

## The *Tampa* Case and its Impact on Burden Sharing at Sea<sup>1</sup>

*Cecilia Bailliet\**

### ABSTRACT

This article reviews the *Tampa* case in order to highlight the lack of clear standards for rescue at sea of asylum seekers. In response to current initiatives to assess the gaps and inconsistencies within the applicable legal framework, the author recommends the elaboration of a burden sharing mechanism based on a protection continuum addressing the following phases: rescue, non-refoulement, disembarkation, and resettlement.

### I. INTRODUCTION

The act of saving a person's life immediately provokes contemplation of the moral norms which form the basis of human interaction and the foundation of modern societies. These norms have found expression and in turn evolved into law within human rights instruments. Refugee law, as a child of human rights, is specifically entrusted with the task of forming an international framework for saving the lives and upholding the rights to freedom and personal security of those forced to flee their homelands because their states prove unable or unwilling to protect them. When a State has assumed

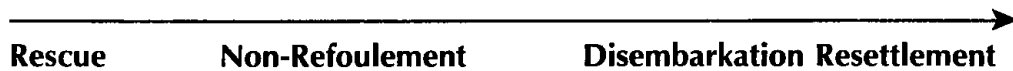
---

\* *Cecilia Bailliet* is a Research Fellow, Institute for Public & International Law, University of Oslo. She received a Joint J.D. and M.A. from the George Washington School of Law and Elliott School of International Affairs. She teaches Refugee Law and has just completed her doctorate in international public law. Her thesis, "Between Conflict & Consensus: Conciliating Land Disputes in Guatemala," addresses prevention and resolution of internal displacement via use of conciliation in land disputes. It assesses the applicable international norms pertaining to IDPs and indigenous people and reviews their implementation at international and national levels, utilizing Guatemala as a case study.

1. This article is a revised version of a lecture I gave at a seminar arranged by the Scandinavian Institute of Maritime Law in Oslo, Norway, 11 Sept. 2001.

a protection role by saving the life of an individual or a group, it follows that all pursuant acts must uphold the protection role, not run counter to it. Hence, this article addresses the protection continuum applicable to rescue at sea of asylum seekers.

**Graph: The Protection Continuum**



Each stage requires cooperation between states in order to uphold the protection function. The *Tampa* case exhibited a breakdown of cooperation and a failure to uphold the protection continuum. One of the central factors for this state of confusion was the lack of clarity within refugee and maritime law as pertaining to rescue at sea of asylum seekers.

**II. FACTS OF THE TAMPA CASE<sup>2</sup>**

On 26 August 2001, the Australian authorities directed the MV *Tampa*, a Norwegian flag container ship on its way to Singapore, to rescue people aboard a fishing boat sinking in the Indian Ocean, 87 miles north of Christmas Island. Although the Norwegian ship was licensed to carry no more than fifty people, it rescued 433 persons of Afghan, Iraqi, and Pakistani origin. The Captain asked the Australian Coast Guard where he should disembark the rescuees, but the Coast Guard responded that they did not know. The ship headed towards Indonesia, however the rescuees threatened to commit suicide if they did not turn back towards Australia. The Captain felt duress and heeded their demands. When the ship was approaching Christmas Island (but outside its territorial waters), the Australian authorities ordered the ship to head back to Indonesia as they considered the asylum seekers the responsibility of Norway (flag state) and Indonesia (state of embarkation). They threatened to fine the shipowners if an illegal entry into territorial waters was made. The Captain was concerned that due to the lack of sufficient food and water and the complications of further travel at sea, there was a significant risk of loss of life. Indonesia indicated that it was unwilling to receive the asylum seekers; in addition, its lack of ratification of the 1951 Convention on the Status of Refugees was a point of concern. On 29 August, the Captain decided to enter Australian territorial waters in spite of lacking permission from the state. In response,

2. See Judge North's recitation of the facts of the *Tampa* case in *Vadarlis v. Minister for Immigration and Multicultural Affairs and Others* (Federal Court of Australia, V 900 of 2001).

Australia sent forty-five Special Armed Services soldiers to board the ship. On 30 August, the rescuees gave the Norwegian Ambassador visiting the ship a letter requesting asylum from Australia. The Australian government inquired whether the Norwegian government would be willing to accept a portion of the asylum seekers for processing, which received a negative response. Amnesty International filed complaints against Australia with the UN Human Rights Committee and the UN Committee Against Torture.<sup>3</sup> The United Nations High Commissioner for Refugees (UNHCR) issued a compromise recommendation calling upon the states to burden-share. Although the Norwegian government's reaction was positive, the Australian government rejected this arrangement and contacted New Zealand, Nauru, and later Papua New Guinea, all of which agreed to receive the asylum seekers for disembarkation and processing.<sup>4</sup>

On 31 August, two claims including a request for *habeas corpus* were filed in the Federal Court of Australia.<sup>5</sup> Justice North ordered mediation, which resulted in a transfer of the asylum seekers to the HMAS Manoora and departure for Port Moresby, Papua New Guinea. The applicants claimed that the rescuees had been arbitrarily detained aboard the *Tampa*. The State argued that "the rescuees were not detained [on the *Tampa*], but were free to go anywhere other than Australia."<sup>6</sup> This concept of freedom of exit was resolutely rejected by Justice North of the Federal Court who noted that the rescuees have the "right to their liberty and to their own choice as to their future course of action. . . . They should not be forced by the exercise of discretion by the Court to accept a plan which they did not formulate or approve."<sup>7</sup> Justice North concluded that there was a clear case of arbitrary detention, as the rescuees had no means of exiting the boat, they were prevented from communicating with legal representatives or others, and the Nauru/New Zealand plan was elaborated without their consultation.<sup>8</sup> He ordered release of the asylum seekers on Australian territory.

The Commonwealth and the Ministers concerned appealed to the full

- 
3. Amnesty International, *News Flash Tampa's asylum-seekers: Australia must fulfill its international obligations*, AI Index ASA 12/004/2001, News Service Nr. 154, available at <http://web.amnesty.org/library/print/engasa120042001?open&of=eng-aus> (31 Aug. 2001).
  4. New Zealand had offered to accept asylum seekers prior to Australia's inquiry. See Daily News, *New Zealand offers help as Australia seeks solution to boat crisis*, at <http://origin.dailynews.lk/2001/09/01/wor02.html> (31 Aug. 2001).
  5. Victorian Council for Civil Liberties Inc. and Another v. Minister for Immigration and Multicultural Affairs and Others (2001) 110 F.C.R. 452, ¶¶ 42, 43 (Federal Court of Australia, V 899 of 2001, FCA 1297); Vadarlis v. Minister for Immigration and Multicultural Affairs and Others (Federal Court of Australia, V 900 of 2001).
  6. Victorian Council, ¶ 45.
  7. *Id.* ¶ 103.
  8. Vadarlis v. Minister for Immigration and Multicultural Affairs and Others (Federal Court of Australia, V 900 of 2001).

Federal Court, which allowed the appeal and set aside Justice North's decision. The Court concluded that the Commonwealth acted within its executive power and did not arbitrarily detain or restrict the freedom of the asylum seekers.<sup>9</sup> An appeal was submitted to the High Court.<sup>10</sup> The asylum seekers reached Nauru and New Zealand and were held in detention centers while undergoing processing.

### III. REJECTING ASYLUM SEEKERS AS A MEANS OF ENSURING ELECTORAL SUCCESS

A curious coincidence, which compromised the protection continuum and placed the right to seek asylum in peril, was that both Australia and Norway were undergoing national elections in which the parties in power at the time (the Liberal-National Coalition in Australia and the Labor Party in Norway) were suffering in the polls. The *Tampa* case provided an arena in which the governments sought to demonstrate their strength by championing national interests. In Australia, Prime Minister John Howard was blamed for the country's economic downturn and was expected to lose to the Labor candidate, Kim Beazley. The Prime Minister made a miraculous turn-around by utilizing the imagery of repelling an "invasion" to raise his popularity. He adamantly refused to permit disembarkation, rejected the UNHCR proposal, and sent the asylum seekers on to a detention center in Nauru and New Zealand. The political parties pushed xenophobia as a platform for support in the upcoming elections; indeed, polls revealed high approval ratings for Prime Minister Howard during the *Tampa* crisis as the Liberal Party was twenty points ahead of the Labor Party.<sup>11</sup> The *Tampa* case was declared to

---

9. *Ruddock and Others v. Vadarlis and Others* (2001) 66 A.L.J. 25 (V 1007 of 2001, FCA 1329); *Ruddock and Others v. Vadarlis and Others* (No 2) (2001) 115 F.C.R. 229 (FCA 1865). The Chief Justice dissented from this opinion as he was in accord with Justice North's decision.

10. The High Court refused to consider the appeal as the asylum seekers had already been transferred to Nauru, hence they were subject to the law of Nauru. The fact that the Australian government was funding and overseeing the detention was not addressed, nor was the fact that the Australian military "escorted" the asylum seekers onto Nauru.

As of June 2002, New Zealand granted asylum to 124 asylum seekers they received, and accepted additional transfers from Nauru. The only other country to offer resettlement was Ireland (fifty persons). UNHCR had finished processing most of the cases on Nauru, finding only thirty-two Afghans to merit refugee status due to the elimination of the Taliban. It requested Australia to give humanitarian status to many of the asylum seekers in Nauru who would no longer qualify as refugees but who could not return due to lack of stability. The Australian government responded by offering cash grants to those who would agree to leave. Kirsten Lawson, *Nauru: Afghans' refugee claims rejected*, ASIA INTELLIGENCE WIRE, 21 Apr. 2003.

11. BBC News, *Howard's Refugee Gamble Pays Off* (21 Sep. 2001), available at <http://news.bbc.co.uk/2/hi/asia-pacific/1542029.stm>.

be his salvation. This negative strategy worsened after the terrorist attacks in New York on 11 September, allegedly linked to the Islamic fundamentalist Osama Bin Laden. The Minister of Defense, Peter Reith, expressed the view that it was necessary to intercept boats carrying asylum seekers in order to prevent the entry of terrorists to Australia.<sup>12</sup> The fact that some of the asylum seekers were fleeing the brutality of the Taliban regime or Saddam Hussein was not discussed. This approach presents a serious threat to the right to seek asylum as there is a presumption of exclusion prior to presentation of the asylum claim.<sup>13</sup>

The government highlighted the fact that there was a rise in unauthorized boat arrivals, 8,316 between July 1999 and June 2001, as compared with 4,114 from 1989–1990 to 1998–1999.<sup>14</sup> In addition, the majority of unauthorized arrivals were now of Middle Eastern origin (Afghans, Iraqis, Iranians, and Palestinians).<sup>15</sup> The Parliament processed fast-track amendments to its immigration laws,<sup>16</sup> *inter alia*:

- 1) Limiting the recognition of refugee status to persons subjected to persecution, as defined within the national framework: “serious harm to the person, and involving systemic and discriminatory conduct.”
- 2) People arriving at Christmas, Cocos, Cartier, and Ashmore Islands will only qualify for a temporary visa.
- 3) Limited opportunity to challenge adverse asylum decisions in court.
- 4) Prohibition of class actions in migration legislation.
- 5) Possibility for adverse inference in the case of failure to provide information regarding identity/nationality.
- 6) Establishing off-shore processing centers in Nauru, Papua New Guinea, Christmas Island, and Cocos Island.
- 7) Mandatory sentences for people smugglers.

