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AUSTRALIA'S *TAMPA* INCIDENT: THE CONVERGENCE OF INTERNATIONAL AND DOMESTIC REFUGEE AND MARITIME LAW IN THE PACIFIC RIM

INTRODUCTION TO THE REFUGEE LAW FORUM

Joan Fitzpatrick[†]

I. INTRODUCTION

The ripple effects on refugee protection from the events of August and September 2001, arising out of the rescue at sea of 433 asylum seekers by the M/V *Tampa*, have been substantial. It is too early to determine whether they will be as profound and as corrosive as the impact of the terrorist attacks of September 11, 2001 on other international legal norms, including those relating to preventive detention and to "securitizing international migration."¹ Australia's actions with respect to the *Tampa* and subsequent intercepted vessels, and its September 2001 legislation,² establish a framework in which asylum seekers who arrive within portions of its territory may be denied asylum, may be forcibly transported to other states that are either not bound by the 1951 Convention relating to the Status of Refugees ("Refugee Convention") or are unwilling to apply their own refugee status determination rules,³ and may be denied durable protection because they arrived spontaneously rather than via resettlement.

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¹ Thomas Faist, "Extension du Domaine de la Lutte": *International Migration and Security Before and After September 11, 2001*, 36 INT'L MIGRATION REV. 7, 8 (2002).

² The events and the six statutes adopted by Australia in September 2001 are detailed in Mary Crock, *In the Wake of the Tampa: Conflicting Visions of International Refugee Law in the Management of Refugee Flows*, 12 PAC. RIM LAW & POL'Y. J. 49, 70 (2003).

³ Nauru, to which many asylum-seekers intercepted by Australia have been transferred, is not a party to the Convention relating to the Status of Refugees, *opened for signature* July 28, 1951 (19 U.S.T. 6259; 189 U.N.T.S. 150; A.T.S. 1954(5)) [hereinafter *Refugee Convention*]; United Nations 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; A.T.S. 1973/37). The United Nations High Commissioner for Refugees ("UNHCR") performs refugee status determination on Nauru. Papua New Guinea is a party to

The *Tampa* incident unfolded in a vortex of policy debates concerning secondary movements of asylum seekers, people smuggling, terrorism, and increasingly vocal political criticism of persons seeking refugee protection in developed states. The United Nations High Commissioner for Refugees (“UNHCR”) cautioned in 2002 that hysteria over irregular migration poses a severe danger to refugee protection:

The necessary public support for the reception of asylum-seekers has continued to be hampered by the tendency of certain media and some politicians to mix illegal migration and refugee arrivals without sufficient clarification or concern for accuracy. Sometimes, asylum-seekers were demonized, especially during election campaigns. At such times, rhetoric, antagonism and verbal or even physical attacks, against asylum-seekers and refugees became particularly pronounced. UNHCR shared the view of those NGOs and other community leaders who responded with measures designed to show that asylum-seekers and refugees should not be made scapegoats for failed economic policies and that racism and xenophobia should not find a place in election campaigns.⁴

Human Rights Watch cautions that Australia’s “Pacific Solution” is “not for export”⁵ and that it cannot grant asylum “by invitation only.”⁶ Yet, during 2002, the United Nations High Commissioner for Refugees proposed a “Convention Plus” approach to discourage secondary movements by asylum seekers and to facilitate collective management of refugee flows.⁷ While many observers believed that Australia’s deflection of refugee processing to its Pacific Island neighbors would prove unsustainable, an

the Refugee Convention, but has ceded refugee status determination to Australian officials with regard to the asylum seekers intercepted by Australia and removed to Manus Island in Papua New Guinea. UNHCR does not participate in these proceedings. *Id.*

⁴ *Note on International Protection*, U.N. High Commissioner for Refugees [hereinafter UNHCR], para. 45, U.N. Doc. A/AC.96/965 (2002).

⁵ Human Rights Watch, *Not for Export: Why the International Community Should Reject Australia’s Refugee Policies*, HUMAN RIGHTS NEWS, Sept. 2002, <http://www.hrw.org/press/2002/09/auslorf0926.htm>.

⁶ *By Invitation Only: Australian Asylum Policy*, HUMAN RIGHTS WATCH, Vol. 14, No. 10(C), Dec. 2002.

