



# UNHCR

United Nations High Commissioner for Refugees  
Haut Commissariat des Nations Unies pour les réfugiés

**Submission by the Office of the United Nations High Commissioner for Refugees  
*Inquiry into the incident at the Manus Island Detention Centre from 16 February to 18  
February 2014*  
The Senate Legal and Constitutional Affairs References Committee**

## EXECUTIVE SUMMARY

UNHCR is of the view that:

- As a matter of international law, the physical transfer of asylum-seekers from Australia to Papua New Guinea, as an arrangement agreed by the two 1951 Convention States, does not extinguish Australia's legal responsibility for the protection of asylum-seekers affected by the transfer arrangements.<sup>1</sup>
- Both Australia and Papua New Guinea have shared and joint responsibility to ensure that the treatment of all transferred asylum-seekers to Papua New Guinea is fully compatible with their respective obligations under the 1951 Convention and other applicable international instruments, which either one State, or both States, may be a party to. UNHCR further considers that arrangements for a fair and efficient RSD procedure and a durable solution within a reasonable time for asylum-seekers transferred to Papua New Guinea have not to date met international standards.

## I. INTRODUCTION

1. The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs References Committee (Committee) in respect of the *Inquiry into the incident at the Manus Island Detention Centre from 16 February to 18 February 2014*.

## II. UNHCR'S STANDING TO COMMENT

2. Australia is a party to the *1951 Convention relating to the Status of Refugees* and its *1967 Protocol relating to the Status of Refugees* (together, the 1951 Convention).<sup>2</sup>

<sup>1</sup> See *UNHCR monitoring visit to Manus Island, Papua New Guinea 23 to 25 October 2013*, November 2013.

<sup>2</sup> The term '1951 Refugee Convention' is used to refer to the *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, [1954] ATS 5 (entered into force for Australia 22 April 1954) as applied in accordance with the *Protocol Relating to the Status of Refugees*, opened for signature on 31 January 1967, [1973] ATS 37 (entered into force for Australia 13 December 1973).

3. UNHCR makes this submission pursuant to its supervisory mandate established by Article 35 of the 1951 Convention and the *1950 Statute of the Office of the United Nations High Commissioner for Refugees*.<sup>3</sup>
4. UNHCR's submission addresses the following two matters that the Committee is examining as part of the inquiry into the incident at the Manus Island Regional Processing Centre ('the Centre')<sup>4</sup> in Papua New Guinea from 16 February to 18 February 2014:
  - a) the Australian Government's duty of care obligations and responsibilities (see Part III below); and
  - b) refugee status determination (RSD) processing and resettlement arrangements in Papua New Guinea (see Part IV below).

### III. THE AUSTRALIAN GOVERNMENT'S DUTY OF CARE OBLIGATIONS AND RESPONSIBILITIES

5. The Governments of Australia and Papua New Guinea 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 Papua New Guinea for processing of their asylum claims and that Papua New Guinea, not Australia, would settle, on a permanent basis, those asylum-seekers who are determined to be refugees.
6. On 6 August 2013, the Governments of Australia and Papua New Guinea entered into a new Memorandum of Understanding<sup>5</sup> (New MOU), which supports the RRA and supersedes the Memorandum of Understanding dated 8 September 2012<sup>6</sup> (2012 MOU).<sup>7</sup>
7. UNHCR acknowledges the complex challenges of mixed migration maritime movements faced by States in the region. In particular, UNHCR has long advocated for stronger regional and international cooperation to address mixed migration maritime movements in a way that respects the legitimate concerns of States, but also the individual protection and humanitarian needs of those who resort to dangerous travel by sea.
8. 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, which is in line with State practice.<sup>8</sup> The primary responsibility to provide protection rests with the State where asylum is sought.

<sup>3</sup> UN General Assembly, Resolution 428 (V), *Statute of the Office of the United Nations High Commissioner for Refugees* (1950), Annex.

<sup>4</sup> During UNHCR's visit in October 2013, the Centre was referred to as the 'Offshore Processing Centre' by Australian immigration staff and service providers, notwithstanding that the Papua New Guinea Government referred to it as the 'Regional Processing Centre'. For the purposes of this submission, the latter term, abbreviated to 'the Centre' will be used.

<sup>5</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.

