

UNHCR Submission to the Expert Panel on Asylum-seekers

27 July 2012

**Introduction**

1. *The Office of the United Nations High Commissioner for Refugees* is mandated to coordinate international action to protect refugees and seek permanent solutions for the problems of refugees worldwide. The Office's primary purpose is to safeguard the rights and well-being of refugees. It strives to ensure that everyone can exercise the right to seek asylum and find refuge in another State, with the option to return home voluntarily, integrate locally or to resettle in a third country.

2. UNHCR's efforts are mandated by the *1950 Statute of the Office of the United Nations High Commissioner for Refugees (hereafter the UNHCR Statute)*<sup>1</sup> and guided by the *1951 United Nations Convention relating to the Status of Refugees (hereafter the 1951 Refugee Convention)* and the *1967 Protocol* to both of which Australia is a Contracting Party.

3. UNHCR has the duty of supervising the application of the 1951 Refugee Convention pursuant to the Preamble and articles 35 and 36 of the Convention, articles II and III of the 1967 Protocol, and the UNHCR Statute (see Attachment A). These instruments call for cooperation between Governments and UNHCR in dealing with refugee problems, including in respect of laws and regulations which they may adopt. They remain the cornerstone of international refugee protection and asylum practice as reaffirmed by the 155 States participating in the Ministerial Intergovernmental Meeting commemorating the 60<sup>th</sup> anniversary of the Convention in Geneva in December 2011. As noted by the High Commissioner during his visit to Australia in February 2012:

*The Refugee Convention is a contemporary and 'living instrument' that lies at the heart of protection for millions of refugees around the world today. Over six decades, it has shown remarkable adaptability and relevance to the now 148 States that have signed it, and I am convinced that the Convention will continue to have the same vitality and relevance in the future as it had for its founding members.*

(Lowy Institute, 14 February 2012)

4. UNHCR welcomes the opportunity to provide a submission to the Expert Panel on Asylum-seekers established to provide a report 'on the best way forward for Australia to prevent asylum-seekers risking their lives on dangerous boat journeys to Australia'.

5. UNHCR has been closely following recent debates in Australia on asylum policy, with particular attention to asylum-seekers arriving by boat and government efforts involving the rescue of persons in distress at sea. The Office has also been monitoring the situation with irregular maritime movements in the Asia-Pacific region more broadly. In this respect, in April 2012, it published an Information Note on Mixed Maritime Movements in the Asia-Pacific Region (see Attachment B).

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<sup>1</sup> UN General Assembly, Resolution 428 (V) of 14 December 1950.

6. UNHCR wishes to provide its views on some of the options being considered in Australia in response to boat arrivals. It is to be noted that these views have been regularly and consistently articulated in numerous public Statements and submissions in Australia over the last few years.

7. UNHCR's comments are specifically directed at the Expert Panel's terms of reference as they relate to:

- how best to prevent asylum-seekers risking their lives by travelling to Australia by boat;
- relevant international obligations; and,
- short, medium and long term approaches to assist in the development of an effective and sustainable approach to asylum-seekers.

***1) How best to prevent asylum-seekers risking their lives by travelling to Australia by boat***

8. For UNHCR, a better formulation of the question is how Australia, through collaborative action with other States and regional actors, can enhance protection for asylum-seekers and refugees in the Asia-Pacific region and thereby avert the loss of life at sea.

9. The phenomenon of people taking to the seas in search of safety, refugee protection or better economic conditions is not new in the Asia-Pacific region nor is it unique to the region. In response to the arrival of thousands of Vietnamese in South-east and East Asian countries, the Comprehensive Plan of Action for the Indochinese Refugees was established in 1989 to provide the regional framework for resolving the large-scale movements of refugees by sea.

