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REFUGEES AND RESPONSIBILITY IN THE TWENTY-FIRST CENTURY: MORE LESSONS LEARNED FROM THE SOUTH PACIFIC

Guy S. Goodwin-Gill[†]

Abstract: [G]overnments throughout the world have tried to avoid dealing with the difficult questions raised by refugee and related movements. One method is to seek to redefine the problem as one not involving obligation or responsibility. Some governments also use the law in an attempt to limit the scope of their obligations. Another technique . . . is to engage in an exercise of extra-territorial jurisdiction . . . and to seek to justify that practice on the ground that somehow obligations towards refugees need not be observed. States have also tried detention, discriminatory treatment, and denial of other human rights in their attempts to dissuade the refugee and asylum seekers In Australia, where there is no constitutional protection or Bill of Rights, the Government has continued to expand its field of executive, arbitrary power which began with the introduction of mandatory non-reviewable detention in 1991.

In the case of the *Tampa*, Norway's position, based on Article 98 of [the United Nations Convention on the Law of the Sea], customary international law and generally accepted humanitarian standards, was that Australia was obliged to allow those rescued into the nearest port: this, in Norway's view, was Christmas Island. However, "next port of call" is not a self-defining or self-applying concept, and in many instances it may be relative to the particular circumstances of rescue [T]he premises of the international protection regime (which draws on the specifics of international refugee law, on human rights law, and on more generally applicable rules), does provide a normative and institutional framework within which States ought to seek solutions. The U.N. Committee on Human Rights found that [Australia's] policy and practice of mandatory and non-reviewable detention was arbitrary and a breach of Article 9 of the International Covenant on Civil and Political Rights, and a similar conclusion was reached by the Australian Human Rights and Equal Opportunity Commission in 1998. The question effectively arising in the *Tampa* case was whether the State primarily engaged had the courage to respond internationally, or whether it would look no further than its own narrow and short-term self-interest. The *Tampa* incident is a reminder that the refugee regime is not a seamless web, even if certain core and often competing principles retain their normative power.

I. INTRODUCTION

The 1951 Convention relating to the Status of Refugees ("Refugee Convention"), with just one amending and updating Protocol adopted in 1967, remains, with 144 States party, the central feature in today's international regime of refugee protection.¹ It did not spring unbidden from the ground but,

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¹ 1951 Convention relating to the Status of Refugees *opened for signature* July 28, 1951 (19 U.S.T. 6259; 189 U.N.T.S. 150) [hereinafter Refugee Convention]; 1967 Protocol to the Convention relating to the Status of Refugees *opened for signature* Jan. 31, 1967 (19 U.S.T. 6223, 6224(E), 6230(F); 606 U.N.T.S. 267)

as its Preamble recalls, the Parties considered it “desirable to revise and consolidate previous international agreements . . . and to extend the scope of and the protection accorded.”²

It was then, in fact, the latest in a long line of international agreements going back to 1922, and the first League of Nations arrangement for the issue of identity certificates to Russian refugees. Halcyon days—when to be a refugee was merely a matter of being outside your country and without the protection of your government or any other State. In fact, though very large numbers of refugees were protected and did find solutions during the interwar years,³ few States became party to the various international agreements of the time,⁴ and the system of international protection remained relatively underdeveloped. The central principle of *non-refoulement*, (the principle that no refugee should be returned to a country in which he or she would be at risk of persecution) began to take root,⁵ notwithstanding tragic examples of “buck passing” and avoidance of responsibility.⁶

No refugee treaty has ever attracted anything like the level of support given to the Refugee Convention, and yet today it is often said to be a relic of a bygone, cold war, almost ice-age era. Signs of decrepitude are identified in its failing focus. For example: the Refugee Convention’s apparent inability to accommodate the “new” refugees from ethnic violence and gender-based persecution; its deafness or insensitivity to national, regional, and international security concerns, particularly since September 11, 2001; its nervousness in heavy traffic; and its inflexibility when faced with the changing nature of flight and movement. Human rights, to which all persons are entitled, are also sometimes said to have made refugee determination (as opposed to simple protection) redundant, so that careful inquiry into the well-foundedness of claims to refugee status is no longer required.

Certainly, the context today is different from what it was in July 1951. There is more economic migration;⁷ there are considerably more people in the world; there are many and easier ways for large numbers of people to travel vast

[hereinafter Protocol]. Both included in GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 389, 409 (2d ed. 1996) [hereinafter *THE REFUGEE IN INTERNATIONAL LAW*]. References below to the Refugee Convention imply the 1951 Refugee Convention read together with the 1967 Protocol, unless the context otherwise requires.

² Refugee Convention, *supra* note 1, at pmb1.

³ See generally CLAUDENA M. SKRAN, *REFUGEES IN INTER-WAR EUROPE* (1995); MICHAEL R. MARRUS, *THE UNWANTED: EUROPEAN REFUGEES IN THE TWENTIETH CENTURY* (1985).

⁴ *THE REFUGEE IN INTERNATIONAL LAW*, *supra* note 1, at 4-7.

⁵ *Id.* at 117-21.

⁶ One of the most egregious examples of the late inter-war period is provided by the voyage of the *St. Louis*, which sailed from Hamburg on May 15, 1939, carrying some nine-hundred German Jews in an ultimately fruitless search for refuge. See IRVING ABELLA & HAROLD TROPER, *NONE IS TOO MANY: CANADA AND THE JEWS OF EUROPE 1933-1948*, at 63-64 (1983).

⁷ It has been estimated that more than 140 million people live outside their countries of birth, and that migrants comprise more than fifteen percent of the population in over fifty countries: UNITED STATES NATIONAL INTELLIGENCE COUNCIL, *GROWING GLOBAL MIGRATION AND ITS IMPLICATIONS FOR THE UNITED STATES* 3 (2001).

distances in a short space of time, often with the assistance of smugglers or traffickers; and there is a clear disparity between what we spend on refugee determination at the national level and what we contribute to refugee protection in other parts of the world.

It is also true that the Refugee Convention, especially the *non-refoulement* provision in Article 33, reminds us that we have obligations to those within our territory or jurisdiction, but no apparent obligations to those whose need may be greater elsewhere. However, as the International Court of Justice remarked as early as 1951, in its Advisory Opinion on *Reservations to the Genocide Convention*, it is the nature of human rights conventions and instruments for humanitarian purposes that no precise balance of responsibility necessarily follows:

In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.⁸

It is equally the case that many of the dichotomies are false, and that governments' inability to deal effectively with many of today's problems cannot, in fact, be traced to any real or apparent defect in the Refugee Convention. Like it or not, the rule that States have obligations towards all those within their territory or subject to their jurisdiction is one of the consequences of sovereignty. Nor is illegal or irregular movement in any way attributable to the Refugee Convention; refugees and migrants have been crossing borders illegally for years. Still, it is right and proper that we consider how we can make this instrument of protection more effective and more efficient, and how also we might be able to fill other unconnected, but no less real, gaps in the international refugee regime.

A. *The International Refugee Regime*

The Refugee Convention was an evolutionary step in the international protection of refugees, setting down certain core principles including the definition of a refugee, the prohibition of *refoulement*, and the principle of

⁸ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, A.O., 1951 I.C.J. Reports 15, at 23 (May 28, 1951).

immunity from penalization for refugees entering or present illegally, thus improving and promoting standards of treatment for refugees in society.

