

International Refugee Law

DEREK N. WHITE,* CHRISTI L. THORNTON, KRISTEN HUNSBERGER, ZOE MEIER,
AND ERICKA CURRAN

This article surveys selected developments in international refugee law during 2012.

I. UNHCR Issues New Guidelines on Detention of Asylum-Seekers**

In response to concern about the increasing number of countries detaining asylum seekers, the United Nations High Commissioner for Refugees (UNHCR) issued new guidelines to replace those issued in February 1999.¹ The stated purpose of the *Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention* (Guidelines) is to guide governments and other bodies, such as the judiciary, national human rights institutions, and non-governmental organizations (NGOs), that deal with matters related to detention and asylum.² In comparison to the 1999 Guidelines, the new 2012 Guidelines are more detailed in relation to the rights of asylum-seekers (including refugees and stateless persons), instances where detention is reasonable, and permissible alternatives to detention.³ The 2012 Guidelines also underscore the importance of adhering to human rights and refugee laws, particularly emphasizing humane and dignified treatment of asylum-seekers, refugees, and stateless persons.⁴

The Guidelines emphasize that though states have the right to “control the entry and stay of non-nationals on their territory,” states should implement measures to avoid detention of asylum-seekers.⁵ The Guidelines further emphasize that detention may be used only as a last resort and must adhere to tests of necessity and proportionality while pursu-

* Derek White served as the Committee Editor for this review of developments during 2012. He is Vice Chair of the ABA Section of International Law, International Refugee Law Committee, D. White Law, P.C., Denver, Colorado.

** Christi L. Thornton, an attorney in Washington, D.C., wrote this section.

1. *UNHCR Concerned at Detention of Asylum-Seekers, Releases New Guidelines*, UNHCR (Sept. 21, 2012), <http://www.unhcr.org/505c33199.html>.

2. See U.N. High Comm’r for Refugees, *Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012), at 3, available at <http://www.unhcr.org/refworld/docid/503489533b8.html> [hereinafter *2012 Guidelines*].

3. See U.N. High Comm’r for Refugees, *UNHCR’s Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers* (Feb. 26, 1999), <http://www.unhcr.org/refworld/docid/3c2b3f844.html>.

4. *2012 Guidelines*, *supra* note 2, ¶ 4, at 8.

5. *Id.* ¶ 1, at 6.

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ing a legitimate purpose for each individual case.⁶ Individual assessment is necessary to ensure respect for international refugee and human rights laws and standards.⁷ The Guidelines outline the three instances in which detention may be permissible on an individual basis and in adherence to international law, including protecting public order, public health, or national security.⁸ Any other purpose, even if entry was illegal, may be considered arbitrary.⁹

In light of the increased instances of irregular migration of refugees and migrants that often lead to a strain on asylum systems in many countries,¹⁰ the Guidelines offer alternatives to detention that meet international standards of humanity and dignity. The Guidelines stress the importance of alternatives being governed by laws and regulations to avoid arbitrariness, particularly in regards to freedom of movement and liberty.¹¹ The Guidelines suggest some alternatives to detention, as opposed to alternative forms of detention,¹² including deposit or surrender of documentation, reporting requirements, designated residence, community supervision, and provision of a guarantor/surety.¹³ Annex A of the new Guidelines, a new and useful addition from the 1999 Guidelines, further details each of the suggestions. The Guidelines state that these alternatives may be used in combination or individually and also indicates that the list is non-exhaustive.¹⁴

The Guidelines highlight the importance of ensuring dignity and upholding human rights standards by implementing the least intrusive measures on a case-by-case basis. The Guidelines also stress the importance of paying particular attention to more vulnerable groups, such as children, the elderly, pregnant women, persons with disabilities, and victims of torture or trauma.¹⁵ Furthermore, the Guidelines emphasize that states' compliance with international standards, including those covering detention centers, should be regulated by independent monitoring bodies.¹⁶ The essential theme of the Guidelines is to underline the fact that seeking asylum is not unlawful and that States should avoid detention of asylum-seekers while seeking to respect and uphold the rights to liberty and security, as well as the freedom of movement, as outlined in international human rights and refugee law. Further, the UNHCR states its willingness to assist States in devising and implementing the enumerated or other alternatives to detention.¹⁷

Though the 1999 Guidelines offered some guidance on the role of detention and alternatives as they included the same principles enumerated in the 2012 Guidelines, it was essentially an outline of the general principles of international law in relation to asylum-seekers as compared to the 2012 Guidelines. The new Guidelines offer detailed guidance and greatly expound on the proper treatment of asylum-seekers in adherence with international law. The UNHCR seeks to promote good practice and ensure that those dealing

6. *Id.* at 21.

