



**UNHCR**  
The UN Refugee Agency

## UNHCR Mission to Manus Island, Papua New Guinea 15-17 January 2013

*Embargoed until Monday 4 February 00:01 (Canberra time)*

*UNHCR undertook a mission to Manus Island on 15-17 January 2013 to assess how Australia and Papua New Guinea were implementing their obligations under the 1951 Refugee Convention, review the reception conditions at the Assessment Centre, and meet with officials, service providers and asylum-seekers to hear any concerns.*

### **Findings**

- UNHCR acknowledges the serious commitment and on-going efforts by the Governments of Papua New Guinea (PNG) and Australia to put in place procedures and conditions of treatment for transferees that are consistent with their international obligations under the 1951 Refugee Convention and other applicable international instruments.
- Nonetheless, UNHCR also recognises the very significant challenge of achieving these standards in remote Pacific Island locations within the ambitious timetable set by the two State Parties for the establishment of an Assessment Centre on Manus Island and the transfer of people to it.
- Whilst acknowledging progress being made UNHCR found, at the time of the visit, that there are still very significant inadequacies in the legal and operational framework governing the transfer, treatment and processing of transferees from Australia to PNG, which require priority attention.
- Currently, the delays and uncertainty surrounding the commencement of the refugee status determination process are inconsistent with the primary and, arguably, sole purpose of transfer from Australia to the Assessment Centre on Manus Island, namely, to identify whether a transferee is a refugee in need of protection under Australia and PNG's obligations under the 1951 Refugee Convention.
- The current PNG policy and practice of detaining all asylum-seekers at the closed Centre, on a mandatory and indefinite 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 amounts to arbitrary detention that is inconsistent with international human rights law.
- UNHCR recognises that officials from both the Governments of PNG and Australia, and contracted service providers, are using their best endeavours to improve the standards of reception and treatment of transferees at the temporary Centre, but there remains no clear time frame as to when more permanent and suitable facilities will be put in place.



- In the meantime, the temporary living conditions for most transferees at the closed detention setting remain harsh and, for some, inadequate. These conditions, coupled with the indeterminate nature and length of processing, are likely to have an increasingly negative impact on the psycho-social and physical health of those transferred, particularly vulnerable individuals including families and dependent children.
- The situation of children transferred to Manus Island gives particular cause for concern. The lack of any appropriate legal or regulatory framework for their treatment (in what UNHCR finds to be a mandatory, arbitrary and indefinite detention setting), and on-going delays in establishing any procedures to assess children's refugee protection needs, and broader best interests, is particularly troubling.
- Since the visit, UNHCR was advised that escorted visits and excursions for some transferees, including children, have begun. UNHCR welcomes these excursions as a way of ameliorating some of the negative effects of detention, but they do not resolve UNHCR's underlying concerns about the arbitrary character of the detention at the Centre.
- Assessed as a whole, the current arrangements for the transfer of asylum-seekers to unsatisfactory temporary facilities, within a closed detention setting, and in the absence of a legal framework and functional system to assess refugee claims, do not currently meet the required international protection standards set out in paragraphs 17 and 20 of this Report.
- UNHCR hopes the following Recommendations will be of value to both States in addressing the main shortcomings of the current arrangements and enable them to establish the Centre as an open centre, with freedom of movement, on a more permanent, sustainable and accountable basis under international law.

## **Recommendations**

### **Refugee Status Determination**

- A. PNG needs to finalize and enact, without delay, an effective and appropriate domestic legal framework for the processing and determination of refugee status (RSD) claims.**
- B. In cooperation with Australia, PNG should ensure that there is sufficient capacity and expertise among officials to process all refugee claims fairly and expeditiously.**
- C. Refugee status determination should commence as soon as possible.**
- D. PNG and Australian officials should provide clearer information to asylum-seekers about their legal and physical situation, in a language they understand, including better counselling on the procedures which will be followed to assess their claims for refugee status and on what basis, by whom and the indicative time frames for these various steps.**

- E. PNG should proceed to lift its seven reservations to the 1951 Refugee Convention.**

#### **Reception of Asylum-Seekers**

- F. The current policy and operational approach of mandatory, indefinite and arbitrary detention should be addressed as a matter of urgency.**
- G. The Manus Island Assessment Centre should be made an open centre, with freedom of movement in line with international law, unless there are compelling circumstances which warrant restrictions on liberty in the individual case, and which are determined to be necessary, reasonable in all the circumstances and proportionate to a legitimate purpose.**
- H. In the meantime, the opportunity for excursions and visits outside the centre for those who have cleared the quarantine period and pose no individualised risk to the security and health of the community should be expanded.**
- I. All operational aspects of the Assessment Centre should be based on a clear legal basis and subject to effective independent and periodic review.**
- J. Immediate steps should be taken to ensure that all asylum-seekers at the Assessment Centre are being provided with dignified and humane reception conditions, including special considerations for children.**

#### **Children**

- K. Children and their families, who have completed preliminary quarantine health checks, should be moved to a child-appropriate and open centre environment. The current policy and practice of detaining children should be terminated as a matter of priority.**
- L. The refugee claims of children and other vulnerable groups should be prioritised for refugee assessments and these should be carried out, without delay, by suitably qualified officials who are also able to conduct 'best interest' determinations.**
- M. Until such time as all the appropriate legal and administrative safeguards are in place for both the reception and processing of children, UNHCR recommends that no more children should be transferred to Manus Island.**
- N. PNG should develop specific legal measures and administrative guidance to ensure that children are treated in full respect of their rights under the Convention on the Rights of the Child including, in particular, measures to ensure children are not detained save in exceptional circumstances where health and security issues relating to an individual child so require it.**
- O. Given the special vulnerability of children, including to the traumatic effects of detention and the asylum experience, their safety and security**

needs to be assured, including ensuring that they are accommodated completely separately to any single men who are in or close to the Centre.