But the Refugee Convention must also be understood in context, with due regard to its place in the order of things. It is an important element in an international regime which brings together a variety of actors in pursuit of certain goals. It is part of a dynamic process involving States, institutions, non-governmental organizations, rules, standards and, increasingly, refugees and asylum seekers. Among the various actors, the Office of the United Nations High Commissioner for Refugees ("UNHCR") has specific responsibilities under its Statute as a subsidiary organ of the U.N. General Assembly:

1. [The Office] shall assume the function of providing international protection . . . to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting Governments . . . to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities.

8. The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by: (a) Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.⁹

In fulfilling its responsibilities to the U.N. General Assembly, the UNHCR is formally assisted by the Executive Committee of the High Commissioner's Program, now comprising some fifty-three member States and responsible, among other matters, for approving the budget and advising on protection issues.¹⁰ In addition, UNHCR also engages regularly with individual States, regional organizations, and non-governmental organizations, both in promoting protection and providing assistance.

This international protection regime¹¹ can be described in two words and by two inter-locking concepts: protection and solutions. It cannot be

⁹ *Statute of the Office of the United Nations High Commissioner for Refugees*, G.A. Res. 428(V), U.N. GAOR, 5th Sess., Supp. No. 20, at 46, U.N. Doc. A/1775 (1950).

¹⁰ See THE REFUGEE IN INTERNATIONAL LAW, *supra* note 1, at 127-29, 214-20; Jerzy Sztucki, *The Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme*, 1 INT'L J. REFUGEE L. 285 (1989). The practical contribution to protection advice was considerably reduced in the mid-1990s, when re-organization of Executive Committee procedures led to the abolition of the Sub-Committee of the Whole on International Protection in favor of a "Standing Committee" arrangement that has proved far less influential. On other aspects of the then-deteriorating protection climate, see Guy S. Goodwin-Gill, *Refugee Identity and Protection's Fading Prospect*, in REFUGEE RIGHTS AND REALITIES: EVOLVING INTERNATIONAL CONCEPTS AND REGIMES 220-49 (Frances Nicholson & Patrick Twomey eds., 1999).

¹¹ I use the word "regime" somewhat loosely, for the purpose, in particular, of focusing on the various actors, institutions, rules and principles, which refugee issues engage; I draw liberally on the definition of

understood, however, without recognizing, on the one hand, the place of rights and human rights in the system overall, and, on the other hand, the continuing influence of both State obligations and interests.

Within this regime, the 1951 Refugee Convention and the 1967 Protocol to the convention relating to the Status of Refugees ("Protocol")¹² occupy a special, though perhaps precarious, position. As indicated above, the Refugee Convention these days is blamed for many things. Those who have not examined its history in detail may say it is too "Eurocentric" for the modern world, concentrating on economic and social integration to an extent beyond the capacity or inclination of most of the developing world, where most of the world's refugees remain. Others may say that it is static, locked in an era of known refugee problems and driven by an East/West political ideology whose day has passed. The Refugee Convention fails, it is said, because it does not provide answers to the phenomenon of large-scale, often involuntary, migration, it does not provide protection to refugees beyond the narrow terms of the definition in Article 1, and because it has not kept pace with human rights.

Again, while many of these issues deserve concerted attention, the failure to deal satisfactorily with the challenges is most readily laid at the feet of governments, which have not been prepared to deal with international migration other than on the basis of nineteenth-century (and generally illusory) conceptions of sovereignty.¹³ These governments have also failed to invest in conflict prevention and mediation, let alone in democratization and development, and even at home have failed to meet the internal order challenges of competent and efficient administration, as exemplified in the lacking determination of refugee status and the provisions of protection in accordance with international obligations.

II. HOW GOVERNMENTS RESPOND TO DIFFICULT QUESTIONS

Over the last twenty or so years, governments throughout the world have tried to avoid dealing with the difficult questions raised by refugee and related movements. One method is to seek to redefine the problem as one not involving obligation or responsibility. During the 1980s and later, for example, many of the first asylum countries in Southeast Asia tried to avoid using the word "refugee."¹⁴ Those seeking refuge were "illegal migrants," for example, or simply "boat people."¹⁵ Since 1985, a number of States have also been

"regime" provided by Stephen Krasner of "implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations." Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in *INTERNATIONAL REGIMES 2* (Stephen D. Krasner ed., 1983).

¹² Protocol, *supra* note 1.

¹³ See Guy S. Goodwin-Gill, *Migration: International Law and Human Rights*, in *MANAGING MIGRATION: TIME FOR A NEW INTERNATIONAL REGIME?* 160-89 (Bimal Ghosh ed., 2000).

¹⁴ *THE REFUGEE IN INTERNATIONAL LAW*, *supra* note 1, at 9.

¹⁵ *Id.* at 13-14, n.53.

concerned with the so-called “irregular movements” of refugees, particularly with a view to enhancing the option of sending such refugees or asylum seekers back to another country deemed able to provide protection or considered more responsible than the State of arrival.¹⁶

Some governments also use the law in an attempt to limit the scope of their obligations. France, for example, tried to turn part of its airport into a sort of rule-free international zone, although this was successfully challenged both at a national level and in the European Court of Human Rights.¹⁷ Australia, not for the first time, has recently sought to redefine itself, purporting first to exclude territorial waters from its domestically created “migration zone,” and later extending that zone by excluding (or excising in their inelegant way) the Cocos (Keeling) Islands, Christmas Island, and Ashmore Reef.¹⁸ Already in the late 1970s and early 1980s, the Government argued that stowaway asylum seekers physically present in Australian ports were not in fact in Australia under the terms of Australian law and could not therefore lodge applications for refugee status. On that occasion, the perspective from international law—that presence is a matter of fact and the fact determines responsibility—prevailed.¹⁹

Another technique favored by some governments is to engage in an exercise of extra-territorial jurisdiction—interdiction, for example, or

¹⁶ On two separate occasions when the UNHCR Executive Committee has addressed such movements, however, participating States expressly acknowledged that refugees may have justifiable reasons for their onward flight. See *Conclusion No. 15 (XXX): Refugees Without an Asylum Country*, UNHCR Executive Comm., 30th Sess., para. 72(2), at 16, U.N. Doc. A/AC.96/572 (1979) [hereinafter *Conclusion No. 15 (XXX)*]. Subparagraph (k) of the Executive Committee’s *Conclusion No. 15 (XXX)* reads:

Where a refugee who has already been granted asylum in one country requests asylum in another country on the ground that he has compelling reasons for leaving his present asylum country due to fear of persecution or because his physical safety or freedom are endangered, the authorities of the second country should give favourable consideration to his asylum request

Id. Similarly, subparagraphs (f) and (g) of the Executive Committee’s *Conclusion No. 58 (XL)* read:

(f) Where refugees and asylum-seekers [*sic*] move in an irregular manner from a country where they have already found protection, they may be returned to that country if

- (i) they are protected there against *refoulement* and
- (ii) they are permitted to remain there and to be treated in accordance with recognized basic human standards until a durable solution is found for them

(g) *It is recognized that there may be exceptional cases in which a refugee or asylum seeker may justifiably claim that he has reason to fear persecution or that his physical safety or freedom are endangered in a country where he previously found protection.* Such cases should be given favourable consideration by the authorities of the State where he requests asylum . . . (emphasis added).

Conclusion No. 58 (XL): The Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner From a Country in Which They Had Already Found Protection, UNHCR Executive Comm., 40th Sess., para. 25(f)-(g), at 9-10, U.N. Doc. A/AC.96/737 (1989).

¹⁷ See *Amuur v. France*, 22 Eur. Ct. H.R. at 533 (1996).

¹⁸ See MARY CROCK & BEN SAUL, *FUTURE SEEKERS: REFUGEES AND THE LAW IN AUSTRALIA* 39 (2002).