7. *Id.* ¶ 34, at 21.

8. *See id.* ¶¶ 21-31, at 16-19.

9. *See id.* ¶ 32, at 19.

10. *UNHCR Concerned at Detention of Asylum-Seekers, supra* note 1.

11. 2012 Guidelines, *supra* note 2, ¶¶ 35-37, at 22.

12. *See id.* ¶ 38, at 23.

13. *Id.* fig.2, at 23.

14. *See id.* Annex A, at 41-44.

15. *See id.* ¶¶ 49-65, at 33-39.

16. *See id.* ¶¶ 66-67, at 40.

17. *See id.* ¶ 3, at 7.

with matters related to asylum-seekers have the guidance they need to conform to international standards.

II. Ensuring Dignity in Australia's Immigration and Refugee Policies*

A. HUMAN DIGNITY IS NOT DEPENDENT ON LEGAL STATUS.¹⁸

Australia drew criticism this year for changes in asylum policies, which critics view as a violation of international refugee law and a departure from the country's strong human rights record. In a report published in August, an expert panel, established to advise the government on how to process refugees arriving by boat, recommended that the refugees be processed in offshore sites of third countries rather than being granted access to Australia.¹⁹ Acting on the recommendations in the report, on August 16, 2012, the Senate passed The Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2012, which allows for asylum seekers arriving by boat to be transferred to and detained on Pacific island nations until their refugee claims are processed.²⁰ The Bill provides no limit to the amount of time that asylum seekers are to remain in the offshore processing centers. The Australian House rejected a proposed amendment, which would have limited the holding time to one year.²¹ But refugees arriving by other means will not be subject to the offshore detention policy.

Before this policy change, the U.N. High Commissioner for Refugees, António Guterres, had lauded Australia's refugee resettlement and integration efforts during his visit in February.²² Perhaps in anticipation of the forthcoming policy shift, Commissioner Guterres expressed concern about Australia's policy of mandatory detention for asylum seekers and recommended that Australia provide entry for individuals in need of protection, regardless of their means of arrival.²³ Australia is a party to the Refugee Convention, which recognizes that refugees often have no choice but to enter a country illegally to gain protection.²⁴ The Convention prohibits receiving countries from imposing penalties on refugees on account of their illegal entry or presence.²⁵

The backers of the offshore detention policy maintain that the practice is an essential means of deterring smuggling. Angus Houston, the chair of the expert panel whose report

* Kristen Hunsberger, a Pro Bono Attorney with California Rural Legal Assistance in Oxnard, California, and Zoe Meier, Catholic Charities Immigration Legal Department in Indianapolis, Indiana, wrote this section.

18. António Guterres, U.N. High Comm'r for Refugees, Statement to Third Committee of the General Assembly, 67th Session: Report of the United Nations High Commissioner for Refugees, Questions Relating to Refugees, Returnees and Displaced Persons and Humanitarian Questions (Nov. 7, 2012), transcript available at <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=&comid=42b2f01a4&cid=49aea93a4c&scid=49aea93a2f&author=guterres>.

19. AUSTRALIAN GOV'T, REPORT OF THE EXPERT PANEL ON ASYLUM SEEKERS (2012), available at http://expertpanelonasylumseekers.dpmc.gov.au/sites/default/files/report/expert_panel_on_asylum_seekers_full_report.pdf.

20. *Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011* (Cth) (Austl.).

21. *Id.*

22. See Ben Farrell, *High Commissioner Praises Refugee Resettlement and Integration in Australia and New Zealand*, UNHCR (Feb. 27, 2012), <http://www.unhcr.org/4f4b51a26.html>.

23. *Id.*

24. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150.

25. *Id.* art. 31.