10. Irregular maritime movements still remain a reality in the Asia-Pacific region as they are in other parts of the world. While the numbers of asylum-seekers arriving by boat have increased and present an operational challenge to Australia, they remain modest by international standards. For example, the number of people who arrived by boat to Australia in the whole of 2011 was around half the number who crossed from Somalia to Yemen in the single month of August 2011 and in a single day between 18 and 19 July 2012 from Syria to Lebanon. In 2011 Australia received only three per cent of the asylum applications submitted in the industrialized world.<sup>2</sup>

11. Nonetheless, UNHCR acknowledges that the irregular movement of refugees, asylum-seekers and migrants by sea creates particular difficulties for States. It can challenge the principles of national sovereignty and good neighbourly relations with other States. It can also engage issues relating to States' security. However, it also raises humanitarian and protection concerns for the individuals affected, whose lives are at risk as a result of travelling on unseaworthy vessels or failure of search and rescue operations, as recent tragic incidents have demonstrated. In addition to the consequences for the victims of such incidents, further public disquiet and controversy can be fuelled when people in distress at sea are: not rescued; not rescued in time; are pushed away from the borders of intercepting States; or, are caught in disputes regarding disembarkation.

12. For State responses to be effective, better coordination at different levels is required with respect to: search and rescue operations; border management and control; and, the different dimensions of ensuring international protection. In particular, cooperative efforts that ensure the human security, safety and protection for those undertaking maritime journeys should have as

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<sup>2</sup> Asylum Levels and trends in Industrialized Countries – 2011, p. 20.

much importance as efforts to combat the criminal dimensions of people smuggling into and through the region.

13. UNHCR has welcomed the increased interest among States in the Asia-Pacific region in regional approaches to address irregular migration. At the Fourth Bali Regional Ministerial Conference held in March 2011, Member States of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime (hereafter the Bali Process) noted that while border control and law enforcement initiatives are important and effective measures to combat people smuggling and trafficking in persons, “these measures alone are not sufficient and that practical cooperative solutions that also address humanitarian and protection needs are required”.

14. They agreed that a Regional Cooperation Framework (RCF) would provide a more effective way to cooperate to reduce irregular movement that is to be operationalized through practical bilateral and other sub-regional arrangements that:

- “promote human life and dignity;
- seek to build capacity to process mixed flows and where appropriate utilize available resources;
- reflect the principles of burden sharing and collective responsibility while respecting sovereignty and the national security of concerned States;
- seek to address root causes of irregular movement and promote population stabilization wherever possible;
- promote orderly, legal migration and provide appropriate opportunities for regular migration;
- avoid creating pull factors to or within the region;
- undermine the people smuggling model and create disincentives for irregular movement, and which may include, in appropriate circumstances transfer and readmission;
- support and promote increased information exchange while respecting confidentiality and upholding the privacy of affected persons.”<sup>3</sup>

15. UNHCR broadly supports the considerations agreed by the Bali Process to underpin the establishment of regional cooperative arrangements. UNHCR is committed to working with Australia and other States in the region to implement practical cooperation arrangements that address State concerns about the onward movements by sea of asylum-seekers and refugees provided these arrangements include adequate protection of such persons. To this end, it considers that the establishment of a Regional Support Office, agreed by members of the Bali Process in October 2012, will provide a unique opportunity to enhance refugee protection through the development of practical cooperation in the region, including with respect to irregular maritime movements.

16. In UNHCR’s view, any regional cooperation arrangement must:

- be built on the shared ownership, commitment and active engagement of participating States and aim to build/strengthen State capacity based on the principle of mutual respect for the sovereignty of participating States;

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<sup>3</sup> Co-Chairs’ Statement, Fourth Bali Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, Indonesia, 29-30 March 2011.