¹⁹ *THE REFUGEE IN INTERNATIONAL LAW*, *supra* note 1, at 155-57.

interception—and to seek to justify that practice on the ground that somehow obligations towards refugees need not be observed. The United States, following the example of Southeast Asian states during the Indo-China refugee crisis, has engaged in this practice with Haitian asylum seekers in the Caribbean. In *Sale v. Haitian Centers Council, Inc.*, for example, the United States Government argued that the prohibition against *refoulement* applies only to refugees present within the territory.²⁰ The Supreme Court held that, despite the categorical language of Article 33(1), the article as a whole, considered together with its negotiating history, indicated that it was not intended to have extraterritorial effect.²¹ From an international law perspective, which is ultimately what counts, the Supreme Court's position suffers from significant omissions. In particular, the principle of *non-refoulement* had already crystallized into a rule of customary international law, the core element of which is the prohibition of the *return in any manner whatsoever* of refugees to countries where they may face persecution. The scope and application of the rule are determined by this essential purpose, thus regulating State action *wherever* it takes place, whether internally, at the border, or through its agents outside territorial jurisdiction. This development is amply confirmed in instruments subsequent to the Refugee Convention, including: declarations in different fora and treaties such as the 1984 U.N. Convention against Torture,²² by the will of States expressed in successive resolutions in the U.N. General Assembly or the Executive Committee of the UNHCR Program, in the laws and practice of States, and even in unilateral declarations by the United States Government.²³

The United Kingdom has begun so-called pre-entry clearance practices in foreign airports considered to be the source of “too many” refugees and asylum seekers. A recent challenge to the practice failed at first instance, but is now being appealed.²⁴ Whatever the result in domestic law, international law nevertheless follows the agents of the State, who remain responsible for the violation of its obligations.

States have also tried detention, discriminatory treatment, and denial of other human rights in their attempts to dissuade the refugee and asylum seeker, even though the empirical basis for such treatment is doubtful and its impact on movements has never been assessed. Moreover, removing asylum seekers' access to services, such as advice, representation, interpretation, counselling,

²⁰ *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993).

²¹ *Id.*

²² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, U.N. Doc. A/39/51 (1984), *available at* http://www.unhcr.ch/html/menu3/b/h_cat39.htm.

²³ See Guy S. Goodwin-Gill, *The Haitian Refoulement Case: A Comment*, 6 INT'L J. REFUGEE L. 103-09 (1994).

²⁴ *European Roma Rights Centre v. Immigration Officer, Prague Airport*, 1989 Q.B. (Admin. Ct.) 127 (2002) EWHC 1989, 2002 WL 31173650 (Oct. 10, 2002). This case is currently (January 2003) on appeal to the Court of Appeals.

and medical care, is also likely to reduce the incidence of good, defensible decisions, and lead to violations of international obligations.

More recently, in certain quarters at least, some governments have been increasingly ready to step beyond the rule of law and to reject the checks and balances which are the hallmarks of the democratic State. This tendency has certainly been exacerbated by the events of September 11, 2001, but the inclination was already there. It is an approach which was witnessed in another variation during the Latin American dictatorships of the 1970s. At that time, the so-called doctrine of national security purported that reasons of State, as determined by non-accountable governing elites, were sufficient to justify any abuse of power.²⁵

In several countries, governments have lately assumed wide-ranging, potentially unaccountable power in the struggle against terrorism. The United Kingdom, for example, has sought to derogate from certain of its obligations under the European Convention on Human Rights, arguing alone among the forty-three members of the Council of Europe that it faces an emergency threatening the life of the nation, against which ministerial discretion is the only effective defense.²⁶ In Australia, where there is no constitutional protection or Bill of Rights, the Government has continued to expand its field of executive, arbitrary power which began with the introduction of mandatory non-reviewable detention in 1991.²⁷ Its legislative program in this area has effectively emasculated the federal courts,²⁸ which incidentally had made a number of positive contributions to refugee jurisprudence and the understanding of the refugee definition.

²⁵ JAIME ORAÁ, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW, 15 n.23 (1992); Pion-Berlin, David, *The National Security Doctrine, Military Threat Perception and the "Dirty War" in Argentina*, 21 COMP. POLITICAL STUD. 382, 385 (1988); FELIPE GONZÁLEZ ET AL., PROTECCIÓN DEMOCRÁTICA DE LA SEGURIDAD INTERIOR: ESTADOS DE EXCEPCIÓN Y DERECHO PENAL POLÍTICO 141-221 (1991).

²⁶ United Kingdom Permanent Representative to the Council of Europe, *Declaration contained in a Note Verbale from the Permanent Representation of the United Kingdom* (Dec. 18, 2001), at <http://sim.law.uu.nl/SIM/Library/RATIF.nsf/c69ac2c770f9cdffc12568b700449344/21e655b3da4c9ea741256bfe004ad9ee?OpenDocument> (last visited Jan. 12, 2003).

²⁷ See generally PETER MARES, BORDERLINE: AUSTRALIA'S TREATMENT OF REFUGEES AND ASYLUM SEEKERS (2001); MARY CROCK, PROTECTION OR PUNISHMENT: THE DETENTION OF ASYLUM SEEKERS IN AUSTRALIA (Mary Crock ed., 1993).

²⁸ Penelope Mathew, *Australian Refugee Protection in the Wakes of the Tampa*, 96 AM. J. INT'L L. 661 (2002); CROCK & SAUL, *supra* note 18, at ch. 7.

III. THE MESSAGE FROM THE *TAMPA*

The message from the M/V *Tampa* was “M’aidez”—the internationally recognized signal calling for assistance. The ship had rescued some 430 refugees and asylum seekers, was over its authorized limit, and needed a port of call at which to disembark the rescued before their situation deteriorated.

A. *The Duty to Rescue*

The duty to rescue those in distress at sea is firmly established in both treaty and general international law: it is more than sufficiently reflected in numerous international treaties, including the laws of war, which require its fulfilment regardless of the nationality or status of the people in distress, or the circumstances giving rise to that distress.²⁹ Thus, the 1979 Search and Rescue Convention (“SAR”) provides that “[p]arties 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 person is found.”³⁰

The 1974 Safety of Life at Sea Convention (“SOLAS”) requires each State party to “ensure that any necessary arrangements are made for coast watching and for the rescue of persons in distress at sea round its coasts.”³¹

Finally, Article 98(1) of the 1982 Convention on the Law of the Sea (“UNCLOS”) requires that:

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

²⁹ See United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982), 1833 U.N.T.S. 397 [hereinafter UNCLOS]; International Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47, T.I.A.S. No. 9700, 164 U.N.T.S. 113 as amended (entered into force May 25, 1980) [hereinafter SOLAS]; International Convention on Maritime Search and Rescue, Apr. 27, 1979 (entered into force on June 22, 1985) [hereinafter SAR Convention], *reprinted* in 6 BENEDICT, BENEDICT ON ADMIRALTY, Doc. No. 3-14, (Frank L. Wiswall ed., 7th rev. ed. 2001); Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82 (entered into force Sept. 30, 1962) (now generally superseded by UNCLOS) [hereinafter 1958 Geneva Convention]. So fundamental is the duty to rescue at sea, that it applies equally to the enemy. See, for example, Article 16 of the 1958 Geneva Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, which reads:

After every engagement, the two belligerents, so far as military interests permit, shall take steps to look for the shipwrecked, sick, and wounded, and to protect them, as well as the dead, against pillage and ill-treatment.

They shall see that the burial, whether by land or sea, or cremation of the dead shall be preceded by a careful examination of the corpse.

Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, Oct. 18 1907, 15 L.N.T.S. 340 (entered into force 26 January 1910), *available at* <http://www.icrc.org/IHL.nsf/52d68d14de6160e0c12563da005fdb1b/f7070391ffc670f2c125641e0039d7ff?OpenDocument> (last visited Jan. 12, 2003).

³⁰ See SAR Convention, *supra* note 29, ch. 2, para. 2.1.10.

³¹ See SOLAS, *supra* note 29, ch. V, reg. 15.

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 for assistance, in so far as such action may reasonably be expected of him.³²

The common expectation, of course, is that those picked up will be disembarked at the next or nearest port of call and assisted to return home, with the shipowner carrying the generally insurable losses associated with rescue, disembarkation, and delay. The 1979 Search and Rescue Convention refers to “rescue” as “[a]n operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a *place of safety*”³³—a simple enough concept in principle, but which leaves many options open, particularly where those rescued, like refugees and asylum seekers, have claims beyond their immediate predicament that require attention and resolution.

B. *The Law of the Sea and the Obligations of Coastal States*

In the case of the *Tampa*, Norway’s position, based on Article 98 of UNCLOS,³⁴ customary international law, and generally accepted humanitarian standards, was that Australia was obliged to allow those rescued into the nearest port: this, in Norway’s view, was Christmas Island. Australia never made its legal position clear, although it hinted that Indonesia was somehow responsible.³⁵

The freedom of the high seas, the right of innocent passage, the law of the flag State, and the right to seek refuge from *force majeure* and stress of weather, are basic international legal principles framed with normal circumstances in mind. The problem is what to do when those rescued are refugees and cannot or do not want to return home—neither the law of the sea nor international refugee law yet provide satisfactory answers for what was a major issue during the Indo-China refugee crisis in the 1970s and 1980s. This was a time of much violence and danger, of shipwreck, pirate attacks, and the deliberate application by some States in the region of forceful measures, such as towing unseaworthy vessels back to the high seas, often with resulting loss of life.

Wherever the arrival of refugee boats or rescued asylum seekers is imminent, the doctrine of sovereignty appears to accord the coastal or receiving State a wide-ranging freedom in deciding how to react. While ports are unquestionably within internal waters and fully within the jurisdiction of the

³² UNCLOS, *supra* note 29.

³³ See SAR Convention, *supra* note 29, at ch. 2, para. 1.3.2 (emphasis added).

³⁴ UNCLOS, *supra* note 29.

³⁵ Mathew, *supra* note 28, at 671-72; Erik Røsæg, *Refugees as Rescues—The Tampa Problem*, in SIMPLY 43-82, 295 (2002) (Scandinavian Institute of Maritime Law Yearbook).

State, the presence of refugee and asylum seekers in the territorial sea, the contiguous zone, the exclusive economic zone, or on the high seas, gives rise to a number of questions to which hard legal answers may be less than obvious.³⁶

For example, the coastal State exercises full sovereignty over its territorial waters and, subject to the right of innocent passage, all the laws of that State may be made applicable. Moreover, under international law, States are entitled to regulate innocent passage, for example, to prevent the infringement of immigration provisions. Articles 19(2)(g) and 25 of UNCLOS are probably declaratory of customary international law. Article 19(2) provides:

Passage of a foreign ship shall be considered prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:

.....
(g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.³⁷

Article 25 of UNCLOS,³⁸ and Article 16 of the 1958 Geneva Convention on the High Seas before it, provides expressly that, “[t]he coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.”³⁹

In principle, the question of whether a refugee or asylum seeker enters State territory on crossing the outer limit of territorial waters is unanswered by the law of the sea or by international refugee law. On the one hand, the refugee (or any person) would benefit at that moment from immunity from prosecution for illegal entry, either by reason of the principle of *force majeure*, the principle of distress,⁴⁰ or the operation of Article 31 of the Refugee Convention, non-penalization for illegal entry.⁴¹ On the other hand, it does not clearly follow that such entry triggers a claim to access procedures for determination of refugee status. This hiatus is obviously exploitable, and the answer must be found in higher rules or principles.

³⁶ Insistence on formal requirements (for example, proof of refugee status or need for international protection, etc.) may be an attractive first option for States seeking to avoid responsibility, although how that is to be determined in the circumstances of rescue is difficult to imagine.

³⁷ UNCLOS, *supra* note 29.

³⁸ *Id.*

³⁹ 1958 Geneva Convention, *supra* note 29.

⁴⁰ The notion of distress, or *force majeure*, reflects not so much a right of entry, as a limited immunity for having so entered in fairly well-defined circumstances. See 2 D.P. O'CONNELL, *THE INTERNATIONAL LAW OF THE SEA* 856 (1952); “*May*”(*The*) *v. R.*, [1931] S.C.R. 374 (1931).

⁴¹ See generally Guy S. Goodwin-Gill, Article 31 of the Refugee Convention relating to the Status of Refugees: Non-penalization, Detention and Protection 23, (Oct. 2001) (paper prepared at the request of the Dept. of Int'l Protection for the UNHCR Global Consultations), <http://www.unhcr.ch/cgi-bin/texis/vtx/global-consultations> (last visited Jan. 10, 2003).

C. *Precedents and Prospects for an International Rescue Regime*

At the time of the Indochinese refugee crisis, the UNHCR Executive Committee adopted a number of conclusions which attempted to bridge these gaps and to promote disembarkation and admission pending a durable solution. In particular, it emphasized the “humanitarian obligation of all coastal States to allow vessels in distress to seek haven,”⁴² and that those rescued at sea, “should normally be disembarked at the next port of call.”⁴³

However, “next port of call” is not a self-defining or self-applying concept, and in many instances it may be relative to the particular circumstances of rescue. For example, the safety and well-being of those rescued, as of the ship and its crew, may well demand disembarkation at the *nearest*, as opposed to the next scheduled, port of call.⁴⁴

The *Tampa* incident is a reminder that the refugee regime is not a seamless web, even if certain core and often competing principles retain their normative power. On the contrary, the gray areas themselves often reflect competing rights and a clash of interests which must be worked out in the light of the international legal principle of good faith, as well as co-operatively. The drafters of the 1951 Refugee Convention recognized these complexities, as the Preamble reflects:

Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international cooperation,

⁴² *Conclusion No. 15 (XXX)*, *supra* note 16.

⁴³ *Conclusion No. 23 (XXXII): Problems Related to the Rescue of Asylum-Seekers in Distress at Sea*, UNHCR Executive Comm., para. 3 (Oct. 21, 1981), available at <http://www.unhcr.ch> (last visited Jan. 12, 2003) [hereinafter *Conclusion No. 23*].

⁴⁴ The UNHCR has suggested a number of criteria for determining the “most appropriate port for disembarkation purposes,” taking into account factors such as:

- the legal obligations of States under international maritime law and international refugee law;
- the pressing safety and humanitarian concerns of those rescued;
- the safety concerns of the rescuing vessel and the crew;
- the number of persons rescued and the consequent need to ensure prompt disembarkation;
- the technical suitability of the port in question to allow for disembarkation;
- the need to avoid disembarkation in the country of origin for those alleging a well-founded fear of persecution; and
- the financial implications and liability of shipping countries engaged in undertaking rescue operations.