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had recommended the offshore processing stated, “We recommend a policy approach that is hard-headed but not hard-hearted. That is realistic not idealist. That is driven by a sense of humanity as well as fairness.”²⁶ An increasing number of refugees seeking protection in Australia have engaged boat smugglers who transport them on boats under often deplorable and unsafe conditions. In the past three years, approximately 600 refugees trying to reach Australia via boat died in the attempt.²⁷ The U.N. High Commissioner for Human Rights, Navi Pillay, also voiced concern over the policy shift, stating: “I obviously appreciate the prime minister’s goal to end people-smuggling but feel that the way (Australia is going) about it is seriously placing at risk the human rights of people such as those being held in Nauru.”²⁸

Human rights groups view the current policy as a dangerous return to the Pacific Solution and a step backward for Australia’s human rights record. Under the leadership of former Prime Minister John Howard, Australia had implemented stringent border protection policies, which included similar offshore processing policies known as the “Pacific Solution.” The policies were criticized for financial inefficiency and inhumane conditions. The government closed the refugee processing at Manus Island in 2004 and at Nauru in 2008.²⁹

The return to an offshore detention policy is also criticized for discriminating against and punishing one group of arrivals due to their mode of transport. Bill Frelick, the Director of the Refugee Program of Human Rights Watch, stated, “The policy, in effect, would discriminate against asylum seekers who do not have the means or opportunity to obtain passports, visas and airline tickets.”³⁰ Frelick also decried the policy for its violations of human rights standards, saying: “People escaping persecution often have good reasons not to ask the authorities for permission to travel before they flee . . . To set up a system that discriminates against asylum seekers just because they arrive irregularly by boat flies in the face of both basic fairness and fundamental refugee protection principles.”³¹

When considered in the broader context of other nations receiving refugees, Australia has one of the lowest levels of arrivals and receives approximately “2.5 [percent] of asylum applicants compared to other industrialized countries.”³² As noted by High Commissioner Guterres following his visit, “Compared to the refugee problem in other regions of the world, the debate is out of proportion in relation to the real dimension of the issue, as the numbers of people coming to Australia are small by global standards.”³³

26. Alison Rourke, *Australian Refugee Plan Criticised by Human Rights Groups*, THE GUARDIAN (Aug. 13, 2012, 3:06 AM), <http://www.guardian.co.uk/world/2012/aug/13/australian-refugee-plan-criticised>.

27. *Id.*

28. *UN Rights Chief Warns Australia on Refugees*, ASSOCIATED FOREIGN PRESS (Nov. 13, 2012, 11:19 AM), http://www.channelnewsasia.com/stories/afp_asiapacific/view/1237080/1.html.

29. *Australia: ‘Pacific Solution’ Redux: New Refugee Law Discriminatory, Arbitrary, Unfair, Inhumane*, HUM. RTS. WATCH (Aug. 17, 2012), <http://www.hrw.org/news/2012/08/17/australia-pacific-solution-redux>.

30. Bill Frelick & Michael Timmins, *Exporting Australia’s Asylum Policies*, HUFFINGTON POST (Oct. 23, 2012, 4:13 PM), http://www.huffingtonpost.com/bill-frelick/exporting-australias-asyl_b_2006732.html.

31. *Australia: ‘Pacific Solution’ Redux*, *supra* note 29.

32. Alison Gerard & Francesco Vecchio, *Australia Among the World’s Worst in Dealing with Asylum Seekers*, THE CONVERSATION (Aug. 24, 2012, 9:57 AM), <http://theconversation.edu.au/australia-among-the-worlds-worst-in-dealing-with-asylum-seekers-8892>.

33. See Farrell, *supra* note 22.

While the UNHCR does establish and use camps to accommodate refugees, such arrangements are utilized out of necessity, such as to accommodate internally displaced persons or refugees during times of conflict. However, in this case, Australia is establishing the camps at the offshore detention centers not out of necessity, but as a policy decision. Voicing concern over the inhumane conditions of the centers and the risk of potentially indefinite detention for the refugees, High Commissioner Pillay suggested that the individuals seeking protection be accommodated in traditional housing within Australia.³⁴

The concern over the processing centers increased when refugees began a hunger strike at detention centers in Nauru, which prompted Amnesty International experts to schedule a visit for late November 2012, during which they examined the human rights conditions and spoke with asylum seekers.³⁵ The experts “found a toxic mix of uncertainty, unlawful detention and inhumane conditions creating an increasingly volatile situation on Nauru, with the Australian Government spectacularly failing in its duty of care to asylum seekers.”³⁶ Amnesty International called on the Australian government to immediately cease transfers to Nauru.³⁷