#### **Mental and physical health**

- P. Australia and PNG should give further consideration to the adequacy of services on Manus Island to respond effectively to the psychosocial and physical health needs of asylum-seekers, some of whom may be survivors of torture and trauma and/or vulnerable due to their age.**
- Q. Australia and PNG should develop specific administrative guidance to ensure that vulnerable individuals are quickly identified and appropriate support provided to them by qualified service providers.**

#### **Meaningful Activities**

- R. Australia and PNG should ensure that asylum-seekers have access to a range of meaningful activities.**

#### **Oversight and monitoring**

- S. Australia and PNG should ensure that appropriate independent oversight bodies are able to access asylum-seekers at the Manus Island facility.**
- T. A complaints procedure should be established to allow concerns raised by asylum-seekers about their situation and treatment, pre-transfer and post-transfer, to be properly investigated.**

#### **Pre-transfer assessments**

- U. Pre-transfer assessments conducted in Australia should fully take into account the individualised needs of vulnerable individuals, including children, the elderly, survivors of torture or trauma, disabled persons and persons with specific health needs.**
- V. 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.**

#### **Conclusion**

- W. In view of their shared and mutual obligations to transferees under the MOU and under international law, including the Refugee Convention, UNHCR recommends that the Governments of Australia and PNG review the recommendations in this Report with regard to persons already transferred to Manus Island and also in relation to any future transferees.**

## **Introduction**

1. UNHCR undertook a three-person mission to Manus Island, Papua New Guinea (PNG) from 15-17 January 2013. The mission was undertaken pursuant to UNHCR's 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.
2. The terms of reference were to assess how Australia and PNG were implementing their obligations under the 1951 Refugee Convention, review the reception conditions at the temporary Assessment Centre,<sup>1</sup> and meet with officials, service providers and asylum-seekers to hear any concerns.
3. During its mission, UNHCR met with officials of the PNG and Australian Governments, all service providers present at the Centre and most of the asylum-seekers at the Centre, either individually or in larger groups. Service providers included the Salvation Army (welfare and case management), Save the Children Australia (education and child welfare), International Health and Medical Services (IHMS, medical), and G4S (security and logistics).
4. At the time of UNHCR's visit to Manus Island, a group 25 asylum-seekers who had been transferred on 12 January 2013 were protesting and refusing to be admitted into PNG's customs processes and were being accommodated in a separate and contained section of the Centre. UNHCR was not permitted to meet with, or receive messages from, this group or to see their accommodation arrangements. UNHCR understands that, since its mission, these asylum-seekers have now entered the Centre proper, and are accommodated with the rest of the single adult males.
5. UNHCR is appreciative of the PNG Government for facilitating the mission, of the Government of Australia for its assistance, and of the service providers for taking the time to meet with UNHCR staff, and to discuss issues of common interest and concern.
6. UNHCR acknowledges that the Governments of PNG and Australia are firmly committed to putting in place procedures and conditions of treatment for transferees that are consistent with their international obligations under the 1951 Refugee Convention and other applicable international instruments. In this regard, UNHCR notes that regulations governing refugee status determination have been drafted and are under active consideration by the Government of PNG.
7. UNHCR also recognises the very significant and complex challenges of achieving these standards in remote Pacific Island locations within the timetable set by the two State Parties for the establishment of an Assessment Centre on Manus Island and the transfer of people to it.
8. UNHCR hopes that implementation of a fair and expeditious refugee status determination procedure will take place shortly and that rapid progress can be

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<sup>1</sup> The temporary Assessment Centre has been established pending more permanent accommodation to house up to 500 asylum-seekers at full capacity.

made to ameliorate the current shortcomings identified in this Report, particularly an early transition from closed detention to an open centre.

### **Background to the visit**

9. Both Australia and PNG are parties to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol ('the 1951 Refugee Convention').
10. Australia and PNG are also parties to a number of international human rights treaties, including the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1989 Convention on the Rights of the Child (CRC). PNG is not a party to the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, nor to the two Statelessness Conventions.
11. The Government of PNG has indicated that it will take steps to withdraw its seven reservations to the 1951 Refugee Convention affecting refugees' and, in some cases, asylum-seekers', rights, which is welcomed.<sup>2</sup> However, at the time of this Report, the reservations remain in place.
12. PNG has also not developed domestic legislation to implement its obligations under the 1951 Refugee Convention. Refugees are largely dealt with under the PNG Migration Act 1978 and its 1989 amendments, which authorize the Minister of Foreign Affairs "to determine a non-citizen to be a refugee", but do not provide any details on the way in which this determination is to be made.
13. PNG does not have a functional system for the identification and protection of refugees under the 1951 Refugee Convention.
14. In the absence of the legal framework and domestic capacity to undertake refugee status determination (RSD), UNHCR has since 2007 exercised its mandate to determine refugee status for asylum-seekers arriving spontaneously in PNG, as well as to provide support to such asylum-seekers and refugees, and to seek durable solutions for them, where necessary.
15. The arrangements for asylum-seekers transferred from Australia to PNG may be distinguished as constituting essentially arrangements agreed by two Convention States and UNHCR has indicated it would not have any operational or active role to play in their implementation.
16. On 9 October 2012 the Australian Parliament designated PNG as a 'Regional Processing Country' to which Australia could transfer asylum-seekers arriving by boat to Australia.
17. At the time of this designation, the United Nations High Commissioner for Refugees provided the Australian Minister for Immigration and Citizenship with an assessment of the challenges likely to be faced in such transfers, and indicated UNHCR's position that the following safeguards needed to be set out

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<sup>2</sup> Reservations are maintained in relation to Article 17(1) [wage earning employment], Article 21 [housing], Article 22(1) [public education], Article 26 [freedom of movement], Article 31 [non-penalization of refugees for illegal entry or stay], Article 32 [expulsion] and Article 34 [naturalization].

in any formal arrangements between the transferring countries, and implemented in practice:

- full respect for the principle of *non-refoulement*;
- the right to asylum (involving a fair and accurate adjudication of claims);
- respect for the principles of family unity and best interests of the child;
- the right to reside lawfully in the territory until a durable solution is found;
- humane reception conditions, including protection against arbitrary detention;
- progressive access to Convention rights and adequate and dignified means of existence, with special emphasis on education, access to health care and a right to employment;
- special procedures for vulnerable individuals with clear pre-transfer assessments by qualified staff (including best interest determinations for children, especially unaccompanied and separated children) and support for victims of torture/trauma or suffering from disabilities (including aged/disabled); and
- durable solutions for refugees within a reasonable period.<sup>3</sup>

18. A bilateral Memorandum of Understanding ('MOU') relating to the transfer of asylum-seekers had earlier been signed by Australia and PNG on 8 September 2012 to allow for such transfers and the assessment of claims for refugee status.

19. Under the MOU, PNG undertook to make an assessment, or allow an assessment to be made, of claims for refugee status and Australia undertook to arrange for the eventual resettlement or transfer from PNG of all persons transferred to PNG under the arrangement.

20. Both Parties undertook to ensure that:

- transferees would be treated with dignity and respect;
- relevant human rights standards would be met; and
- special arrangements would be developed and agreed to by the participants for vulnerable cases including unaccompanied minors.<sup>4</sup>

21. The MOU along with a *Statement about Arrangements that are in place, or are to be put in place, in the Independent State of Papua New Guinea for the Treatment of Persons taken to Papua New Guinea* ('the Statement about Arrangements') were tabled as part of the instrument of designation of PNG as a 'regional processing country' in the Australian Parliament on 9 October 2012.

22. The terms under which transfers have taken place and will continue to take place as well as the significant *de facto* control exercised by Australian officials and contractors on Manus Island reinforce UNHCR's view that legal

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<sup>3</sup> Letter dated 9 October 2012 available at:

<http://unhcr.org.au/unhcr/images/121009%20response%20to%20minister%20on%20png.pdf>. See also 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, [34]-[35] <<http://www.unhcr.org/refworld/docid/4cd12d3a2.html>>. See, also, UNHCR, Aide-mémoire: UNHCR's Observations on the Final Draft of the Malaysia-Australia Arrangement on Transfer and Resettlement and Annexed Operational Guidance (dated 8 July 2011) (July 2011); ExCom Conclusion No. 85 (XLIX) (1998), para. (aa); ExCom Conclusion No. 58 (XL) (1989), para. (f)

<sup>4</sup> Clauses 14, 15, 16 and 18 of the 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 8 September 2012.

responsibility under international law for the care and protection of all transferees from Australia to PNG remains with both contracting States equally.

23. A temporary assessment centre was established at Lombrum Naval Base, Manus Island,<sup>5</sup> and the first asylum-seekers were transferred from Australia to the Centre on 21 November 2012. At the time of the visit, the Centre was host to 221 asylum-seekers, comprising: 80 asylum-seekers from Sri Lanka, 49 from Afghanistan, 47 from the Islamic Republic of Iran, 27 from Iraq, 16 from Pakistan and two from Kuwait.

## **Findings**

### **I. Refugee Status Determination**

24. During its mission, UNHCR held discussions with the Interim Operations Manager (PNG Government) regarding the nature of PNG's responsibilities under the 1951 Refugee Convention, and in particular the need for a national legal framework and regulations to implement a fair and efficient refugee status determination (RSD) process for those asylum-seekers transferred to the Centre.
25. PNG officials confirmed UNHCR's understanding that PNG is drafting regulations to establish RSD procedures, but that these have not yet been finalized, and that no time frame for the operationalization of such procedures has been identified.
26. In addition to meetings with PNG officials, UNHCR also held various discussions with officials of the Australian Department of Immigration and Citizenship (DIAC).
27. DIAC advised of its intention to send two officials to the Centre in the near future to begin conducting initial interviews with asylum-seekers, with PNG officials attending the interviews for professional development purposes. These interviews are understood to be preliminary in nature and will not form part of a formal refugee status determination, although transcripts of the interviews will be shared with decision-makers once the formal process commences.
28. DIAC officials were also not able to offer any indication of when a formal refugee status determination process would commence.
29. Asylum-seekers expressed varying degrees of confusion to UNHCR over the processing arrangements that would apply to them in PNG. Most advised that the information they received upon arrival about how and when the process would begin was limited and confusing, and many expressed frustration that no one at the Centre could provide them with adequate answers.
30. While responsibility for providing information in a language they understand to asylum-seekers was assumed by PNG officials, they were unable to provide

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<sup>5</sup> The Centre is technically on the island of Los Negros, however the common usage in reference to the Centre is Manus Island.

UNHCR with any kind of script or written information (pamphlets or information sheets) that is provided to asylum-seekers on arrival about their processing.

31. Many asylum-seekers stated that they had not seen any PNG or Australian officials inside the Centre and thus continued to be unable to receive answers regarding their processing.
32. The lines of responsibility regarding the management of Centre were also unclear to some asylum-seekers, adding to the sense that asylum-seekers do not know where to go to address their queries in regard to processing.
33. This was underlined by the limited input by PNG officials into the daily coordination meetings of the various service providers at the Centre, notwithstanding the final decision-maker in relation to the management of the Centre being the PNG Chief Migration Officer (through his delegate, the Acting Operations Manager).
34. Discussions in PNG took into account the terms of the bilateral MOU relating to the transfer to and assessments of persons in PNG, under which the Government of PNG assures the Government of Australia it will make a refugee status determination – or permit one to be made – in accordance with the 1951 Refugee Convention, and that it will respect the *non-refoulement* obligations of the Refugee Convention and other human rights treaties.
35. In UNHCR's view, when transfers take place from one State to another, at a minimum, the transferring State needs to establish that each individual asylum-seeker, in addition to being admitted and receiving protection against *refoulement*, and as a matter of practice:
  - will have access to fair, efficient and timely assessments of their refugee claims and/or need for other forms of international protection – as the primary purpose of the transfer is the 'processing' of people's claims for protection, that assessment process needs to take place as soon as practicable after transfer;
  - will be treated in accordance with accepted international human rights standards (including e.g. appropriate reception arrangements and safeguards against arbitrary detention, and that persons with specific needs are identified and assisted); and
  - if recognized as being in need of international protection, will be able to access a durable solutions.<sup>6</sup>
36. The current situation with regard to the legal context for asylum-seekers transferred from Australia to PNG is that:
  - there is no adequate domestic legal framework to implement PNG's responsibilities under the 1951 Refugee Convention. In particular, there are currently no provisions incorporating the provisions of the 1951 Refugee Convention and establishing the procedures for RSD, and no appropriate legal framework governing decisions to detain;

