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Irene Khan

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TRADING IN HUMAN MISERY: A HUMAN RIGHTS PERSPECTIVE ON THE *TAMPA* INCIDENT

Irene Khan[†]

Three years ago, while working for the United Nations High Commissioner for Refugees, I witnessed hundreds of tired children, women, and men from Kosovo who spent the night in the open, at Blace, in freezing cold weather. They had been refused entry into Macedonia the night before, ostensibly because their sheer numbers constituted a threat to national security. I later learned that among those pushed back was a well-known political dissident, who was later shot dead by the Serbs on his return.

In December 2001, as Secretary General of Amnesty International, I visited the Jalozei camp in Pakistan, where I met an Afghan woman named Zainab. After her husband had been killed by the Taliban in northern Afghanistan, she had moved to Kabul. She later was forced to move from Kabul to Pakistan after an American bomb destroyed her home and killed her seven-year-old son. She described to me how she had held in her hand the head of her son, severed from his body by the bomb, while pieces of his limbs lay scattered around her. Only a few hours earlier, I had pleaded with General Musharraf, the President of Pakistan, to grant Afghans, like Zainab, asylum in Pakistan. He replied that Pakistan's border was closed because the country could not bear the endless burden of refugees.¹

In March 2002, I visited a trauma center for torture victims in Sydney, Australia. I met an Iraqi man there, who had been recognized as a refugee after prolonged detention; however, he was given only a Temporary Protection Visa ("TPV") because he had entered Australia without a visa. He asked Amnesty International to help him file a case against the Australian navy, which, he claimed, stood by as his wife drowned after her boat sank in Australian territorial waters. His wife was trying to enter Australia clandestinely because his TPV status did not allow him to apply for family reunification. He told me

[†] The author, Irene Khan, has served as Secretary General of Amnesty International since August 2001. Prior to joining Amnesty International, Irene Khan worked for the United Nations High Commissioner for Refugees for twenty-one years, working directly with refugees and displaced persons to protect their rights. The author wishes to acknowledge the assistance of Eve Lester, Head, Refugee Unit, Amnesty International, in writing this Article.

¹ See Mark Baker, *Pakistan Leader's Swipe at Australia's Refugee Ban*, SYDNEY MORNING HERALD, Oct. 24, 2001, LEXIS, News Library (quoting General Musharraf, the President of Pakistan, in an apparent reference to Australia's refusal to allow *Tampa* asylum seekers to disembark in Australia, justifying Pakistan's action, "You can compare this when you think of Australia not accepting even 200 refugees So a poor country, an economically weak country like Pakistan cannot really accept refugees over this great figure of 2.5 million.").

that he had not been able to attend his wife's funeral in Indonesia because, as a TPV holder, he could not have re-entered Australia if he had left.

What connection do these diverse cases have with the M/V *Tampa*? It is true that none of these people came by boats, and it is equally true that two of the cases had nothing directly to do with Australia, and one even pre-dated the *Tampa*. However, these are but other variations of the *Tampa* crisis.²

These cases all demonstrate the widely condoned policy of governments today to restrict and deny asylum, effectively undermining refugee protection in the name of immigration control and national self-interest. This policy is based either on the belief that these people are irregular migrants who do not deserve protection, or that they are refugees who should find protection elsewhere. Each government, in turn, pushes the problem to the next country until the asylum seekers end up in the very danger they were trying to escape.

Under this policy, at its simplest, governments close borders, as was seen in Pakistan, where Afghan refugees were denied entrance. At its most sophisticated, governments introduce measures such as visa restrictions and carrier sanctions, as seen in many Western countries.³ At its most stark, governments intercept refugee boats on the high seas before the asylum seekers reach the "migration zone"⁴ of the destination country. The United States initiated this practice when it intercepted boat migrants from Haiti in the early 1990s;⁵ Australia is now following in the footsteps of the United States by repelling boat migrants from Afghanistan and Iraq.⁶ The human toll for those daring to circumvent such government barriers to entry is high. One organization, UNITED for Intercultural Action, has documented the cases of more than 3000 asylum seekers who have died seeking access to the European Union between 1993 and May 2002.⁷ Many other asylum seekers have lost their lives while trying to flee persecution; however, accurate figures of those lost can never be known.