---

12. BBC News, *Australia links Asylum Policy to US Attack* (13 Sept. 2001), available at <http://news.bbc.co.uk/2/hi/asia-pacific/1542029.stm>.

13. See Declaration on Measures to Eliminate International Terrorism, *adopted* 17 Dec. 1996, G.A. Res. 51/210, U.N. GAOR, 51st Sess., Annex, U.N. Doc. A/RES/51/210/Annex (1996). This instrument calls upon states to ensure that asylum seekers are not terrorists.

14. Department of Immigration and Multicultural Affairs of Australia.

15. In August 2001, the government announced plans to establish three detention centers on the mainland to process unauthorized arrivals.

16. The laws affected included: Migration Act, 1958 (Austl.), Migration Amendment (Excision from Migration Zone) Act 2001 (Austl.), Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 (Austl.), and Border Protection (Validation and Enforcement Powers) Act 2001 (Austl.).

The Australian Federal Government reformed the Migration Act 1958,<sup>17</sup> to remove Ashmore Reef and Cartier Island, Christmas Island, Cocos Island, any other prescribed external Territory and island, and Australian sea or resource installations from the Australian Migration Zone, thereby creating a legal fiction with respect to entry.<sup>18</sup> In addition, consequential provisions were also adopted that provide officers with discretionary powers to detain aliens seeking to enter or who have entered offshore places, to remove offshore entry persons from Australia to a "declared country," and to bar legal proceedings with respect to the entry, status and detention of such offshore entrants who entered without a visa.<sup>19</sup> This enables the government to deny asylum seekers visas and basic due process rights, however the Australian government claims that there is an objective refugee status determination process with review opportunity. Those identified as refugees will be referred to resettlement programs. Asylum seekers will not be able to access courts to appeal their detention. Asylum seekers arriving by boat will be taken to detention centers in Nauru, Papua New Guinea, and the above-mentioned islands for off-shore "rapid processing." The reforms to the immigration law also include the Border Protection Act 2001 authorizing Australia to board boats in international waters and take them elsewhere, essentially engaging in "push offs."<sup>20</sup>

Prime Minister Howard was re-elected, and the Labor Party conceded that its failure to support the immigration reform legislation might have cost it the election. Ironically, three months after the election Prime Minister

---

17. For Amendments to Australia's Border Protection Arrangements, see Migration Amendment (Excision from Migration Zone) Act 2001, No. 127, 2001 (Austl.).

18. The legal fiction is the notion that a migrant has not entered the Australian territory by landing on these islands, although the arrival of paratroopers would be viewed differently—thus from a military perspective the islands are part of Australia, but from an immigration perspective they are not—the entry is considered to be unauthorized and thus it is not recognized. The reason for the distinction is that entry entitles one to legal protection under the national system. At present many countries now utilize unauthorized entry and authorized entry as modes of distinguishing procedural rights; the former are subject to expedited proceedings. *Id.*

19. These are amendments to the Migration Act of 1958, thus they are now part of that law, not separate laws—but may be referred to as the Migration Amendment (Excision from Migration Zone) Act 2001 (the Excision Act) and the Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 which commenced on 27 Sept. 2001.

There are other new provisions affecting immigration rights, such as: Border Protection (Validation and Enforcement Powers) Act 2001—commenced 27 Sept. 2001, Migration Legislation Amendment Act (No. 1) 2001 and Migration Legislation Amendment Act (No. 6) 2001—commenced 1 Oct. 2001, Migration Legislation Amendment (Judicial Review) Act 1998—commenced 2 Oct. 2001 and Migration Legislation Amendment Act (No. 5) 2001—commenced 21 Dec. 2001.

20. Border Protection Act 2001 (Austl.).

Howard admitted that the policy to push asylum seekers' boats back to sea was "completely inhuman."<sup>21</sup>

In Norway, then-Prime Minister Jens Stoltenberg assumed a strong stance before the electorate by declaring it essential to uphold international maritime norms relating to rescue at sea missions and preventing any possible infringement on Norwegian shipping interests. In addition, the government espoused a moral high stand, accusing the Australian government of failing to cooperate in a humanitarian mission. Neither government appeared willing to make concessions, thus complicating resolution of the dispute. However, Norwegian voters failed to be distracted from their frustration regarding high taxes. The *Tampa* case was simply not regarded as a significant issue during the election. The Labor Party suffered the worst defeat since 1924, winning only 24 percent of the vote.

It should be noted that criticism of the Australian government's refusal to allow disembarkation of the asylum seekers did not result in any self-reflection regarding Norway's additional duties pertaining to the protection continuum. A point of interest is that the only political candidate to express the view that Norway should offer asylum to those on board the *Tampa* was Kjell Magne Bondevik (who subsequently won the election and is a member of the Christian People's Party, now in a coalition with the Conservative Party and the Liberal Party). Since taking office, he has not extended an offer of resettlement, regardless of the fact that the asylum seekers remain detained in Nauru.

#### IV. COMPARATIVE REVIEW OF ASYLUM IN NORWAY & AUSTRALIA

*Everyone has the right to seek and to enjoy in other countries asylum from persecution.*  
—Universal Declaration of Human Rights<sup>22</sup>

UNHCR conducted a comparative analysis of asylum statistics in thirty-eight countries for the period of 1999–2000.<sup>23</sup> Its findings for Australia and Norway are helpful for understanding the background of asylum in each context. Australia's refugee recognition rate in 2000 totaled 25 percent, over twice the average recognition rate (7 percent) among mostly industrialized countries conducting asylum decisions.<sup>24</sup> Australia's rejection rate for 2000 totaled 71

---

21. UNHR News, *Australia Set to Back Down on Restrictive Refugee Policy* (12 Dec. 2001), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/print?tbl=News&id=3c187df44>.

22. Adopted 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess. (Resolutions, pt. 1), at 71, art. 14, U.N. Doc. A/810 (1948), reprinted in 43 AM. J. INT'L L. 127 (Supp. 1949).

23. UNHCR, *Trends in Asylum Decisions in 38 Countries, 1999–2000* (22 June 2001), available at <http://www.unhcr.ch>.

24. *Id.* at 3 ¶ 12.

percent. Norway's refugee recognition rate in 2000 totaled 1 percent. However, it recognized humanitarian status in 3,309 cases, thus bringing its total recognition rate up to 26 percent of cases. Its rejection rate was similar to Australia's at 74 percent.<sup>25</sup>

As mentioned previously, the asylum seekers aboard the *Tampa* were identified as originating from Iraq, Afghanistan, and Pakistan. According to the UNHCR study, during 1999–2000 these three countries were among the top ten countries of origin for persons granted refugee status. Iraq and Pakistan also are included among the top ten countries of origin for persons granted humanitarian status.<sup>26</sup> The 2000 total recognition rates, or the percentage of applicants accepted from each country (including both refugee status and humanitarian status), were as follows: Afghanistan, 35 percent; Iraq, 40 percent; Pakistan, 18 percent.<sup>27</sup> If one turns to Australia and Norway, the figures reveal a stark contrast. As of 2000, in Australia, the refugee recognition rate for persons of Iraqi origin totaled 74 percent, whereas the Norwegian immigration authorities rejected 100 percent of Iraqi applicants.<sup>28</sup> As pertaining Afghani applicants, the Australian immigration authorities recognized 60 percent of applicants as refugees, and rejected 40 percent. In comparison, the Norwegian immigration authorities recognized only 3 percent of Afghans as refugees at the first instance level, but provided humanitarian protection to bring the total recognition rate up to 19 percent, while rejecting 81 percent of the applicants.<sup>29</sup> In fact, Iraq, Pakistan, and Afghanistan are included among the top ten countries of origin of rejected asylum seekers in Norway. Hence, with respect to the asylum seekers aboard the *Tampa*, it appears that transfer to Norway for processing would not necessarily have increased the chances of attaining protection, as Norway has significantly lower recognition rates vis-à-vis their countries of origin than Australia. Of interest, the case may have promoted a policy change, since the Norwegian immigration authorities recently announced the creation of fifty resettlement spots for refugees from the Middle East and Indian Subcontinent.

## V. THE RESCUE STAGE IN THE PROTECTION CONTINUUM

There has been great concern regarding the lack of clarity surrounding, and the absence of a specific international convention addressing, the responsibilities of rescue at sea of asylum seekers. With regard to this "protection

---

25. *Id.* Tbl. 2.

26. *Id.* at 4 ¶ 14.

27. *Id.* Tbl. 6.

28. *Id.* Tbl. 8.

29. *Id.* Tbl. 9.



gap,” according to the 1982 Law of the Sea Convention, Article 98, the duty to rescue is absolute:

1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:
  - a. to render assistance to any person found at sea in danger of being lost;
  - b. to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him.<sup>30</sup>

However, as pointed out by Rosaeg, there is an obvious disincentive to conduct rescue operations when there are costs due to deviation and delay for a ship and its cargo.<sup>31</sup> This is especially true when the coastal state will not cooperate in terms of allowing access to its port and permitting disembarkation.<sup>32</sup> The success of a rescue operation is contingent on speedy disembarkation of rescuees; rather than consider the two phases as unrelated, it is necessary to analyze them as a continuum.