<sup>6</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.

<sup>7</sup> The main difference between the New MOU and the 2012 MOU is that asylum-seekers processed in Papua New Guinea were not barred from settling in Australia under the 2012 MOU.

<sup>8</sup> See UN High Commissioner for Refugees (UNHCR), *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013 (UNCHR Guidance Note); and UNHCR, *Protection Policy Paper: Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing*, November 2010.

9. With these observations in mind, UNHCR maintains its longstanding position that the physical transfer of asylum-seekers from Australia to Papua New Guinea, as an arrangement agreed by the two 1951 Convention States, does not extinguish the legal responsibility of the transferring State (Australia) for the protection of asylum-seekers affected by the transfer arrangements.<sup>9</sup> UNHCR's view is that the legality and/or appropriateness of any such arrangement needs to be assessed on a case-by-case basis, subject to its particular modalities and legal provisions.
10. Both Australia and Papua New Guinea have shared and joint responsibility to ensure that the treatment of all transferred asylum-seekers to Papua New Guinea is fully compatible with their respective obligations under the 1951 Convention and other applicable international instruments.
11. In particular, the transfer arrangement needs to 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>10</sup>
12. UNHCR's position is that the obligation to ensure that conditions in the receiving State meet these requirements in practice rests with the transferring State, prior to entering into such arrangements.<sup>11</sup> It is not sufficient to merely assume that an asylum-seeker would be treated in conformity with these standards. In particular, regular monitoring and/or review by the transferring State of the transfers and the conditions in the receiving State would also be required to ensure they continue to meet international standards.<sup>12</sup>
13. Following a monitoring visit to the Centre by UNHCR between 23 to 25 October 2013, UNHCR welcomed some positive developments since its previous visit in June 2013, but

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<sup>9</sup> UNHCR monitoring visit to Manus Island, Papua New Guinea 23 to 25 October 2013, November 2013.

<sup>10</sup> UNHCR Guidance Note, 2.

<sup>11</sup> UNHCR Guidance Note, 2.

<sup>12</sup> UNHCR Guidance Note, 2; and *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011.

expressed that it was deeply troubled to observe that the current policies, operational approaches and harsh physical conditions at the Centre did not comply with the above-mentioned international standards.

14. In particular, UNHCR found that the policy and practice of detaining all asylum-seekers at the closed Centre, 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 amounted to arbitrary detention that is inconsistent with international law.<sup>13</sup> Further, although UNHCR reported some positive developments, overall, UNHCR found that the conditions at the Centre remained 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.
15. UNHCR found that, cumulatively, the harsh conditions for asylum-seekers at the Centre, the slowness of RSD processing and the lack of clarity regarding RSD processes and approximate timeframes for durable solutions for refugees, were punitive in nature for those affected, and did not provide safe and humane conditions of treatment for asylum-seekers in detention as required under international law. UNHCR considered that, within the policy settings and physical environment at the Centre, the situation of vulnerable people, particularly survivors of torture and trauma, was likely to be an issue of growing concern and that these concerns were heightened due to the uncertainty and delays of RSD processing and the arbitrary and mandatory detention framework.

#### **IV. RSD PROCESSING AND RESETTLEMENT ARRANGEMENTS IN PAPUA NEW GUINEA**

##### **A RSD processing of transferred asylum-seekers in Papua New Guinea**

###### **i) Status of processing**

16. Papua New Guinea acceded to the 1951 Convention on 17 July 1986.
17. Section 15A of Papua New Guinea's *Migration Act 1980* (Act) empowers the Minister of Foreign Affairs and Immigration to determine whether a non-citizen is a refugee, but provides no procedural or substantive guidance as to how a RSD should be made by the Minister.
18. In January 2013, Papua New Guinea incorporated provisions into the Migration Regulation 1979 (Regulation), which provide the Minister of Foreign Affairs and Immigration 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>14</sup>
19. UNHCR understands that Papua New Guinea 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).

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<sup>13</sup> UNHCR *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012.