- be based on principles of burden and responsibility sharing between States that share common concerns over irregular movements, while ensuring that such actions do not shift burdens or responsibilities or undermine existing international obligations;
- be based on full respect for humanitarian and human rights principles, including those enshrined in the 1951 Refugee Convention and other international human rights instruments;
- provide for the establishment of differentiated processes and procedures for various categories of people that ensure effective and fair access to asylum for those with claims for international protection while providing efficient and timely outcomes to others, including return as appropriate;
- address disparities in the standard of treatment for asylum-seekers and refugees and ensure access to conditions of safety and dignity until a decision is made on their status and, in the case of those recognized as refugees, timely access to a durable solution;
- respond to the criminal dimensions of people smuggling and trafficking without inadvertently penalizing or discriminating against the victims of criminal enterprises or compromising the protection responsibilities that are owed to persons engaged in onward maritime movements under the 1951 Refugee Convention and other international human rights instruments.

17. Within a broader Regional Cooperation Framework, UNHCR acknowledges that there might be certain situations in which refugee status determination processing and the search for solutions takes place in a country other than the one in which an asylum-seeker originally applies for asylum. Under certain circumstances, UNHCR might be prepared to consider such arrangements at a bi-lateral or regional level provided that they meet the criteria set out at paragraphs 14 and 16 and incorporate fundamental protection safeguards (see further Part 3.6).

18. In this context, UNHCR would be deeply concerned by any policy which consisted of pushing boats of asylum-seekers back to sea. Any such blanket approach would potentially place Australia in breach of its obligations under the Refugee Convention and other international law obligations<sup>4</sup> and, as past experience has shown, would be operationally difficult and dangerous for all concerned.

19. Experience also shows that ‘pushbacks’ undermine efforts to arrive at genuine regional cooperation as they tend to deflect rather than share the responsibilities associated with these issues. They can also be a counter-productive irritant to good inter-State relations on which the Regional Cooperation Framework is based and the long term success of the Regional Support Office depends.

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<sup>4</sup> See, *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, available at: <http://www.unhcr.org/refworld/docid/4f4507942.html>; UN High Commissioner for Refugees, *Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Hirsi and Others v. Italy*, 29 March 2011, Application no. 27765/09, available at: <http://www.unhcr.org/refworld/docid/4d92d2c22.html>; UN High Commissioner for Refugees, *UNHCR's oral intervention at the European Court of Human Rights - Hearing of the case Hirsi and Others v. Italy*, 22 June 2011, Application no. 27765/09, available at: <http://www.unhcr.org/refworld/docid/4e0356d42.html>; and UN Office of the High Commissioner for Human Rights, *Hirsi et al. v. Italy: Intervener Brief filed on behalf of the United Nations High Commissioner for Human Rights*, 5 May 2011, Application No 27765/09, available at: <http://www.unhcr.org/refworld/docid/4f5f11a52.html>.

## 2) *Relevant international obligations*

20. The legal framework governing the treatment of asylum-seekers, refugees and other persons travelling by boat as part of onward or irregular movements up to and following disembarkation is contained in the international law of the sea, as well as international refugee and human rights law. Core principles include:

- The duty to render assistance to those in distress at sea without discrimination.<sup>5</sup>
- The obligation to ensure arrangements for distress communication and coordination.<sup>6</sup>
- The duty to cooperate to ensure that shipmasters providing assistance for those in distress are released from their obligations and that survivors are disembarked from the assisting ship and delivered to a place of safety as soon as reasonably practicable.<sup>7</sup>
- The principle of *non-refoulement*, which prohibits return to territories where an individual may be at risk of persecution, torture, inhuman and degrading treatment or other serious harm. The principle of *non-refoulement* also applies when a State acts extraterritorially.<sup>8</sup>
- The obligation to treat rescued persons humanely in line with international human rights law.<sup>9</sup>
- The duty to respect the sovereignty of other States.<sup>10</sup>
- The underlying principle of international cooperation in the refugee regime stemming from the Charter of the United Nations and the 1951 Convention relating to the Status of Refugees.<sup>11</sup>

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<sup>5</sup> Article 98 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), entered into force 16 November 1994; Chapter V, Regulation 33 1-1, SOLAS Convention; Chapter 2.1.10 SAR Convention.

<sup>6</sup> Article 98(2), UNCLOS; Chapter V, Regulation 7, SOLAS Convention.