⁷ Mr. Ruud Lubbers, United Nations High Commissioner for Refugees, Statement at an informal meeting of the European Union Justice and Home Affairs Council (Sept. 13, 2002), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/print?tbl=ADMIN&id=3d92deeb6> (last visited Jan. 8, 2003).

infusion of new economic aid to Nauru extended the problematic partnership between the two states beyond 2002.⁸

II. THE REFUGEE ARTICLES: A CONTEXTUAL BACKGROUND

During April 2002, the University of Washington School of Law was privileged to host three outstanding experts on refugee law who offered important and insightful reflections on the *Tampa* affair—Mary Crock, Guy Goodwin-Gill, and Irene Khan. Their contributions to the Symposium are presented in this volume of the *Pacific Rim Law & Policy Journal*. I am honored to introduce their articles, and to provide additional reflections on the state of refugee protection in the aftermath of the traumatic events of August and September 2001.

A. *Local Settlement*

The three durable solutions to the forced migration of refugees are local settlement, repatriation, and resettlement. During the decades following the adoption of the Refugee Convention, local settlement—the grant of asylum or equivalent permission to remain in lawful residence in a state of refuge—was the most common solution. The causes of forced migration were generally regarded as enduring, and the appropriateness of policies favoring integration of refugees was widely accepted. Especially for traditional states of immigration, such as the United States and Australia, the granting of durable asylum to the largely European refugees displaced by the Second World War was uncontroversial and constituted an integral element of these states' foreign and economic policies during the Cold War. The Refugee Convention mandates the extension of economic and social rights to recognized refugees, with entitlements increasing with duration of residence. Article 34 of the Refugee Convention encourages asylum states to naturalize refugees, thereby sealing a durable legal, social, and political attachment to them. The emphasis upon local settlement did not escape criticism, however, and some commentators questioned the “exilic bias” of state practice during the first three or four decades following adoption of the Refugee Convention.⁹

⁸ *Australia to Continue Sending Asylum-Seekers to Island Camps*, N.Y. TIMES, Dec. 10, 2002, LEXIS, News Library, Majpap File (agreeing to maintain detention centers for asylum seekers in exchange for an additional \$8.2 million in foreign aid).

⁹ Gervase Coles, *Approaching the Refugee Problem Today*, in REFUGEES AND INTERNATIONAL RELATIONS 373 (Gil Loescher & Leila Monahan eds., 1989).

B. *Repatriation*

In more recent years, repatriation came to be seen as the optimal durable solution for refugees.¹⁰ The restoration of democracy in various states, along with the end of the Cold War, aroused optimism that forced migrants could return in safety and dignity to their states of origin, being spared life-long exile and enjoying an opportunity to participate in the rebuilding of their societies. Large-scale repatriations have sometimes been successfully engineered, generally on a voluntary basis.¹¹ The massive returns of Afghans since the fall of the Taliban regime present a problematic example of this type of “solution,” as the durability of the change in conditions remains questionable, and as resources for successful reintegration of returnees remain inadequate.¹²

Faith that contemporary refugee crises would prove to be short-lived also generated enthusiasm for temporary protection. Temporary protection came to be regarded not only as a means to extend protection to persons fleeing serious but non-persecutory harm, such as war victims, but also as a substitute protection for Convention refugees or mixed flows during periods of mass influx.¹³ One profound irony of the legislation adopted in Australia over the last several years is that temporary protection (in the form of “temporary protection visas”) has become a device to punish spontaneously arriving asylum seekers, who are Convention refugees, by depriving them of durable asylum, requiring them to repeatedly prove their continued need for protection, and denying them family reunification.¹⁴

Temporary protection also had a link to earlier refugee crises in which resettlement played an important protection role. During the mass influxes

¹⁰ *Agenda for Protection, Report of the Fifty-third Session of the High Commissioner's Programme*, UNHCR, Annex IV, at 57, U.N. Doc. A/AC.96/973 (2002) [hereinafter *Agenda for Protection*].

¹¹ MARJOLEINE ZIECK, *UNHCR AND VOLUNTARY REPATRIATION: A LEGAL ANALYSIS* (1997). The cessation clauses have been little used to terminate refugee protection and are only beginning to be fully explicated. Involuntary repatriation of formerly recognized refugees remains rare.

¹² *Note on International Protection*, *supra* note 4, paras. 62-64.

¹³ Temporary Protected Status (“TPS”) in the United States is an example of protection for a widened category of persons facing danger or hardship if returned to their states of origin. 8 U.S.C. §1254a (2000). TPS does not function as an admissions program. 8 U.S.C. §1254a(c)(5)(2000). Temporary protection as established in the European Union is limited to mass influx situations, and can be extended to Convention refugees as well as persons fleeing more generalized dangers. Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, Council Directive 2001/55/EC, 2001 O.J. (L 212/12).