Expressing the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States⁴⁵

The UNHCR Executive Committee likewise in 1988 reaffirmed that “refugee problems are the concern of the international community and their resolution is dependent on the will and capacity of States to respond in concert and wholeheartedly, in a spirit of true humanitarianism and international solidarity.”⁴⁶

In the series of conclusions adopted in regard to the Indochinese refugee crisis throughout the 1980s, the UNHCR Executive Committee not only examined the relationship between the law of the sea and international refugee law, but also endorsed the link between rescue and landing or admission, as well as the importance of international solidarity and burden-sharing as a means of facilitating the fulfilment of international obligations.⁴⁷ In 1981, the Executive Committee—including Australia as an active member—reiterated the duty to rescue, but also recognized that the refugee dimension entailed a division of responsibilities between flag States, coastal States, and resettlement States.⁴⁸ The urgent need for practical solutions in a field of competing interests led to the creation of a pool of resettlement places which could be used to facilitate disembarkation in States otherwise reluctant to participate fully in the refugee regime.⁴⁹

This pool came to an end with the eventual resolution of the Indo-China refugee crisis following agreement on the Comprehensive Plan of Action in 1989.⁵⁰ The legal dimensions to disembarkation following refugee rescue thus remain open. In the situation of the *Tampa*, legal analysis and a principled solution were rendered more difficult by uncertainties and disputed facts, and by a pre-determined political agenda not unrelated to an imminent general election in Australia. For example, had the ship diverted from its planned route to a port closer than its next scheduled port of call? Had it changed course under some form of duress, or because of concerns about the safety of the vessel and the health and welfare of those on board? It is precisely these sorts of uncertainties

⁴⁵ See Refugee Convention, *supra* note 1.

⁴⁶ *Conclusion No. 52 (XXXIX): International Solidarity and Refugee Protection*, UNHCR Executive Comm., (1988), available at <http://www.unhcr.ch> (last visited Jan. 12, 2003).

⁴⁷ See *supra* notes 42, 43; see also *Conclusion No. 14 (XXX): General Conclusion on International Protection*, UNHCR Executive Comm., para. (c), (1979), available at <http://www.unhcr.ch> (last visited Jan. 12, 2003), noting as a matter of concern, “that refugees had been rejected at the frontier . . . in disregard of the principle of *non-refoulement* and that refugees arriving by sea had been refused even temporary asylum with resulting danger to their lives” *Id.*

⁴⁸ *Conclusion No. 23*, *supra* note 43.

⁴⁹ THE REFUGEE IN INTERNATIONAL LAW, *supra* note 1, at 157-60.

⁵⁰ *Id.* 1, at 281-82, 534-39.

and differences which make it less likely that a definitive rule on disembarkation will be found. While that has obvious disadvantages for those rescued by allowing a more nuanced approach to complex situations, it may in fact promote coherent and principled solutions, at least in a world in which States *are* prepared to co-operate.

It will still be relevant, of course, to attend to the juridically relevant facts. In the *Tampa* case, given the undeniable presence of the refugees, the exercise of effective control over them by Australian military forces, and the request for asylum lodged by those rescued while present in Australian waters, the coastal State clearly had protection responsibilities. They may not have been exclusive responsibilities, but neither were they unilaterally to be imposed on other States. Practice during the Indo-China refugee crisis does not reveal support for any obligation on the part of the flag State to determine the status of, and grant asylum to, refugees rescued by ships flying its flag, other than in the case of naval vessels and other ships of State. However, State practice in situations of rescue does show a measure of recognition for a contributive role in finding solutions, even though between the rules and practices, gaps are ready for exploitation. The "right to seek and to enjoy" asylum, set out in Article 14(1) of the 1948 Universal Declaration of Human Rights,⁵¹ has not been formally incorporated in later, binding covenants. Its scope and content must therefore be determined in the light of customary, or general international law, in an area of practice where States are often keen to assert their sovereign rights.

The UNHCR, the competent international agency having the mandate to provide protection, sought a solution premised on levels of cooperation and commitment successfully tried in the past. It proposed a three point plan calling for: (1) the temporary disembarkation of the asylum seekers on Christmas Island; (2) the immediate screening of asylum applicants, for which it offered UNHCR teams to apply international standards; and (3) resettlement of recognized refugees in Australia and other countries (some of which had already offered places).⁵² The question effectively arising in the *Tampa* case was whether the State that was primarily engaged had the courage to respond internationally, or whether it would look no further than its own narrow and short-term self-interest. Australia, however, had already begun to develop its own "Pacific Solution."⁵³

⁵¹ Universal Declaration of Human Rights, G.A. Res. 217A(III), art. 14(1), U.N. Doc. A/810 (1948).

⁵² Press Briefing, UNHCR, Australia/Tampa: UNHCR brokering 3-point plan (Aug. 31 2001), <http://unhcr.ch>.

⁵³ See Jean-Pierre Fonteyne, "Illegal Refugees" or Illegal Policy?, in WILLIAM MALEY ET AL., REFUGEES AND THE MYTH OF THE BORDERLESS WORLD 16 (2002); Greg Fry, *The "Pacific Solution?"*, in WILLIAM MALEY ET AL., REFUGEES AND THE MYTH OF THE BORDERLESS WORLD 23 (2002); James Jupp, *Australia's Refugee and Humanitarian Policies*, in WILLIAM MALEY ET AL., REFUGEES AND THE MYTH OF THE BORDERLESS WORLD 32 (2002); and Mathew, *supra* note 28.

IV. ARBITRARY, ILLEGAL, AND BEYOND THE RULE OF LAW

The policy adopted by Australia with regard to the *Tampa* can be best understood in the light of its practice over the last decade or so towards the small numbers of asylum seekers arriving without prior clearance. Successive governments have introduced a variety of measures in an attempt to manage or stop such arrivals. In 1992, it introduced "mandatory and non-reviewable detention" on the day before the Federal Court was due to hear an application to release a group of asylum seekers from imprisonment.⁵⁴ Further restrictions on judicial review of Department of Immigration decisions have since been added. The U.N. Committee on Human Rights found that the policy and practice of mandatory and non-reviewable detention was arbitrary and a breach of Article 9 of the International Covenant on Civil and Political Rights ("ICCPR"), and a similar conclusion was reached by the Australian Human Rights and Equal Opportunity Commission in 1998.⁵⁵ Government policy nevertheless continued unchanged, in direct and indirect disregard of its international obligations.

One of the more far-reaching changes, announced on October 13, 1999, was the introduction of "temporary protection visas" for unauthorized (that is, spontaneous) arrivals who are successful in their applications for refugee status in Australia. They are no longer granted permanent residence, but are accorded a three-year temporary entry visa, after which they will be required to re-apply for refugee status.

Although there is no obligation upon the State of refuge to grant permanent residence (and by doing so for so long, countries such as Canada and Australia were ahead of the rest of the world), the temporary protection visa class enjoys a significantly lower range of benefits and entitlements than other refugees, notwithstanding the fact that they have been formally accepted as entitled to Refugee Convention status. They are not eligible for many social programs, are not permitted family reunion, and, contrary to the provisions of Article 28 of the Refugee Convention and the Schedule to the Refugee Convention, have no automatic right of return should they need to travel abroad. This particular class of recognized refugees is thus penalized by reason of their "illegal entry," contrary to Article 31 of the Refugee Convention, and denied the enjoyment of Refugee Convention rights on a non-discriminatory basis. No objective justification on administrative grounds seems to have been advanced.⁵⁶

⁵⁴ Reviewing the ninth edition of Dicey's Law of the Constitution in 1939, Sir William Holdsworth was of the view that, "in so far as the jurisdiction of the courts is ousted, and officials are given a purely administrative discretion the rule of law is abrogated." 55 L. Q. REV. 585, 588 (1939).