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6 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, [34]-[35] <<http://www.unhcr.org/refworld/docid/4cd12d3a2.html>>. See, also, UNHCR, *Aide-mémoire: UNHCR's Observations on the Final Draft of the Malaysia-Australia Arrangement on Transfer and Resettlement and Annexed Operational Guidance (dated 8 July 2011)* (July 2011); ExCom Conclusion No. 85 (XLIX) (1998), para. (aa); ExCom Conclusion No. 58 (XL) (1989), para. (f)

- there are no specific legal provisions governing the processing and treatment of child asylum-seekers/transferees;
  - there are no experienced officials in the Government of PNG able to undertake the RSD on the scale and complexity of cases envisaged under the transfer arrangements; and
  - to date, there has been no preliminary data collection of asylum-seekers other than biodata collected in Australia prior to transfer, which represents another obstacle to commencing the substantive assessments of refugee claims.
37. The mission also confirmed UNHCR's view that there is considerable ambiguity and confusion about operational aspects of the arrangements between the parties, especially in respect of:
- the interpretation and application of the so-called 'no advantage principle' - a concept with which UNHCR has consistently expressed deep reservations;
  - entitlement to Convention and other rights; and
  - responsibility for the provision of permanent solutions within a reasonable period.
38. Taking together these findings, UNHCR concludes that there is a significant and troubling lacuna in the legal arrangements that would be required to implement the provisions of the MOU and transfer arrangements and which are needed to ensure compliance with applicable international law and protection standards, including those outlined in paragraphs 17 and 20 of this Report.
39. In UNHCR's assessment, the on-going delays in the commencement of refugee status determination procedures are inconsistent with the primary and, arguably, sole purpose of transfer from Australia to the 'Assessment Centre' on Manus Island.
40. UNHCR considers it essential for the Governments of Australia and PNG to proceed with urgency to put in place a full refugee status determination process, with appropriate additional safeguards for the protection and treatment of vulnerable groups, particularly children.
41. UNHCR further considers it a matter of urgency to provide comprehensive information in writing, and in a language they understand, to asylum-seekers setting out the procedures which will be followed to assess their claims for refugee status, on what basis, by whom and indicative time frames for these procedural steps.

#### **Recommendations: Refugee Status Determination**

- A. PNG needs to finalize and enact, without delay, an effective and appropriate domestic legal framework for the processing and determination of refugee status (RSD) claims.**
- B. In cooperation with Australia, PNG should ensure that there is sufficient capacity and expertise among officials to process all refugee claims fairly and expeditiously.**

- C. Refugee status determination should commence as soon as possible.
- D. PNG and Australian officials should provide clearer information to asylum-seekers about their legal and physical situation, in a language they understand, including better counselling on the procedures which will be followed to assess their claims for refugee status and on what basis, by whom and the indicative time frames for these various steps.
- E. PNG should proceed to lift its seven reservations to the 1951 Refugee Convention.

## ***II. Reception of Asylum-Seekers***

### **General**

- 42. The Centre is considered to be temporary until a permanent facility is established. UNHCR understands that several sites on Manus Island have been identified as possibilities for a permanent facility but that no decision has as yet been taken on this matter.
- 43. The Centre was divided into three sections. The first was the Family Compound, in which 130 people, including 34 children, were living. In the second were 66 single adult males of Iranian, Afghan, Iraqi and Kuwaiti nationalities. In the third were the 25 single adult males of Iraqi nationality who had arrived on 12 January 2013 and who were protesting their entry to the Centre.
- 44. The first group of asylum-seekers was transferred to Manus Island on 21 November 2012. Since then successive groups have been transferred to Manus Island. Initially transferees were exclusively families, but they are now a mixture of families and single adult males.
- 45. The asylum-seekers were told that they would be allowed to move outside the Centre with an escort following an initial quarantine period of 30 days, or until such time as they had completed their vaccinations (particularly for measles and polio).
- 46. As at the date of UNHCR's visit, none of the asylum-seekers had been allowed out of the Centre. This includes children who had been promised excursions after the initial quarantine period.
- 47. During the mission, a PNG official advised UNHCR and service providers that the quarantine period would be open-ended 'until further notice' because of the security and operational situation relating to the protests of a group of 25 single adult males who were continuing to protest their entry to the Centre.
- 48. In meetings with asylum-seekers, it was repeatedly noted that those among them who were at or near the end of their 30-day quarantine period had had their hopes of being able to go on an excursion in the near future raised and then frustrated.

