed by the Government of Australia on 5 August 2013 and the Government of Papua New Guinea on 6 August 2013 (New MOU).

<sup>4</sup> *Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, relating to the Transfer to and Assessment of Persons in Papua New Guinea, and Related Issues*, signed by the Governments of Australia and Papua New Guinea on 8 September 2012 (2012 MOU).

<sup>5</sup> The main difference between the New MOU and the 2012 MOU is that asylum-seekers processed in PNG were not barred from settling in Australia under the 2012 MOU.

the individual protection and humanitarian needs of those who resort to dangerous travel by sea, and who may be exploited by people smugglers.

15. In addressing these challenges, UNHCR's general position is that asylum-seekers and refugees should ordinarily be processed in the territory of the State where they arrive, or which otherwise has jurisdiction over them.<sup>6</sup> All cooperation arrangements should build on and strengthen national asylum systems, not undermine or deflect responsibilities onto other States.
16. With these general observations in mind, UNHCR maintains its position that the physical transfer of asylum-seekers from Australia to PNG, as an arrangement agreed by two 1951 Refugee Convention States, does not extinguish the legal responsibility of Australia for the protection of the asylum-seekers affected by the transfer arrangements. In short, both Australia and PNG have shared and joint responsibility to ensure that the treatment of all transferred asylum-seekers is fully compatible with their respective obligations under the 1951 Refugee Convention and other applicable international instruments.
17. As with earlier visits and reports in PNG and Nauru, for the purposes of this report, UNHCR assessed the conditions and treatment of the transferred asylum-seekers against the following standards and agreed principles, which must guarantee that each asylum-seeker:
  - a) is individually assessed as to the appropriateness of the transfer, subject to procedural safeguards, prior to transfer. Pre-transfer assessments are particularly important for vulnerable groups, including unaccompanied and separated children. The best interests of the child must be a primary consideration;
  - b) is admitted to the proposed receiving State;
  - c) is protected against *refoulement*;
  - d) has access to fair and efficient procedures for the determination of refugee status and/or other forms of international protection;
  - e) is treated in accordance with applicable international refugee and human rights law standards, for example, appropriate reception arrangements; access to health, education and basic services; safeguards against arbitrary detention; identification and assistance of persons with specific needs; and
  - f) if recognized as being in need of international protection, is able to enjoy asylum and/or access a durable solution within a reasonable time.<sup>7</sup>
18. In addition to these standards, UNHCR has taken into account the terms of the New MOU which includes commitments by the Governments of Australia and PNG to treat transferred asylum-seekers with dignity and respect and in accordance with relevant human rights standards,<sup>8</sup> and to develop and agree to special arrangements for vulnerable cases, including unaccompanied minors.<sup>9</sup> Further, the Government of PNG also provided an assurance to make an assessment, or permit an assessment to be made, of claims for refugee status by transferred asylum-seekers.<sup>10</sup>

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<sup>6</sup> UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, para. 1.

<sup>7</sup> UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, para. 2.

<sup>8</sup> See clause 17 of the New MOU.

<sup>9</sup> See clause 18 of the New MOU.

<sup>10</sup> See clauses 20 (b) of the New MOU.

### III. Refugee status determination and other international protection obligations

#### i) Legal and regulatory framework

19. PNG acceded to the 1951 Refugee Convention on 17 July 1986.
20. Section 15A of PNG's *Migration Act 1980* (Act) empowers the Foreign Affairs Minister of PNG to determine whether a non-citizen is a refugee, but provides no procedural or substantive guidance as to how a refugee status determination (RSD) should be made by the Minister.
21. In January 2013, PNG incorporated provisions into the Migration Regulation 1979 (Regulation), which provide the Foreign Affairs Minister of PNG with guidance in respect of determining the refugee status of 'non-citizens' transferred under the 2012 MOU. These provisions are now redundant as the 2012 MOU has been superseded by the New MOU.<sup>11</sup>
22. UNHCR was advised by PNG ICSA that PNG officials conducting RSD of asylum-seekers transferred under the New MOU are authorized to act under s 15A of the Act and are guided, but not bound, by the Regulation (which refers to the 2012 MOU).
23. UNHCR is concerned as, although RSD processing has commenced at the RPC, at present there is no clear legislative or regulatory guidance for the Foreign Affairs Minister or other PNG officials to follow when determining whether an asylum-seeker is a refugee.
24. UNHCR was advised by PNG ICSA that legislation will be introduced to amend the Regulation so that it applies to asylum-seekers transferred to PNG under the New MOU. UNHCR has previously identified a number of deficiencies in the Regulation and recommends that PNG considers and takes into account previous comments made by UNHCR to ensure compliance with PNG's commitments under the 1951 Refugee Convention and other international instruments.
25. UNHCR was also advised by PNG ICSA that a new *Migration Act* is in the process of being drafted to introduce comprehensive RSD procedures that will apply to all asylum-seekers. UNHCR would welcome the opportunity to review and comment on the draft *Migration Act*.
26. UNHCR acknowledges that the Government of PNG has partially lifted the seven reservations to the 1951 Refugee Convention, but this is confined to asylum-seekers and refugees transferred under the New MOU. UNHCR welcomes advice that the Government of PNG is in the process of arranging to lift the seven reservations in relation to all refugees in its jurisdiction and would urge that this be finalized as a matter of priority.

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<sup>11</sup> Sections 14 and 15 of the Regulation were only recently inserted when the PNG Parliament passed the *Migration (Amendment) Regulation 2013* in January 2013.

ii) Capacity and expertise of RSD officers

27. At the time of UNHCR's visit, there were only five RSD officers who had been recruited by the Government of PNG to undertake RSD in relation to transferred asylum-seekers. These RSD officers alternate their time at the RPC, so that at any one time there are only two or three RSD officers available to conduct assessments. They receive mentoring from experienced Australian DIBP officials. However, at the time of the visit, there was only one experienced DIBP RSD official who was responsible for mentoring the RSD officers.
28. UNHCR understands that the RSD officers' capacity in relation to interviewing asylum-seekers has improved, but further training and capacity building needs to be undertaken in relation to preparing written RSD decisions and continued mentoring is also required.
29. UNHCR was advised that the week prior to its arrival in October, the experienced DIBP decision makers who had been seconded to the Government of PNG to conduct RSD assessments, so as to increase its decision making capacity, had ended their secondment. Although ICSA advised UNHCR that it is currently recruiting more RSD officers and intends to have 20 RSD officers available to undertake RSD, the newly recruited RSD officers will have to undertake training and it will take a period of at least six months' before they are able to undertake RSD with any degree of sufficiency. In addition, together with the five RSD officers already recruited, the newly recruited officers will require on-going development and support from DIBP mentors.
30. UNHCR welcomes ICSA's intention to train two of the RSD officers to undertake a 'quality oversight' role of the RSD decisions, but notes that this will further reduce the already very limited capacity for conducting RSD assessments.
31. Overall, UNHCR has serious concerns about the RSD capacity and capability currently available to the Government of PNG to process, in an efficient and timely manner, the asylum-seekers who have arrived, and will continue to arrive, at the RPC. In this regard, UNHCR notes with concern that as of 28 October 2013, of the 1,093 asylum-seekers who were at the RPC during UNHCR's visit, only about 160 had been able to lodge applications for asylum and only 55 had received RSD interviews.
32. UNHCR notes with concern that since the decision was made by the Governments of PNG and Australia to transfer asylum-seekers to PNG from Australia in November 2012, no RSD decision has been finalized and handed down by the Government of PNG.
33. UNHCR also notes that, based on their countries of origin, the asylum-seekers at the RPC are likely to present very complex cases requiring a high level of skill, experience and expertise by decision makers. UNHCR is very concerned that the current and projected RSD officers from ICSA will have great difficulty in producing timely, accurate and fair assessments, unless DIBP decision makers are available to ensure adequate mentoring and quality assurance for the foreseeable future. Any withdrawal of mentoring or oversight by



experienced decision makers would be likely to reduce further the quality, accuracy and efficiency of RSD assessments undertaken by the RSD officers.