In the opinion of the Norwegian government, the ship and its asylum seekers entered lawfully due to the situation of distress and the norms involving rescue at sea missions. According to Churchill and Lowe: “The one case where there is a clear customary law right of entry to ports concerns ships in distress. If a ship needs to enter a port or internal waters to shelter in order to preserve human life, international law gives it a right of entry.”<sup>33</sup> Thus, Australia’s intended expulsion was not in accord with the relevant Law of the Sea customary norms regarding the right of entry to ports concerning ships in distress. Nor did it uphold the International Convention on Maritime Search and Rescue<sup>34</sup> and International Convention for the Safety of Life at Sea Regulation 15,<sup>35</sup> both calling for cooperation between

- 
30. U.N. Convention on the Law of the Sea, *opened for signature* 10 Dec. 1982, Annex VI, U.N. GAOR, art. 98, U.N. Doc. A/CONF.62/122 (*entered into force* 16 Nov. 1994), *reprinted in* 21 I.L.M. 1261, 1345 (1982). *See also* International Convention on Maritime Search and Rescue, 1979, *adopted*, 27 Apr. 1979, *entered into force* 22 June 1985, *amended* 10 May 1998, *entered into force* 1 Jan. 2000, *available at* <http://www.admiraltylawguide.com/conven/searchrescue1979.html>, *amendments available at* <http://www.admiraltylawguide.com/conven/amendsearch1998.html> (hereinafter *Maritime Search and Rescue 1998*). “Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such a person or the circumstances in which that persons is found.” International Convention on Maritime Search and Rescue, 1979, art. 2.1.10.
  31. E. Rosaeg, *Refugees as Rescuees—The Tampa Problem*, SCANDINAVIAN INSTITUTE MARITIME L.Y.B. (2002).
  32. R.P. Shaffer, *The Singular Plight of Sea-Borne Refugees*, 8 AUSTRALIAN Y.B. INT’L L. 213, 226 (1983).
  33. ROBIN CHURCHILL & VAUGHAN LOWE, *THE LAW OF THE SEA* 63 (1999).
  34. *Maritime Search and Rescue 1998*, *supra* note 30, ch. 3.
  35. International Convention for the Safety of Life at Sea Regulation, *available at* <http://www.uscg.mil/hq/g-m/nmc/imo/circ1996/Sls15.html>.

states. Neither was the action compatible with Article 32 of the 1951 Convention on the Status of Refugees which conditions expulsion of refugees who have entered legally to be pursued in accordance with due process of law norms and only on the grounds of national security and public order. It is highly unlikely that the temporary disembarkation of the asylum seekers would have affected national security or public order, thus the denial of access to port may be seen as contrary to the Convention on the Status of Refugees.

The idea of the creation of compensation funds earmarked for rescue operations by individual states or the international community as a whole is not new. An important precedent to consider is the UNHCR's initiation of the Rescue at Sea Reimbursement Project in 1985.<sup>36</sup> Reimbursement was provided for costs related to the care of refugees rescued at sea and expenditures related to disembarkation, e.g., transportation expenses, immigration formalities, and inoculations. Reimbursement addressed only those claims not recoverable from insurance or Protection and Indemnity Clubs. Norway and Australia were two of fifteen countries to support the program.<sup>37</sup> Of interest, Shaffer cited the Norwegian government's practice of reimbursement of costs related to rescue of refugees incurred by merchant ship owners flying its flag as a "commendable example to the international community" and calls for the elaboration of an international compensation fund.<sup>38</sup> It would be fitting for these two countries to retake an initiative to cooperate for the creation of a new program. It may be worthy to reconsider this project for possible implementation/adaptation in the near future.<sup>39</sup>

It is imperative that international review of standards as pertaining rescue at sea operations clarify that the success of rescue operations is contingent on right of entry and disembarkation guarantees by coastal states. The issues arising under disembarkation are discussed further in this article.

---

36. The details of the reimbursement scheme are laid out in UNHCR, *Guidelines for the Disembarkation of Refugees* (1985). See also International Protection (SCIP) Problems Related to the Rescue of Asylum-Seekers at Sea, U.N. Doc. EC/SCP/42, available at <http://unhcr.org>.

37. The other countries were Canada, Denmark, Finland, France, Greece, Japan, the Netherlands, New Zealand, Spain, Sweden, Switzerland, the United Kingdom and the United States. In addition, this project intended to ensure respect for rescue at sea norms by facilitating disembarkation of refugees rescued at sea and alleviating the burden on flag states by establishing resettlement quotas.

38. See Shaffer, *supra* note 32, at 225.

39. See CHURCHILL & LOWE, *supra* note 33.

## VI. THE NON-REFOULEMENT STAGE IN THE PROTECTION CONTINUUM

After conducting a rescue, the Captain of the ship must decide which port he will approach in order to disembark the asylum seekers. One consideration to be taken into account is the need to respect the non-refoulement principle. The *Tampa* case revealed how states seek to avoid upholding this protection duty. Non-refoulement may be considered the bedrock of Refugee Law; it is defined in Article 33 of the 1951 Convention on the Status of Refugees:

No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.<sup>40</sup>

This may apply to the country of origin or a third country in which there would be a risk to the life, freedom, or safety of the person. Article 3 of the Convention Against Torture also guarantees non-refoulement:

No State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.<sup>41</sup>

Non-refoulement is now considered a rule of customary international law, and it may be argued that it is applicable within and beyond a state's territorial jurisdiction. The Norwegian Ministry of Foreign Affairs asserted that the non-refoulement duty only became relevant when the ship entered Australia's territorial waters.<sup>42</sup> However, according to Sir Elihu Lauterpacht and Daniel Bethlehem, non-refoulement is indeed applicable outside the territory of a state, and carrier ship actions can be imputed to the flag State.<sup>43</sup>

---

40. Convention Relating to the Status of Refugees, *adopted* 28 July 1951, art. 33, U.N. Doc. A/CONF.2/108 (1951), 189 U.N.T.S. 150 (*entered into force* 22 Apr. 1954), *reprinted in* 3 WESTON III.G.4.

41. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* 10 Dec. 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at art. 3, U.N. Doc. A/39/51 (1985) (*entered into force* 26 June 1987), *reprinted in* 23 I.L.M. 1027 (1984), *substantive changes noted in* 24 I.L.M. 535 (1985).

42. T. Jagland, *Tampa' og Folkeretten*, AFTENPOSTEN (6 Sept. 2001), at 22, *available at* <http://www.aftenposten.no>, *responding to* Cecilia Bailliet, *Byrdefordeling til sjøs*, AFTENPOSTEN, 4 Sept. 2001, at 14. *See also* Cecilia Bailliet, *Rettigheter uten grenser*, AFTENPOSTEN (12 Sept. 2001).

43. SIR ELIHU LAUTERPACHT & DANIEL BETHLEHEM, *THE SCOPE AND CONTENT OF THE PRINCIPLE OF NON-REFOULEMENT* 23 (2001).

In order to uphold the protection continuum, recognition of the extraterritorial applicability of non-refoulement is necessary.

Asylum seekers are in a special situation because they lack the diplomatic protection of their own state, hence it would be reasonable to expect the flag states, coastal states, states of embarkation, resettlement states, as well as UNHCR, International Organization of Migration (IOM), and International Maritime Organization (IMO) to collaborate to provide protection. From a humanitarian perspective, a ship that has rescued asylum seekers at sea should not turn around and deliver them back to their country of origin or to a third country, should they risk persecution. Nor should it deliver them to a country that has voiced its intention to return them to the country of origin; this would be refoulement.

In the *Tampa* case, the Australian government suggested that the ship should return the asylum seekers to Indonesia, the port of embarkation. Indonesia has not ratified the 1951 Convention on the Status of Refugees, and although one may argue that it would be bound by customary law, the government initially replied negatively to the suggestion that it should receive the asylum seekers. Hence, one may glean that there may have been a risk of potential refoulement. Indonesia later shifted its position, however by that point the *Tampa* had already entered Australian territorial waters.

Norway's historical role as an important maritime nation as well as champion of humanitarian causes (it is the largest per capita donor to UNHCR) resulted in an unquestioning support for the rescue at sea mission and an expectation that the Australian government would cooperate accordingly for disembarkation. The Norwegian government and the Norwegian Refugee Council (the latter joined by the Refugee Council of Australia) criticized the Australian government for what they deemed to be a failure to take responsibility for a humanitarian situation.<sup>44</sup> The Norwegian government asserted that the Australian Coast Guard had instructed the Norwegian ship to deviate from its course and that it provided the nearest port, hence it expected the Australian authorities to cooperate. In Norway, the *Tampa's* Captain, Arne Rinnan, was hailed as a hero, named "Man of the Year" by the newspaper *Dagbladet*, and duly knighted for upholding the duty to rescue at sea. In 2002, he and his crew received the Nansen Refugee Award.<sup>45</sup>

The Australian government negated the situation of distress on the boat and sought to refuse entry of the ship based on the principle that it was only

---

44. N. Helle, *Jagland til Australias utenriksminister: Inhumant og uakseptabelt*, AFTENPOSTEN (29 Aug. 2001), available at <http://aftenposten.no>.

45. See UNHCR Press Release, *Nansen Award for captain, crew and owner of "Tampa"* at <http://www.unhcr.ch/cgi-bin/texis/vtx/home/opendoc.htm?tbl=NEWS&id=3c9717a24&page=news> (19 Mar. 2002).

sending it back to the high seas, not the state of origin. It argued that it was not violating the non-refoulement guarantee. When the ship entered its territorial waters, the Australian government classified the entry of the asylum seekers as illegal and felt entitled to expel the ship according to its prerogative powers.<sup>46</sup>

On the international level, we may refer to Article 31 of the 1951 Convention on the Status of Refugees that prohibits states from imposing penalties on illegal entrants but leaves room for expulsion, as the right to remain is not guaranteed.<sup>47</sup> Europeans utilize the same defense in the Schengen regime to uphold their practices of sending asylum seekers back to first country of asylum or a safe third country.<sup>48</sup> Some countries have arrangements with countries in Eastern Europe to process asylum seekers who may be sent back in "chain refoulement."<sup>49</sup> Asylum seekers conducting an irregular entry or lacking proper papers are subject to accelerated procedures that do not uphold basic due process guarantees. Because identification of first country of asylum or safe third country precedes review of the asylum claim, many applicants are sent back without consideration of the persecution claim. There is a striking similarity between the suspicions aroused in Australia and those maintained in Norway regarding asylum seekers arriving by irregular means, in both nations they are referred to as "queue jumpers," "economic opportunists," or potential criminals.

Due to the human rights situation in the countries of origin, there was a need to ensure that the asylum seekers be given the opportunity to present their claims for review in a country which upholds the principle of non-refoulement.<sup>50</sup> Hence, ships delivering asylum seekers should obtain

---

46. The government considered the power of expulsion to be a valid exercise of prerogative power. However, Justice North pointed to the Migration Act—an act relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons. Although his judgment was reversed, legislative amendments were passed to strengthen expulsion actions.