<sup>7</sup> Regulation 33, 1-1, SOLAS Convention, as amended; Chapter 3.1.9, SAR Convention, as amended; IMO Resolution MSC.167(78), Annex 34, *Guidelines on the Treatment of Persons Rescued at Sea*, 2004.

<sup>8</sup> See especially, Article 33 of the 1951 Convention relating to the Status of Refugees, entered into force 22 April 1954 (1951 Convention); Articles 6 and 7 of the 1966 International Covenant on Civil and Political Rights, entered into force 23 March 1976 (ICCPR); Article 3 of the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, entered into force 26 June 1987 (CAT). See also UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, available at: <http://www.unhcr.org/refworld/docid/45f17a1a4.html>.

<sup>9</sup> See generally, ICCPR, CAT and the 1966 International Covenant on Economic, Social and Cultural Rights, entered into force 3 January 1976 (ICESCR); Regulation 33.6, SOLAS Convention.

<sup>10</sup> Article 2, Charter of the United Nations, entered into force 24 October 1945 (UN Charter).

<sup>11</sup> Articles 55 and 56, UN Charter; Preamble, 1951 Convention. These instruments do not specify how international cooperation is to be implemented in practice, yet it has been recognized that international cooperation is both a principle and a methodology underlying State action in the refugee area: see *Expert Meeting on International Cooperation to Share Burdens and Responsibilities, Summary Conclusions*, Amman, Jordan, June 2011, documents available at: <http://www.unhcr.org/4ea0105f99.html>.

**3) *Short, medium and long term approaches to assist in the development of an effective and sustainable approach to asylum-seekers***

**3.1 Strengthen Refugee Status Determination (RSD) Processes in Australia**

21. UNHCR considers that any credible RSD system should be robust, fair, efficient, and have meaningful consequences. This means that identified refugees receive the full range of rights to which they are entitled under the Refugee Convention. It also means that people who are found not to be in need of refugee protection are returned home in safety and dignity. Both consequences are needed if the integrity and efficiency of the international protection system is to have real purpose.

22. UNHCR has been concerned for some time about:

- (i) the length of time taken to reach a final decision on refugee status in Australia;
- (ii) the significant inconsistencies between decisions at first instance and on review;
- (iii) the lack of meaningful consequences for those found not to be in need of international protection;
- (iv) the treatment of those awaiting a decision, especially where that involves prolonged detention and the serious psychosocial and physical impact this has; and,
- (v) the unsustainable situation of (currently 54) persons held in indefinite detention having received adverse security assessments by the Australian Security and Intelligence Organisation (ASIO).

23. UNHCR is also concerned that the combined effect of the first three factors is contributing to an erosion of public confidence in the asylum system in Australia and may, inadvertently, be serving as an added incentive for those seeking to come to Australia by boat.

24. Some of these issues are being addressed. UNHCR welcomed the Government's decision in late 2011 to merge the refugee assessment procedures under the existing 'offshore' and 'onshore' systems into a single determination process. It considers that this change should lead to greater consistency, administrative efficiency and credibility. UNHCR also welcomed the Government's decision, taken at the same time, to release more asylum-seekers from immigration detention under the new Bridging Visa scheme.

25. UNHCR also considers it could be worthwhile for the Australian Government to consider: (i) ways of triaging cases by nationality, including accelerated processing for manifestly well-founded / unfounded claims, provided that all necessary procedural safeguards are in place; and, (ii) to intensify efforts to achieve returns for those who are not in need of international protection, including through bilateral and international agreements. In all cases, human rights and refugee protection principles would need to be fully respected.

**3.2 Temporary Protection Visas**

26. In principle, UNHCR does not support measures that are punitive and deterrent in purpose and which tend to undermine rather than reinforce the legal protections to which refugees are entitled under the Refugee Convention.