iii) Commencement of RSD processing

34. During its visit to the RPC, UNHCR held discussions with the ICSEA Centre Manager (PNG Government), the senior DIBP official (Australian Government) and a DIBP RSD mentor to discuss the current status of RSD processing of asylum-seekers and the procedures in place.
35. Since 19 July 2013, following the transfer of asylum-seekers under the New MOU, UNHCR understands that asylum-seekers have been scheduled for processing in order of their arrival by boat on Australia.
36. UNHCR welcomes the commencement of RSD processing at the RPC. However, as noted in the previous reports, UNHCR reiterates its concerns that fair and efficient RSD procedures and safeguards are still not in place, and it remains unclear as to how and when final RSD decisions will be made and handed down. This unsatisfactory situation undermines what UNHCR understands to be the primary purpose of the transfer arrangements, namely to process claims for refugee protection in a fair and efficient manner.
37. UNHCR was advised that following the federal election in Australia on 7 September 2013 and the announcement that the Immigration Advice and Application Assistance Scheme (IAAAS) in Australia would be withdrawn, all RSD interviews of asylum-seekers at the RPC were suspended. Further, the assistance provided by Australian lawyers who were at the RPC to provide asylum-seekers with claims assistance has been withdrawn, until the implications of the withdrawal of the availability of claims assistance for asylum-seekers transferred to the RPC is clarified by the Government of Australia.
38. UNHCR is very concerned at the possibility of claims assistance for asylum-seekers at the RPC being withdrawn. Unlike Australia, PNG does not have legal service providers with readily available capacity and experience in RSD who are able to provide *pro bono* legal advice to assist asylum-seekers with navigating the complexity of RSD processes and procedures. In addition, the suspension of RSD interviews has caused further delays with the processing of asylum-seekers.
39. UNHCR understands that the 'initial transferee interviews' observed by UNHCR during its June 2013 visit, which were designed to elicit details about the asylum-seekers, their families, the route they took to Australia and some basic information about why they sought asylum in Australia, have ceased as a matter of practice.
40. Prior to an RSD interview an initial interview is an important stage in the RSD process. Initial or registration interviews enable RSD officers to identify and assist persons with special needs and vulnerabilities (who may not have been identified during the very short 48 hour pre-transfer assessment conducted in Australia (see further section (X) below)) and also provide an opportunity to gather information to conduct country of origin research prior to the RSD interview, enhancing the fairness and efficiency of the RSD process. UNHCR recommends that the Government of PNG reinstate so-called initial transferee interviews.

41. UNHCR was advised that RSD officers, when conducting RSD assessments, are using draft procedural guidelines which have not yet been finalized.<sup>12</sup> UNHCR urges the PNG Government to finalize and promulgate the guidelines as a matter of priority. This is necessary to provide greater clarity and transparency to the RSD procedures.
42. UNHCR welcomes advice received that the PNG Government intends to establish an independent panel comprised of an officer from the Department of Justice and an officer from the Attorney-General's Department, who will review negative RSD decisions. Given the importance of an independent merits review of the primary assessment, it is essential that any appointed officials have a high degree of experience, expertise and knowledge in refugee law and a special expertise in dealing with vulnerable cases, especially survivors of torture and trauma.
43. As during UNHCR's visits in January and June 2013, asylum-seekers who met with UNHCR continued to express confusion and anxiety over the RSD processing arrangements that would apply to them in PNG.
44. Many asylum-seekers told UNHCR that after their arrival at the RPC, the only occasion that they received information about the RSD process was during their induction on the first day. A specific concern widely voiced by asylum-seekers was that in addition to not being kept informed about the applicable RSD processes and procedures, they had not received any approximate timeframes in relation to the RSD process, causing distress and a deep sense of helplessness. Some asylum-seekers advised that they had been told that the RSD process could take anywhere between two to five years and expressed despair at this prospect.
45. In relation to the asylum-seekers who had completed their RSD interviews (55 in total), they reported that they had not received any indication as to when they would be contacted about the next step in the RSD process, nor had they been provided any approximate timeframes in relation to the RSD process.
46. UNHCR understood that, following its earlier visit in June, information fact sheets about the RSD process had been drafted and would be provided to the asylum-seekers once finalized. However, UNHCR noted that these pamphlets have not been finalized at the time of the visit and it was unclear whether there remains any intention to do so.
47. UNHCR was advised by PNG ICSA that the PNG Government does not intend to implement any timeframes in relation to the RSD process (a decision which is partly due to the uncertainty of the officers' capacity to undertake RSD), and that its current policy is not to formally communicate approximate RSD processing timeframes. In particular, it was confirmed that on occasions when asylum-seekers have asked PNG officials about processing timeframes, they have been advised that there are no timeframes and that it could take anywhere from two to five years. Further, there does not appear to be any

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<sup>12</sup> UNHCR notes that it has reviewed a draft of PNG's 'Refugee Determination Guidelines - Part 2: Procedures Manual', but understands that the draft reviewed has been revised significantly. UNHCR has not been given the opportunity to review PNG's Refugee Determination Guidelines: Part 1, but would welcome the opportunity to do so.

intention to keep asylum-seekers updated and informed on a regular basis about the RSD processes and procedures and their rights.

48. It is an essential procedural safeguard that asylum-seekers should be informed of the RSD processes at the earliest possible stage and be kept well-informed throughout the procedure.<sup>13</sup> In particular, asylum-seekers have the right to be informed orally and writing, in a language which they understand, of the processes and procedures to be followed, of their rights and obligations during the procedure and to consult in an effective manner with a legal adviser. The communication of these rights is essential in order for asylum-seekers to be able to exercise their rights, as rights are rendered ineffective if an asylum-seeker is unable to act on them due to a failure of being informed of what those rights are.
49. Further, UNHCR's view is that reasonable and appropriate timeframes should be implemented and communicated to asylum-seekers. This is integral not only for a fair and efficient asylum system, but also for the psycho-social well-being of asylum-seekers.

iv) Complementary protection and statelessness

50. PNG and Australia are parties to the *1966 International Covenant on Civil and Political Rights* (ICCPR).<sup>14</sup> However, PNG is not a party to the *1986 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, nor the *1954 Convention relating to the Status of Stateless Persons* or the *1961 Convention on the Reduction of Statelessness* (together the 'Statelessness Conventions'), yet Australia is a party to those conventions.
51. UNHCR notes that transferred asylum-seekers who do not meet the definition of a refugee may still be entitled to complementary protection or protection on the basis of being stateless. However, there is no regulatory mechanism under which PNG or Australia's responsibilities can be clearly determined.
52. As noted above, UNHCR is of the view that Australia's responsibilities under applicable international instruments to which it is a party remain engaged and cannot be extinguished by the physical transfer of asylum-seekers to PNG.
53. On this basis, UNHCR recommends that the Governments of PNG and Australia clarify how the question of statelessness persons will be dealt with and resolved. In the meantime, Australia's obligations to such persons in accordance with the Statelessness Conventions remain extant.
54. Although PNG has provided its assurance to Australia under the New MOU that it will not return an asylum-seeker to a country where he or she will be subjected to torture, cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of life or the imposition of the death penalty, PNG has not codified the right to complementary protection into its domestic law or set out a process for determining whether an individual is in need of complementary protection.