47. *But see* James Z. Pugash: *The Dilemma of the Sea Refugee: Rescue without Refuge*, 18 HARV. INT'L L.J. 577, 590 (1977), suggesting that sea refugees are unlikely to qualify for Article 31's protection due to the fact that they may be considered not to have come directly from the country of origin and may lack good cause for illegal entry.

48. *See* Alberto Achermann & Mario Gattiker, *Safe Third Countries: European Developments* 7(1) INT'L J. REFUGEE L. 19 (1995). *See also* Gretchen Borchelt, *The Safe Third Country Practice in the European Union: A Misguided Approach to Asylum Law and A Violation of International Human Rights Standards*, 33 COLUM. HUM. RTS. L. REV. 473 (2002). The U.S. Committee for Refugees' Annual World Refugee Survey provides country reports which outline the readmission agreements for each country, e.g., Germany and Austria, with their border countries and resulting problems. Available at <http://www.refugees.org/>.

49. *See* Acherman & Gattiker, *supra* note 48.

50. Regarding the risk of refoulement to the country of origin, we must discuss conditions in those countries. The asylum seekers were identified to be from Afghanistan, Pakistan, and Iraq. At the time of the incident, Afghanistan qualified as a state in which the risk

guarantees from the port of disembarkation that protection norms will be upheld.

## VII. THE DISEMBARKATION STAGE IN THE PROTECTION CONTINUUM

The IMO Conventions call upon states to cooperate to save lives through rescue at sea missions, and it may be argued that as pertaining cases

---

of refolement ran high, it was the source of five million refugees, over half in Pakistan and Iran. The Taliban regime was extremely repressive in its imposition of Islamic rule. The Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in Afghanistan confirmed reports of summary executions, massacres, mass arrests, indiscriminate bombing, targeting of civilians, rape, looting, burning of houses, destruction of livelihood, and torture. Some of the asylum seekers aboard the *Tampa* were identified by the Australian Refugee Council as pertaining to the Hazaras ethnic group (Shi'ite Muslim), which has been persecuted by the Taliban. The ongoing conflict with the Northern Alliance and drug lords created a climate of total impunity, gross violations of human rights and breaches of humanitarian law, in some cases amounting to crimes against humanity. See *Interim Report of the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in Afghanistan*, U.N. G.A.O.R., U.N. Doc. A/56/409 (2001). Amnesty International reported incidents of arbitrary detentions, torture, and forced displacement on account of a twenty-two year old war and severe drought. Amnesty International, *Afghanistan* (2001), available at <http://web.amnesty.org/>. Further displacement occurred after the US bombing action in retaliation for the terrorist bombing in New York on 11 Sept. 2001.

Pakistan, Iran, and Tajikistan closed their borders to Afghani refugees and engaged in forcible repatriation or "questionable return" of tens of thousands of refugees, thereby resulting in an internal displacement crisis totaling 500,000. UNHCR News, 7 Dec. 2001, available at <http://www.unhcr.ch>. The Pakistani camps themselves proved to have deplorable conditions, refugees have resorted to begging and prostitution to survive. Hence, refugees (including some of those aboard the *Tampa*) chose to flee the country of first asylum as well due to violation of basic rights. Of note, the Taliban asked Australia to accept the Afghan asylum seekers aboard the *Tampa* due to the humanitarian situation.

With respect to Iraq, Saddam Hussein's repressive regime has been accused of systematic human rights abuses against political opponents, leaders of the Shi'a religious community, military deserters, and relatives of individuals falling within the former categories. Violations include torture, arbitrary arrest and detention, denial of due process, political and extrajudicial killings, and disappearances. U.S. Dept. of State, *Country Report on Human Rights Practices: Iraq* (2000), available at <http://www.state.gov/>.

As pertaining Pakistan, the country remains controlled by General Musharraf who suspended the Constitution, the Parliament, and provincial assemblies. Impunity reigns as the judiciary has been accused of corruption, weakness, and inefficiency. Passage of ordinances to establish punishments for violations of the Shari'a has resulted in prosecution of women for adultery. Violence against women in the form of rape and abuse is a serious problem. The police have been accused of extrajudicial killings, rape, disappearance, torture, arbitrary arrest and detention, and abuse of citizens. U.S. Dept. of State, *Country Report on Human Rights Practices: Pakistan* (2000), available at <http://www.state.gov/>. Victims of human rights abuses include journalists, members of religious minorities, political opponents, and bonded laborers.

involving asylum seekers rescued at sea this spirit of cooperation should be respected with regard to the disembarkation and resettlement stages.<sup>51</sup> However, as pointed out by Rosæg, at present there is no clear legal obligation to permit disembarkation.<sup>52</sup> One may suggest that the key to elaborating a functional burden sharing arrangement with respect to asylum seekers rescued at sea is contingent on the willingness of coastal states to permit disembarkation for assistance and processing.

The UNHCR's Executive Committee concluded that "solution of the problems connected with the rescue of asylum-seekers should not only be sought in the context of legal norms but also through practical arrangements aimed at removing as far as possible the difficulties which have been encountered."<sup>53</sup> After rescuing asylum seekers at sea, it is a generally accepted principle that a ship should proceed to the next port of call for disembarkation. Coastal states indicate that the next port of call is that which is scheduled in the course of the ship's normal business.<sup>54</sup> Indeed, UNHCR's Guidelines for the Disembarkation of Refugees, which was elaborated in the context of the Indo-China exodus, upholds this perspective.<sup>55</sup> Flag states prefer the next port of call to be considered that nearest to the ship for the purpose of convenience.

The *Tampa's* next scheduled port of call was Singapore; thus the Australian government encouraged the ship to move on. The Captain was

---

51. International Convention for the Safety of Life at Sea Regulation, 15 (1978), and the International Convention on Maritime Search and Rescue, at art. 2.1.1 (1998, revising the 1978 Convention), both calling for cooperation between states, although not specifically calling for disembarkation rights. *But see*, International Convention on Salvage, art. 11 (1989):

A State Party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general.

52. See E. Rosæg, *supra* note 31 (citing the International Convention on Maritime Search and Rescue Convention at art. 3.1.2) (noting that the coastal state is not required to receive rescuees). We may also consider the practice regarding stowaways on ships, for example, the UN Human Rights Committee stated that it was concerned that France did not allow asylum seekers "to disembark from ships at French ports, without being given an opportunity to assert their individual claims," which would "raise issues of compatibility with article 12, paragraph 2 of the Covenant (Everyone shall be free to leave any country, including his own)." *Concluding Observations*, U.N. Hum. Rts. Comm., U.N. Doc. CCPR/C/79/Add.80 (1997).

53. Conclusions Concerning Asylum Seekers at Sea—Rescue at Sea, UNHCR, Annex Conclusion No. 26.

54. See *Executive Committee of the High Commissioner's Programme, Preliminary Report on Suggestions retained by the Working Group of Government Representatives on the Question of Rescue of Asylum-Seekers at Sea*, U.N.H.C.R. Sub-Committee of the Whole on International Protection, 33d Sess., U.N. Doc. EC/SCP/24 (1 Oct. 1982).

55. UNHCR, Guidelines for the Disembarkation of Refugees (1985).

concerned due to the intimidating amount of rescuees and the fear that they would jump off the ship should he move in the direction of Indonesia. Hence, he approached Christmas Island. Some commentators have indicated that the threat of committing an act of violence, including suicide, is nothing more than a calculated move initiated to ensure arriving at the country of choice and avoiding the first country of asylum rule. Some suggest refusal of entry would be warranted in order to prevent rewarding actors for such manipulation. On the other hand, we may also consider such acts to be a result of utter desperation at the prospect of being returned to a country that would be likely to refole them. Indonesia has not been especially forthcoming in offering asylum to boat refugees, including those aboard the *Tampa*. Everyone has the right to seek asylum, even though there is no right to choose the country of asylum. Problems arise when the country of first asylum refuses to offer asylum, is unable to guarantee basic human rights for the asylum seekers, and/or threatens refoulement. Efforts to avoid refoulement may derive from the basic need to survive that may suggest a mitigating factor related to psychological stress. Even if one were to regard Indonesia as a transit country and deem Australia the first country of asylum, it would still be necessary to conduct an analysis as to whether protection was actually available and effective there. One may suggest that the denial of opportunity to apply for asylum or other legal status granting basic rights renders the notion of available and effective protection shaky. From this perspective, Norway's protection interest increased.

Disembarkation for refugees rescued at sea is necessary first and foremost in order to render the rescue effective. Aside from preventing the rescue vessel from entering a situation of distress due to a passenger load that it may be unequipped to handle, one may argue that the provision of medical assistance, food, and shelter on land fulfills the rescue function. The Norwegian government expected the Australian government to authorize disembarkation based on the fact that some of the asylum seekers required medical assistance; hence access to the nearest port of call was necessary. In addition, from a practical perspective, it would be logical to seek disembarkation near the physical location of the ship.

Disembarkation was refused and the negotiations dragged on. Conditions on the ship indicated that there was a possible risk of violation of the rights to life, liberty, personal security and freedom from arbitrary detention, and danger of being subject to cruel, inhuman, or degrading treatment.<sup>56</sup> With the exception of the right to liberty, these rights are non-derogable and

---

56. International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at arts. 6, 7, 9, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* 23 Mar. 1976).



cannot be infringed under any circumstance. Hygienic and sanitary conditions faltered. It was reported that fifteen persons had lost consciousness and additional concern was had for pregnant women exhibiting pains. The asylum seekers refused to accept food in protest of non-response to their plight. The Australian government denied that there was any threat of infringement of the asylum seekers' rights, in particular the right to life.

The Australian government sent a group of commando soldiers to accompany doctors on board the ship. Their arrival was seen as an intimidation tactic intended to prevent disembarkation. As a consequence, it served to occupy the ship and prevented it from docking.