49. The children UNHCR spoke with were particularly disappointed by the lack of excursions, despite earlier promises. Because they are unable to leave the centre, there has also been - as yet - no ability for children to access the local school (education is currently provided within the Centre by Save the Children).
50. Since the visit, UNHCR was advised that escorted visits and excursions for some transferees, including children, have begun. UNHCR welcomes these excursions as a way of ameliorating some of the negative effects of detention, but they do not resolve UNHCR's underlying concerns about the mandatory and arbitrary character of the detention at the Centre.
51. UNHCR considers that, at present, all transferees at the Centre are subject to deprivation of liberty in a closed place which amounts to "detention" under international law (and as set out in more detail in UNHCR's Detention Guidelines 2012, which identify comprehensively the criteria and standards relating to the detention of asylum-seekers.<sup>7</sup>)
52. In UNHCR's view, the detention of asylum-seekers should be a measure of last resort, with liberty being the default position:<sup>8</sup>  
*As seeking asylum is not an unlawful act, any restrictions on liberty imposed on persons exercising this right need to be provided for in law, carefully circumscribed and subject to prompt review. Detention can only be applied where it pursues a legitimate purpose and has been determined to be both necessary and proportionate in each individual case.*<sup>9</sup>
53. UNHCR notes that one of the objectives of the MOU for the transfer and the establishment of an Assessment Centre is to provide "a visible deterrent to people smugglers." The arrangements only apply to asylum-seekers who have arrived in Australian excised territories in an irregular manner by sea, and may thus be considered to be penalised for their illegal entry to Australia.
54. In accordance with international law, detention that is imposed in order to deter future asylum-seekers, or to dissuade those who have commenced their claims from pursuing them, is inconsistent with international norms, and would be arbitrary.<sup>10</sup> Likewise, under international law, automatic or mandatory detention is arbitrary,<sup>11</sup> as is detention without limits and without legal challenge, leading in cases to arbitrary indefinite detention. Maximum limits on detention should be established in law.<sup>12</sup>
55. In terms of procedural safeguards, asylum-seekers in detention must be brought promptly before a judicial or other independent authority to have the decision to detain reviewed, with periodic reviews thereafter, to ensure that persons in detention are not detained for any longer than necessary.<sup>13</sup>

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7 UNHCR, Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012), [5]: *For the purposes of these Guidelines, "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.*

8 Ibid, [14].

9 Ibid, [2].

10 Ibid, [31-32].

11 Ibid, [20].

12 Ibid, Guideline 6.

13 Ibid, Guideline 7 [iii-iv].

Irrespective of these reviews, the asylum-seeker retains the right to challenge his or her detention before a court of law.<sup>14</sup>

56. UNHCR found that asylum-seekers are being detained on Manus Island without any appropriate legal safeguards to ensure that their continued detention is lawful, proportionate and justified by their individual circumstances; no opportunity to challenge the administrative basis of their detention; and no opportunity to prosecute their refugee claims within any clear timeframe in the future. UNHCR was particularly concerned by the advice that the quarantine period would be extended indefinitely (see paragraph 47).
57. More broadly for all asylum-seekers currently detained at the Manus Island facility, UNHCR is deeply concerned that there is currently:
- no domestic regulatory framework for detention;
  - no process by which the necessity of detention of an individual (as opposed to the group of transferees) is made or reviewable;
  - no process to consider claims for refugee status, nor any timetable within which such a process might be established; and
  - no time limit on detention.
58. In this regard, UNHCR notes that both Australia and PNG are parties to the 1966 International Covenant on Civil and Political Rights, which inter alia states that:
- Everyone has the right to liberty and security of person. No one shall be subject to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law. (Art. 9(1))*
59. In addition, UNHCR notes that the Minister's Statement about Arrangements states that the PNG Government has inter alia advised the Commonwealth that:
- ...transferees will not be permitted to leave the processing centre until security and health assessments have been completed, and they are assessed as not presenting a risk to public health and are security cleared. Thereafter, transferees in the process of having their claims for protection assessed, or who have been determined to be a refugee, will be permitted to leave the Centre with an escort for approved activities;...(Para. 2 (b))*
60. Detention for the purposes of initial security screening or health checks is a legitimate ground for an initial period in detention in individual cases. However, such checks can usually be carried out quickly and the persons released. In respect of health checks, apart from such detention occurring in appropriate locations (such as health clinics, hospitals or specially designated medical centres), any extension of detention on health grounds must be authorised by qualified medical personnel.<sup>15</sup>
61. Overall, this arrangement explicitly envisages reception arrangements and conditions which are not consistent with applicable international standards for asylum-seekers and refugees, and in particular that current practice of

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<sup>14</sup> Ibid, Guideline 7 [v].

<sup>15</sup> UNHCR Detention Guidelines, [29, 30].

confining all asylum-seekers to a closed place where they are not allowed to leave at will, and without proper legal safeguards, amounts to arbitrary detention in violation of international law.

62. UNHCR considers that steps should be taken immediately to make the Assessment Centre an open centre for those who demonstrably pose no security or health risk to the PNG community. Asylum-seekers should be provided with freedom of movement, unless there are compelling circumstances which warrant restrictions on liberty in the individual case, and which are determined to be necessary, reasonable in all the circumstances and proportionate to a legitimate purpose. Even if such circumstances are considered to exist in individual cases, asylum-seekers are entitled to periodic review of their detention decision, and any extensions, and the right to challenge that detention in a court of law.

### **Conditions of detention: UNHCR's observations**

63. During the mission UNHCR found the physical conditions of the Assessment Centre harsh. Asylum-seekers and service providers advised they found the hot and humid weather made the temporary accommodation very uncomfortable. Due to recent heavy rain, some areas were extremely muddy and in some places there were large amounts of standing water.
64. UNHCR's examination of the site and its accommodation, and discussion with service providers, suggests that it would be extremely crowded if the current facility ever accommodated the envisaged capacity of 500 people.