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<sup>13</sup> Global Consultations on International Protection/Third Track: *Asylum Processes (Fair and Efficient Asylum Procedures)*, para. 50 (G).

<sup>14</sup> PNG acceded to the *1966 International Covenant on Civil and Political Rights* (ICCPR) on 21 July 2008 and Australia ratified the ICCPR on 13 August 1980.

55. UNHCR recommends that PNG takes the necessary action to implement complementary protection legislation covering all asylum-seekers who are found not to be refugees, but are in need of international protection. In this regard, UNHCR notes the right to complementary protection arising under Article 7 of the ICCPR<sup>15</sup> (to which both PNG and Australia are parties) and also in relation to the prohibition against torture, which is a peremptory or *jus cogens* norm<sup>16</sup> (a norm from which no derogation is permitted by any State).<sup>17</sup>
56. More broadly, UNHCR recommends that the current legal and regulatory framework in PNG be amended and developed to:
- a) apply the same RSD processes and procedures to all asylum-seekers, regardless of where they are from or their manner of arrival;
  - b) ensure the exclusion and expulsion provisions of the 1951 Refugee Convention are applied correctly to safeguard against wrongful denial of refugee status;
  - c) provide adequate procedural safeguards, such as processing within reasonable timeframes, access to legal advice and access to independent merits review of first instance decisions; and
  - d) cover both complementary protection and non-refugee statelessness claims to align the treatment of asylum-seekers more closely to applicable international standards and commitments made by the two States.

### **Recommendations: Refugee status determination and other international protection obligations**

**A. The Government of PNG should amend the Migration Act and Regulation as a matter of priority, so that a clear and adequate legal and regulatory framework is in place governing the RSD of asylum-seekers. In particular, any amendments should:**

- 1) ensure consistency of the national legal framework with the provisions of the 1951 Refugee Convention, in accordance with the detailed comments provided previously by UNHCR;**
- 2) set out in detail the asylum processes and procedures in PNG, including to ensure an independent merit review process and to incorporate complementary protection and non-refugee statelessness claims to align the procedures with international standards to which Australia and PNG are party; and**
- 3) ensure that the same regime applies to all asylum-seekers regardless of where they are from or their mode of arrival in PNG.**

**B. The Governments of PNG and Australia should finalize and disseminate, as a matter of priority, clear information to asylum-seekers about their**

<sup>15</sup> See UN Human Rights Committee (HRC), *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, [9]: 'In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement. States parties should indicate in their reports what measures they have adopted to that end.'

<sup>16</sup> See Article 53 of the *1969 Vienna Convention on the Law of Treaties*.

<sup>17</sup> International Court of Justice, *Questions relating to the obligation to prosecute or extradite (Belgium v Senegal)*, Judgment on the Merits of 20 July 2012 [99]. It is noted that Australia is a party to the *1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*, but PNG is not. However, on the basis that torture has attained the status of a peremptory or *jus cogens* norm, PNG is bound under international law not to *refouler* a person to a place where he or she will be subjected to torture, despite the fact that PNG is not a party to the CAT.

legal rights and entitlements, and provide counselling on the procedures which will be followed to assess their claims for refugee status including the legal basis, the decision-making authority and the indicative time frames for these various steps.

- C. Additional and specific support should be provided to vulnerable persons, including torture and trauma survivors, to ensure that they are able to fully understand and benefit from the RSD processes and procedures.
- D. Interviews of asylum-seekers should recommence immediately and the initial interviews should be reinstated, to enhance fairness and efficiency of the RSD process.
- E. The Government of Australia, which is jointly responsible for the transferred asylum-seekers, should continue to assist the Government of PNG with increasing its RSD processing capacity. In this regard, experienced DIBP decision makers should be seconded to the Government of PNG to increase its decision-making capacity, mentoring and overall quality assurance and integrity of process, and to ensure that timely assessments are made and delivered.
- F. Access to independent legal advice and assistance for asylum-seekers at the RPC should be reinstated as a matter of priority.
- G. The Government of PNG should take steps to codify the right to complementary protection and to implement a legal and regulatory framework that provides guidance for RSD officers to determine whether an individual is in need of complementary protection.
- H. As PNG is not a party to the Statelessness Conventions, Australia has a residual responsibility that has not been extinguished by the transfer arrangements. This lacuna needs to be addressed as a matter of priority.
- I. The Government of PNG should take steps to become a party to the Statelessness Conventions to resolve any lacunae in the arrangements relating to state responsibility.
- J. UNHCR welcomes the partial lifting of the seven reservations to the 1951 Refugee Convention in relation to refugees affected by the bilateral transfer arrangement between the Governments of Australia and PNG, and recommends that the Government of PNG take the necessary steps, as matter of priority, to extend this in relation to all refugees within its jurisdiction. The current differentiated treatment of refugees raises issues of partiality and discrimination that need to be addressed and removed.

#### IV. Detention and conditions of reception

##### i) International legal standards

57. The right to liberty and security of person<sup>18</sup> and freedom of movement<sup>19</sup> are fundamental rights enshrined under international human rights law, including under the ICCPR (which both PNG and Australia are a party to) and the *Universal Declaration of Human Rights* (UDHR).
58. In addition to these rights, the 1951 Refugee Convention provides for the non-penalisation of refugees and asylum-seekers<sup>20</sup> and for the freedom of movement and choice of residence for refugees lawfully in the territory, which includes asylum-seekers.<sup>21</sup> The applicable legal framework and standards are found in UNHCR's *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012 (Detention Guidelines).
59. In relation to the detention of asylum-seekers, 'detention' refers to the deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities.<sup>22</sup>
60. Although UNHCR acknowledges that detention of asylum-seekers is not prohibited under international law *per se*, it is only lawful if it is:<sup>23</sup>
- a) pursued for a legitimate purpose such as public order, public health or national security;
  - b) necessary in the individual case (requiring an individualized assessment of the asylum-seeker's particular circumstances);
  - c) reasonable in all the circumstances (requiring an assessment of any special needs of the individual); and
  - d) proportionate to a legitimate purpose.
61. Further, it is noted that consideration of alternatives to detention forms part of the overall assessment of the necessity, reasonableness and proportionality of detention in any given situation.<sup>24</sup>
62. In relation to reception conditions put in place by States for asylum-seekers, UNHCR's Executive Committee of the High Commissioner's Programme has recommended, among other things, that reception arrangements be guided by

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<sup>18</sup> See Articles 3 and 9 of the *1948 Universal Declaration of Human Rights* (UDHR) and Article 9 of the ICCPR.