The *Tampa* case does not stand in isolation. It is part of a wider pattern of restrictive asylum policies. To fully understand the significance of the *Tampa* case, one should go back more than two decades to the exodus of the

² For a detailed description of Australia's *Tampa* Crisis, see Emily C. Peyser, Comment, "*Pacific Solution*"? *The Sinking Right to Seek Asylum in Australia*, 11 PAC. RIM L. & POL'Y J. 431 (2002); Jessica E. Tauman, Comment, *Rescued at Sea, but Nowhere to Go: The Cloudy Legal Waters of the Tampa Crisis*, 11 PAC. RIM L. & POL'Y J. 461 (2002).

³ See, e.g., AMNESTY INTERNATIONAL, NO FLIGHTS TO SAFETY: CARRIER SANCTIONS; AIRLINE EMPLOYEES AND THE RIGHTS OF REFUGEES 1 (1997), <http://www.web.amnesty.org/ai.nsf/index/ACT340211997> (last visited Dec. 7, 2002).

⁴ Migration Act 1958, §5 (Austl.).

⁵ For a discussion of the U.S. interdiction program, see *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993). See also Peyser, *supra* note 2, at 444-46.

⁶ For a retelling of the *Tampa* crisis and events following, see Peyser, *supra* note 2, at 455-60.

⁷ UNITED FOR INTERCULTURAL ACTION, EUROPEAN NETWORK AGAINST NATIONALISM, RACISM, FASCISM AND IN SUPPORT OF MIGRANTS AND REFUGEES, LIST OF 3026 DOCUMENTED REFUGEE DEATHS THROUGH FORTRESS EUROPE 1-10 (2002), <http://www.united.non-profit.nl/pdfs/listofdeaths.pdf> (last visited Dec. 7, 2002).

Vietnamese boat people.⁸ Then, as now, boatloads of asylum seekers were pushed away, and refugees were detained on small islands, including, for example, Galang Island in Indonesia.⁹ Then, as now, many asylum seekers drowned as their calls of distress went unnoticed or unheeded. In response to this exodus, asylum, as a permanent solution to refugee problems, was diminished with the crafting of the notion of temporary refuge¹⁰—an initiative led by Australia with the support of the United Nations High Commissioner for Refugees (“UNHCR”).¹¹ The practical problem of what to do with Vietnamese refugees was solved, not through legal obligations, but through a political compromise, which provided that refugees would be resettled after a temporary stay in Australia, primarily to Australia, Canada, and the United States.

Then, as now, refugees were portrayed by states in the Association of Southeast Asian Nations (“ASEAN”) as a threat to security and sovereignty. But then, unlike now, there was a greater political will to find protection and solutions for refugees. In the case of the *Tampa*, the Australian Government has portrayed the asylum seekers as a threat to Australian society and Australian values, a perspective which received an unexpected boost after the terrorist attacks of September 11, 2001. Australian Defense Minister Peter Reith was reported as saying that the government had to be allowed to prevent entry by boat, because “[o]therwise it can be a pipeline for terrorists to come in and use your country as a staging post for terrorist activities.”¹² These claims, however, are without foundation. In fact, the Director-General of Australian Security Intelligence Organization (“ASIO”), Dennis Richardson, recently reported to the Australian Parliament that not one asylum seeker of the 6000 screened in the last two and a half years has been rejected on security grounds.¹³

In the post-September 11th climate of suspicion, mistrust, xenophobia, and racism, governments and media have had little difficulty effecting a general fear of foreigners who are seeking asylum. In the public mind those fleeing terror are confused with those suspected of causing it; consequently, public support is often cited by democratic governments as a basis for curtailing refugee protection. In fact, in Australia, Prime Minister John Howard was re-elected on the coattails of the asylum issue.¹⁴

⁸ See W. COURTLAND ROBINSON, *TERMS OF REFUGE: THE INDOCHINESE EXODUS AND THE INTERNATIONAL RESPONSE* 151 (1998); Tauman, *supra* note 2, at 493-94; Josh Briggs, Comment, *Sur Place Refugee Status in the Context of Vietnamese Asylum Seekers in Hong Kong*, 42 AM. U. L. REV. 433, 437 (1993).

