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HIGH COMMISSIONER FOR HUMAN RIGHTS

SPECIAL PROCEDURES OF THE
HUMAN RIGHTS COUNCIL

Mandates of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Working Group on the use of mercenaries; and the Special Rapporteur on the human rights of migrants.

REFERENCE: AL G/SO 218/2 Health (2002-7) G/SO 214 (106-10) G/SO 214 (33-27) G/SO 214 (53-24) G/SO 214 (2005-4)
PNG 2/2014

27 March 2014

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Rapporteur on extrajudicial, summary or arbitrary executions; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; Chair of the Working Group on the use of mercenaries; and Special Rapporteur on the human rights of migrants pursuant to Human Rights Council resolutions 24/6, 17/5, 16/23, 24/13, and 17/12.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the **circumstances and conditions of detention of asylum seekers at the Manus Island Regional Processing Centre and the recent violence that erupted in Manus Island.**

According to the information received:

The Manus Island Regional Processing Centre is a closed immigration detention centre which was set up on Manus Island in Papua New Guinea (PNG). The Regional Resettlement Agreement adopted in 2013 by Australia and PNG requires that asylum seekers travelling to Australia by boat are sent to the immigration detention centre on Manus Island for further processing of their status. It is alleged that these asylum seekers are mandatorily detained for a prolonged and potentially indefinite period without an individual assessment mechanism to determine whether the detention is necessary, reasonable or proportional and without the possibility of review of the assessment before a judicial or independent authority. It is also reported that there is lack of access to legal assistance in this regard. It is reported that there are approximately 1330 men currently detained at the Centre.

We note that although children and families are no longer transferred to the Regional Processing Centre of Manus Island, it is reported that this is set to recommence in the first half of 2014. We have also received information that there might still be unaccompanied children present in the immigration detention centre.

Reportedly, detention conditions at the Regional Processing Centre of Manus Island are inadequate, including poor living conditions, inadequate access to healthcare, insufficient drinking water, and lack of attention to the particular circumstances of persons with special needs. Other major concerns include the cramped living conditions, the lack of privacy, the extreme heat and the risk of malaria. The impact of such conditions on the physical and mental health of the detained migrants and asylum seekers is extremely alarming. Many asylum seekers held in Manus Island expressed concern to the Office of the United Nations High Commissioner for Refugees (UNHCR) about the deterioration of their physical and mental health, the limited medical services available, respiratory problems exacerbated by the hot and humid conditions and the time for accessing medical treatment.

The Regional Resettlement Agreement states that for at least the next 12 months, asylum-seekers arriving by boat to Australia will be transferred “to PNG for processing and resettlement in PNG and in any other participating regional, including Pacific Island, States”¹, thereby ensuring that the asylum seekers never settle in Australia. The Regional Resettlement Agreement further states that those “persons found not to be refugees may be held in detention or returned to their home country or a country where they had right of residence”².

It is reported that the security within the perimeter of the Centre is ensured by unarmed agents of the private security firm G4S, which was contracted for these purposes by the Government of Australia. The Police of PNG is reportedly in charge of providing security outside the perimeter of the Centre.

At the end of January 2014, asylum seekers detained at the Manus Island Regional Processing Centre allegedly started peaceful protests. Reportedly, the protests were related to a lack of information about the lack of progress in processing the asylum-seekers’ claims and the conditions of their detention. Allegedly, the situation turned violent during the days of 16 to 18 February 2014, after a meeting in which the asylum seekers were informed that they had no chance of being resettled in Australia.

From the evening of the 17 February 2014 to 18 February 2014, the violence intensified and resulted in the death of one asylum seeker and at least 53 wounded persons. While some reports indicate internal fighting among the asylum seekers

¹ <http://www.dfat.gov.au/geo/png/regional-resettlement-arrangement-20130719.pdf>, para 3

² Ibid at para 5

as the reason for the escalation of violence, other reports state that altercations began when the asylum seekers began taunting the PNG police and G4S security guards. The G4S security guards allegedly responded with excessive use of force using bats and machetes and when violence escalated further, it is alleged that the PNG Police responded with gunfire. It is further alleged that the PNG Police was heavily armed with M16A2 firearms. There are different accounts about the number of firearm shots operated, varying from reports of four or five warning shots to 12 unexplained shots. Some detainees were allegedly confined in another part of the detention facility as a result of this altercation.

On 18 February 2014, several asylum seekers demanded that the detainees who were locked up by the PNG police the night before, be released. Reportedly, the internal and external fences of the Regional Processing Centre were pushed down during the night of 18 February 2014, by individuals yet to be identified. Allegedly, the PNG Defence Force and local residents of Manus Island might have also been involved in the violence that occurred that night.