<sup>19</sup> See Article 12 of ICCPR, which covers the right to freedom of movement and choice of residence for persons lawfully staying in the territory, as well as the right to leave any country, including one's own.

<sup>20</sup> See Article 31 of the 1951 Refugee Convention. Further provides that restrictions on movement shall not be applied to refugees (or asylum-seekers) who have entered irregularly, other than restrictions which are necessary and such restrictions shall only be applied until the individuals status is regularized or they gain admission;

<sup>21</sup> See Article 26 of the 1951 Refugee Convention.

<sup>22</sup> See UNHCR's *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012.

<sup>23</sup> See UNHCR's *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, 21.

<sup>24</sup> See UNHCR's *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, 22.

respect for 'human dignity and applicable international human rights law and standards'.<sup>25</sup>

ii) National regulatory framework

63. UNHCR notes that s 42(1) of PNG's Constitution provides that subject to certain limited exceptions, no person shall be deprived of his personal liberty.<sup>26</sup>
64. Furthermore, the New MOU includes commitments made by the Governments of Australia and PNG to treat transferred asylum-seekers in accordance with relevant human rights standards.<sup>27</sup>
65. UNHCR notes that prior to their transfer from Australia to PNG, asylum-seekers are issued visas by the Government of PNG to legally enter and reside in PNG, so their status upon arrival in PNG is authorized and legal.
66. At the time of UNHCR's visit, asylum-seekers were being held in the RPC at the Lombrum Naval Base immediately following their arrival at Manus Island.
67. While the physical boundaries of the RPC appear to be fairly low-security, there is a significant presence of security guards and no one is allowed to enter or leave without explicit permission, nor are any asylum-seekers able to freely move around the RPC by leaving the compound to which they have been allocated.
68. UNHCR was advised by PNG ICSA and service providers that, following the arrival of asylum-seekers at the RPC, security, identity and initial health checks are conducted on the first day. The newly arrived asylum-seekers are then placed in quarantine for a period of 30 days, which is a requirement under PNG law. Following the 30 day quarantine period (which includes inoculations), asylum-seekers are then moved to one of the main compounds (at the time of the visit Foxtrot, Oscar and soon to include Mike).

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<sup>25</sup> *Conclusion on reception of asylum-seekers in the context of individual asylum systems*, 8 October 2002, No. 93 (LIII) - 2002. See generally UNHCR, *Global Consultations on International Protection/Third Track: Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems*, 4 September 2001, EC/GC/01/17.

<sup>26</sup> Those limited exceptions are as follows: '(a) in consequence of his unfitness to plead to a criminal charge; or (b) in the execution of the sentence or order of a court in respect of an offence of which he has been found guilty, or in the execution of the order of a court of record punishing him for contempt of itself or another court or tribunal; or (c) by reason of his failure to comply with the order of a court made to secure the fulfilment of an obligation (other than a contractual obligation) imposed upon him by law; or (d) upon reasonable suspicion of his having committed, or being about to commit, an offence; or (e) for the purpose of bringing him before a court in execution of the order of a court; or (f) for the purpose of preventing the introduction or spread of a disease or suspected disease, whether of humans, animals or plants, or for normal purposes of quarantine; or (g) for the purpose of preventing the unlawful entry of a person into Papua New Guinea, or for the purpose of effecting the expulsion, extradition or other lawful removal of a person from Papua New Guinea, or the taking of proceedings for any of those purposes; or (h) in the case of a person who is, or is reasonably suspected of being of unsound mind, or addicted to drugs or alcohol, or a vagrant, for the purposes of— (i) his care or treatment or the protection of the community, under an order of a court; or (ii) taking prompt legal proceedings to obtain an order of a court of a type referred to in Subparagraph (i); (i) in the case of a person who has not attained the age of 18 years, for the purpose of his education or welfare under the order of a court or with the consent of his guardian.'

<sup>27</sup> Clause 20 of the 2012 MOU.

iii) Freedom of movement at the RPC

69. In its earlier visits and reports, UNHCR recommended that the RPC be changed to an open centre environment. However, since UNHCR's last visit to the RPC in June, there has only been very minor progress towards improving asylum-seekers' freedom of movement. The most notable improvement is that asylum-seekers, who sign up to participate, are now permitted limited and tightly controlled opportunities to run or walk around the RPC (remaining at all times on the naval base), accompanied by two staff members from The Salvation Army and escorted by a G4S vehicle.
70. Three weeks prior to UNHCR's visit, excursions for the asylum-seekers by bus had commenced occurring five times a day, unless the buses are required for other purposes, such as arranging transport for newly arrived asylum-seekers. Excursions allowed asylum-seekers to alight from the bus in some locations around the island, under close escort and supervision.
71. UNHCR was advised that permission has been granted for the oval on the naval base (outside of the RPC) to be used by asylum-seekers, but measures need to be implemented before the oval can be used. In addition, there are proposals to restore a pool on the naval base (outside the RPC) for use by asylum-seekers and RPC staff, and to establish swimming excursions to the beach if lifesavers can be recruited. As reported during the June visit, options for allowing asylum-seekers to undertake voluntary work in the community were still being explored.
72. UNHCR was advised by PNG ICSA and DIBP that consultations with the local community on Manus Island have and will continue to take place in relation to the asylum-seekers at the RPC. UNHCR understands that one of the reasons why asylum-seekers' freedom of movement has been restricted relates to concerns held by the local community about asylum-seekers. UNHCR notes that Manus Island is very isolated and the majority of the population has had very limited exposure to foreigners.
73. When viewed in their totality, UNHCR concluded that excursions, whilst welcome in ameliorating the impact of the detention regime currently in place, do not change the underlying conclusion that asylum-seekers at the RPC are living within an environment with no genuine freedom of movement.
74. On this basis, UNHCR again concludes, on the totality of evidence observed, that a tightly controlled detention regime remains in place. Asylum-seekers at the RPC are accommodated in a closed space and are not permitted to leave at will. This constitutes detention under international law.
75. International legal standards require that decisions to detain, or to extend detention of, asylum-seekers at the RPC be in accordance with national laws.
76. In particular, those laws must prescribe minimum procedural safeguards, which are compatible with international human rights law including, but not limited to:  
a) following an initial individualised decision to detain an asylum-seeker, asylum-seekers are given reasons for their detention in writing and receive regular periodic reviews of the necessity for the continuation of detention