Australia has the opportunity to respond to the rising criticism by reassessing their policies and engaging in greater collaboration with regional governments to address the refugee situation in the long term. As High Commissioner Guterres recently noted, “we should not forget the wide ranging consequences of unresolved refugee situations for the communities who host them.”³⁸ Many of the refugees journeying to Australia by boat originate in or have already traveled through Southeast Asian countries that are not signatories to the Refugee Convention and lack the means and policies necessary to accommodate refugees seeking protection. Australia should collaborate with these countries to foster participation in the Refugee Convention, while also developing the infrastructure needed to support it. Australia’s current policies not only violate standards of refugee law, but also do little to address the greater issues that will continue to bring refugees to Australia’s shores.

III. Update on the Forcible Return of Haitian Nationals Post Earthquake*

Haiti already faced significant political stability challenges and complex humanitarian issues when the January 2010 earthquake hit. Early on in the recovery, the Haitian government and international community began struggling with the issue of how to address the non-voluntary return of Haitian Nationals in the aftermath of the earthquake. Almost immediately, the U.S. government issued a moratorium on deportations to Haiti and the executive implemented Temporary Protected Status to certain Haitian Nationals present

34. *UN Rights Chief Warns*, *supra* note 28.

35. *Amnesty Representatives to Inspect Nauru Processing Centre*, ABC RADIO AUST. (Nov. 12, 2012, 6:03 PM), <http://www.radioaustralia.net.au/international/radio/program/pacific-beat/amnesty-representatives-to-inspect-nauru-processing-centre/1044902>.

36. Press Release, Amnesty Int’l, Nauru Camp a Human Rights Catastrophe with No End in Sight (Nov. 23, 2012), *available at* <http://www.amnesty.org.au/images/uploads/news/NauruOffshoreProcessingFacilityReview2012.pdf>.

37. *Id.*

38. Guterres, *supra* note 18.

* Professor Ericka Curran, Director of the Immigrant Rights Clinic at Florida Coastal School of Law, wrote this section.

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in the United States on the date of the earthquake.³⁹ Haitians with felony convictions or two or more misdemeanors were not eligible for the Temporary Protected Status,⁴⁰ and therefore, were subject to apprehension and removal; however, removal was suspended temporarily to allow the Haitian government time to recover and prioritize. In January 2011, the U.S. government began removing Haitians not eligible for Temporary Protected Status. But later that year, the U.S. government extended Temporary Protected Status for Haitians through July 2014.⁴¹

In July 2012, the U.N. Independent Expert on the situation of human rights in Haiti submitted an Addendum to his annual report to the Human Rights Council at its twentieth session.⁴² In his report, the Independent Expert makes the recommendation that all forcible returns to Haiti be halted immediately and that if States did decide to forcibly return Haitian nationals, certain precautionary measures be taken.⁴³

The Expert found that since the January 2010 earthquake, several U.N. Member States have continued to forcibly return Haitian nationals to Haiti, despite appeals from numerous bodies to suspend forced returns to Haiti. The Independent Expert found that the returns have placed individuals in a life-threatening position and have further burdened the already unstable Haitian government. The Expert relied on numerous reports and findings that forcibly returned individuals face deplorable conditions, separation from family, and exposure to disease. The Independent Expert reported deep concern that the forced returns constitute human rights violations.⁴⁴

39. Press Release, USCIS Update: Registration Begins for Temporary Protected Status to Haiti (Jan. 21, 2010), <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=9236745543256210VgnVCM100000082ca60aRCRD&vgnnextchannel=17dcb6f2cae63110VgnVCM1000004718190aRCRD>.

40. 8 C.F.R. § 244.4 (2011).

41. See *Temporary Protected Status*, USCIS (Jan. 9, 2013), <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=848f7f2ef0745210VgnVCM100000082ca60aRCRD&vgnnextchannel=848f7f2ef0745210VgnVCM100000082ca60aRCRD>.

42. Independent Expert on the Situation of Human Rights in Haiti, *Forced Returns of Haitians from Third States*, U.N. Doc. A/HRC/20/35/Add.1 (June 4, 2012) (by Michel Forst).

43. *Id.*

44. *Id.*