Although the Norwegian government expressed concern for the well-being of the asylum seekers aboard the *Tampa*, it did not offer asylum as a means of relieving their situation. In spite of the fact that a state may choose not to grant asylum to those aboard a ship carrying its flag, it remains free to do so. A Norwegian journalist from *Aftenposten* queried the Norwegian Minister of Foreign Affairs, Thorbjørn Jagland as to whether it was possible for the government to resolve the whole crisis by guaranteeing resettlement for the asylum seekers.<sup>57</sup> The Minister retorted that due to the humanitarian situation priority had to be placed on disembarking the asylum seekers on Christmas Island, thus indicating a conceptual lack of connection between the two stages into the protection continuum. The Norwegian Ministry of Foreign Affairs considered negotiations of the case to be separated in two parts, first the duties of the states to cooperate in rescue at sea operations, i.e., the Norwegian government agreed to rescue the asylum seekers and expected permission to be granted by the Australian government to enter territorial waters and reach the port; and second, the need for resettlement of the asylum seekers after entry was conducted. Whereas the Norwegian government placed emphasis on resolving the first issue before discussing resettlement, the Australian government appeared to regard the provision of guarantees for burden sharing with respect to transfer for processing and resettlement as a necessary precondition of allowing disembarkation.<sup>58</sup>

Countries receiving asylum seekers by sea need to rely on burden sharing by other countries, otherwise they will refuse to collaborate in rescue at sea missions. Obviously, flag states have no binding legal duty to accept asylum seekers, however it is unfair of flag states to expect coastal states to single-handedly receive the asylum seekers. Indeed, Goodwin-Gill identified a precedent from 1979 which may clarify Australia's perspective:

---

57. See Helle, *supra* note 44.

58. In comparison, UNHCR's Guidelines for the Disembarkation of Refugees (1985) states that should the flag state be in a position to resettle refugees, it should indicate its willingness to do so within ninety days of their disembarkation.

when a British ship rescued 150 Vietnamese asylum seekers at sea and sought to disembark them in Australia, it offered a resettlement guarantee in exchange for disembarkation rights.<sup>59</sup> The *Tampa* was carrying many more people, hence cooperation with respects to burden sharing was expected. The Australian Minister of Foreign Affairs, Alexander Downer, stated that he requested the Norwegian Minister of Foreign Affairs Thorbjørn Jagland to take on part of the responsibility by accepting some of the asylum seekers for processing but that Minister Jagland refused.<sup>60</sup> He stated that the air travel time to Norway was not excessive; hence he considered his suggestion to be practical to implement.

Minister Jagland retorted that in his opinion, the Australian government had sole responsibility for processing, but that he was willing to take on some of those determined to be refugees after processing.<sup>61</sup> In fairness, prior practice within the specific context of rescue at sea of asylum seekers supports the Norwegian perspective. However, the Australian government's suggestion reflects prior burden sharing practice in situations of mass influx, such as the Balkans. In that case, Norway airlifted 6,072 Kosovar asylum seekers from Macedonia for processing in Norway.<sup>62</sup> The *Tampa* asylum seekers did not constitute a mass influx; hence it is unlikely that the Norwegian government considered it necessary to take extra measures, as the processing could be conducted on Australian territory without resulting in disorder.<sup>63</sup>

The Australian government regarded the *Tampa* asylum seekers as one group among many. From this perspective, there may well be a case for burden sharing in order to prevent the establishment of burden shifting, where coastal states and other states of first asylum are left with the bulk of processing and maintenance costs. One may regard the Australian government's failure to allow access to the port as a possible form of signaling political displeasure, due to the Norwegian government's failure to offer to burden share with respect to accepting transfer of asylum seekers for processing and resettlement.

The Norwegian government retained the power to offer resettlement/transfer for processing at all stages of the crisis, when the boat was in

---

59. GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 159 (2d ed. 1996).

60. Statements by Foreign Ministers Alexander Downer & Thorbjørn Jagland (Australia: Utenriksminister skjelles, 3 Sep. 2001), available at <http://www.tv2.no>.

61. *Id.*

62. Richard Caplan, *Kosovo: The Implications for Humanitarian Intervention*, 5 *FORCED MIGRATION REV.* 5, 7 (1999).

63. See Michael Barutcioski & Astri Suhrke, *Lessons from the Kosovo Refugee Crisis: Innovations in Protection and Burden Sharing*, 14 *J. REFUGEE STUD.* 95 (2001) (discussing the benefit of burden sharing in situations of mass influx).

international waters, as well as within the territorial waters of Australia. Regardless of the presence of Australia's fifty special commando soldiers, the Norwegian government could have offered to accept a percentage of the asylum seekers for processing in Norway in order to promote a compromise and facilitate disembarkation. The fact that the Australian government behaved reprehensibly by refusing to uphold its protection duties, does not justify the Norwegian government's rejection of a protection role. On the contrary, it strengthens the moral argument that the Norwegian government could have been more forthcoming.

However, the Captain of the *Tampa* considered the appearance of the commandos on board the ship to approximate a seizure, hence it is unlikely that the Norwegian government could be expected to respond positively to what it undoubtedly considered to be a hostile act. The Norwegian government may have been reluctant to offer transfer and resettlement of the asylum seekers in the face of bullying by the Australian government and possible interpretation as waiving maritime humanitarian traditions. The Norwegian government wrote to the IMO and UNHCR to protest Australia's action.<sup>64</sup>

Any initiative to establish rules regarding processing of asylum seekers arriving by sea should strive to guarantee prompt disembarkation and processing *on land*. If one compares the *Tampa* case to the case of the Haitian refugees, those who were processed on board boats were subjected to procedural injustice. Many were unable to appear credible, as they were mentally and physically exhausted from their voyage. Their lack of sleep, dehydration, and state of malnutrition required adequate rest and treatment. Unfortunately, some were even subjected to interviews at three a.m.<sup>65</sup>

Thus commenced what may be characterized to be the humanitarian "Cuban Missile Crisis" composed of six days of tense negotiations while the world awaited resolution. Norway did not want to recognize any flag state responsibility over the asylum seekers. In turn, Australia did not want to assume the entire burden as a coastal state. UNHCR recommended a compromise three-point plan:

- 1) Temporary disembarkation for humanitarian reasons on Christmas Island
- 2) Immediate screening of asylum applicants (by UNHCR if requested)
- 3) Transfer to third countries for processing and/or resettlement

---

64. See *Norway involves IMO in "Tampa" Affair*, 1 Sept. 2001, available at <http://www.aftenposten.no/english>.

65. Personal recollection of events from my time as a legal assistant to the Legal Officer at the Latin American Section of UNHCR Headquarters in 1994.

Under the proposed UNHCR compromise plan, the Norwegian government was to accept refugees for resettlement only as a member of the international community rather than as a flag state, which was an acceptable compromise position.

Recently, while commenting on the *Tampa* case, the Danish government stated that it has an agreement with its Shipowners Association to accept the asylum seekers rescued by its flagships within the Indo-China region that remains valid to this day.<sup>66</sup> It was admitted that should the coastal states refuse to process the asylum seekers, the Danish government would assume the responsibility, thus suggesting that the Norwegian government's position did not necessarily reflect flag state, much less Scandinavian, traditions and norms. Indeed, both Norway and Australia were identified as states engaging in the practice of offering resettlement to refugees by ships flying their flags, thereby suggesting the possibility of an emerging rule of international law.<sup>67</sup>

In its defense, the Norwegian government cited the European Parliament's condemnation of Indonesia and Australia's lack of cooperation in the *Tampa* case due to their failure to take immediate steps to solve the problem. This resolution made no mention of any possible lack of cooperation on the part of Norway in terms of burden sharing.<sup>68</sup> However, the European Parliament does not have the clout that other institutions within the European system have, particularly with regard to human rights. Hence, this resolution may not be regarded as having significant weight.

After immediate needs are met, asylum seekers undergo interviews in order to establish identity and determine whether refugee status may be granted. Links to other countries, e.g., family ties, may assist resettlement. With respect to the *Tampa* asylum seekers, IOM conducted identification interviews to determine country of origin and provided counseling for the asylum seekers aboard the vessel that transferred them to Nauru. UNHCR and immigration authorities in Nauru (Australian immigration authorities in Nauru) and New Zealand carried out further processing including status determination and assessment. Amnesty International indicated concern that the asylum seekers were experiencing post-traumatic stress, rendering credibility determinations unreliable.<sup>69</sup>

---

66. Ulrik Dahlin, *Danmark vil motage badflygtninge—i princippet*, INFORMATION (2001). The agreement was reached on 28 June 1979.

67. Shaffer, *supra* note 32 at 230, also identifies Sweden, Denmark, Canada, Israel, Switzerland, and Germany.

68. *Afghan refugees seeking asylum in Australia*, EUR. PARL. DOC. B5-0559/2001 (2001).

69. *Australia Set to Back Down on Restrictive Refugee Policy*, WORLD NEWS, 19 Dec. 2001, available at <http://www.unhcr.ch>.

### VIII. PRIOR EFFORTS TO PROMOTE BURDEN SHARING

Although resettlement is intended to be a solution to forced migration, in some scenarios, such as the Indo-China exodus, it has proved to be a pull factor. It is necessary to review the practice and policy developed within the specific context of asylum seekers rescued at sea. During the 1970s, the fall of the Republic of Vietnam and the Cambodian Lon Nol governments resulted in hundreds of thousands of boat people. From 1975–1992, UNHCR identified boat people arrivals: from Vietnam at 860,149, Cambodia totaled 260,647, and 364,889 came from Laos.<sup>70</sup> The Indo-China exodus resulted in a crisis in which coastal states were overwhelmed by the numbers and refused disembarkation unless resettlement agreements were offered by the flag states, and ships refused to conduct rescue at sea missions due to the expense and delay of disembarkation. Within two months in 1979, 80 to 90 percent of ships ignored asylum seekers' distress signals.<sup>71</sup> In order to reclaim observance of the duty to rescue at sea, UNHCR sought to promote compromise, in which the coastal state would allow temporary disembarkation while the flag state and other members of the international community would offer resettlement guarantees. Thousands of asylum seekers were disembarked in Hong Kong, the Philippines, Singapore, Thailand, and Japan on condition of such resettlement guarantees.

Any effort to elaborate a burden sharing scheme needs to address establishing links to programs in the countries of origin as well as first asylum countries in order to prevent repeating pull scenarios. This would require investment of resources for internal displacement programs and first asylum programs. With respect to internal displacement there is a need for the elaboration of binding standards pertaining to internally displaced persons (IDPs) and procedures for determining asylum claims of IDPs. With respect to countries of first asylum, they need financial support and human resources to ensure adequate attention to the human rights needs of asylum seekers.

By 1989, first asylum ports, such as Malaysia, Thailand, and Hong Kong attempted to relieve themselves of the burden of receiving boat refugees by resorting to tactics such as "redirection to other states" or "push offs" back to the high seas. This resulted in the deaths of hundreds of refugees. As mentioned previously, asylum seekers who managed to arrive on shore were placed in human deterrence camps and incarcerated for months to years. These camps were characterized by the existence of police brutality,

---

70. C. Lanphier, *The Final Phase of Southeast Asian Asylum?—Some Unfinished Business*, 13 REFUGE 3, 6 (1993).

71. UNHCR, Executive Committee of the High Commissioner's Programme, 32d Sess., Sub-Committee of the Whole on International Protection, *Problems Related to the Rescue of Asylum-Seekers in Distress at Sea*, U.N. Doc. EC/SCP/18, ¶ 7 (26 Aug. 1981).

murder, rapes, and deplorable living conditions. All persons were treated as illegal immigrants unless determined to be refugees.