- before a judicial or other independent authority to have the detention decision reviewed;
- b) a maximum period for detention of asylum-seekers ought to be prescribed;
  - c) right to challenge the lawfulness of detention before a court of law at any time;<sup>28</sup> and
  - d) persons in detention must be given access to asylum procedures and be provided with accurate legal information about the asylum process and their rights.<sup>29</sup>
77. UNHCR is concerned that, despite previous recommendations and aspirational comments by PNG officials, to move towards a more 'open' reception environment, there continues to be:
- a) no adequate domestic regulatory framework for the detention of transferred asylum-seekers whose residence in PNG is regularised;
  - b) no time limit on how long the period of detention will last; and
  - c) no adequate process by which the necessity of detention of an asylum-seeker is made or reviewable, or can be effectively challenged.
78. In addition, information is not communicated on a regular basis to asylum-seekers at the RPC about the RSD processes and procedures and their rights in relation to the processing or their detention.
79. UNHCR remains deeply concerned that despite asylum-seekers having completed health, security and identity checks, and having been granted visas regularising their stay in PNG, they remain detained for protracted periods, without any limits on the period of detention. Furthermore, the majority of asylum-seekers in detention have not received any processing or assessment of their claims for international protection.
80. The current PNG policy and practice of detaining all asylum-seekers at the closed RPC, on a mandatory and open-ended basis without an assessment as to the necessity and proportionality of the purpose of such detention in the individual case, and without being brought promptly before a judicial or other independent authority for review of that decision amounts, in UNHCR's assessment, to arbitrary detention that is inconsistent with international law.
- iv) Facilities and physical conditions at the RPC
81. UNHCR acknowledges some positive developments following its visit in June. These include:
- a) shortly after its June visit, children and their families were transferred back to Australia and for the time being they are not being transferred to the RPC under the New MOU; and
  - b) asylum-seekers are no longer being accommodated in tents, but rather hard-walled structures.
82. UNHCR understands that upon the arrival of asylum-seekers at the RPC they are placed in the Bravo compound for one day and are then moved to the Delta compound for the 30 day quarantine period. Following the 30 day quarantine

<sup>28</sup> Article 9(4) ICCPR.

<sup>29</sup> See UNHCR Excom Standing Committee Conference Room Paper, *Detention of Asylum-Seekers and Refugees: The Framework, the Problem and Recommended Practice*, June 1999, EC/49/SC/CRP.13, Figure 2; and UNHCR's *Detention Guidelines: guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, 28.

period, asylum-seekers are then placed in either the Foxtrot or Oscar compound. UNHCR also understood, at the time of its visit, that the construction of Mike compound was anticipated to be completed by 31 October, to further increase the capacity of the centre. Once finalized, UNHCR understands the RPC will have the capacity to accommodate 1,500 asylum-seekers.

83. Since UNHCR's visit in June, the numbers of asylum-seekers at the RPC have increased dramatically (from about 302 to 1,093 as at 28 October 2013), yet despite this increase the physical boundaries of the RPC have remained almost the same. This has increased the density of asylum-seekers living at the RPC.
84. To accommodate for the increase in numbers, additional accommodation has been constructed over the recreational playing field that was being used by asylum-seekers during UNHCR's June visit. The loss of any recreational space for people living in cramped, hot and confined conditions is a regrettable development.
85. The increase in numbers at the RPC has also further reduced the already limited privacy available to asylum-seekers, with numbers in each building at the Oscar compound increased from 40 to 50 during UNHCR's visit. UNHCR also observed one long building, named P Block in the Foxtrot compound, with approximately 56 bunk beds lined up next to each other in very cramped conditions, with no screens creating any privacy and with only fans providing minor relief from the very hot and humid conditions.
86. UNHCR found that the conditions and facilities between, and even within, the compounds differ significantly. At the Oscar compound, all the buildings that the asylum-seekers are housed in are air-conditioned, yet asylum-seekers do not have access to the internet. Conversely, at the Foxtrot compound asylum-seekers do not have air-conditioning, are accommodated either in dongas with four people to a room or in long buildings with capacity to accommodate about 112 asylum-seekers. However, unlike the Oscar compound, asylum-seekers at the Foxtrot compound have access to the internet on a roster basis.
87. The majority of asylum-seekers at the RPC live in cramped accommodation conditions. In particular, UNHCR observed that in the Foxtrot compound asylum-seekers accommodated in P Block are placing their bedding on the floor in the four person dongas with friends, in an attempt to escape the already hot conditions that are particularly oppressive in P Block (making sleep extremely difficult). UNHCR also observed that in the compounds at the RPC, the only real opportunity for privacy for asylum-seekers is in the ablution blocks, many of which were, according to asylum-seekers and supported by UNHCR's first hand observations, not cleaned and maintained regularly enough. In the Delta compound, UNHCR was particularly concerned to observe one of the blocks that smelt putrid and had blocked shower drains with several inches of filthy water flooding the floor, was badly lit and not adequately ventilated.
88. UNHCR's first-hand observations were validated by many of the asylum-seekers interviewed, who expressed the following concerns about their living conditions:
  - a) very cramped conditions and the need for privacy;
  - b) hygiene issues and lack of culturally appropriate facilities in the ablution blocks;

- c) extreme heat and humidity;
- d) health concerns caused by insects and parasites (particularly malaria from mosquitos); and
- e) hygiene issues in relation to the food served.

89. At the time of UNHCR's visit in June, ICSA and DIBP advised that the current RPC at Lombrum Naval Base was intended as a temporary measure only, pending the future construction of a permanent facility close to Lorengau (the capital of Manus Island). This would provide improved conditions and greater freedom of movement, and allow for significantly greater opportunities for interaction with the local population and activities outside the RPC.<sup>30</sup>
90. However, at the time of UNHCR's most recent visit in October, although clearing of the new centre construction site near Lorengau had commenced, PNG ICSA advised that the new centre is now intended to provide capacity for families and children, and may also be used to provide accommodation for recognized refugees. Completion of the new centre is anticipated in April 2014 and will have capacity for 800 individuals.
91. UNHCR is disappointed by advice that the Governments of PNG and Australia intend to recommence transferring children and families to PNG in 2014 and remains of the firm view that children and families should not be transferred to PNG given the significant shortcomings of protection guarantees identified in this and earlier reports.
92. Further, UNHCR notes with disappointment that there are no plans to move all asylum-seekers to the new centre that offers better conditions, greater freedom of movement and is closer to the local community. The current temporary detention facilities will continue to create serious challenges for the wellbeing of the detained asylum-seekers.
93. Despite some positive developments, UNHCR is of the view, overall, that conditions at the RPC remain harsh and unsatisfactory, particularly when viewed against the mandatory detention environment, slowness of processing and lack of clarity and certainty surrounding the process as a whole.
- v) Activities and amenities available at the RPC and addressing the needs of minorities
94. As noted above, UNHCR was advised that three weeks prior to its visit excursions around Manus Island had commenced. Daily activities had also been introduced with a high participation rate by asylum-seekers.
95. UNHCR welcomes an initiative introduced by The Salvation Army whereby significant cultural dates and festivals, such as Eid and Diwali, are celebrated at the RPC for the different ethnic groups. UNHCR was advised that arrangements were being made for a Christian priest to come to the RPC, but there was no intention to arrange access to other religious leaders, such as Imams, despite the high proportion of Muslims at the RPC.

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<sup>30</sup> The current, temporary RPC is located over 30 minutes' drive from Lorengau, within the Lombrum naval base on Los Negros Island (though generally referred to as part of 'Manus Island').

