NATIONS UNIES
LE HAUT COMMISSAIRE
POUR LES RÉFUGIÉS

UNITED NATIONS
THE HIGH COMMISSIONER
FOR REFUGEES

Case postale 2500
1211 Genève 2
Suisse

9 October 2012

Sir,

I have the honour to thank you for your recent letter of September 2012, seeking UNHCR's views on the proposed designation of Papua New Guinea as a 'regional processing country,' pursuant to section 198AB of the Migration Act 1958. You have also asked for consideration of what role UNHCR might play in Australia's proposed processing arrangements in that country.

UNHCR's views are based on the information available to us at this time and I recognize that many of the important practical aspects of the arrangements, which are under active discussion between the Governments of Australia and Papua New Guinea, have yet to be finalized. For that reason, UNHCR's observations are necessarily general and subject to review as the operational arrangements become clearer.

First, as a general principle, I wish to recall UNHCR's earlier advice of 5 September 2012, in relation to a comparable designation of the Republic of Nauru, that asylum-seekers arriving at the frontier of a Convention State fall within the responsibility of that State. This responsibility includes, ordinarily, their access to a fair and effective process to determine their need for protection under the Refugee Convention and related human rights instruments.

This general practice is elaborated in more detail in the policy paper, to which you specifically refer in your letter, concerning maritime interception and the processing of international protection claims. Importantly, the paper also notes that *"claims for international protection made by intercepted persons are, in principle, to be processed in procedures within the territory of the intercepting State."*

As a significant exception to this normal practice, arrangements to transfer asylum-seekers to another country should normally only be pursued "as part of a burden-sharing arrangement to more fairly distribute responsibilities and enhance available protection space," and when the appropriate protection safeguards are in place in the countries involved.

Indeed, it has long been UNHCR's view that cooperative approaches in the region, which build and complement effective national asylum procedures and promote responsibility-sharing, can help asylum-seekers and refugees find viable protection options other than through dangerous and exploitative boat journeys. We believe that measures which enhance the quality of protection and improve the availability of solutions for refugees in South-East Asia will serve to expand the 'asylum space' for refugees in those places and reduce the need for onward movements by sea towards Australia, with all the dangers this entails.

The Hon. Chris Bowen MP
Minister for Immigration and Citizenship of Australia

When it comes to protection safeguards, any arrangements should include the following:

- respect for the principle of *non-refoulement;*
- the right to asylum (involving a fair 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.

Against the above background, it is not clear from the information available to us that the transfer of asylum-seekers to Papua New Guinea, including the crucial element of legal responsibility, is fully appropriate. While UNHCR welcomes steps taken by the Government of Papua New Guinea to improve the overall quality of refugee protection, a number of very significant challenges still need to be overcome before it could be concluded, with any confidence, that a full transfer of legal responsibility from Australia to Papua Guinea could take place in practice and that this would be appropriate.

It is UNHCR's assessment that, in the current protection environment, there are several crucial challenges. First of all, with regard to commitments under international law, Papua New Guinea has acceded to the 1951 Refugee Convention in 1986 but retains seven significant reservations that affect a range of social, economic and political rights to which refugees would ordinarily be entitled under the Convention. While UNHCR welcomes pledges made by the Government of Papua New Guinea to withdraw these reservations, they remain extant at the time of writing. Papua New Guinea is party to the Convention on the Rights of the Child (30 September 1990), the Convention on the Elimination of Discrimination against Women (12 January 1995), the Convention on the Elimination of Racial Discrimination (30 March 1995), the International Covenant on Civil and Political Rights (21 July 2008) and the International Covenant on Economic Social and Cultural Rights (21 July 2008), but is not party to the UN Convention against Torture or either of the two Statelessness Conventions. Each of these Conventions is relevant to the protection of refugees and stateless people in Papua New Guinea.

Second, in considering Papua New Guinea's legal framework at the domestic level, there is, at present, no effective national legal or regulatory framework to address refugee issues. Importantly, there are currently no laws or procedures in place in the country for the determination of refugee status under the Refugee Convention.

Third, there are a number of gaps in Papua New Guinea's capacity to implement international obligations. There are currently no immigration officers with the experience, skill or expertise to undertake refugee status determination under the Refugee Convention. Since 2008, in the absence of any national capacity in this regard, UNHCR has been obliged to exercise its mandate to determine asylum-seekers' need for protection and to find solutions through resettlement. We recognize that efforts are presently being made to identify and train a small cadre of officers in asylum and refugee issues. Over time, capacity will improve but, depending on the scale and complexity of the task of processing cases and protecting refugees under the bilateral arrangements, it will likely remain insufficient for an important period of time.