⁹ *Id.*

¹⁰ Migration Regulations 1994, sched. 2, pt. 785 (Austl.).

¹¹ UNHCR, *Background Note on the Protection of Asylum-Seekers and Refugees Rescued at Sea* (Mar. 18, 2002), http://heiwwww.unige.ch/conf/psio_230502/files/unhcr.doc (last visited Jan. 18, 2003).

¹² *Australia Links Asylum Policy to US Attack*, BBC NEWS, Sept. 13, 2001, at <http://new.bbc.co.uk/1/hi/world/asia-pacific/1542029.stm>.

¹³ Cynthia Banham, *Rotten Safety Measures “Risked Lives at Port Hedland,”* SYDNEY MORNING HERALD, Aug. 23, 2002, LEXIS, News Library.

¹⁴ *Election Ahoy*, ECONOMIST (U.S. ed.), Sept. 8, 2001, LEXIS, News Library.

For most of the world, the image of 438 desperate asylum seekers cast adrift in the scorching heat on the *Tampa*, was truly overshadowed by the events of September 11th. There is little doubt that the post-September 11th developments will have, and indeed have already had, a significant impact on the protection of refugees in many parts of the world. Basic rights of asylum seekers will continue to be trumped by issues of national security, even though any links to terrorism have yet to be proven. Although overshadowed, the legal implications of the *Tampa* case will likely have a more profound and more serious impact on refugees than the legal implications of September 11th. While post-September 11th measures target individual asylum seekers who are perceived as security risks, the *Tampa* incident represents a broad assault on the right of any person to seek asylum spontaneously.

The legal implications of *Tampa* are wide, affecting not only refugee law and international maritime law, but also international human rights law. For this reason, Amnesty International submitted an *amicus curiae* brief in a petition filed by Victorian Council for Civil Liberties (“VCCL”) and Eric Vadarlis against the Australian Government. The brief advocated orders that would oblige the Australian Government to permit the asylum seekers to enter Australia’s migration zone.¹⁵ Upon entry into the migration zone, *Tampa* asylum seekers would have been eligible to apply for refugee status under Australia’s migration laws.¹⁶ The VCCL’s action against the Government succeeded at first,¹⁷ but failed on appeal.¹⁸ Although the Government won the case in the end, it is important to note that the Australian Full Court’s opinion failed to consider Australia’s obligations under international law in any substantive detail. Moreover, the Government avoided any legal scrutiny of its conduct by hastily passing six bills on September 26, 2001 to impose even tougher restrictions on the rights of asylum seekers in Australian territory.¹⁹

This Article seeks to place the legal implications arising from the *Tampa* case within the context of the broader refugee protection crisis, not only in Australia, but globally. It warns of the dangers of precipitous ad hoc, unilateral, and politically motivated policies that endanger the lives of the world’s most marginalized people. It seeks to lift the veil of sovereignty behind which

¹⁵ Ruddock v. Vadarlis (2001) 110 F.C.R. 491.

¹⁶ Migration Act 1958 (Austl.).

¹⁷ Vadarlis v. Ruddock (2001) 110 F.C.R. 452, *overruled by* Ruddock v. Vadarlis (2001) 110 F.C.R. 491.

¹⁸ Ruddock v. Vadarlis (2001) 110 F.C.R. 491.