96. Many of the Muslim asylum-seekers (who comprise the majority religious group at the RPC) also expressed concern that the ablutions at the RPC were not culturally appropriate to allow for ritual washing in preparation for performing prayers. Although there are prayer spaces available for asylum-seekers, UNHCR noted that in the Oscar compound the space was provided in a building that also served as the canteen and education room, with very little opportunity for quiet prayer or reflection.
97. Rohingya and Somali asylum-seekers shared with UNHCR their frustration that, as members of smaller ethno-linguistic groups within the RPC, they experience difficulty in obtaining access to interpreters. This, in turn, limits access to other services within the RPC and was felt by the asylum-seekers concerned to lead to their marginalization. This issue was also noted independently by RPC staff. UNHCR noted that statistics provided by DIBP officials (current at 28 October 2013) revealed there were six different countries represented by fewer than five asylum-seekers.
98. UNHCR also met with two unaccompanied children who had revealed after their transfer to the RPC that they were under 18 years of age. UNHCR was advised by DIBP that an age determination assessment was conducted at the RPC by DIBP officials. At the time of UNHCR's visit, one of the children was from the Islamic Republic of Iran and about to turn 18 in two weeks and the other child was 16 years old and from Myanmar. The unaccompanied children were being held separately from the rest of the asylum-seekers which, they said, increased their feelings of isolation and depression. UNHCR welcomes action taken by the Government of Australia to return the unaccompanied children to Australia, but is concerned by reports that others who claim to be under 18 years of age are at the RPC.
99. UNHCR observed that asylum-seekers, at the time of its visit, did not have access to appropriate reading materials and timely information, such as books, magazines or newspapers, which increased their feeling of isolation. However, UNHCR was advised by RPC staff and DIBP that plans are in place to introduce a library for asylum-seekers at the RPC. This would be a welcome initiative.
100. UNHCR understands that asylum-seekers are placed on a roster system to telephone their family members and are able to contact them if there are emergencies. However, many asylum-seekers expressed distress at not being able to contact family members and the prospect of long periods of separation.

#### **Recommendations: Detention and conditions of reception**

- K. Reception arrangements for asylum-seekers should respect human dignity and applicable international human rights law and standards.<sup>31</sup>**
- L. The need for detention of an asylum-seeker should be based on an assessment, in every individual case, of risk to public order, public health or national security and an assessment of any vulnerabilities (such as**

<sup>31</sup> *ExCom Conclusion on reception of asylum-seekers in the context of individual asylum systems*, 8 October 2002, NO. 93 (LIII) – 2002, and the *Global Consultations on International Protection/Third Track: Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems*, 4 September 2001.

survivors of torture or trauma), which may make detention inappropriate.

**M. Where the detention of an asylum-seeker is not necessary, reasonable or proportionate, the asylum-seeker must be provided with freedom of movement as a matter of priority and the RPC should be made an open centre without delay.**

**N. The Government of PNG should establish a clear legal framework which outlines the permissible bases for detention, and proper assessment procedures, which should be consistent with international law and in line with UNHCR's Detention Guidelines. Such a legal and regulatory framework should:**

- 1) require individualized assessments of the necessity, reasonableness and proportionality of detaining an asylum-seeker with consideration of alternatives to detention;**
- 2) provide that asylum-seekers are given reasons for their detention in writing and receive regular periodic reviews of the necessity for the continuation of detention before a judicial or other independent authority to have the detention decision reviewed;**
- 3) prescribe a maximum period for detention of asylum-seekers;**
- 4) give asylum-seekers the right to challenge the lawfulness of their detention before a court of law at any time; and**
- 5) require that asylum-seekers are given access to asylum procedures and provided with accurate legal information about the asylum process and their rights.**

**O. The consideration of alternatives to detention, as well as improvements in the physical living conditions for asylum-seekers on Manus Island, should be undertaken as soon as possible, with asylum-seekers receiving the same amenities and facilities regardless of the compound they are placed in.**

**P. Immediate steps should be taken to address the harsh and cramped conditions at the RPC. In particular, by reducing the number of asylum-seekers placed in sleeping quarters, creating separate areas and partitions between bunks to create privacy and addressing sanitation issues in the ablution areas.**

**Q. Given the serious shortcomings in the overall protection environment, UNHCR strongly recommends that no children or their families be transferred to PNG from Australia.**

## **V. Mental health**

101. In contrast to UNHCR's visit in June 2013, it was positive to note that asylum-seekers did not express the same degree of injustice and sense of discrimination arising from their selection for transfer to Manus Island, compared to those asylum-seekers who have remained in Australia.

102. UNHCR was also advised that the incidents of self-harm at the RPC have been low, with only one reported incident and that overall the mental state of asylum-seekers was not as acute as UNHCR observed during its June visit. In particular, at the time of UNHCR's visit there were no asylum-seekers on the

Support, Monitoring and Engagement Programme, which is designed to monitor and assist asylum-seekers who are identified as being at high risk.

103. At the time of UNHCR's visit, a two-person torture and trauma counselling team from STTARS had been at the RPC for about three weeks. There is an intention to expand the number of trauma and torture counsellors to four by 1 December 2013. UNHCR was advised that asylum-seekers identified by IHMS staff as being survivors of torture and trauma are referred to STTARS. Although currently the STTARS counsellors are able to meet the demands for torture and trauma counselling, both IHMS and STTARS advised that there is a real concern that as the numbers of transferred asylum-seekers at the RPC continue to rise, this may not be possible.
104. UNHCR was advised by some service providers that the conditions of detention are already aggravating symptoms caused from pre-existing torture and trauma. In this regard, UNHCR notes expert advice received that following an altercation that occurred between the PNG police and the PNG army outside of the RPC (but in view of asylum-seekers in the Foxtrot compound) on 18 October 2013, there was a reported increase in post-trauma symptoms. However well-founded that may be, and UNHCR makes no finding on this incident, the majority of asylum-seekers with whom UNHCR met expressed fear for their safety because of the incident.
105. Overall, and despite the current reasonable mental health of the detainees, UNHCR and many of the RPC staff that UNHCR met with agreed that there was no room for complacency.
106. The relative calm and absence of self-harm or other overt signs of deteriorating mental health in the RPC were attributed, in part, to the fact that most asylum-seekers were newly arrived and part of the "post 19 July" cohort. The sense of injustice observed with earlier groups therefore was not present.
107. However, the longer asylum-seekers remain in detention – without any clarity or certainty regarding the RSD processes and procedures, the length of their detention and future options – the level of tension, anxiety, depression and community unrest are likely to rise.
108. It can reasonably be anticipated that the mental health of asylum-seekers will deteriorate rapidly if these underlying factors are not addressed as a matter of priority. Experience with processing in PNG, Nauru and Australia in earlier years lends weight to this as a factor that will require very close attention.

#### **Recommendation: Mental health**

- R. The Governments of PNG and Australia, as a matter of priority, should conduct a full review of the current policies, settings and operational approaches at the RPC to ensure that they provide a fair and humane environment that is conducive to all asylum-seekers' mental health, particularly torture and trauma survivors.**

## **VI. Physical health**

109. UNHCR inspected the medical centre at the RPC and met with senior IHMS staff. UNHCR was advised that the medical centre is well-equipped to deal with emergencies and IHMS has clear guidelines and procedures in place to arrange for transfers to either Port Moresby or Australia for asylum-seekers suffering from acute conditions. At the time of UNHCR's visit, two asylum-seekers had been transferred to Port Moresby for treatment and no one had been transferred to Australia. For general consultations, asylum-seekers are able to fill in forms requesting an appointment and consultations are arranged in order of submission and may be prioritized if necessary.
110. At the time of UNHCR's visit there remained only limited dental services available on Manus Island, which was being provided by the local dentist in Lorengau. IHMS advised that the dentist had recently acquired a drill, so he would be able to do fillings rather than just extractions of teeth. UNHCR was advised that teeth extractions have been conducted when less invasive procedures may have been performed, perhaps if more adequate equipment had been available. UNHCR met with asylum-seekers who were very distressed at having had their teeth extracted, rather than receiving fillings.
111. IHMS advised that the pre-transfer screenings which take place in Australia are very thorough and follow IHMS' own internal guidelines to ensure asylum-seekers are "fit to fly". However, UNHCR remains concerned that the very quick turnaround of pre-transfer assessments increases the likelihood that medical and psychological conditions may not be adequately and appropriately identified.
112. UNHCR noted that many asylum-seekers expressed concern about:
- a) their deteriorating physical as well as mental health;
  - b) the limited medical services available;
  - c) respiratory concerns that were exacerbated due to the hot and humid conditions;
  - d) the time it took to access medical treatment; and
  - e) the limited medication they were issued with.