### **Family Compound**

65. The Family Compound houses asylum-seekers in 'dongas', similar to shipping containers, which are around three metres by three metres. Each of these is home to either a couple (two persons) or a couple with a child/minor relative (three persons). The dongas in which three persons were housed contain one camp bed and one pair of bunk beds, with limited space to store belongings.
66. Many of the dongas did not have doors or blinds for the windows (both of which were covered only with see-through mesh). This lack of privacy was a major concern for many asylum-seekers, particularly for the parents of girls who were worried that people walking past could see into the dongas.
67. Each donga contained a fan (no air-conditioning), and the way this accommodation heated up during the day, and stayed warm during the night, was one of the key concerns of the asylum-seekers that UNHCR spoke with. Some reported that they were forced to sleep outside (under a roofed 'breezeway' between the rows of dongas with a cement floor) to escape the heat.
68. Concerns were raised that the single adult males who were protesting were being housed in a compound that was separated from the family compound only by a (covered) wire fence. Several parents reported that their children could hear threats from some single adult males of self-harm, angry voices and discussions, and the general noise from the neighbouring compound. This is

reported to have caused distress among some children and families, as well as some children being unable to sleep at night and finding it difficult to concentrate on their studies during the day.

69. There are two blocks of sanitary (toilet and shower) facilities in the family compound. One block contains separate facilities for men and women, while one is unisex.

#### Single Adult Male Compound

70. UNHCR was not permitted, for operational and security reasons, to access the area where those asylum-seekers protesting their arrival in Manus Island are being housed, but was informed that the accommodation is in the form of the same tents described at point 73, below.
71. UNHCR was also unable to speak with or receive any correspondence from those asylum-seekers housed in this area.

#### 'Temporary' Single Adult Male Compound

72. Because the group of 25 asylum-seekers protesting their entry into the Centre are being held in the regular single adult male compound, the remainder of the single adult males are living temporarily in a compound on the oval (which was previously used for recreational activities). On the morning UNHCR visited this temporary compound it was extremely wet and muddy from heavy rain the previous evening. The 66 men are living here in a mixture of tents and marquees.
73. There were six four metre by four metre canvas tents in each of which five men were living. Each tent contained five camp beds and fans. Despite the rainy and overcast conditions these tents were hot during UNHCR's visit and were reported to be 'unbearably hot' on the warmest days. The tents had raised floors which, while muddy at the entrances, appeared to be adequate in keeping the floor dry.
74. In one large marquee there were 27 camp beds (with mosquito nets), eight large fans, and a number of boxes/chests for storage. It was later observed that educational activities were being conducted in this marquee.
75. There was one smaller marquee which had neither a floor nor full sides, meaning the 13 men living there were sleeping with an extremely muddy and wet floor, and had no effective way of keeping mosquitos out. There were no lights in this marquee, and the roof was leaking. The physical living conditions for the 13 men in this smaller marquee were deplorable and, in UNHCR's assessment, required urgent remedial attention. These conditions did not meet the standard of Accommodation Arrangements specified in the Statement of Arrangements.
76. For the 66 single men living in this compound, there was only a single toilet (though it was expected that one more would be made available soon). The men held here accessed the dining room in the family compound for meals via a race/walkway connecting the two compounds.

77. UNHCR took the view that, as a matter of urgency, this temporary arrangement (within an already temporary facility) needed to be concluded as quickly as possible and that the men living there should be provided with decent accommodation that does not expose them consistently to mud, water and heat.
78. UNHCR understands that following the conclusion of the protest, the asylum-seekers living in these temporary conditions have been moved back to the regular single adult male compound and the inadequate facilities, particularly the marquees, are no longer in use.
79. Notwithstanding, UNHCR assessed that overall the living conditions at the Centre and the legal basis on which transferees' residence at the Centre is enforced fall short of the standards outlined by the High Commissioner in his letter of 9 October 2012 with respect to humane reception conditions, including protection against arbitrary detention (see paragraph 17).

**Recommendations: Reception of Asylum-Seekers**

- F. The current policy and operational approach of mandatory, indefinite and arbitrary detention should be addressed as a matter of urgency.**
- G. The Manus Island Assessment Centre should be made an open centre, with freedom of movement in line with international law, unless there are compelling circumstances which warrant restrictions on liberty in the individual case, and which are determined to be necessary, reasonable in all the circumstances and proportionate to a legitimate purpose.**
- H. In the meantime, the opportunity for excursions and visits outside the centre for those who have cleared the quarantine period and pose no individualised risk to the security and health of the community should be expanded.**
- I. All operational aspects of the Assessment Centre should be based on a clear legal basis and subject to effective independent and periodic review.**
- J. Immediate steps should be taken to ensure that all asylum-seekers at the Assessment Centre are being provided with dignified and humane reception conditions, including special considerations for children.**

***III. Children***

80. At the time of UNHCR's visit, there were 34 children housed at the Centre, aged between seven and 17 years. Educational and child welfare services are provided by Save the Children Australia, which has 13 staff at the Centre.
81. There are two classes (junior and senior) for school children and the formal education programme is coupled with a recreation programme. The Australian English as a Second Language (ESL) curriculum is taught. The building where classes are delivered does not have air-conditioning, doors or shutters for the

windows. UNHCR understands that these have been approved but not yet delivered.

82. At the time of UNHCR's visit, some of the parents were not sending their children to classes as a form of protest against conditions at the Centre.
83. Due to the continued quarantine restrictions, plans for children to attend the local school have not progressed, but it is understood that the local schools are receptive to the suggestion.
84. Asylum-seekers and service providers expressed concerns to UNHCR that the on-going restrictions on freedom of movement may have a long-term impact on the psychosocial health and development of the children. Some service providers report that children are showing signs of the trauma of both their boat journey to Australia and the on-going detention on Manus Island, as well as the worries and stresses being expressed by their parents 'rubbing off' on them and causing additional anxiety in the children.
85. In the family compound there is limited space for play, with children observed playing cricket on the footpath/road down the centre of the compound. The ground on an open area with a volleyball net was observed to be muddy and with rocks and sticks protruding.
86. As described above, there are concerns that children, particularly young girls, do not have adequate privacy in the dongas with no doors.
87. In UNHCR's assessment, the lack of legal framework, in a mandatory and arbitrary detention setting, and the lack of progress in establishing any procedure to assess the refugee protection needs of children, is deeply troubling.
88. UNHCR is of the view that the provision of the 1989 Convention on the Rights of the Child (to which Australia and PNG are both parties) must be given full effect, notably:

*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.* (Art 3 (1))
89. Whilst service providers are doing their best to ameliorate the consequences for children detained, including through limited excursions and controlled outings, the underlying legal, policy and operational responses to the treatment of transferred children and their families, is deficient in many fundamental ways, when assessed against UNHCR's Detention Guidelines 2012 and the CRC.
90. In addition to the general principles outlined for asylum-seekers in UNHCR's Detention Guidelines and international law more generally, the CRC requires States Parties to ensure that the detention of asylum-seeking children be used only as a measure of last resort and for the shortest appropriate period of time.<sup>16</sup> A child's best interest is a primary consideration,<sup>17</sup> while an ethic of care

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16 Article 37, CRC; *ibid.* [51].

17 UNHCR Detention Guidelines, Guideline 9.2 on Children [51].

– not enforcement – needs to govern interactions with asylum-seeking children.<sup>18</sup>

91. When viewed against the applicable international legal standards, it is clear that the current situation for detained children is profoundly unsatisfactory and UNHCR is therefore of the view that it is not currently appropriate for children to be transferred to Manus Island.
92. For those children already transferred to Manus Island, steps should be taken to accommodate them completely separately to any single men who are in or close to the Centre and, at a minimum, the family compound should be transitioned to a genuinely 'open' centre without further delay.

#### **Recommendations: Children**

- K. Children and their families, who have completed preliminary quarantine health checks should be moved to a child-appropriate and open centre environment. The current policy and practice of detaining children should be terminated as a matter of priority.**
- L. The refugee claims of children and other vulnerable groups should be prioritised for refugee assessments and these should be carried out, without delay, by suitably qualified officials who are also able to conduct 'best interest' determinations.**
- M. Until such time as all the appropriate legal and administrative safeguards are in place for both the reception and processing of children, UNHCR recommends that no more children should be transferred to Manus Island.**
- N. PNG should develop specific legal measures and administrative guidance to ensure that children are treated in full respect of their rights under the Convention on the Rights of the Child including, in particular, measures to ensure children are not detained save in exceptional circumstances where health and security issues relating to an individual child so require it.**
- O. Given the special vulnerability of children, including to the traumatic effects of detention and the asylum experience, their safety and security needs to be assured, including ensuring that they are accommodated completely separately to any single men who are in or close to the Centre.**

#### ***IV. Mental and Physical Health***

93. Health services are provided by IHMS, which presently has two doctors, two psychologists, one counsellor, and a range of nursing and support staff. IHMS operates from a clinic located just outside the main compound housing asylum-seekers, and IHMS staff do not, as a general rule, enter the compound.

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<sup>18</sup> Ibid, [52].

94. Asylum-seekers who need a medical appointment are able to receive one within 72 hours (including time taken to translate request forms), and some asylum-seekers have raised concerns that this is an unreasonable length of time to wait. IHMS advised that it triages more serious cases earlier. The usual process is that, once an appointment time has been confirmed, asylum-seekers are advised of the time on the morning of the appointment.
95. A large number of asylum-seekers who spoke to UNHCR expressed concern about the amount of time they had to wait for an appointment, and other disputes regarding appropriate treatment. Due to restrictions on freedom of movement, asylum-seekers need to be transported from their compound to the clinic by G4S, and some asylum-seekers raised concerns that they are unable to directly approach the clinic when health issues arise. Some complained that 'to get a Panadol for a headache' you had to make a request and wait up to three days (by which time the headache was gone).
96. UNHCR considers it desirable for the clinic to be more centrally located, and consultation procedures simplified, so as to allow more direct and immediate access for asylum-seekers.
97. The clinic has an emergency/resuscitation room, a dispensary and several consulting rooms. There are also four consulting rooms which are used also as wards for those patients who may need to stay overnight. According to IHMS, the facilities (while they could be improved with more space and a purpose-built building) are adequate for primary healthcare (including basic pathology, ultrasound, etc.), basic life-support and stabilization in emergencies. Contingencies are in place for medical evacuations to Port Moresby or Cairns should they be necessary. There are also dental, x-ray and pathology facilities available at the local hospital, but UNHCR was advised that asylum-seekers were not able to access these facilities at present due to restrictions on their freedom of movement. Medications (including malarial) are dispensed by nurses in each compound at three set times each day (morning, lunchtime and evening). There is also an IHMS ambulance on site.
98. According to IHMS, until the protests among single adult males which started on 12 January, there were no significant incidents of self-harm or other major symptoms of mental health problems. However, it is reported by both asylum-seekers and service providers that a hunger strike and other incidents of self-harm have occurred since that time. Community tensions arising from the arrival of single adult males and subsequent protest actions have also resulted in some incidents escalating to the point where asylum-seekers and staff have been involved in scuffles. There was also an incident in December 2012 in which a fight broke out between two community groups, which UNHCR understands is now under investigation by the PNG police.
99. One of the key concerns among almost all asylum-seekers that UNHCR met with was regarding the perceived unfairness and arbitrariness by which they were chosen for transfer to Manus Island while others, often from the same boat, have remained in Australia and even been released into the community on Bridging Visas.
100. The combination of poor conditions of detention, and uncertainty and duration of processing timelines, were reported by some service providers to be raising tensions within and among the asylum-seekers at the Centre.

101. UNHCR is of the view that providing more information and clarity about processing, as well as an early commencement of processing without further delay will contribute to reducing the risk of harm, including self-harm, to asylum-seekers.