Reportedly, Mr. **Reza Berati**, a 23 year old Iranian asylum seeker died in yet unclear circumstances and five asylum seekers at the facility were airlifted for medical treatment. According to reports, a post-mortem examination conducted in PNG by the Police of PNG, with the support of the Australian Government; indicate that Mr. Berati's death was caused by heavy attacks on his head, while ruling out the possibility of a firearm wound. Reportedly, a criminal investigation is being conducted by the PNG Police, with support from the Government of Australia. The Australian authorities in charge of immigration are allegedly also conducting an internal investigation.

While the unrest has calmed down, the PNG police and G4S security guards who were involved in the violent protests continue to provide security services at the Regional Processing Centre. Reportedly the detainees continue to protest, there have been some attempted suicides and tensions among detainees remain high, given that the root issues of their situation and protests have reportedly not yet been addressed.

In light of all the above, and while acknowledging the fact that investigations are currently ongoing, we are concerned with regard to the indefinite detention of asylum seekers, the detention conditions, the alleged detention of children, and the escalating violence and tension at the Regional Processing Centre. Given the facts, we have also transmitted a similar allegation letter to the Government of Australia.

Without implying any conclusion as to the facts of the case, we would like to reiterate what was stated in the report of the Special Rapporteur on the human rights of migrants as presented to the Human Rights Council in 2012, that detention for immigration purposes should never be mandatory or automatic. According to international human rights standards, it should be a measure of last resort, only

permissible for the shortest period of time and when no less restrictive measure is available.³

Furthermore the United Nations Human Rights Committee has found that detention in the course of proceedings for the control of immigration is not per se arbitrary but that the detention must be justified as “reasonable, necessary and proportionate in light of the circumstances, and reassessed as it extends in time.”⁴ Detaining migrants and asylum seekers who have entered unlawfully onto a State party’s territory for more than a “brief initial period” while their claims are being resolved is “arbitrary absent particular reasons specific to the individual, such as an individualized likelihood of absconding, danger of crimes against others, or risk of acts against national security.” The decision must “consider relevant factors case-by-case, and not be based on a mandatory rule for a broad category”.⁵ The Committee has for these reasons considered mandatory detention to be inherently arbitrary and therefore contrary to the International Covenant on Civil and Political Rights (ICCPR).

Allow us to recall that research on various alternatives to detention has found that over 90 per cent compliance or cooperation rates can be achieved when persons are placed in alternative to detention programmes.⁶ In addition, there is reportedly no empirical evidence that immigration detention deters irregular migration, or discourages people from seeking asylum. In fact, treating migrants and asylum-seekers with dignity and respect for their human rights throughout the asylum or immigration process contributes to constructive engagement in these processes.⁷ We would like to stress that alternatives to detention should not be used as alternative forms of *detention* and neither should alternatives to *detention* become alternatives to release. Alternative measures may also impact on the enjoyment of human rights and should therefore be in line with the principles of necessity, proportionality, legitimacy and other key human rights principles.⁸ Alternatives to detention include registration and/or deposit of documents, bond/bail, reporting conditions, community release and supervision, designated residence, electronic monitoring or home curfew.⁹

Of particular relevance in this regard is General Assembly resolution 65/212 of 21 December 2010 which reaffirms “the duty of States to effectively promote and protect the human rights and fundamental freedoms of all migrants, especially those of women and children, regardless of their immigration status”. The resolution calls upon all States to “review detention policies in order to avoid excessive detention of irregular migrants and to adopt, where applicable, alternative measures to detention” (para. 4). The same

³ A/HRC/20/24

⁴ CCPR/C/107/R.3, para 18

⁵ CCPR/C/107/R.3, para 18

⁶ <http://www.ohchr.org/Documents/Issues/Migration/Events/SummaryConclusions.pdf> . Please see: <http://www.ohchr.org/Documents/Issues/Migration/Events/SummaryConclusions.pdf>

⁷ Summary Conclusions of the UNHCR-OHCHR Global Roundtable on alternatives to detention of refugees, asylum seekers, migrants and stateless persons, 11-12 May 2011 (hereinafter “Summary Conclusions 2011”).

⁸ Summary Conclusions 2011, paras. 18, 19.

⁹ Ibid., para. 20.

resolution called upon Member States to address international migration through “international, regional or bilateral cooperation and dialogue and through a comprehensive and balanced approach, recognizing the roles and responsibilities of countries of origin, transit and destination in promoting and protecting the human rights of all migrants, and avoiding approaches that might aggravate their vulnerability”.