⁵⁵ Human Rights and Equal Opportunity Commission, *Those Who've Come Across the Seas: Detention of Unauthorised Arrivals*, (1998), available at http://www.hreoc.gov.au/pdf/human_rights/asylum_seekers/h5_2_2.pdf (last visited Jan. 12, 2003). On the Views of the Human Rights Committee, see discussion, *infra*.

⁵⁶ The applicability of Article 31 was not considered by the Full Federal Court of Australia in *Ruddock v. Vardarlis* (2001) 110 F.C.R. 491, decided on September 18, 2001, which arose out of the *Tampa* incident.

In its decision in *A v. Australia* in 1997, the Human Rights Committee, whose competence covers State performance under ICCPR generally and extends to the review of individual complaints under the Optional Protocol, set out some of the elements which it considered essential to avoid arbitrary detention.⁵⁷ In particular, it emphasized that every detention decision should be open to *periodic review*, so that the *justifying grounds* can be assessed. Detention should not continue beyond the period for which it can be objectively justified.

[T]he fact of *illegal entry* may indicate a *need for investigation* and there may be other factors particular to the individual such as the *likelihood of absconding* and *lack of cooperation*, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal.⁵⁸

The Committee also stressed the importance of *effective*, not merely formal review, and that:

[b]y stipulating that the court must have the power to order release “if the detention is *not lawful*,” article 9, paragraph 4, requires that the court be empowered to order release, if the detention is *incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant*.⁵⁹

Besides the Human Rights Committee, the U.N. Commission on Human Rights has had the question of detention under review for some years.⁶⁰ A Working Group on Arbitrary Detention (“Working Group”) was established by Resolution 1991/42, and its mandate revised by Resolution 1997/50. Its role now is to investigate cases of deprivation of liberty imposed arbitrarily, provided that no final decision has been taken in such cases by local courts in conformity with domestic law, with the standards set forth in the Universal

⁵⁷ Human Rights Committee, Communication No. 560/1993, *A v. Australia, views adopted on 3 April 1997*, U.N. GAOR, 52d Sess., Supp. No. 40, U.N. Doc. A/52/40, vol. II; CCPR/C/59/D/560/1993, *reprinted in 9 INT’L J. REFUGEE L.* 506 (1997) [hereinafter Communication No. 560/1993].

⁵⁸ *Id.* para. 9.4 (emphasis added).

⁵⁹ *Id.* para. 9.5 (emphasis added).

⁶⁰ The prohibition on the arbitrary arrest or detention of non-nationals has been re-affirmed in Article 5 of the Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, adopted Dec. 13, 1985, G.A. Res. 144, 40th Sess., Supp. No. 53, at 252, Annex, U.N. Doc. A/40/53 (1985). See also *U.N. Standard Minimum Rules for the Treatment of Prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Geneva in 1955, and approved by the Economic and Social Council by its Resolutions 663C (XXIV) of July 31, 1957 and 2076 (LXII) of May 13, 1977; *Code of Conduct of Law Enforcement Officials*, G.A. Res. 34/169, U.N. GAOR, 34th Sess., Supp. No. 46, at 185, U.N. Doc. A/34/46 (1979); *Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians*, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 37/194, U.N. GAOR, 37th Sess., Supp. No. 51, at 210, U.N. Doc. A/37/51 (1982).

Declaration of Human Rights, and with the relevant international instruments accepted by the States concerned. This same resolution directed the Working Group to give attention to the situation of immigrants and asylum seekers, "who are allegedly being held in prolonged administrative custody without the possibility of administrative or judicial remedy."⁶¹

In December 1998, the Working Group set out criteria for determining whether or not custody is arbitrary,⁶² and in the following year it adopted Deliberation No. 5, developing those guidelines.⁶³

The Working Group approached the notion of "arbitrary" as involving detention, which cannot be linked to any legal basis, is based on facts related to the exercise by the person concerned of his or her fundamental human rights, and is further based on or characterized by the non-observance of international standards, for example, in relation to due process or the conditions of treatment. The Working Group has also paid particular attention to the need for guarantees as to the competence, impartiality and independence of the "judicial or other authority," ordering or reviewing both the lawfulness and the necessity of detention.⁶⁴

In principle, therefore, the power of the State to detain must be related to a recognized object or purpose, and there must be a reasonable relationship of proportionality between the end and the means. Limitations on rights must not only be prescribed by law (the first line of defense against arbitrary treatment), but must only be such as are *necessary in a democratic society* to protect national security, public order, and the rights and freedoms of others. Not only must legality be confirmed, but the particular situation of the individual must also be examined in the light of such claim or right as he or she may have.

In May and June 2002, the Working Group on Arbitrary Detention visited Australia, at the invitation of the Government.⁶⁵ It focused on three aspects of Australia's detention of non-citizens, namely, its mandatory, automatic and indiscriminate character, its indefinite length, and the lack of access to a court to challenge the lawfulness of the detention. The Working Group was unpersuaded by the Government's claim that, as the Migration Act provided a lawful basis for detention, international law and international standards did not apply.⁶⁶ The Working Group recalled Article 2(1) of the ICCPR, under which Australia committed itself to undertake,

⁶¹ U.N. ESCOR, 54th Sess., Provision Agenda Item 8, U.N. Doc. E/CN.4/1998/44 (1997).

⁶² *Civil and Political Rights, Including Questions of Torture and Detention*, Commission of Human Rights, 55th Sess., Provisional Agenda Item 11(a), para. 69, U.N. Doc. E/CN.4/1999/63, (1999) (fourteen guarantees).

⁶³ U.N. ESCOR, 56th Sess., Provisional Agenda Item 11(a), Annex II, U.N. Doc. E/CN.4/2000/4 (1999) (relating to the situation of immigrants and asylum seekers and guarantees concerning persons held in custody). The Declaration has been noted by the Commission on Human Rights in Resolutions 2001/40 (Apr. 23, 2001) and 2000/36 (Apr. 20, 2000).

⁶⁴ *Id.*

⁶⁵ U.N. ESCOR, U.N. Doc. E/CN.4/2003/8/Add.2 (2002).

⁶⁶ *Id.* para. 23.

[w]here not already provided for by existing legislative or other measures . . . the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.⁶⁷

It then referred, among others, to Article 26 of the 1969 Vienna Convention on the Law of Treaties, which provides that “a treaty is binding upon the parties and must be performed in good faith.”⁶⁸ The Working Group asked:

Can it be considered that the “good faith” requirement of this article is respected when a State ratifies a convention, notably in the field of human rights, refrains for 21 years from adapting its domestic legislation, and then takes advantage of this legal void, for which it is responsible, to evade its obligations?⁶⁹

After identifying in some detail eight particular areas of concern,⁷⁰ the Working Group recommended to the Government that it review the mandatory, automatic and indeterminate character of detention, revise the potentially indefinite duration of detention, remedy the lack of sufficient judicial review, and take steps better to guarantee the rights of the defense.

As it had done earlier in regard to the Views of the Human Rights Committee,⁷¹ the Government rejected the findings, claiming that the report of the Working Group on Arbitrary Detention was “biased, inaccurate and flawed.”⁷² The U.N. High Commissioner for Human Rights, Mary Robinson, urged the Government to accept the report, “because human rights standards must apply to affluent nations as well as developing ones.”⁷³ The Government chose not to. This, then, is the context in which one State has elected to pursue

⁶⁷ *Id.* para. 24.

⁶⁸ Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 26, 1155 U.N.T.S. 331, A.T.S. 1974/2, 8 I.L.M. 679.

⁶⁹ *See supra* note 65.