27. With respect to calls for a reintroduction of temporary protection visas (TPVs) in Australia, it is UNHCR's longstanding position that differentiated visa regimes for refugees based on their mode of arrival are undesirable in that they penalize refugees based on their mode of arrival.<sup>12</sup> UNHCR welcomed the abolition of Australia's TPV regime in 2008 because, in part, the previous system denied refugees family reunion and, unless the Minister allowed them to apply for permanent protection, required refugees to re-establish refugee status after three years. The requirement to re-establish refugee status perpetuated uncertainty for refugees who had already suffered enormous hardship, impeding their ability to restart their lives and prolonging the separation of families. It is also widely believed they led to family members of TPV holders to seek family reunion by getting on boats and so, in practice, had the reverse effect to that intended.

28. In UNHCR's view, any reconsideration of TPVs, along the lines of previous policy positions, should be carefully considered and assessed in light of international refugee and human rights standards and the above-mentioned position.

### 3.3. Review Resettlement to Australia

29. UNHCR has been concerned by the frequent conflation in the Australian public debate of the asylum system and the global resettlement programme, to which Australia is a generous and active participant. This confusion has led to an erroneous assumption that 'genuine' refugees arrive in an orderly, invited and managed way through a resettlement programme and asylum-seekers who arrive by boat are, in some way, undermining the humanitarian system by, as frequently described, 'queue-jumping' ahead of more deserving people in the resettlement system. In UNHCR's view, this misperception has served to erode public understanding of, and support for, the asylum system to which Australia is committed.

30. It must be recalled that the international system of asylum (on which the Refugee Convention is based) usually involves the spontaneous arrival of people at the border of a State seeking access to the territory and a refugee status determination process. In reality, refugee displacement tends to be disorganized and chaotic, where desperate people have to resort to irregular means to escape from the harm they fear. On the other hand, resettlement is a quite separate and managed process through which States commit, on a voluntary basis, to receive through an orderly programme, a pre-determined number of selected refugees who are in need of protection through resettlement.

31. The global resettlement programme, under which resettlement countries provide places for refugees in acute need of international protection on a discretionary basis, provides a critical contribution to international refugee protection, but will only ever be able to provide a solution for a small percentage of the world's refugees.

32. Australia's current commitment to 13,750 refugees and others in humanitarian need under its Humanitarian Program, with 6,000 allocated to UNHCR-referred refugees is very welcome as an important tool of international protection and a means by which durable solutions can be secured for refugees who are not otherwise able to access protection.

33. In this context, UNHCR is mindful of the impact that increasing numbers of asylum-seekers in Australia are having on the Special Humanitarian Program, and the consequent reduced

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<sup>12</sup> Article 31, 1951 Convention.

access that settled communities in Australia have to family reunion. One step towards addressing this challenge would be to discontinue the linkage between the 'offshore' and 'onshore' components of the Humanitarian Program.

34. UNHCR would welcome an increased commitment to resettlement, though this should not be at the expense of maintaining an asylum channel for those asylum-seekers who arrive spontaneously in Australia, whether by boat or by air.

35. Any increase in resettlement would need to be very carefully managed to ensure maintenance of the global balance in the resettlement intake and primacy of protection needs in allocating spaces. Any increase of resettlement from South-east Asia would need to be carefully balanced by resettlement from other parts of the world where refugees are in acute need of resettlement and should actively involve other resettlement States to ensure genuine responsibility sharing, and managed in such a manner that the situation of asylum-seekers in the region is not negatively affected by such increased intake.

36. Care must also be taken to ensure that increased resettlement does not, in itself, create further 'pull factors' towards countries in South-east Asia and that other durable solutions, such as local integration or parallel migration schemes, are also explored in appropriate cases.

#### 3.4 Strengthen "Protection Space" in South-east Asia

37. With some notable exceptions, States' approaches to refugee protection in the region are mostly *ad hoc* and based upon political, security and broader immigration considerations of each State. In a number of countries, asylum-seekers and refugees are considered to be illegal immigrants with the consequence that they are not formally recognized and thus do not have access to basic rights and public services, are at risk of arrest and detention, and can only benefit from limited material support provided by UNHCR and other actors. Without access to adequate assistance or lawful opportunities to become self-reliant, most asylum-seekers or refugees live in abject poverty and, if employed, are engaged in performing 3-D jobs (dirty, dangerous and difficult) in the grey economy with limited, if any, access to rights or social protection safeguards.