Fourth, the risk of *refoulement* persists in spite of written undertakings. Papua New Guinea has land and sea borders that are extensive, porous and often unregulated. The level of training and understanding by border officials (who are usually not immigration officers) of asylum and of Papua New Guinea's protection responsibilities is, at best, limited. In the past six years a number of attempted expulsions, particularly on the northern border with Indonesia, have been brought to the attention of UNHCR and the Office managed to prevent them.

Finally, the quality of protection for asylum-seekers and refugees remains of concern. At present, Papua New Guinea does not provide any resources for the care, maintenance, support or protection of non-Melanesian asylum-seekers and refugees. Regularization of legal status for both Melanesian and non-Melanesian refugees is extremely limited, and there are very limited opportunities for sustainable local integration for refugees from outside the region. UNHCR (in cooperation with the International Organization for Migration) provides basic care and maintenance for these populations and is obliged to find resettlement for the majority of non-Melanesian refugees. The level of human insecurity and extremely high cost of living in Port Moresby (where most of the populations reside) make life very difficult for asylum-seekers and refugees and render local integration almost impossible.

From the language of the Memorandum of Understanding, which was attached to your letter, it seems that the common intention is that "all persons entering Papua New Guinea ... will depart within as short a time as is reasonably necessary," that "transferees will be treated with dignity and respect and that relevant human rights standards are met," and that there will be "oversight of practical arrangements required to implement this MOU."

These are welcome acknowledgements, which go some way to addressing the issue of protection safeguards as identified above. They would indicate that both Australia and Papua New Guinea have shared and joint legal responsibility for the protection of refugees identified for processing.

However, from the information available to UNHCR at this time, it is not clear how this responsibility will be apportioned between the two contracting States. This is important because all operational and ancillary details will be predicated necessarily on how the question of legal responsibility is framed.

In UNHCR's view, it would be prudent for the legal responsibilities of both the transferring and receiving States to be very clearly and unambiguously set out in the formal arrangements, and that oversight mechanisms exist to ensure their full implementation in practice.

This said, we also note the indications received from your officials to the effect that Australia does not see itself as having any legal responsibilities after transfer to Papua New Guinea. In light of these various considerations, and barring receipt of information to the contrary, it is difficult to see how Papua New Guinea alone might meet the conditions set out in UNHCR's paper on maritime interception and the processing of international protection claims.

For the reasons set out above, it is UNHCR's assessment that Papua New Guinea does not have the legal safeguards nor the competence or capacity to shoulder alone the responsibility of protecting and processing asylum-seekers transferred by Australia. At best, we would see the transfers as a shared and joint legal responsibility under the Refugee Convention and other applicable human rights instruments.
As with the situation in Nauru, we also anticipate particular challenges in finding timely solutions for refugees. We do not underestimate the challenges involved in caring for people transferred to Manus Island and in conducting refugee status determination, nor the difficulty of preserving the psychosocial and physical health of those remaining on Manus Island for any prolonged period.

In this regard, the "no-advantage" test endorsed by your Government contemplates a time frame that is assessed against and consistent with the period a refugee might face had s/he been assessed "by UNHCR within the regional processing arrangement." The practical implications are not fully clear to us. The time it takes for resettlement referrals by UNHCR in South-East Asia or elsewhere may not be a suitable comparator for the period that a Convention State, whose protection obligations are engaged, would need. Moreover it will be difficult to identify such a period with any accuracy, given there is no "average" time for resettlement. UNHCR seeks to resettle on the basis of need and specific categories of vulnerability, not on the basis of a "time-spent" formulation. Finally, the "no advantage" test appears to be based on the longer term aspiration that there are, in fact, regional processing arrangements in place. We share this aspiration. However, for the moment, such regional arrangements are very much at their early conceptualization. In this regard, UNHCR would be concerned about any negative impact on recognized refugees who might be required to wait for long periods of time in remote island locations.

In response to your request for consideration of what role UNHCR might play in the proposed arrangements, I am conscious that a number of important questions still need to be clarified which would inform the degree to which my Office might be involved.

Our continuing view is that the arrangements being contemplated are essentially between two Convention States and that UNHCR would not have any operational or active role to play in their implementation.

However, as we have already indicated in relation to Nauru, UNHCR has a statutory role under Article 35 of the 1951 Refugee Convention which requires the Office to supervise implementation of the Refugee Convention by States parties. This role is adaptive to the context of particular situations. When the structural, operational and procedural details are clarified, we would be pleased to discuss how, in the specific context of the current arrangements, this can be most usefully employed.

Finally, allow me to reiterate my appreciation for the opportunity to provide this advice in relation to the possible designation of Papua New Guinea under section 198AB of the Migration Act 1958. My Office remains at your disposal to discuss any of these matters in greater detail. I look forward to continuation of our ongoing positive and very fruitful cooperation on refugee protection, both in the region and globally.

Please accept, Sir, the assurances of my highest consideration.

with the very warmest personal regards

António Guterres