⁷⁰ These included: the detention of vulnerable persons; the relationship between the legal framework for detention and “collective depression syndrome”; the practice of collective or individual isolation; detention in prison; the *gross inadequacy* of guarantees concerning the role of lawyers and of the judiciary (emphasis supplied); costs levied on detainees; delays in releasing detainees to whom protection has been granted; and the ramifications of the privatization of the centers on the legal status of detention. *See id.* paras. 28-59.

⁷¹ *See* Communication No. 560/1993, *supra* note 57.

⁷² *Id.*

⁷³ *Australia Urged to Accept U.N. Report on Asylum Seekers*, DOW JONES INT’L NEWS, Aug. 20, 2002. *See also* Lawyers Committee for Human Rights, *Review of States’ Procedures and Practices Relating to Detention of Asylum Seekers, Final Report*, (Sept. 2002); and *By Invitation Only: Australian Asylum Policy*, 14 HUMAN RIGHTS WATCH 51 (2002).

its policies towards refugees and asylum seekers—not cooperatively and internationally, but unilaterally and uncooperatively.

V. WORKING TOWARDS INTERNATIONAL SOLUTIONS

It may be that neither the law of the sea nor international refugee law provides clear guidance on the landing of rescued refugees, or on responsibility to determine their claims for refugee status, or on solutions. However, the premises of the international protection regime (which draws on the specifics of international refugee law, on human rights law, and on more generally applicable rules), do provide a normative and institutional framework within which States ought to seek solutions.

Primary rules lay down the parameters for State action, indicating the limits beyond which the State cannot go without incurring responsibility for its unlawful actions. Such primary rules do not necessarily provide solutions for every resulting problem, but they are the essential juridical bases from which subsidiary rules will take their normative and constructive force. For example, a primary rule prohibits the return of any individual to a State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. There is no rule, however, prescribing how that person shall be treated in the State which recognizes its duty not to return the individual to his or her country of origin. Is he or she to be granted temporary or permanent residence, be confined in camps, or sent elsewhere?

The fundamental rules of the international refugee regime are primary in the sense that, absent very exceptional circumstances, they override or trump other important interests. They change the picture, not just by creating an exception in the instant case, but also by laying down the conditions for *subsequent* State conduct (not to return a refugee to where he or she may be persecuted, not to penalize a refugee by reason of illegal entry, to deal with a person *as a refugee*, and within the legal framework of protection, cooperation and solutions provided by international law and its institutions).

A. *Trafficking and Smuggling*

Progress towards humane and effective solutions today is hampered by the tendency of States to seek to justify measures against refugees and asylum seekers on the ground, among others, that there is a need to combat perceived international evils. Trafficking, smuggling, and terrorism are obvious targets.⁷⁴

⁷⁴ Trafficking is a form of highly abusive irregular migration involving the exploitation of migrants for profit or other purposes. Smuggling is best described as the illegal facilitation of border crossing or continued residence in a country, generally without the dimension of abuse and exploitation. See *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, G.A. Res. 55/25, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (2001), reprinted in 40 I.L.M. 335 (2001); *Protocol Against the Smuggling of*

It is (and has probably always been) a fact that refugees may well use the same means of travel or facilitation of entry or residence as are used by illegal, irregular and undocumented migrants. They will often face the same or greater exploitation, but for many these will be the only means by which they are able to leave their country of origin or an intermediate country of temporary or ineffective refuge. It is also the case that the irregular movement of persons who do not qualify for international protection, and the failure to return them to their country of origin, undermines the credibility and efficiency of asylum systems.

In recent years, given the complexity and extent of the problem, States have begun to accept that international cooperation is necessary to combat trafficking, but that measures are also required to ensure humane options for the return of victims to their home countries and their reintegration. Even those who, in the parlance of today, do not need or no longer need international protection, require still to be treated humanely and enabled to return in safety and dignity.

Nevertheless, any steps taken to combat smuggling are likely to have an impact on the protection of refugees. This means that measures to ensure the assessment of protection needs and the provision of solutions become all the more important. As the UNHCR has pointed out, "In the context of mixed or composite flows, asylum systems are likely to function better if States establish policies and procedures which permit them to distinguish clearly among the different categories of migrants and to identify solutions appropriate to their specific circumstances."⁷⁵

A regional workshop on the interception of asylum seekers and refugees, held in Ottawa in May 2001 in the context of UNHCR's Global Consultations on International Protection, emphasized the necessity for:

- (1) safe and humane treatment of intercepted persons in accordance with applicable human rights standards;
- (2) particular measures to take into account the special needs of refugee women and children;
- (3) respect for the principle of *non-refoulement* and the right to seek and enjoy asylum in other countries;
- (4) adequate procedures to identify those in need of international protection among the intercepted persons.⁷⁶

Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, at 62, U.N. Doc. A/55/383 (2000), reprinted in 40 I.L.M. 335 (2001). The two documents are known as the "Palermo Protocols"—protocols to the U.N. Convention on Transnational Organized Crime.

⁷⁵ *Refugee Protection and Migration Control: Perspectives from UNHCR and IOM*, UNHCR, para. 33, U.N. Doc. EC/GC/01/11 (2001).

⁷⁶ *Id.* para. 36.

While recognizing the limited ability of international organizations (and States) to influence the forces that determine the dynamics of global migration, many commentators are turning their attention, nonetheless, to the desirability of laying the groundwork for an international migration regime, comparable to that for the protection of refugees, which will meet both human and community interests.⁷⁷

In this project, however, a clearly defined framework of law and principle will be essential. Article 16(1) of the U.N. Protocol against the Smuggling of Migrants by Land, Sea and Air, obliges States to take “all appropriate measures . . . to preserve and protect the rights of persons” who have been the object of smuggling, “in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.” According to Articles 16(3) and (4), States should “afford appropriate assistance to migrants whose lives and safety are endangered by reason of being smuggled, and shall also take into account the special needs of women and children.”

B. *Inter-Agency Developments on Rescue*

Efforts have also been undertaken at the U.N. agency and inter-agency level to find solutions to the problems associated with the rescue of refugees and asylum seekers at sea. In November 2001, the International Maritime Assembly adopted resolution A.920 (22), in which it recommended a comprehensive review of safety measures and procedures for the treatment of rescued persons.⁷⁸ The resolution recalled International Maritime Organization (“IMO”) measures and recommendations aimed at ensuring that the life of persons on board ships is safeguarded at any time pending their delivery to a “place of safety.”⁷⁹ In May 2002, the IMO Maritime Safety Committee further examined the issues relating to the rescue of persons at sea.⁸⁰ The Committee noted that the Secretary-General had brought the issue of persons rescued at sea to the attention of a number of competent U.N. specialized agencies and programs, and that a meeting was being organized between representatives of the U.N. Division for Ocean Affairs and the Law of the Sea, the Office of the UNHCR, the U.N. Office for Drug Control and Crime Prevention, the Office of the U.N. High Commissioner for Human Rights, the International Office of

⁷⁷ See generally Goodwin-Gill, *supra* note 13.

⁷⁸ *Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea*, 22nd Sess., Agenda Item 8, IMO Assembly Res. A.920(22) (Nov. 2001).