38. Access to durable solutions is limited. Local integration is not formally recognized as a durable solution in most countries in the region. Some returns take place on an *ad hoc* basis and at times under duress in the case of asylum-seekers and refugees held in detention for prolonged periods. Resettlement of refugees from South east Asia countries must be very carefully managed as it can never be the primary durable solution for more than a small percentage of the total numbers of refugees in the region. The degree of access to resettlement is contingent upon a number of factors such as: a) the size of the resettlement quota allocated to each country including the composition of any such quota; b) the ratio between allocated resettlement places to the size of refugee population; c) the timeframe for resettlement to take place; and, d) concerns about the impact of resettlement on onward movements to and from the country of asylum, and responses to such concerns, including the risk that over-weighted resettlement programs might be a 'pull factor' into the region – a risk that a number of states are keenly anxious to avoid.

39. In the absence of greater participation by States in processing asylum-seekers and supporting refugees in South-east Asia, UNHCR is currently, *de facto*, the main protection actor in most countries asylum-seekers and refugees might transit before boarding boats on the way to Australia. It is responsible for registration, documentation, RSD and the search for solutions. In



some countries, the Office is also the main source of welfare support for asylum-seekers and refugees.

40. UNHCR's operations in the region have played and continue to play a significant role in providing a basic protection safety net for persons in need of international protection. In the absence of an appropriate institutional framework that provides for a rights-based approach, State responsibility and predictable partnerships, the effect of the Office's activities on maintaining or expanding protection space in countries people transit through might best be described as limited in scope and palliative in nature.

41. Experience shows that counter-criminality efforts by States in the region will not, of themselves, resolve the problems they face. Clearly, human insecurity and the lack of any reasonable solutions are the key drivers of onward movement towards Australia and other places where solutions are more readily available. Therefore, any comprehensive approaches to address the situation of asylum-seekers and refugees moving into and through the region must address, *inter alia*, these two drivers. If people can be helped to be safer and more secure where they currently reside, and have some reasonable prospect of a sustainable solution to their situation, then some or all of the incentive to join dangerous and exploitative maritime ventures, will be reduced.

42. For this reason, one of UNHCR's primary objectives in South-east Asia is to strengthen its practical cooperation with States under the Regional Cooperation Framework, and to encourage Governments to be more actively involved, alongside UNHCR, in the registration and management of asylum-seekers and refugees in their territories. Australia's support for this objective is essential to UNHCR's work.

43. UNHCR considers that any strengthening of the Office's operations through additional financial support could make a tangible and substantial difference to the range and quality of services provided and, by extension, to the lives of those asylum-seekers and refugees benefiting from enhanced support. UNHCR's 2012-13 Global Appeal provides a summary of needs, strategies and financial requirements that can serve as the framework for considering options for further supporting UNHCR's work.<sup>13</sup>

44. An immediate priority would, *inter alia*, be to strengthen UNHCR capacity for registration and RSD while advocating for an increase in the participation of resettlement countries from outside the region in resettlement activities. Another priority would be to improve living conditions for asylum-seekers during the asylum determination procedure and for refugees until a durable solution is found. A third would be to work with Governments in the region to develop more predictable and harmonized protection arrangements.

45. Practical programmes should be developed to ensure that asylum-seekers and refugees are able to be self sufficient through access to the market, improve their education, and access to health services and housing.

46. Under the RCF, and over time using the RSO, a number of scoping studies and assessments could identify areas where enhanced social services support for refugees, especially for vulnerable cases such as unaccompanied or separated children, would improve their general sense of human security and stability.

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<sup>13</sup> UNHCR, Global Appeal 2012-13 (<http://www.unhcr.org/ga12/index.xml>).