**Recommendations: Mental and Physical Health**

**P. Australia and PNG should give further consideration to the adequacy of services on Manus Island to respond effectively to the psychosocial and physical health needs of asylum-seekers, some of whom may be survivors of torture and trauma and/or vulnerable due to their age.**

**Q. Australia and PNG should develop specific administrative guidance to ensure that vulnerable individuals are quickly identified and appropriate support provided to them by qualified service providers.**

**V. Other issues**

**Meaningful activities**

102. In line with UNHCR's Detention Guidelines and international human rights standards, asylum-seekers in detention should have the opportunity to conduct physical exercise through indoor or outdoor recreational activities, to have access to reading materials and information, and to participate in other meaningful activities.<sup>19</sup>

103. Asylum-seekers have access to English classes, limited exercise equipment, and internet facilities. A shipment of books is still being awaited so that a library can be established.

104. The Salvation Army has a number of community-generated ideas for activities that could be conducted outside of the Centre, but at present asylum-seekers have no access due to restrictions on their freedom of movement. The Salvation Army also has information on the range of skills, education and interests of the asylum-seekers that could usefully be employed in the broader Manus Island community if and when asylum-seekers are granted freedom of movement.

105. In the meantime, asylum-seekers reported frustration at the limited meaningful activities available to them.

**Recommendations: Meaningful Activities**

**R. Australia and PNG should ensure that asylum-seekers have access to a range of meaningful activities.**

<sup>19</sup> UNHCR Detention Guidelines [48].

### Oversight and monitoring

106. UNHCR understands that the Joint Advisory Committee, which is envisaged under the arrangement between Australia and PNG, has not yet been established, and UNHCR was unable to ascertain when this might occur.
107. UNHCR considers that any detention should be subject to independent monitoring and inspection.<sup>20</sup> As far as UNHCR is aware, no other monitoring organizations have as yet visited the Centre, and UNHCR encourages the Government of PNG to ensure as much openness and transparency as possible. This is particularly important so that asylum-seekers at the Centre can have some reassurances that they have not been 'forgotten' (a concern heard several times by UNHCR) and that there are independent organizations monitoring their well-being and progress.
108. A consistent theme in UNHCR's discussions with asylum-seekers held at Manus Island was distress with the process in which they were transferred from Australia. Many reported that they were given very little notice that they were to be transferred and very little information on what would await them at Manus Island.
109. While UNHCR is not in a position to assess the veracity of these reports and allegations, it would recommend that an appropriate independent complaints procedure be instituted to ensure complaints and concerns can be addressed fairly and effectively.
110. With respect to individual complaints about services at the Centre, UNHCR discussed with the Salvation Army the processes being used to collect, assess, and respond to complaints. UNHCR has been advised that complaints regarding physical aspects of the Centre (food, medical treatment etc) are able to be responded to individually and within a reasonable timeframe. However, UNHCR remains concerned that those asylum-seekers who raise questions about their asylum claims are unable to receive any adequate information.

### **Recommendations: Oversight and Monitoring**

- S. Australia and PNG should ensure that appropriate independent oversight bodies are able to access asylum-seekers at the Manus Island facility.**
- T. A complaints procedure should be established to allow concerns raised by asylum-seekers about their situation and treatment, pre-transfer and post-transfer, to be properly investigated.**

### Pre-transfer assessments

111. While outside the scope of the visit to Manus Island, UNHCR is of the view that pre-transfer assessments are an integral part of the suite of measures

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<sup>20</sup> UNHCR, Detention Guidelines, 2012, Guideline 10.

encompassing the transfer arrangements, as outlined by the High Commissioner in his letter of 9 October 2012 (see paragraph 17 above).

112. UNHCR has reviewed a sample of Pre-Transfer Assessments of asylum-seekers transferred from Australia to PNG and Nauru. In the case of children, a Best Interest Assessment (BIA) is also undertaken by Australian officials as part of the pre-transfer assessment.
113. While appreciating that these pre-transfer assessments are not the sole basis for selection or identification of potential transferees, UNHCR is concerned by a number of aspects of the pre-transfer assessment process.
114. The primary concerns relate to the pro-forma template which appears to restrict the scope of questioning and limit the assessment to a record of comments rather than any analysis of needs. The sample reveals that the Assessment Forms do not contain any substantive analysis of the physical and mental characteristics (physical or mental health of the persons, special needs identified, fitness to travel, and other vulnerabilities) nor do they match the actual resources, capacities and facilities currently available in the Assessment Centre.
115. In the case of children, UNHCR considers a BIA should result in an individualized assessment of the situation of the child and include recommendations on protection and care interventions.<sup>21</sup>
116. In view of UNHCR's findings in this Report, including that the legal framework and detention environment at the Centre on Manus Island fall short of international standards of protection, it is difficult to see how the 'best interests' of transferee children could have been appropriately weighed, and led to a conclusion that adequate and appropriate levels of care and support are currently available on the island.

#### **Recommendations: Pre Transfer Assessments**

- U. Pre-transfer assessments conducted in Australia should fully take into account the individualised needs of vulnerable individuals, including children, the elderly, survivors of torture or trauma, disabled persons and persons with specific health needs.**
- V. 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.**

## **VII Conclusion**

117. Assessed as a whole, UNHCR is of the view that the facilities on Manus Island lack some of the basic conditions and standards required. In particular, the closed detention setting and lack of freedom of movement, along with the

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<sup>21</sup> UNHCR, Field Handbook for the Implementation of UNHCR BID Guidelines (November 2011), 7.

absence of an appropriate legal framework and capacitated system to assess refugee claims, are particularly concerning.

118. In view of the significant shortcomings identified in relation to people already transferred to Manus Island, UNHCR is of the view that the recommendations of this Report be reviewed carefully before any further transfers take place to Manus Island.

**Recommendations: Conclusion**

**W. In view of their shared and mutual obligations to transferees under the MOU and under international law, including the Refugee Convention, UNHCR recommends that the Governments of Australia and PNG review the recommendations in this Report with regard to persons already transferred to Manus Island and also in relation to any future transferees.**

UNHCR Regional Representation  
Canberra, 4 February 2013