¹⁴ *By Invitation Only*, *supra* note 6, at 81-89; Penelope Mathew, *Australian Refugee Protection in the Wake of the Tampa*, 96 AM. J. INT'L L. 661, 672-676 (2002).

from Southeast Asian states in the 1970s and 1980s, frontline states that were not parties to the Refugee Convention were induced to grant temporary refuge to asylum seekers. The quid pro quo was a promise that more distant states, including Australia, Sweden, and the United States, would resettle and grant durable refugee status to a significant segment of those granted temporary refuge. Resettlement, along with more frequent repatriation of those ineligible for refugee protection, composed elements of the Comprehensive Plan of Action to resolve the lingering Southeast Asian refugee crisis—an example of multilateral cooperative management of refugee flows.

C. Resettlement

Resettlement remained an important element of the refugee policies of approximately ten states.¹⁵ During the “dirty wars” in South America, for example, refugees were successfully resettled out of the region in modest numbers.¹⁶ The United Nations High Commissioner for Refugees varied in the degree of emphasis it placed on its resettlement program, and the number of states that formally participate in resettlement of refugees referred by UNHCR remains strikingly small—only eighteen by current count.¹⁷ One major receiving state, the United States, experienced a sharp decline in resettlement during fiscal year 2002, because of the imposition of demanding new security screening in the aftermath of the terrorist attacks of September 11, 2001.¹⁸

III. AUSTRALIA’S REFUGEE POLICY

Australia’s policy of granting durable refugee status only to persons who are pre-selected for resettlement constitutes a significant reinterpretation of the process and dynamic of refugee protection. Other states, that are traditional immigration states and that have admitted large numbers of refugees directly from states of first asylum or from states of

¹⁵ Gary Troeller, *UNHCR Resettlement: Evolution and Future Direction*, 14 INT’L J. REFUGEE L. 85, 88 (2002). These states are the United States, Canada, Sweden, Norway, Finland, Denmark, the Netherlands, Switzerland, New Zealand, and Australia. *Id.* at 88, n.7.

¹⁶ Troeller estimates that 15,000 Latin Americans were resettled beginning in the 1970s. *Id.* at 87.

¹⁷ Recently, Argentina, Benin, Brazil, Burkina Faso, Chile, Iceland, Ireland, and Spain have offered to assist UNHCR with resettlement. *Id.* at 93.

¹⁸ Although 70,000 overseas refugee admissions had been authorized for FY 2002, only 27,075 refugees were actually admitted to the United States during that period. *Bush Administration to Reduce Refugee Admissions in FY 2003*, 23 REFUGEE REP. 1, 1 (Sept./Oct. 2002).

origin, continue to offer durable refugee protection, in the form of indefinite grants of asylum with derivative family benefits (potentially leading to lawful permanent residence) and *non-refoulement*, to arriving asylum seekers. The United States is an example of a state that operates both an overseas refugee admissions program and a system for granting asylum to spontaneously arriving asylum seekers and persons already present in its territory. European Union states have only recently begun to explore the possibility of engaging directly in refugee status determination outside their own boundaries.¹⁹

At the same time, the phenomena of migrant smuggling and mass boat arrivals have generated draconian reactions in a number of receiving states. The interdiction of the *Tampa* and subsequent vessels by the Australian military seemed to replicate interdiction policies adopted by the United States, especially with regard to Haitian asylum seekers. Yet, the contrasts between the two interdiction programs are perhaps more interesting than their similarities.

A. *Australian and American Policies*

While the Haitian interdiction program evolved over time, the harshest phase involved the direct return of Haitian asylum seekers to Haiti without any screening to determine whether they met the refugee definition. This policy was notoriously upheld as consistent both with the 1967 Refugee Protocol and with United States law by the Supreme Court in *Sale v. Haitian Centers Council, Inc.*²⁰ Despite its many drawbacks, Australia's "Pacific Solution" has not yet resulted in the involuntary *refoulement* of refugees without any semblance of screening for refugee status.²¹ However, the combination of denial of family reunification to holders of temporary protection visas; harsh detention conditions in Nauru, Papua New Guinea, and Christmas Island; the interdiction of family members; and family members' return to an insecure status in states such as Indonesia, may result in "voluntary" repatriation of refugees who are unable to withstand these stresses.

¹⁹ Gregor Noll & Jessica Fagerlund, *Safe Avenues to Asylum? The Actual and Potential Role of EU Diplomatic Representations in Processing Asylum Requests* (Danish Centre for Human Rights/UNHCR, April 2002).