47. At present, there is little civil society involvement in the delivery of support to refugees and there is a need to improve both the degree and quality of NGO involvement and to create stronger links of trust and cooperation between civil society and Governments on these issues.

48. In parallel, in order to address the root causes of onward movements and associated push and pull factors, increases in financial support for UNHCR will need to be coupled with a concerted effort to build State ownership and national capacity for refugee protection.

49. This could involve:

- (a) the development of standardized profiling, registration and referral procedures for different categories of persons throughout the South-east Asia region;
- (b) strategies towards wider ratification of the Refugee Convention and other complementary international human rights instruments, and their implementation;
- (c) the development of predictable and harmonized arrangements on a national or regional basis without undermining existing international obligations;
- (d) the establishment /strengthening of national asylum systems that provide for fair and efficient procedures to determine who is in need of international protection;
- (e) access to public services that provide for living conditions in safety and dignity until a final decision on an asylum claim is made;
- (f) timely access to durable solutions for refugees and to appropriate outcomes to other persons moving irregularly;
- (g) strengthened capacity and engagement by civil society in the provision of community and social services support to asylum-seekers and refugees.

50. To this end, UNHCR recalls that in its *Discussion Paper on a Regional Cooperative Approach to address refugees, asylum-seekers and irregular movement* (see [Attachment C](#)) endorsed by the Workshop on Regional Cooperation and Irregular Migration in Manila on 22 and 23 November 2010, UNHCR identified three broad areas for engagement and cooperation under the RCF (the so-called 'regional support functions'): processing and case management; resettlement and burden sharing; and, return to countries of origin.

51. Under *processing and case management*, support could be provided to interested States for the development of in-country processing and case management with a view to greater harmonization. Activities would include information sharing, capacity building, development of harmonized processes and procedures, and the pooling together of resources (interpreters and country-of-origin information).

52. Under *resettlement and burden sharing*, operational support could be provided for the resettlement of targeted, pre-defined groups of refugees possibly through a regional processing centre(s) for a limited number of refugees. Information, advice and necessary technical support could also be provided for the effective processing and management of certain cases requiring resettlement under a Regional Cooperation Framework.

53. Under *return to countries of origin*, operational support could be provided for the return of rejected asylum-seekers and others who are not in need of international protection to their countries of origin.

### 3.5 Address Irregular Maritime Movements

54. There are many aspects of irregular maritime movements which clearly require closer cooperation on the part of States, including with regard to: (i) maritime interception operations; (ii) distress and rescue at sea; and, (iii) irregular sea arrivals. The ‘*Oceanic Viking*’ incident provides a number of important lessons in this regard, and a good example of the need to clarify roles and responsibilities in a more predictable, and mutually agreed basis prior to the arrival of boats.

55. UNHCR is spearheading the organization of an expert regional roundtable to take place in advance of the 10<sup>th</sup> Anniversary Bali Process meeting in October-November 2012 which will aim to promote a common understanding of conceptual issues on irregular movements by sea. As part of the discussions, it is expected that consideration will be given to how the conclusions from a Global Expert Meeting on rescue at sea held in Djibouti in November 2011 could be operationalized in the Asia-Pacific context (see Attachment D).

56. UNHCR will encourage Australia and other integrated Bali States to consider elevating the issue to a higher political level of endorsement that will ensure that officials are given guidance and directions on how these areas can be further ‘operationalised’. The main purpose would be to build regional consensus that this is a serious humanitarian and security issue that States need to address collaboratively and comprehensively.

57. For UNHCR, a key ‘priority’ is to support practical approaches to irregular maritime movements that are adapted to specific regional circumstances, build upon areas of common interest to a number of States and contribute to strengthening protection space through inter-State cooperation and dialogue in the region. Such arrangements will need to:

- be protection sensitive and respect the principle of *non-refoulement*;
- preserve the integrity and effectiveness of maritime search and rescue;
- provide for effective disembarkation procedures following rescue at sea/interception operations where there is ambiguity about which State is responsible;
- provide for standardized procedures for identification, registration, documentation and referral to different procedures based on an assessment of needs and vulnerabilities and in accordance with the 1951 Refugee Convention and other international human rights instruments;
- provide for timely and effective solutions to those in need of international protection, and irregular maritime arrivals who are not in need of international protection including those who cannot return to their country of origin.