⁷⁹ The IMO Secretary-General, William O’Neil, also proposed that a review of the existing legislation concerning the delivery of persons rescued at sea to a place of safety, regardless of their nationality and status or the circumstances in which they are found, should be undertaken by an inter-agency group within the U.N. system, with a view to strengthening and harmonizing the competence of the agencies involved. *Id.* He suggested the establishment of a co-ordinating mechanism to ensure a consistent U.N. response in any future emergency. *Id.*

⁸⁰ *Id.*

Migration (“IOM”) and the IMO Secretariat.⁸¹ The Committee agreed to further review the provisions of the 1974 International Convention for the Safety of Life at Sea (“SOLAS”) and the 1979 International Convention on Maritime Search and Rescue (“SAR”) regarding the treatment of persons rescued at sea, with a view, if possible, to formulating specific proposals for amendments. It also undertook to consider whether additional guidance should be developed for ships’ masters and other interested parties to ensure that persons rescued at sea are delivered to a place of safety.

As the UNHCR noted in its 2002 Note on International Protection:

the problem of access to territory and procedures for those arriving by sea had a particular focus during the reporting period in the light of some highly publicized incidents. Refusal by States to disembark those rescued or sometimes even to come to the rescue was on occasion a serious problem. There were other States, however, which continued . . . to uphold the accepted maritime practice of permitting sometimes larger numbers of people, rescued for instance in the Mediterranean, to disembark on their territory.⁸²

In March 2002, the UNHCR also convened an expert roundtable in Lisbon on rescue-at-sea, bringing together experts from governments, the shipping industry, international organizations, NGOs, and academia. It produced a set of conclusions on rescue-at-sea and disembarkation, and reviewed the possibilities for an international cooperative framework on this issue.⁸³

At its Fifty-Third Session in October 2002,⁸⁴ the Executive Committee recognized that the UNHCR’s Agenda for Protection “is a statement of goals and objectives and an important inventory of recommended actions to reinforce the international protection of refugees, and is intended to guide action by States and UNHCR, together with other United Nations organizations, and other inter-governmental as well as non-governmental organizations.”⁸⁵ Within this statement, the UNHCR set itself the objective of seeking to reach, together with States and other stakeholders such as the IMO, “common understandings on responsibilities in the context of rescue at sea of asylum-seekers and refugees,

⁸¹ The meeting duly took place at UNHCR Headquarters in July 2002. *Id.* The inter-agency review group, led by the IMO, broadly supported the conclusions of the Lisbon Roundtable, referred to in *infra* note 83.

⁸² *Note on International Protection* UNHCR, U.N. GAOR, 53d Sess., para. 20, U.N. Doc. A/AC.96/965 (2002).

⁸³ See UNHCR, *Expert Roundtable on Rescue-at-Sea, Specific Aspects Relating to the Protection of Asylum-Seekers and Refugees*, (Lisbon, Mar. 25-26, 2002) (Summary of Discussion, Apr. 11, 2002).

⁸⁴ The Executive Committee also witnessed the award of the Nansen Medal to the captain and crew of the *M/V Tampa*.

⁸⁵ *General Conclusion on International Protection*, UNHCR Executive Comm., U.N. GAOR, 57th Sess., Supp. No. 12A, para. 21(b), U.N. Doc. A/57/12/Add.1 (2002).

including with regard to rescue itself, the disembarkation of those rescued and the solutions to be pursued.”⁸⁶

Significantly, given the primary character of the fundamental rules of international refugee law, none of the measures proposed or adopted with regard to rescue, trafficking or smuggling, deprives refugees and asylum seekers of their entitlement to access protection, or relieves the State of its particular duties towards refugees. An important and very practical consideration in this regard, in that it secures the interests of both States and individuals, is access to procedures. Both the UNHCR Executive Committee and the United Nations General Assembly have reiterated the importance of admission and the principle that there should be no rejection at the frontier “without access to fair and effective procedures for determining status and protection needs.”⁸⁷ The value of an approach in these terms is consistently underrated by governments and bureaucracies focusing on targets and short-term interests.

VI. CONCLUSIONS

Among much else, the *Tampa* incident shows that modalities are still required for the better allocation of responsibilities between States for the effective resolution of refugee problems. The response of the Australian government, however, is also a lesson in the dangers which unilateral and self-interested action poses for the international regime of refugee protection as a whole.

It is the nature of the international protection regime that it is conditioned on each participating State *not* acting unilaterally—on each participating State *not* insisting on the paramountcy of its own self-styled sovereign interest in any particular case. Nevertheless, the scope of Australia’s attempted unilateral determinations were ambitious:

- (1) to determine the destination of a ship carrying refugees and asylum seekers rescued at sea;

⁸⁶ *Id.* Annex IV, at 38, 48-49 (protecting refugees within broader migration movements).

⁸⁷ See, e.g., *Conclusion No. 82 (XLVIII): Safeguarding Asylum*, UNHCR Executive Comm., para. (d)(iii), (1997); *Conclusion No. 85 (XLIX): Conclusion on International Protection*, UNHCR Executive Comm., para. (q), (1998). See also Office of the United Nations High Commissioner for Refugees, G.A. Res. A/RES/51/75, 82d Plenary Mtg., paras. 3-4, (1996), which states that the General Assembly:

3. Reiterates that everyone, without distinction of any kind, has the right to seek and to enjoy in other countries asylum from persecution, and calls upon all States to uphold asylum as an indispensable instrument for the international protection of refugees and to respect scrupulously the fundamental principle of non-refoulement, which is not subject to derogation;

4. Urges States to ensure access, consistent with relevant international and regional instruments, for all asylum-seekers to fair and efficient procedures for the determination of refugee status and the granting of asylum to eligible persons

- (2) to determine the point of disembarkation and therefore the locus of claim;
- (3) to determine the character of an interim solution;
- (4) to determine the ultimate solution (not in Australia);
- (5) to determine the level of UNHCR engagement (assistance but no protection, and no international meeting);
- (6) to determine the scope of law of the sea freedoms and obligations; and
- (7) to determine the applicability of domestic law.

The extent of Australia's challenge to refugee law should not be overestimated; its impact generally on the practice of States can easily be exaggerated and the extent of acceptance of these measures is highly doubtful. Norway, for example, rejected the Australian position and no other maritime State indicated any support for its approach. Moreover, the attempt to determine destination and disembarkation was accepted only on the basis of time-limited and support-conditioned terms by two other States in the region.⁸⁸

In fact, the only sphere in which Australia may be considered to have succeeded in its unilateral action is in determining the scope of application of domestic law—a matter within its domestic competence in a formal sense, but not at all determinative of its obligations at the international level. No matter how much of Australia is “excised” from Australia, its international obligations remain unchanged and its liability for breaches of international law is unaffected. Moreover, Australia's failure to take account of the primary rules in determining its response to movements of refugees and asylum seekers has not been ignored by the Charter- and treaty-based institutions competent to assess its performance against the standards of international law.

Nevertheless, there is an aspect to Australian policy and practice which ought to give rise to concern. International refugee law acknowledges that refugee movements are likely to be irregular or unlawful, but that individuals nonetheless have the right to seek asylum from persecution. Australia's position aims to confound that principle, and to allow no room in which rights or protection may be claimed. The denial of access to procedures, to recognition as a refugee in appropriate cases, and thereafter to the rights of a refugee, is thus tantamount to a rejection of the system of international protection as a whole. This regime is premised on the acceptance of responsibilities, within the rule of law, and a commitment to work cooperatively in pursuit of solutions.

In 1982, at a time when it was one of the major donors to refugee needs generally and a leading country of resettlement for Indochinese refugees, Australia promoted Executive Committee Conclusion No. 22 on Temporary

⁸⁸ Fry, *supra* note 53.

Refuge, precisely because it feared being abandoned by other States in the case of a mass influx of refugees and asylum seekers. Its recent essays in unilateralism and its massive steps outside the rule of law have certainly made it harder for other States to consider the present Government of Australia as a *bona fide* partner in refugee protection and solutions.