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

20. UNHCR has expressed its concern previously about the absence of a clear legislative or regulatory guidance for the Minister of Foreign Affairs and Immigration and Papua New Guinea officials to follow when determining whether an asylum-seeker is a refugee.
21. UNHCR has been advised by Papua New Guinea officials that steps are under way to amend the Regulation, so that it applies to asylum-seekers transferred to Papua New Guinea under the New MOU and that a new *Migration Act* is being drafted to introduce comprehensive RSD procedures that will apply to all asylum-seekers.
22. UNHCR notes with concern that since the decision was made by the Governments of Papua New Guinea and Australia to transfer asylum-seekers to Papua New Guinea from Australia in November 2012, no RSD decision has been finalized and handed down by the Government of Papua New Guinea.

**ii) Uncertainty about RSD processes**

23. It is an essential procedural safeguard that asylum-seekers should be informed of the procedures at the earliest possible stage and be kept well-informed throughout the procedure.<sup>15</sup> In particular, they have the right to be informed orally and in 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.
24. 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 to Australia.
25. During UNHCR's visits in January, June and October 2013, asylum-seekers who met with UNHCR expressed confusion and anxiety over the RSD processing arrangements that would apply to them in Papua New Guinea.
26. At the time of UNHCR's visit in October 2013, many asylum-seekers told UNHCR that after their arrival at the Centre, 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 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.
27. UNHCR was advised by Papua New Guinea officials during its October 2013 visit, that the Papua New Guinea Government did not intend to implement any timeframes in relation to the RSD process and that its current policy was not to communicate approximate RSD processing timeframes. In particular, it was confirmed that on occasions when asylum-seekers had asked Papua New Guinea officials about processing timeframes, they were

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<sup>15</sup> Global Consultations on International Protection/Third Track: *Asylum Processes (Fair and Efficient Asylum Procedures)*, para. 50 (G).

advised that there were no timeframes and that it could take anywhere from two to five years. There also did not appear to be any intention to keep asylum-seekers updated and informed on a regular basis about the RSD processes and procedures and their rights.

28. 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.

## **B Integration arrangements in Papua New Guinea**

29. As noted above, the New MOU provides that any asylum-seeker who arrives irregularly by boat to Australia on or after 19 July 2013 is liable to transfer to Papua New Guinea and, if determined to be a refugee, will not be returned to Australia, but will be provided with an opportunity to settle permanently in Papua New Guinea.
30. Although the 19 July 2013 agreement between Australia and Papua New Guinea (the RRA) is titled a regional "resettlement" agreement, the issues raised do not strictly relate to resettlement, which is an established international process for the transfer of refugees whose safety or fundamental rights cannot be met in the country where they have sought asylum, to a third state which has agreed to admit them with permanent legal status.<sup>16</sup> Solutions for those transferred asylum-seekers who are recognized as refugees relate, rather, to the issue of adequate integration support, accompanied by the necessary rights, obligations and legal protections, for recognized refugees in Papua New Guinea.
31. Notwithstanding the above observation, available guidance on the establishment and conduct of resettlement programmes also sets out important standards relating to the integration of resettled refugees. Although not universally applicable to the integration of asylum-seekers who are recognized as refugees, the examination by such documents of requirements and standards for the integration of resettled refugees is nonetheless highly instructive.
32. UNHCR considers certain minimum standards need to be met to ensure sustainable integration. In particular, protection against *refoulement* must be ensured, in accordance with universally applicable customary international law and the terms of the 1951 Convention. The 1951 Convention sets out additional obligations and rights which must be observed and extended to refugees granted asylum by a signatory State. These rights include, *inter alia*, the right to protection under the law and access to the judicial system, property rights, freedom of movement and of association, the right to wage earning employment, and rights to housing and education. The 1951 Convention obliges State Parties to "make every effort to expedite naturalization" of refugees.<sup>17</sup>
33. Fundamental components of effective integration include the provision of enduring legal status and a pathway to naturalization, and the right to family unity and reunification with nuclear and dependent family members abroad, in accordance with key provisions of

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<sup>16</sup> Resettlement is defined in *UNHCR Resettlement Handbook*, UNHCR, 2011, p.3. Further information on resettlement can be obtained from UNHCR, "Frequently Asked Questions About Resettlement", available at: <http://www.unhcr.org/4ac0873d6.html>.