In response to this terrible situation, UNHCR sponsored the International Conference on Indo-Chinese Refugees. Seventy-five nations adopted a Comprehensive Plan of Action (CPA) that included temporary refuge in the country of first asylum (i.e., coastal states), and promise by other countries (e.g., Western states) to offer resettlement. This program ran until 1996. A total of 80,000 Vietnamese boat people were resettled in the West and 72,000 persons were repatriated to Vietnam.<sup>72</sup> Thailand alone repatriated 250,000 to Cambodia. Between 1975–1995, Norway resettled 6,194 Indo-Chinese refugees while Australia resettled 137,543.<sup>73</sup> The CPA had problems involving forced repatriation of those considered “economic refugees,” arbitrary detention, and diminishing interest by resettlement states to live up to commitments. Hence, it cannot be deemed to be a total success—“rather than burden sharing it turned out to be burden avoidance.”<sup>74</sup> This scheme did not take into account the actual needs of the refugees due to the lack of political will by states to engage in real cooperation.

In 1982, at the request of the UNHCR Executive Committee, a Working Group of government representatives from maritime states (including Norway), coastal states (including Australia and Indonesia), and resettlement states met to study the problems of rescue, disembarkation, and resettlement of asylum seekers at sea with representatives from international organizations such as the IMO, UNHCR, International Committee of the Red Cross (ICRC), and the Inter-Governmental Committee for Migration (ICM).<sup>75</sup> This report is obviously not binding law; rather the suggestions can be regarded as soft law—guiding principles if you will. It acknowledged that responsibility is to be shared between the flag states, the coastal states, and resettlement states within the international community.<sup>76</sup> Flag states cannot accept full responsibility because this would end rescue at sea missions, neither can coastal states accept full responsibility, as they would then prevent the entry of ships carrying asylum seekers. Cooperation and international solidarity was viewed as the only solution. Hence recognition was made of the following practical norms:

---

72. Hiram A. Ruiz, *The CPA: Tempestuous Year Left Boat People Adrift*, in *WORLD REFUGEE SURVEY* 82, 82–83 (1996).

73. UNHCR, *THE STATE OF THE WORLD'S REFUGEES: FIFTY YEARS OF HUMANITARIAN ACTION* 99 (2001).

74. Richard A. Cort, *Resettlement of Refugees: National or International Duty?*, 32 *TEXAS INT'L L.J.* 307, 327 (1997).

75. *Report on the Meeting of the Working Group of Government Representatives on the Question of Rescue of Asylum-Seekers at Sea*, UNHCR, U.N. Doc. EC/SEP/21 (5–7 July 1982).

76. GOODWIN-GILL, *supra* note 59, at 160.

- 1) Coastal states are to allow ships to disembark asylum seekers at the next port of call;
- 2) Flag states are to assume burden sharing in the event of large-scale influx[.]<sup>77</sup>

Some coastal states at the meeting indicated that they viewed granting permission to disembark as meeting their duty of burden sharing.<sup>78</sup> In practice, coastal states have refused disembarkation completely and required the ships to leave their jurisdiction, or they have made disembarkation of large-scale influx conditional on resettlement guarantees by flag states or other members of the international community.<sup>79</sup> UNHCR found that some coastal states agreed with the principle that asylum seekers should be disembarked at the next port of call provided that it is scheduled in the course of the ship's normal business. There was no agreement as to permitting longer periods of stay on the basis of resettlement guarantees.

It should be noted that it was the flag states themselves (United Kingdom, the Netherlands, and Greece) that proposed recognition of a principle of equitable burden sharing of asylum seekers rescued at sea.<sup>80</sup> Some flag states did accept responsibility for processing of asylum seekers rescued at sea by their boat, and there was general agreement by the flag states and other resettlement states that they had a responsibility to relieve the burden falling on coastal countries confronting situations of large-scale influx. Other flag states preferred their burden sharing duties to be identified with their membership in the international community rather than their flag state identity.

The Working Group of Government Representatives on the Question of Asylum-Seekers at Sea suggested future elaboration of an international mechanism in which flag states and other resettlement states would assume a responsibility to provide resettlement opportunities according to quotas in coordination with UNHCR.<sup>81</sup> This would avoid the need for protracted bilateral resettlement negotiations in each case. However, the coastal states,

---

77. *Report on the Meeting of the Working Group of Government Representatives on the Question of Rescue of Asylum-Seekers at Sea*, *supra* note 75, ¶ 20(iv).

78. *Id.* ¶ 11.

79. *Id.* ¶ 4. If we consider the situation of stowaways, coastal states are encouraged to allow temporary disembarkation, but flag states retain responsibilities. The International Convention Relating to Stowaways states that the port of call shall return the stowaway to the flag state should it be impossible to return him to the state of origin, state of embarkation, or the prior port of call. Art. 3(4) (1957). The Convention has not entered into force.

80. See GOODWIN-GILL, *supra* note 59, at 159, citing U.N. Doc. A/AC.96/SR.319.

81. See *Report on the Meeting of the Working Group of Government Representatives on the Question of Rescue of Asylum-Seekers at Sea*, *supra* note 75, ¶ 20(ix).

led by Australia, feared that if governments were not required to make specific resettlement commitments, then it would be more difficult to ensure implementation of resettlement and they would be left with large residual caseloads.<sup>82</sup> They were negative to the creation of detailed, legally binding principles on state responsibility for asylum seekers rescued at sea, because states did not appear to be willing to bind themselves to rules, and existing rules were not applicable to situations of mass exodus. This is made obvious if we consider the problems of the Indo-China Comprehensive Plan of Action and that is why there is no specific mechanism or law on point.

### IX. THE RESETTLEMENT STAGE IN THE PROTECTION CONTINUUM: A DURABLE SOLUTION

Resettlement is considered to be a key instrument for providing durable solutions for refugees. Only persons who have been officially recognized as refugees are considered for resettlement. According to UNHCR, in circumstances where voluntary repatriation is not possible and the country of refuge is unable or unwilling to provide protection, resettlement is the only solution available.<sup>83</sup> In the case of the *Tampa*, Australia indicated that it expected some of the refugees to be resettled elsewhere. The absence of an offer of local integration for all those identified as refugees and the ongoing threat of expulsion and arbitrary detention rendered resettlement a necessary step. The offer of resettlement is a voluntary act (there is no legal obligation on the part of states to resettle refugees), however Norway has a resettlement quota for refugees recognized by UNHCR. The quota has a total of 1,500 spots per year, of which 700 are reserved for refugees from the Middle East.<sup>84</sup> In 2000, Norway resettled 462 Afghani refugees. In spite of this, Norway declined to make a resettlement offer to the refugees from the *Tampa*. Hence, UNHCR has had to turn to third states, such as Ireland, for resettlement. Australia's resettlement program includes 12,000 places, among which are refugees from the Middle East and its surrounding area, particularly Iraq, Afghanistan and Iran (27 percent in 2000–2001).<sup>85</sup> A negative consequence of the increase of asylum seekers arriving by boat to Australia is the cut in resettlement spots available to refugees selected by

---

82. See Executive Committee, *Preliminary Report on Suggestions retained by the Working Group of Government Representatives on the Question of Rescue of Asylum-Seekers at Sea*, *supra* note 54, ¶ 6.

83. UNHCR, RESETTLEMENT HANDBOOK (July 1997, revised July 2002).

84. Norwegian Directorate of Immigration, *available at* <http://www.udi.no> (follow the "statistikksider" link for statistics).

85. Australian Department of Immigration and Multicultural Affairs, *available at* <http://www.immi.gov.au> (follow the "Information Resources" link, then "Statistics" link).



UNHCR in the region of origin. Rather than create additional places, the government chose to utilize approximately half of the resettlement places for the arrivals by sea. This factor may be considered an additional argument for creating a burden sharing scheme. Failure to provide international cooperation for resettlement of asylum seekers rescued at sea jeopardizes coastal state's participation in UNHCR's resettlement programs.

The Australian immigration authorities suspended processing asylum claims from Afghan asylum seekers on 24 December 2001 as a result of the removal of the Taliban. There appears to be a presumption for application of the cessation clause prior to review of asylum claims, this prompts concern similar to that raised by recommendations of determining asylum seekers to be subject to the exclusion clause prior to review of the claim.<sup>86</sup> Regardless of whether the cessation clause may be deemed relevant, it may be viable to promote voluntary repatriation if safety and dignity can be assured. However, given the instability in the country, presence of land mines, damaged infrastructure, and limited reintegration possibilities, it may be difficult to guarantee that effective protection and security in the immediate period in Afghanistan. Care should be taken to ensure that refugees are not pressured due to their detention in Nauru.

The willingness of flag states and other resettlement states to offer resettlement guarantees may be considered the key condition to respecting rescue at sea principles and having an effective system to carry out the protection continuum. Coastal states will prove more receptive to disembarkation if other states will share the burden. At a time when the international community (states and international organizations, such as IOM, UNHCR, and IMO) fears escalation of flight at sea, it should not be backing away from burden sharing initiatives. On the contrary, it should be solidifying them. Otherwise, states are likely to engage in another diplomatic stand off which endangers the lives and safety of those rescued on board ships. There is a compelling need to call for a new conference to examine the possibility of adopting binding standards for rescue of asylum seekers at sea as well as a practical burden sharing arrangement pertaining to disembarkation and resettlement. It is likely that coastal states may be expected to provide immediate medical attention, food, and shelter upon disembarkation. However, there may be discussion as to whether they should be reimbursed for such costs by the international community via a specific fund, the flag state in particular, the state of embarkation, or otherwise. It is also unclear as

---

86. The cessation clauses are the provisions in Article 1(c) of the Geneva Convention on the Status of Refugees (1951) which set forth conditions for cessation of the application of the Convention to the person based on inter alia: reavilment of the protection of nationality, voluntary reestablishment in the country he left, or a change of circumstances in the country of origin.

to which country should be responsible for processing asylum seekers for identification, assessment, and status determination. It is important to emphasize that ideally, no processing should occur on ships, but rather on land in order to minimize traumatizing rescued asylum seekers and to prevent ensuing procedural injustices. In addition, there should be a clear standard with respect to upholding due process norms in terms of access to review mechanisms to ensure a fair determination of the asylum claim. Access to review should be speedy in order to avoid excessive detention. Questions that must be resolved include: should coastal states assume the burden for each of these stages; or should this be shared by other states? How would burden sharing be defined?