Additionally, PNG is a state party to the 1951 Refugee Convention and consequently must ensure that the treatment of all transferred asylum-seekers is fully compatible with its obligations under the 1951 Refugee Convention and other applicable international instruments which it has ratified.

We would like to recall the principle of non-refoulement in the Refugee Convention, by which PNG is bound, which bars States not only from returning asylum seekers to countries where they may be at risk of persecution but also to countries where there is a risk of “chain deportation” whereby asylum seekers are sent to third countries that predictably will not respect their rights but instead send them back to places of persecution.

According to international standards, an individual assessment mechanism is required in order to determine the necessity, proportionality and reasonableness of detention. A policy of mandatory detention leaves no or little consideration to the particular circumstances of each detainee’s case with full application of procedural safeguards applicable to persons deprived of their liberty.

An accurate and effective individual assessment mechanism would also prevent vulnerable groups such as children, particularly unaccompanied from being transferred to Manus Island. We wish to recall that as a matter of principle no migrant children should be subjected to detention.¹⁰ The consequences of detention on their mental and physical development are incalculable. As stated by the Committee on the Rights of the Child, no child should be detained based on their migratory status or irregular entry to the country (General Comment No. 6 on Treatment of Unaccompanied and Separated Children outside Their Country of Origin, CRC/GC/2005/6, para. 61). We also wish to recall that the Committee on the Rights of the Child stated in 2012 that “the detention of a child because of their or their parent’s migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child”¹¹.

In relation to the alleged violations committed by the G4S security guards, we refer to paragraph 18 of Human Rights Council resolution 24/13 which requested the Working Group on the use of mercenaries “to continue to monitor mercenaries and

¹⁰ Article 37 of the Convention on the Rights of the Child and Committee on the Rights of the Child, Committee on the Rights of the Child, General Comment No. 10 on children’s rights in juvenile justice; Commissioner for Human Rights, Position on the rights of minor migrants in an irregular situation. Strasbourg, 25 June 2010. CommDH/PositionPaper(2010)6, p. 5. See also Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons Geneva, Switzerland, 11-12 May 2011, para. 7.

¹¹<http://www2.ohchr.org/english/bodies/crc/docs/discussion2012/ReportDGDChildrenAndMigration2012.pdf>

mercenary-related activities in all their forms and manifestations, including private military and security companies, in different parts of the world...” In this context, we would like to refer to the foundational principles of the Guiding Principles on Business and Human Rights, adopted by the Human Rights Council in 2011, which sets out, *inter alia*, that States must protect against human rights abuse within their territory and/or jurisdiction by third parties including business enterprises. Furthermore, business enterprises should respect human rights, a responsibility that applies to all enterprises regardless of their size, sector, operational context, ownership and structure. States must also take appropriate steps to ensure through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction, those affected have access to effective remedy.

With regard to allegations of inadequate access to health care, we wish to refer your Excellency’s Government to article 12 of the International Covenant on Economic, Social and Cultural Rights, which your country acceded to on 21 July 2008 and which specifically provides for the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. This includes an obligation on the part of all States parties to ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially the most vulnerable or marginalized sections of the population, without discrimination. In addition, we wish to refer your Government to General Comment No. 14 of the Committee on Economic, Social and Cultural Rights, which provides that, “States are under the obligation to respect the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services...” (para.34).

We wish to recall the 2013 report of the Special Rapporteur on the right to health (A/HRC/23/41), which states in paragraph that long periods of detention and poor living conditions in detention centres facilitate the transmission of communicable diseases and can have a devastating effect on the mental health of migrant workers. In the same paragraph, the report points out that, where States persist with immigration detention, they should, at the minimum, provide detainees with adequate living conditions, consensual medical check-ups and make quality and confidential physical and mental health facilities available and accessible in a timely manner.

With regard to the conditions of detention, we would like to draw the attention of your Excellency’s Government to the Standard Minimum Rules for the Treatment of Prisoners (adopted by the Economic and Social Council by resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977). Rule 22(2) provides that, “(s)ick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers. Furthermore, Rule 25(1) provides that, “(t)he medical officer shall have the care of the physical and mental health of the prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed”.

We would also like to draw your attention to the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment adopted by the General Assembly on 9 December 1988 (adopted by General Assembly resolution 43/173 of 9 December 1988).