<sup>17</sup> Article 34 of the 1951 Convention.

international human rights law, which state that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”<sup>18</sup>

34. In short, integration support must be capable of giving refugees the opportunity to rebuild their lives in safety and dignity. This requires:
  - a) a solid legislative and/or policy foundation;
  - b) a shared commitment from key government and other support agencies (including civil society);
  - c) an adequately resourced integration programme which will provide the services and support needed by refugees to adjust to a new society; and
  - d) a welcoming and supportive host community.<sup>19</sup>
35. A State that is unable to guarantee relevant rights or extend provision of essential services to refugees is not in a position to offer refugees a permanent solution through resettlement. Similarly, UNHCR believes that these standards provide highly pertinent guidance on the question of whether adequate integration support is available to refugees transferred through bilateral arrangements such as the RRA.
36. From UNHCR's first-hand experience in supporting Melanesian and non-Melanesian refugees in Papua New Guinea over approximately 30 years, it is clear that sustainable integration of non-Melanesian refugees in the socio-economic and cultural life of Papua New Guinea will raise formidable challenges and protection questions.<sup>20</sup> Indeed, UNHCR has consistently referred ‘non-Melanesian’ refugees who have arrived spontaneously in Papua New Guinea for resettlement to third countries, including to Australia, over a number of years and as recently as 2013, precisely because of severe limitations and significant challenges of finding safe and effective durable solutions in Papua New Guinea itself.
37. Particular concern is expressed in relation to refugees who may be lesbian, gay, bisexual, transgender or intersex individuals, as Papua New Guinea’s *Criminal Code Act 1974* criminalises homosexuality, with penalties of between three and 14 years imprisonment. For such refugees, integration in a society which criminalises homosexuality may give rise to serious protection issues.

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<sup>18</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Article 16(3); and UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 23(1).

<sup>19</sup> UNHCR, *The Integration of Resettled Refugees: Essentials for Establishing a Resettlement Programme and Fundamentals for Sustainable Resettlement Programmes*, 2013, p.13, 23.

<sup>20</sup> See UNHCR’s 2010 submission on Papua New Guinea’s Universal Periodic Review it was 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.’

38. With regard to the right to family unity and reunification with nuclear and dependent family members abroad, this is, to UNHCR's knowledge, an issue which remains to be addressed in terms of legal and policy frameworks in Papua New Guinea.
39. The majority of asylum-seekers that UNHCR met during its October 2013 visit expressed serious concern and anxiety about the prospect of being settled in Papua New Guinea, with many expressing that they had fled conflict and insecurity to seek peace and safety in Australia and did not believe that Papua New Guinea was able to provide adequate protection and cultural acceptance.
40. As has been set out, UNHCR maintains the position, in the context of bilateral transfer arrangements to Papua New Guinea (or any future third country), that Australia maintains a shared legal responsibility with Papua New Guinea to ensure appropriate legal standards are met for individuals determined to be refugees under the 1951 Convention. These include access to durable solutions which reflect the rights guaranteed by the 1951 Convention and other applicable standards. If safe and sustainable integration cannot be provided elsewhere within a reasonable timeframe, the transferred refugees should be returned to, and settled in, Australia.
41. For asylum-seekers who are determined to be refugees and are to be settled in Papua New Guinea, the Governments of Papua New Guinea and Australia maintain joint responsibility for providing appropriate settlement services and ensuring that their rights under the 1951 Refugee Convention are respected and fulfilled.

## **V. CONCLUSION**

42. For the reasons outlined above, UNHCR's view is that the physical transfer of asylum-seekers from Australia to Papua New Guinea, as an arrangement agreed by the two 1951 Convention States, does not extinguish Australia's legal responsibility for the protection of asylum-seekers affected by the transfer arrangements.<sup>21</sup>
43. Specifically, UNHCR's view is that both Australia and Papua New Guinea have shared and joint responsibility to ensure that the treatment of all transferred asylum-seekers to Papua New Guinea is fully compatible with their respective obligations under the 1951 Convention and other applicable international instruments, which either one State, or both States, may be a party to. UNHCR further considers that arrangements for a fair and efficient RSD procedure and a durable solution within a reasonable time for asylum-seekers transferred to Papua New Guinea have not to date met international standards.

### ***UNHCR Regional Representation in Canberra***

***7 May 2014***

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<sup>21</sup> UNHCR monitoring visit to Manus Island, Papua New Guinea 23 to 25 October 2013, November 2013.