Moreover, should the asylum seekers be distributed to different countries prior to identification as refugees? Coastal states would favor this so as not to be burdened with maintenance costs, processing costs, and repatriation costs of those not recognized as refugees. Would it be preferable to transfer only those identified as refugees within preliminary interviews, or instead only those officially recognized as refugees after final status determination is accomplished? Should states share the costs related to the disembarkation to resettlement processing phase regardless of location of processing?

## **X. LESSONS FOR FUTURE BURDEN SHARING**

While I agree that flag states should not assume all of the burden of resettlement, neither should coastal states. A quota system should be established for resettlement and a fund should be established to contribute to maintenance, health care, and processing costs amassed within the interim between disembarkation and resettlement. In addition, I suggest that coastal states should accept disembarkation at the nearest port of call rather than the next scheduled port in order to ensure successful completion of the rescue operation. Burden sharing is the most practical manner of resolving such situations and the reluctance of both the Norwegian government and Australian government to cooperate has jeopardized the future of rescue at sea missions. This case cast aside prior progress made to uphold the rescue at sea obligation by cooperating and dividing responsibilities. A new multilateral initiative is needed to establish a binding framework of norms and implementing mechanisms.

One of the most important aspects of disembarkation is that it is a transitional phase; hence resettlement states and other international actors should cooperate to ensure that the period of stay in the coastal state is limited to a reasonable time. In the case of the Indo-Chinese asylum seekers,

many were detained for excessive periods in conditions that proved degrading and dangerous. Asylum seekers who are rejected must be repatriated speedily in order to minimize the risk of arbitrary detention. IOM should be given a key role in assuring an efficient and fair system of repatriation of migrants. As an alternative, IOM should be given resources to facilitate exploration of the possibility of burden sharing of migrants, in order to provide access to regular migration opportunities for those cases in which repatriation is not viable due to the situation in the country of origin.

Greater resources should be dedicated to addressing migration flows rooted in poverty and civil unrest that do not result in recognition of refugee status. Although an ideal scenario would be open immigration, the current environment belies such possibility. In the case of Norway, part of the reason that it is overwhelmed by abuse of the refugee process is that the opportunities for regular immigration are few. Focus is now on speedy return, as evidenced by new mechanisms for accelerated procedures of "manifestly unfounded claims," accompanied by detention centers to prevent flight underground. While courts and human rights monitors criticize the legitimacy of detention, there is a need to devise creative strategies. There is a need to establish links between repatriation of migrants and programs on development, human rights protection, conflict resolution, peace building. Rather than treating illegal migrants as criminals or opportunists, they should be treated as untapped potential for countries. Given their proven drive and initiative to pursue a better future, they need a framework for evolution. Such action would require the investment of resources in country of origin programs, as well as better coordination with IOM, UNDP, and other organizations.

With respect to the increasing percentage of persons migrating due to situations of poverty and civil disturbance, and who are unlikely to qualify for refugee status, there is an equally compelling reason to design burden sharing mechanisms pertaining to regular migration alternatives as well as repatriation. Should burden sharing be applied to those determined not to be refugees? Would states be willing to provide access to regular migration procedures in cases where repatriation is not viable due to the situation in the country of origin? IOM should be given sufficient resources in order to strengthen its role in promoting such burden sharing as well as overseeing repatriation of non-refugees.

Such initiatives should also be linked to country of origin actions focused on development, human rights protection, conflict resolution and peace building.

## XI. CONSEQUENCES OF NON-COOPERATION OF RESCUE AT SEA OF ASYLUM SEEKERS: OFF-SHORE PROCESSING CENTERS IN "SAFE HAVENS"

The absence of an adequate burden sharing arrangement with respect to asylum seekers rescued at sea or arriving in boats has resulted in the elaboration of offshore processing centers in "safe havens." Such mechanisms exploit smaller, poorer countries by cajoling them into assuming a burden that would normally be beyond their means.<sup>87</sup> It is a policy that institutionalizes racism by forcing certain ethnic groups to reside in marginalized areas deprived of basic human dignity.<sup>88</sup> The use of safe havens serves primarily to limit the right of persons to seek asylum. If one considers the past experiences of safe havens in the Caribbean as pertaining to the Haitian refugees headed for the United States, in Hong Kong for those seeking British protection, and New Caledonia as pertaining to France, these havens proved to be nothing more than detention centers in which fundamental rights were persistently violated.<sup>89</sup> Rather than rapid process-

---

87. As a side note, in 1980 in response to the problems faced by states issuing flags of convenience and small states that could not provide for asylum seekers, the DISERO Disembarkation Resettlement Offers was created. Australia, Canada, France, Germany, New Zealand, Sweden, Switzerland, and the United States resettled asylum seekers rescued by the ships flying under flags of convenience. Thus the international community sought to engage in burden sharing in order to assist small states. It makes no sense for developed states to now utilize small countries, such as Nauru, as safe havens when they clearly cannot handle the responsibility.

88. It may be pointed out that the concept of offshore processing centers has received favorable interest by the Norwegian Progressive Party, precisely the party famed for xenophobic positions. A good example of the Progressive Party's perspective is Per Sandberg's proposal to refuse asylum seekers from outside the Schengen territory:

We don't want more asylum seekers from countries outside of the Schengen area. The increase in asylum applications has been enormous, and I believe that 70-75% of them are unfounded. . . . The majority of those who seek asylum are economic refugees who come to Norway to exploit our welfare system.

The Minister of Local Government rejected this proposal as being in violation of international treaties. See *Dagbladet*, *Kun vestlige innvandrere*, at <http://www.dagbladet.no> (29 Nov. 2002).

89. As pertaining to New Caledonia, in 1998, sixty Chinese boat people were detained in a military hangar in Noumea. *Chinese boat people languish as New Caledonia debates future*, AGENCE FRANCE PRESSE, 30 Oct. 1998. When they protested their upcoming expulsion, the gendarmes fired tear gas and rubber bullets at them, in spite of the fact that the group included children and a baby (none of whom were injured). The government suspended the deportation. With respect to Hong Kong, there were inhumane conditions in the camps, including violence (rape and murder), health problems, lack of medical and educational programs, and lack of access to judicial or administrative review. E. Burton & D. Goldstein, *Vietnamese Women and Children Refugees in Hong Kong: An Argument Against Arbitrary Detention*, 4 DUKE J. COMP. & INT'L L. 71 (1993).

ing, they subjected asylum seekers to extended delays. In many cases, deterrence of further refugee flows was the true purpose of such programs.

In the case of the Haitian refugees, the United States initially approached states of the Caribbean Basin to explore the possibility of burden sharing. Many newspapers in the United States and regional states sensationalized the "invasion" of "black, HIV infected" people. Within the Caribbean Basin, some questioned the legitimacy of taking responsibility for the consequences of a faulty US foreign policy in Haiti. Hence there was a lack of interest in accepting Haitian refugees. The United States finally managed to obtain cooperation from smaller island nations as well as Panama (which had an off-shore island available). The US Coast Guard intercepted the boats and processed some of the asylum seekers on board the receiving boats.<sup>90</sup> Most were sent back to Haiti or to safe havens in small Caribbean islands. Others were sent to a detention center in Guantanamo Bay, which proved to have problems with violence, including suicide. (A fitting example of the inappropriateness of remote detention centers for asylum seekers is the fact that the US government is now utilizing the Guantanamo center to imprison those arrested in connection with the Al-Qaeda terrorist network, precisely for security and isolation purposes.)<sup>91</sup>

The creation of a detention center in the "declared country" (safe haven) in Nauru (as well as Papua New Guinea) is disturbing.<sup>92</sup> Nauru is only 13 square miles and suffers from poverty. In addition, it has not ratified the 1951 Convention on the Status of Refugees. The Australian government provided Nauru with security fencing and infrastructure to ensure the detention of the asylum seekers. It also provided Nauru with two aid

---

90. Personal Recollection of events during my period as a legal assistant for the Legal Protection Officer of the Latin American Section at UNHCR Headquarters Geneva in 1994.

91. The US Supreme Court held that the government had not infringed the principle of non-refoulement, as its actions occurred beyond the territory of the United States. *Sale v. Haitian Centres Council, Inc.*, 509 U.S. 155, 183, 187 (1993). The Inter-American Commission of Human Rights disagreed and concluded that the United States had violated the right to life, liberty, security of the person, equality before the law (as Cubans had received asylum), right to resort to the courts, and the right to seek and receive asylum. *Haitian Centre for Human Rights, et al. v. United States*, ¶¶ 183–88, Case 10.675, Inter-Am. Ct. H.R. 51.96, O.A.S. Doc. OEA/Ser.L./V/11.95, Doc. 7 (1997) (judgment of 13 Mar. 1997).

92. According to the Australian government, a "declared country" is one which provides access for persons seeking asylum to effective procedures for assessing their protection needs, provides protection pending determination of refugee status, pending voluntary repatriation or resettlement to another country, and meets human rights standards. Furthermore, a "declared country" is one that the Minister for Immigration believes will not engage in refoulement. Nauru and Papua New Guinea are declared countries. I take issue with such declaration, as I believe that detention on Nauru begets violation of human rights.

packages totaling thirty million dollars, including diesel fuel, education, health, and sporting scholarships, teacher training, mobile classrooms, waste management, water tank repairs, technical assistance, police training, and canceled health care debts.<sup>93</sup> From August to December 2001, approximately 1,000 asylum seekers were sent to Nauru and Papua New Guinea.<sup>94</sup> The Australian government indicated that it was merely following customary practice with respect to utilizing off-shore processing facilities; hence it is essential for the international community to refute the notion that this is acceptable practice.