Furthermore, we would like to stress that Your Excellency's Government has the obligation to protect the right to life, physical and mental integrity of all persons. This right is set forth inter alia in the UDHR, the ICCPR, acceded to by Papua New Guinea on 21 July 2008, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Under article 6(1) of the ICCPR, the Government of Papua New Guinea has the obligation to protect every individual's right to life and to ensure that no individual on its territory or subject to its jurisdiction is arbitrarily deprived of his or her life. Such protection should apply to all individuals without discrimination on any grounds whatsoever in accordance with article 2(1) of the ICCPR.

The use of force, including of lethal force, is strictly regulated under international human rights law. In this regard, we would like to draw your Excellency's Government's attention to Principle 4 of the UN Basic Principles on the Use of Force and Firearms by Law Officials, which provides that, "Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms." Furthermore, Principle 5 provides that, "Whenever the use of force and firearms is unavoidable law enforcement officials shall, (a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate object to be achieved; (b) Minimize damage and injury, and respect and preserve human life; (c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment and (d) Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment." (Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990). Principle 14 further states that "in the dispersal of violent assemblies, law enforcement officials may use firearms only when less dangerous means are not practicable and only to the minimum extent necessary." The principle of necessity under international human rights law is interpreted to mean that lethal force may be used as a last resort, with the sole objective of saving life. This applies also to the context of violent assemblies.

We would like to further draw the attention of your Excellency's Government to the duty to investigate, prosecute and punish all violations of the right to life by any State or non-State actor, in line with the Principles on Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (adopted by the Economic and Social Council resolution 1989/65). In particular, principle 9 provides that "[t]here shall be thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death in the above circumstances". Principle 18 further requires Governments to "ensure that persons identified by the investigation as having

participated in extra-legal, arbitrary or summary executions in any territory under their jurisdiction are brought to justice.” We wish to recall also that the families and dependents of victims of extra-legal, arbitrary or summary executions shall be entitled to fair and adequate compensation within a reasonable period of time pursuant to principle 20.

Finally, as it is our responsibility under the mandate provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would greatly appreciate receiving additional details from your Excellency’s Government. We would in particular appreciate to receive information on the following points:

1. Please indicate if the information above is accurate.
2. Please explain how the detention system provides individual assessment mechanisms in order to determine the necessity, proportionality and reasonableness of the detention of persons in immigration detention. In particular please provide information on how review of the legality of detention is being made available for persons in immigration detention and how the domestic courts can order a person to be released from immigration detention on the grounds that this detention may be arbitrary.
3. Please explain all measures taken to avoid detaining migrant, asylum-seeking and refugee children under the responsibility of Papua New Guinea authorities, including through considering and implementing alternatives to detention – rather than alternative forms of detention or alternatives to release.
4. Please explain all measures taken, or intended to be taken, to ensure adequate protection safeguards for asylum seekers in line with Papua New Guinea’s obligation under international human rights and refugee law and standards, as well as to ensure that these safeguards are actually respected throughout implementation.
5. Please provide information on any investigations currently underway and whether any penal, disciplinary or administrative sanctions have been imposed on the alleged perpetrators? Have any remedies been provided to the alleged victims?
6. Concerning the MOU between Australia and Papua New Guinea, we would be grateful if your Excellency’s Government could keep us informed on the measures that may be taken to implement this agreement in conformity with international human rights law and safeguards to ensure protection of individual migrants, refugees and asylum-seekers.
7. Please keep us informed about the protests and violence that took place at the Manus Island Regional Processing Centre from 16 to 18 February 2014, including any investigations and prosecutions being carried out. Please also provide information on the role of the PNG police and G4S security guards in these violent acts, as well as of the PNG Defence Force and local residents.

8. Please keep us informed on the protection of asylum seekers who witnessed the violent incidents and who may be at risk of retaliatory attacks or threats and intimidation, particularly as the investigation into the incidents take place.

9. Please keep us informed on the medical treatment and care given to those who were injured as a result of the violence.

10. Please keep us informed as to whether an individual case assessment was carried out in each case, and whether those concerned were allowed to submit the reasons why he or she should not be deported, and to have the case reviewed by the competent authorities.

11. Additionally, we would appreciate receiving information on asylum seekers' access to legal assistance and the judicial review of decisions.

We would appreciate a response within sixty days. Your Excellency's Government's response will be made available in a report to the Human Rights Council for its consideration.

While waiting for your response, we urge your Excellency's Government to take all necessary measures to guarantee that the rights and freedoms of migrants and asylum seekers are respected and, in the event that your investigations support or suggest the above allegations to be correct, the accountability of any person responsible of the alleged violations should be ensured. We also call on your Excellency's Government adopt effective measures to prevent the recurrence of these acts.

Please accept, Excellency, the assurances of our highest consideration.

Anand Grover
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highest attainable standard of physical and mental health

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