### **Recommendations: Physical health**

- S. All findings outlined in this report need to be addressed as a matter of priority, to ensure that the physical health and psycho-social well-being of asylum-seekers does not deteriorate further, which may reasonably be predicted if processing delays and uncertainty together with the harsh conditions at the RPC remain.**
- T. The Governments of Australia and PNG should replace the "fit to fly" test with a thorough individualized assessment that considers in sufficient detail any medical and psychological conditions of an asylum-seeker.**
- U. Appropriate dental expertise and equipment need to be sourced as a matter of priority to address asylum-seekers dental hygiene and other related issues.**

## VII. Assisted voluntary returns

113. At the time of UNHCR's visit to the RPC in October, there were two IOM officers responsible for counselling asylum-seekers who express an interest in returning. UNHCR met with IOM who explained the counselling process to assess an asylum-seeker's voluntariness of returning and to provide him with information about the current situation in the relevant country of origin.
114. UNHCR was advised by IOM that the week prior to UNHCR's visit, 49 per cent of the requests made by asylum-seekers to service providers was to meet with IOM and that the numbers of requests are expected to increase.
115. As noted in UNHCR's June report, UNHCR fully supports the need for assisted voluntary return programmes to help any asylum-seeker return home at any time if he or she is not in need of international protection and wishes, voluntarily, to return home.
116. However, UNHCR is concerned that some asylum-seekers at the RPC who may be *bona fide* refugees, or in need of complementary protection, may contemplate a return to their country of origin as a result of the combined uncertainty around processing in PNG, the prospect of lengthy delays in accessing a permanent solution, the harsh conditions, and the prospect of settling in PNG where there are high levels of insecurity and significant challenges around local integration.<sup>32</sup>
117. Having viewed the arrangements in their entirety, UNHCR observed that there appears to be a pervasive climate at the RPC which places an emphasis on promoting return. When responding to asylum-seekers concerns and complaints, some asylum-seekers reported that they are told that they can return if they are dissatisfied. In particular, one asylum-seeker shared with UNHCR a letter received from a service provider agency advising that: *'if you are not pleased with the current processing arrangement, we can put you in touch with IOM who may assist you with return to your country of origin.'*
118. UNHCR considers it essential that any returns be fully informed, truly voluntary, and not prompted by harsh detention conditions or uncertainty and protracted detention. The challenge of determining true 'voluntariness' in the current conditions of the RPC is likely to be increasingly difficult for those involved in assisted voluntary returns.
119. Pressure exerted by persons in authority to return, coupled with poor conditions, and/or the failure to correctly identify the 'voluntariness' of the asylum-seekers return, raises concerns around 'constructive *refoulement*' under Article 33 of the 1951 Refugee Convention.

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<sup>32</sup> See UNHCR's 2010 submission on PNG's Universal Periodic Review.



## **Recommendation: Assisted voluntary returns**

- V. The Governments of PNG and Australia should conduct a full review of the current policy, settings and operational approaches at the RPC to ensure that they provide a fair and humane environment for all asylum-seekers to prosecute their refugee claims in safety and dignity. Processing and treatment of all asylum-seekers should be recalibrated to identify refugees in a timely manner, rather than the current 'return-orientated' approach, which puts pressure on individuals to return and raises questions as to the voluntariness of that return.**

## **VIII. Settlement of refugees in PNG**

120. In accordance with the New MOU, any asylum-seeker who arrives irregularly by boat at Australia on or after 19 July 2013 may be transferred to PNG for processing and, if determined to be a refugee, will not be settled in Australia, but will be settled in PNG.
121. The majority of asylum-seekers that UNHCR met expressed very serious concern and anxiety about the prospect of being settled in PNG, many expressing that they had fled conflict and insecurity to seek peace and safety in Australia, and were fearful and anxious at the prospect of being settled in PNG.
122. UNHCR believes these concerns are not without foundation. From UNHCR's first-hand experience in supporting Melanesian and non-Melanesian refugees for nearly 30 years, it is clear that sustainable integration of non-Melanesian refugees in the socio-economic and cultural life of PNG will raise formidable challenges and protection.<sup>33</sup> Indeed, UNHCR has been obliged to remove 'non-Melanesian' refugees for resettlement to third countries, including Australia, precisely because of severe limitations of finding safe and effective durable solutions in PNG itself.
123. Particular concern is expressed in relation to refugees who may be lesbian, gay, bisexual, transgender or intersex individuals, as PNG's *Criminal Code Act 1974* criminalises homosexuality, with penalties of between three and 14 years. For these asylum-seekers, being transferred to a country for processing and potential settlement that criminalises homosexuality raises serious protection concerns for these individuals.
124. Another concern is that the vast majority of PNG citizens are Christians, meaning that there is likely to be little community understanding of Islam and

<sup>33</sup> In its 2010 submission on PNG's Universal Periodic Review, UNHCR observed that: 'Crime in PNG is frequent and largely violent, usually committed by gangs and often directed at foreigners. Persons of concern, unlike most expatriates in PNG, cannot afford additional security. Non-Melanesian asylum-seekers and refugees in PNG are particularly vulnerable to xenophobia and racism amongst the local population. Non-Melanesian refugees are perceived to be foreigners and are unlikely to integrate into local society or overcome the obstacles they face preventing their legal integration (e.g. access to the labour market). ... Non-Melanesian refugees are more likely to be marginalized and unable to access formal or informal protection systems, especially in the Highlands and in Port Moresby. Harassment is experienced by the majority of asylum-seekers and refugees, including non-Asian refugees. The involvement of the police and the very poor record they have with regard to human rights also represents a risk of escalation to urban warfare.'

few places of worship available to Muslims. UNHCR also notes that currently, non-Melanesian refugees in PNG are unable to access State education and employment. Even if these barriers are overcome, in relation to finding employment, the PNG 'wantok' system of kinship and affiliation is not likely to provide any real measure of security for non-Melanesian refugees from outside the region. In PNG society, challenging economic conditions and a lack of support for the recognition of overseas qualifications is expected to make attainment of meaningful employment extremely difficult for refugees in PNG.