The creation of detention centers provokes concern due to the fact that they restrict the right to liberty, effectively punishing people for seeking asylum. In addition, they are often linked to private companies who profit from the construction and management of these centers. The International Organization of Migration manages the facility in Nauru (UNHCR and the Australian immigration authorities process claims) as well as another processing facility at the Lombrum Naval Base in Papua New Guinea (Australian immigration authorities process claims). However, Australasian Correctional Management runs the center on Christmas Island. This company also runs detention centers for persons convicted of penal crimes, hence its focus is on control of the population and not necessarily geared specifically to refugee concerns, e.g., providing mental health treatment for those suffering from post-traumatic stress syndrome. Detention centers are often criticized for being overcrowded and lacking basic minimum norms regarding privacy and hygiene. The Australasian Correctional Management Company is subject to financial penalties in the event of escape of asylum seekers; thus security is a key objective. Indeed, when such events happen government officials have cited concern that the escapees may include

---

93. The use of safe havens must be distinguished from "safety zones." The latter have been utilized in conflict situations, and have also been deemed to be failures. Indeed, the safety zones in Bosnia were considered to be among the most dangerous places in the region. The lack of shelter, medical assistance, infrastructure, and security guarantees rendered the zones to be detention centers subject to armed attack. The safety zone in Northern Iraq has also received criticism due to the deplorable human rights conditions. Leonardo Franco of UNHCR, asserted that:

We have to conclude that the 'safe area' fell short of providing protection during flight or an effective protection, as an adequate substitute for asylum. The "safe areas" are anything but safe in a meaningful way. . . . The safety zones proposal . . . appears inconsistent with established human rights and refugee law principles. They cannot provide effective protection and safeguard all basic human rights, including the right to leave the country and seek asylum.

Leonardo Franco, *An Examination of Safety Zones for Internally Displaced Persons as a Contribution toward Prevention and Solution of Refugee Problems*, in *INTERNATIONAL LEGAL ISSUES ARISING UNDER THE UNITED NATIONS DECADE OF INTERNATIONAL LAW* (M. Al-Nauimi & R. Meese eds., 1995).

94. *Australia Strikes Deal with Nauru on Asylum Seekers*, *WORLD NEWS* (11 Dec. 2001) available at <http://www.unhcr.ch>.

criminal asylum seekers and have implored the people not to harbor them.<sup>95</sup> Complaints regarding privatization of these centers is that they remove asylum seekers from public oversight; given that the managers are given a great deal of discretion in the day to day treatment of the asylum seekers, there is potential for abuse.<sup>96</sup> Asylum seekers may be denied contact with the media, NGOs, or UNHCR. They may not be informed of their legal rights and may have limited access to judicial or administrative review, thus provoking a risk of arbitrary detention.<sup>97</sup> Ironically, shortly after the *Tampa* case, Norway's immigration authorities announced the proposed creation of a detention center for asylum applicants with manifestly unfounded claims.<sup>98</sup>

---

95. *Contractor Faces Fines After Immigrants Escape Australian Detention*, AGENCE FRANCE PRESSE, 23 Jul. 2001 (quoting Philip Ruddock, Minister of Immigration and Multicultural Affairs). The UN Working Group on Arbitrary Detention visited Australia and completed a report addressing problems with the mandatory detention of unauthorized arrivals (automatic and indiscriminate character, duration, absence of judicial control/judicial review, psychological stress, denial of family unity, maintenance of children in detention, and private management of the detention centers) E/Cn.4/2003/Add.2 (24 Oct. 2002).

96. In April 2001, the Australasian Correctional Management Company settled a case brought forward by detainees at the Villawood detention center in which the staff assaulted the detainees by punching, kicking, and hitting with batons. Public Services International Research Unit, *Prison Privatization Report International*, No. 44 (Nov. 2001), available at <http://www.psir.org/justice/>.

97. Australia has utilized mandatory detention of unauthorized arrivals since 1992, establishing seven detention centers on the mainland. In 2000, the UN Human Rights Committee presented its concern regarding the mandatory detention under the Migration Act of unauthorized asylum seekers, which "raises questions of compliance with article 9" on arbitrary detention. It criticized the failure of the state to inform detainees of their right to seek legal advice and of not allowing access of nongovernmental human rights organizations to them to inform them of this right. The Committee recommended the use of alternative mechanisms than detention, and commitment by the state to inform detainees of their legal rights. *Concluding Observations of the Human Rights Committee: Australia*, Concluding Observations/Comments, Hum. Rts. Comm., 69th Sess., 1967th mtg., U.N. Doc. CCPR/A/55/40 ¶¶ 498–528 (2000).

In 1997, the UN Human Rights Committee issued a view condemning the Australian government's arbitrary detention of a Cambodian asylum seeker for four years. *A v. Australia*, UN Hum. Rts. Comm., Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (30 Apr. 1997).

The UN Committee Against Torture expressed concern for Australia's lack of review mechanisms for ministerial decisions in cases risking refoulement as well, and called for the creation of an independent mechanism for such purpose. A key consideration of establishing the inappropriateness and injustice of the detention was the lack of procedural remedy in the form of access to a court empowered to order his release. *Conclusions*, U.N. Comm. Against Torture, U.N. Doc. CAT/C/XXV/Concl.3 (21 Nov. 2000).

98. The purpose of the center is to reduce crimes, such as shoplifting, committed by rejected asylum seekers living in open reception centers. According to the UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to Detention of Asylum Seekers (1999), detention of asylum seekers is "inherently undesirable," including those arriving in an irregular manner. It calls for judicial and administrative

Thus, the *Tampa* case initiated a moral debate among NGOs, international organizations, and human rights activists in both Australia and Norway. Although the discussion commenced with attention being placed on the violation of humanitarian principles regarding rescue at sea, it soon progressed to address other aspects of treatment rendered to asylum seekers, in particular detention. There appeared to be a striking lack of congruence between the modern governments that espouse democratic principles and their actions which support systems that degrade and marginalize human beings by infringing their fundamental rights and liberties. Is the answer to forced flight on account of war, natural disaster, or poverty really the construction of detention centers?

## XII. CONCLUSION

Burden sharing is necessary in the context of rescue of asylum seekers at sea in order to save those who risk their lives in search of freedom. Without cooperation, the duty to rescue at sea may be ignored; ship owners may choose not to incur financial losses for the sake of refugees. Coastal states may engage in "push offs" and use safe havens as a means of repelling arrivals. The lack of clarity in international law for situations involving the rescue of asylum seekers at sea calls for a new initiative to create appropriate standards. The current *ad hoc* approach has revealed the cost of

---

review of detention. It highlights the following criteria for detention: (1) To verify identity when this is undetermined or in dispute, (2) To determine the elements on which the claim for refugee status or asylum is based (thus justifying detention for preliminary interview, not the entire status determination period), (3) In cases in which the asylum seeker has destroyed his/her ID/travel documents or utilized fraudulent documents with the intention to mislead the immigration authorities, and (4) To protect national security and public order. ECRE has also issued guidelines regarding conditions for use of detention:

1. The asylum seeker is liable for prosecution for a serious non-political offence.
2. The asylum seeker has repeatedly and unjustifiably failed to comply with reporting requirements issued by the authorities.
3. The asylum seeker fails to comply with an order to leave the territory issued after he has pursued an appeal in a fair determination procedure and there are not humanitarian grounds to grant a permit to stay.

European Council on Refugees & Exiles: Position Paper on detention (1996) (on file with author). In comparison, in England the law lords, in the *Saadi* case concerning detention of Iraqi Kurd asylum seekers, dismissed the appeal based on the view that the detention was proportionate and reasonable given the huge numbers of asylum seekers and risk of long delays. The detention was recognized as being linked to the objective of speedy determination of asylum application. The court cited the Human Rights Act of 1998 that implements the European Convention on Human Rights. *R (on the application of Saadi and others) v. Secretary of State for the Home Department*, House of Lords (31 Oct. 2002).



lack of systematization. The asylum seekers suffered an extended stay on the *Tampa*, followed by detention in Nauru.

On 26 November 2001, the Secretary-General of the IMO opened the Twenty-second IMO assembly by calling for a review by a UN interagency group of the existing legislation concerning the delivery of persons rescued at sea to a place of safety. He called for asylum seekers and refugees to be treated in accordance with international treaties as well as humanitarian maritime norms.

The IMO Assembly adopted a resolution titled "Review of safety measures and procedures for the treatment of persons rescued at sea." It calls for a comprehensive review, coordination, and cooperation among parties to deliver rescued persons to a place of safety, regardless of their nationality, status, or circumstance in which they are found. The review will be geared towards clarification of the gaps and inconsistencies among the IMO instruments.

In addition, the Secretary-General of the IMO proposed the establishment of a coordinating mechanism in the form of an interagency panel to be activated in situations of concern. Although there can be doubt that such a panel would be a positive evolution, one may suggest that a more permanent, comprehensive scheme may be in order. The international organizations should re-examine the possibility of creating a framework for burden sharing of asylum seekers rescued at sea based on the protection continuum. I offer the following suggestions:

- 1) Flag states and coastal states should reiterate their obligation to cooperate in rescue actions for asylum seekers at sea;
- 2) The principle of non-refoulement should be recognized as applying extra-territorially. Flag states, carriers, and IMO should guarantee respect for the non-refoulement principle;
- 3) Coastal states should guarantee a right of disembarkation at the nearest port of call for immediate assistance (medical attention, food, shelter, etc.). A set standard should be elaborated with respect to where further processing for identification and status determination should occur, i.e., the coastal state, flag state, state of embarkation;
- 4) Flag states, coastal states, and states of embarkation should declare their respect for the right to seek asylum;
- 5) Flag states should express a willingness to avoid "burden-shifting" of refugee flows within specific regions;
- 6) Flag states, embarkation states, and coastal states should recognize the need to provide durable solutions for asylum seekers rescued at

sea, hence they should accept burden sharing responsibilities for resettlement. Resettlement should be provided speedily in order to avoid long stays in centers while undergoing processing. Quotas may be elaborated for such action; in addition states should offer to consider refugees rescued at sea eligible for already established quota programs via creation of additional spots or inclusion within existing spots;

- 7) UNHCR should establish a mechanism by which to involve other states within the international community in such a burden sharing framework;
- 8) Set procedures should be elaborated for repatriation of persons determined not to be refugees or to be at risk of refoulement in order to avoid excessive detention; IOM should oversee this phase. Exploration of the possibility of elaborating a mechanism of alternative migration possibilities (in cases where repatriation is not viable) via regular immigration procedures in other countries is needed;
- 9) Countries should increase their contributions to protection and assistance programs in countries of origin and first asylum in order to prevent resettlement programs related to rescue at sea from becoming "pull factors."<sup>99</sup> Consideration of in-country processing for asylum claims by IDPs as well as burden sharing schemes regarding refugees in first countries of asylum should also be developed as support framework;<sup>100</sup> and
- 10) Donors should support the elaboration of a new reimbursement fund by UNHCR/IMO to cover the extra costs related to rescue at sea of asylum seekers.

---

99. Both Australia and Norway provide aid to such programs.

100. Of note, Norway has a mechanism for selection of persecuted individuals who remain in Colombia for asylum in Norway.