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

²¹ Australia and Afghanistan negotiated an agreement providing reintegration assistance for persons agreeing to be repatriated from detention in Australia and Nauru. *By Invitation Only*, *supra* note 6, at 75. By October 8, 2002, 410 detainees on Nauru (398 Afghans, six Iranians, three Sri Lankans, and three Iraqis) had accepted the reintegration package. *Id.*

The notion that states are free to redefine the geographic scope of their international legal obligations under the Refugee Convention seems to be shared by the United States and Australian Governments. The United States never denied that Haitian asylum seekers who arrived within its territorial waters had a right to apply for asylum, although recently, persons arriving irregularly by boat have been subjected to expedited removal, which provides a truncated and unreliable process for screening persons for a credible fear of persecution.²² Australia has gone further than the United States in attempting to excise portions of territory over which it exercises undisputed sovereignty from its "migration zone."²³ Christmas Island is thus transformed into a variant on Guantánamo.²⁴ As Guy Goodwin-Gill notes, sovereignty carries with it obligations as well as power, costs as well as benefits.²⁵

B. Current Trends

The association of migration with security threats and organized crime by politicians and the general public contributed to the *Tampa* crisis. Strangely, victims *fleeing* regimes involved with international terrorism (the Taliban in Afghanistan) or accused of possessing weapons of mass destruction (Saddam Hussein in Iraq) became confused with their own persecutors. These Afghan and Iraqi asylum seekers, arriving with the assistance of smugglers, became the objects of fear and distrust, rather than the beneficiaries of ideological solidarity, as the anti-Communist refugees traditionally welcomed in the West had been. Despite the demonization of the Taliban and the insistence by policy makers in the antiterrorist coalition that the Afghan war remains an international armed conflict, the premature cessation of refugee protection for Afghans has become a troubling possibility.

The High Commissioner's "Convention Plus" proposal builds upon the desire of policy makers for more comprehensive management of

²² Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 219 (Nov. 13, 2002).

²³ Australia has purported to "excise" Christmas Island from its migration zone, to establish a refugee processing/detention center there, and to screen asylum seekers without providing the opportunity to apply for permanent protection visas. Human Rights Watch, *supra* note 5, at 4-6.

²⁴ Harold Koh described the Guantánamo Naval Base as a "rights-free zone" during the period when Haitian and Cuban asylum seekers were being detained there and denied access to counsel and U.S. courts to assert their rights under international and U.S. law. Harold Hongju Koh, *America's Offshore Refugee Camps*, 29 RICH. L. REV. 139, 140-41 (1994).

²⁵ Guy Goodwin-Gill, *Refugees and Responsibility in the Twenty-First Century: More Lessons from the South Pacific*, 12 PAC. RIM LAW & POL'Y J. 23, 25 (2003).

international migration. As High Commissioner Ruud Lubbers stated to the Fifty-third Session of the Executive Committee of the High Commissioner's Programme:²⁶

The "Plus" concerns special agreements for improving burden sharing, with countries in the North and South working together to find durable solutions for refugees. It concerns comprehensive plans of action in cases of massive outflows. It concerns agreements on 'secondary movements,' defining the roles and responsibilities of countries of origin, transit, and potential destination. It concerns better targeting of development assistance in regions of origin, helping refugee hosting countries to facilitate local integration, and enhancing post-conflict reintegration. And it concerns multilateral commitments for resettlement.

The Agenda for Protection recently approved by the Executive Committee contains a number of points relating to resettlement, as a "protection tool" (for example, to relocate women at risk in a state of first asylum), as a "durable solution," and as a "tool of burden sharing."²⁷

Despite shared concerns over the dangers posed by the irregular arrival of asylum seekers, often via maritime smuggling routes, no state has yet attempted to replicate the "Pacific Solution" or to deny durable asylum as a penalty for jumping a hypothetical resettlement queue. We must await the international response to the "Convention Plus" initiative, in order to determine if the *Tampa* incident signals a dramatic departure from the decentralized system of protection traditionally exercised under the Refugee Convention and Protocol, to a system of much more intense collaboration and collective management by states. Such a system may privilege the security, political, and economic concerns of receiving states over the autonomy, dignity, and family rights of refugees.

²⁶ *Report of the Fifty-third Session of the Executive Committee of the High Commissioner's Programme*, UNHCR, Annex II, at 28, U.N. Doc. A/AC.96/973(2002) (opening statement by Mr. Ruud Lubbers).

²⁷ *Agenda for Protection*, *supra* note 10, Annex IV, at 54, 59.