125. Some asylum-seekers also expressed concerns about whether they will be able to reunite with their family members if they are recognized as refugees. UNHCR notes that family unity is a right enshrined under the UDHR, the ICCPR and the *1989 Convention on the Rights of the Child* (CRC), which provides that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.'<sup>34</sup>
126. The Executive Committee of the High Commissioner's Programme (ExCom) has adopted a number of Conclusions on reunification as well as family unity which have reiterated the fundamental importance of the principle of family reunion for refugees who are separated during flight.<sup>35</sup>
127. UNHCR reaffirms its position that, in the context of transfer arrangements to PNG (or any third country), Australia maintains a shared legal responsibility with PNG to ensure appropriate legal standards are met for individuals determined to be refugees under the 1951 Refugee Convention. These include access to sustainable durable solutions in Australia if other safe and sustainable solutions cannot be found elsewhere and within a reasonable timeframe.
128. For asylum-seekers determined to be refugees and who are to be settled in PNG, the Governments of PNG and Australia maintain joint responsibility for providing appropriate settlement services and guaranteeing their rights under the 1951 Refugee Convention are respected. In the current circumstances, this is not a responsibility that rests solely on the shoulder of one Convention State alone.

## **Recommendations: Settlement of refugees in PNG**

- W. PNG should address the severe limitations of finding safe and effective durable solutions for refugees in PNG, by producing and promulgating a detailed national settlement and integration policy and plan that identifies how the socioeconomic, political and civil rights of refugees are to be protected under the 1951 Refugee Convention and related instruments.**
- X. Where settlement is not a feasible option for any refugee, or person in need of complementary protection, within a reasonable time period, both Australia and PNG should identify what other options are available, including resettlement to Australia, and ensure full compliance with the 1951 Refugee Convention and other applicable international laws and**

<sup>34</sup> UDHR, Article 16(3); and ICCPR, Article 23(1).

<sup>35</sup> See eg ExCom Conclusion No.9 on *Family Reunion* (1977).

**standards.**

- Y. Implement a transparently constituted oversight body that is able to assess the overall viability and integrity of the settlement plan during its implementation.**
- Z. UNHCR recommends that PNG take immediate action to provide for family reunification into its domestic laws and regulations to enable the swift and efficient reunion of refugees with their family members as early as possible.**

## **IX. Oversight and monitoring**

- 129. One of the conditions of the New MOU is that a Joint Committee with responsibility for the oversight of practical arrangements required to implement the New MOU will be established.<sup>36</sup> UNHCR's understanding is that such a Joint Committee has not been established.
- 130. Within the RPC, there is a complaints mechanism accessible to asylum-seekers, which is managed by The Salvation Army. As noted in UNHCR's previous report, there are few available spaces at the RPC for staff to meet with asylum-seekers to discuss sensitive issues in private (a challenge which has increased due to the significant increase in numbers at the RPC).
- 131. UNHCR maintains its earlier recommendation that an Advisory Committee responsible for advising the Governments on issues arising out of the implementation of the arrangement be established. The Advisory Committee could also allow the Governments to have the benefits of the advice of independent experts in various aspects of the reception, treatment and processing of claims for refugee status of asylum-seekers. It would also increase the transparency of the arrangements and allow greater public scrutiny and confidence that the arrangements are both meeting defined obligations and are compatible with each States responsibilities under international law.
- 132. UNHCR appreciates the continued co-operation with allowing UNHCR to have full access to all areas at the RPC and for facilitating meetings and discussion with asylum-seekers and RPC staff during its visit.

### **Recommendations: Oversight and monitoring**

- AA. Australia and PNG should continue to ensure that appropriate independent oversight bodies are able to gain access to asylum-seekers at the RPC.**
- BB. Establish an Advisory Committee responsible for advising the Governments on issues arising out of the implementation of the arrangement.**

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<sup>36</sup> Clause 23 of the 2012 MOU.

**CC. Australia and PNG should establish an Advisory Committee to provide advice to the respective Governments on issues arising out of the implementation of the transfer arrangement and be a body to which the Governments might refer issues for guidance and advice.**

## **X. Pre-transfer assessments**

133. To assess whether to transfer an asylum-seeker, Australia should determine whether PNG has appropriate health services and the ability to assist each asylum-seeker with specific needs and vulnerabilities, in accordance with international standards.
134. Since UNHCR's visit in June of this year, Australia announced that it would conduct pre-transfer assessments of asylum-seekers who have arrived by boat within 48 hours. UNHCR also understands that new pre-transfer assessment forms are being used to assess asylum-seekers.
135. Although UNHCR understands that, in reality, many pre-transfer assessments are taking longer than the 48 hours, UNHCR is doubtful that Australian officials can conduct thorough, fair and accurate pre-transfer assessments of asylum-seekers, including health assessments, age determination and identification of vulnerabilities such as pre-existing trauma, within such short time frames.
136. UNHCR has serious reservations that adequate individualized assessments to identify vulnerabilities can be thoroughly completed in this timeframe. In certain instances, vulnerabilities of an asylum-seeker may mean that transfer to PNG is inappropriate and may cause harm to the individual concerned.
137. In this regard, UNHCR concurs with the statement by the Royal Australian College of Physicians on 27 September 2013 that:

*'...an adequate medical assessment is not possible within 48 hours. Initial health assessments conducted on asylum-seeker arrivals involves taking a detailed history and conducting a thorough examination of the patient, identifying any chronic or acute conditions and ensuring immunisations are up to date. Conducting the health assessment once the person seeking asylum has arrived at the centre is just not acceptable.'*<sup>37</sup>

138. As noted above in paragraph 98, at the time of UNHCR's visit there were two confirmed unaccompanied children at the RPC. UNHCR also understands that there are a number of other asylum-seekers at the RPC who may, after closer enquiry and proper assessment, be under 18 years of age. The fact that two confirmed unaccompanied children were inadvertently transferred to PNG reveals shortcomings in the way pre-transfer arrangements are conducted and the lack of adequate safeguards in place to identify these children (particularly a 16 year old).

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<sup>37</sup> The Royal Australasian College of Physicians, *Health of unaccompanied children in detention at risk*, Media Release, 27 September 2013.

139. Unaccompanied children should not be transferred to the RPC, as there are not adequate measures in place to address their specific vulnerabilities due to their young age. This was evidenced by the fact that they were placed in separate and isolated accommodation.
140. UNHCR was advised by DIBP that, prior to transfer, triaging of individuals who look young or who claim to be less than 20 years of age will now take place, to assess whether they are children. UNHCR welcomes this additional safeguard, but remains concerned as to whether thorough age assessments can be achieved within the short pre-transfer assessment timeframe.
141. Overall, the current pre-transfer assessments raise many troubling questions. It is very difficult to see how a 48 hour “fit to fly” criterion can effectively discharge such an important aspect of the transfer arrangements. Should the States contemplate the resumption of transferring children and families to PNG then the thoroughness and integrity of the pre-transfer assessments becomes even more important.
142. As matters currently stand, UNHCR is of the view that any future transfer of children to the Manus Island facility would be inappropriate.

#### **Recommendations: Pre-transfer assessments**

- DD. Pre-transfer assessments conducted in Australia should thoroughly take into account the individualized needs of vulnerable individuals, including the elderly, survivors of torture or trauma, disabled persons and persons with specific health needs.**
- EE. Pre-transfer assessments should also contain a realistic assessment of the actual quality of support and capacities of service providers on PNG, within the legal, operational and physical conditions currently prevailing and based on the individual needs of every asylum-seeker.**
- FF. Given the significant and substantial protection concerns observed by UNHCR at the RPC, no children or families should be transferred to PNG. Unaccompanied children at the RPC should be returned to Australia where proper support services are available.**

*UNHCR Regional Representation  
Canberra, 26 November 2013*