¹⁹ Immediately following the *Tampa* incident, the Australian Parliament passed retroactive border control legislation to institute mandatory sentencing for people smugglers, restrict the legal rights of refugees, establish a new temporary visa system for “illegal” migrants, and excise external territories—including Christmas Island and Ashmore Reef—from Australia’s migration zones. See Border Protection (Validation and Enforcement Powers) Act, 2001 (Austl.); Migration Amendment (Excision from Migration Zone) Act, 2001 (Austl.); Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act, 2001 (Austl.); Migration Legislation Amendment Act, No. 1, 2001 (Austl.); Migration Legislation Amendment Act, No. 5, 2001 (Austl.); Migration Legislation Amendment Act, No. 6, 2001 (Austl.); and Migration Legislation Amendment (Judicial Review) Act, 2001 (Austl.).

Australia has sought to hide, and argues for a protection-sensitive, multilateral approach to dealing with refugee flows.

I. THE *TAMPA* IMPLICATIONS FOR INTERNATIONAL MARITIME LAW

The position of international maritime law is that persons in distress at sea must be rescued, which may include delivery to a “place of safety.”²⁰ The status of the individuals who have been rescued is irrelevant in the determination of what would be an appropriate “place of safety.” It is logical that “place of safety” should include the right to disembark. In the case of the *Tampa*, the logical place of safety would have been the next, nearest, or safest port of call. It appears that there was some measure of choice on the day of the rescue, and the *Tampa* captain chose Christmas Island.

Australia has argued that “[p]eople picked up in distress situations do not have the right to dictate the country in which they are to be landed.”²¹ The Australian Government explained that it was concerned about creating a precedent for other asylum seekers by allowing boat people to coerce a rescue vessel into transporting them to their “preferred destination.”²² “Preferred destination” is language carefully chosen by the Australian Government, suggesting that there are other options. Australia’s Immigration Minister has also accused asylum seekers of making a “lifestyle choice” when they seek to enter Australia without a visa.²³ However, if we interpret “preferred destination” from a human rights perspective as the asylum seekers’ desire to find a “place of protection”—most of which on the *Tampa* were later found to have been legitimately seeking—the Australian Government’s assertion assumes a different character.²⁴

If measures are taken by those rescued to coerce the vessel and redirect it to another destination, then these are matters to be taken seriously. However, disembarkation, in the *Tampa* case, would not have impeded this determination.

²⁰ See Fredrick J. Kenney & Vasilios Tasikas, 12 PAC. RM L. & POL’Y J. 143 (2003) (discussing the duties to rescue and assist, and analyzing the responses to the *Tampa* incident by international maritime organizations); Tauman, *supra* note 2 (focusing on the legal duties of states under international maritime law and criticizing Australia’s response).

²¹ *Principled Observance of Protection Obligations and Purposeful Action to Fight People Smuggling and Organised Crime—Australia’s Commitment*, document distributed by the Australian Government delegation at the Global Consultations on International Protection (Sept. 2001) [hereinafter Protection Obligations].

²² Letter from Philip Ruddock, Minister for Immigration and Multicultural Affairs, to David Purnell, National Administrator, United Nations Ass’n of Australia, Inc. (Jun. 13, 2000), <http://www.unaa.org.au/wn000613a.html> (“Most of these people are not fleeing to the most logical place of protection—they are seeking out Australia as their preferred destination for migration.”).

²³ Alison Croweller & Megan Saunders, *Refugees Plight a “Lifestyle Choice,”* AUSTRALIAN, Jan. 8, 2002, LEXIS, News Library (reporting that Phillip Ruddock, Immigration Minister, claimed that “Most asylum-seekers who seek to come to Australia are not fleeing persecution but making a ‘lifestyle decision.’”).

²⁴ See AMNESTY INTERNATIONAL, AUSTRALIA-PACIFIC, OFFENDING HUMAN DIGNITY—THE “PACIFIC SOLUTION” 8 (2002), http://web.amnesty.org/aidoc/aidoc_pdf.nsf/index/ASA120092002 ENGLISH/\$FileASA1200902.pdf (last visited Dec. 7, 2001) [hereinafter OFFENDING HUMAN DIGNITY].