58. UNHCR considers that, under certain circumstances, some States of disembarkation and/or processing may require support to ensure that the immediate needs of persons travelling irregularly by sea are met in terms of care and assistance, refugee determination and other procedures and finding appropriate outcomes.

### 3.6 UNHCR’s Position on Regional Processing

59. UNHCR’s views on the proposed Australia-Malaysia Transfer Arrangement were clearly set out in UNHCR’s Aide Memoire of July 2011 (see Attachment E).

60. Should Australia consider this or other similar proposals in the future, UNHCR would assess their legal and operational viability as and when their details are clear. In particular, UNHCR would need to consider how any proposed arrangements incorporated the range of fundamental protection safeguards which were put forward by the Office in connection with the Australia-Malaysia Transfer Arrangement.

61. UNHCR would need to see that fundamental protection safeguards were effectively included both in the terms of any formal arrangements and were, in fact, capable of being implemented in practice. Effective monitoring and supervision of any arrangements would need to be in place to ensure their integrity.

62. Fundamental protection safeguards would include:

- respect for the right to asylum and the principle of *non-refoulement*, including a prospective risk assessment;
- right to remain lawfully in the territory for asylum-seekers until such time when a final decision is made on an asylum claim;
- protection against arbitrary or prolonged detention;
- respect for the principle of family unity and best interests of the child;
- access to an adequate standard of living and self-sufficiency (e.g. access to market, adequate accommodation, education etc);
- appropriate treatment for vulnerable individuals with special procedures and in particular arrangements for unaccompanied and separated children; and,
- durable solutions for refugees within a reasonable period.

63. The integrity and viability of any such arrangements would depend on how far they incorporate these guarantees formally into the arrangements and also, whether they can be effectively implemented in practice. Whether or not UNHCR would be prepared to play any practical role in the implementation of such arrangements would depend on the circumstances and how far they were compatible with the object and spirit of the Regional Cooperation Framework and international protection principles.

64. UNHCR considered the Pacific ‘Solution’ or ‘Strategy’ implemented by Australia in the early 2000s as problematical, both as a matter of principle, and in its practical implementation for refugees and asylum-seekers affected. Without wishing to pre-judge any proposals for future engagement with Pacific Island States, UNHCR notes that, in the past, the processing arrangements in the Pacific did not contain the necessary ingredients of genuine regional cooperation and protection that now underpin the Regional Cooperation Framework. Rather, the facilities on Manus Island (PNG) and Nauru were ‘off shore processing’ centres run by and for Australia for its own purposes but in the territory of two Pacific Island territories.

65. The arrangements did not build long-term capacity for the region and were not based on genuine responsibility sharing and burden sharing between States with common concerns about irregular migration, particularly maritime movements. They also led to particular hardships for those processed on those islands. If such arrangements were replicated, they would not fit with UNHCR’s understanding of the Regional Cooperation Framework’s objectives and spirit.

## Conclusion

66. UNHCR believes that the remit of the Expert Panel provides a very useful opportunity for many diverse stakeholders to reassess Australia's current approach to refugee and asylum issues not only domestically but also in the region.

67. Clearly, there are no short term or 'quick fix' domestic solutions to what are complex, multidimensional and global and regional challenges. Nonetheless, UNHCR is convinced that the only way forward is through comprehensive and genuine engagement of cooperation with other States in the region through the Regional Cooperation Framework.

68. For its part, UNHCR is prepared to work closely with States to identify and implement practical cooperation arrangements that address common concerns about maritime movements of asylum-seekers and refugees. provided the protection of such persons is placed centrally in any such responses.

*UNHCR Regional Representation  
Canberra, 27 July 2012*