Although Australia argued that the rescuees had no right to dictate the country in which they were to be landed, it is far from clear whether Australia itself had the right to dictate the country in which the asylum seekers were to be landed. As a matter of international maritime law, the International Convention for the Safety of Life at Sea (“SOLAS”)²⁵ creates a general obligation for masters to proceed to the assistance of those in distress. Thus, international maritime law and convention established over many years would tend to suggest that it is the prerogative of the ship’s captain, not that of a nearby State, to determine the country in which persons in distress are to be landed. Further, in terms of Australia’s obligations, the International Convention on Maritime Search and Rescue (“SAR Convention”) of 1979,²⁶ which entered into force on June 22, 1985, provides that a party should take measures to expedite entry of rescue units from other parties into its territorial waters.²⁷

II. THE *TAMPA* IMPLICATIONS FOR INTERNATIONAL REFUGEE LAW

The right to seek asylum is enshrined in the Universal Declaration of Human Rights (“UDHR”),²⁸ and implicitly recognized in the 1951 United Nations Convention relating to the Status of Refugees (“Refugee Convention”),²⁹ to which Australia is a State Party.³⁰ Access and entry are clearly essential in giving effect to the right to seek and enjoy asylum.

Australia’s interpretation of the right to seek and enjoy asylum takes a highly restrictive view of where that right might be exercised and by whom. The implication is that the people on the *Tampa* had no right to seek and enjoy asylum *in Australia*, despite the fact that they had clearly engaged Australia’s

²⁵ United Nations Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47, 164 U.N.T.S. 113 [hereinafter SOLAS].

²⁶ International Convention on Maritime Search and Rescue, Apr. 27, 1979, amended by Resolution of the IMO’s Maritime Safety Comm., May 18, 1998, Res. MSC 70(69) (effective Jan. 1, 2000) [hereinafter SAR Convention].

²⁷ SAR Convention, *supra* note 26, art. 2.1.1.

²⁸ Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., Supp. No. 3, at 71, U.N. Doc. A/810 (1948) [hereinafter UDHR].

²⁹ United Nations Convention relating to the Status of Refugees, opened for signature July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150, available at <http://untreaty.un.org> (entered into force Apr. 22, 1954) [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, available at <http://untreaty.un.org> [hereinafter Protocol]. As of January 1, 2002, there were 141 States Parties to either the Refugee Convention or Protocol or both. United Nations High Commissioner for Refugees, *States Parties to the 1951 Convention relating to the Status of Refugees* (Jan. 1, 2002), available at <http://www.unhcr.ch> [hereinafter *States Parties*]. Australia is a party to both the Refugee Convention and the Protocol. *Id.*

³⁰ While the right to seek asylum is not explicitly included in the 1951 [Refugee] Convention, it is nevertheless implicit in its very existence. Provisions of the [Refugee] Convention which are particularly relevant to the right to seek asylum include the prohibition on the imposition of penalties for illegal entry (Article 31), the prohibition on expulsion (Article 32), and, of course, the prohibition on *nonrefoulement*, or non-return to a country in which the asylum seeker’s life or freedom would be threatened (Article 33). UNHCR, *RELOCATING INTERNALLY AS A REASONABLE ALTERNATIVE TO SEEKING ASYLUM: THE SO-CALLED “INTERNAL FLIGHT ALTERNATIVE” OR “RELOCATION PRINCIPLE”* (1999), <http://www.unhcr.ch/research/legal.htm> (UNHCR position paper, last visited Dec. 23, 2002).

protection obligations by arriving in Australia's territorial waters.³¹ Australia justifies its position on the ground that these asylum seekers were not escaping directly from their country of origin because they had already landed in another country of asylum, Indonesia.

While various attempts have been made in refugee law to determine when an individual already residing outside her country of origin could move elsewhere to seek protection, it is clear that such a determination should not be made arbitrarily but should take into account the actual circumstances of the individual, particularly the availability and effectiveness of protection offered in the first safe country that she entered.³² Moreover, "[i]t is the humanitarian obligation of all coastal states to allow vessels in distress to seek haven in their waters and to grant asylum, or at least temporary refuge, to persons on board wishing to seek asylum."³³

By turning away those on board the *Tampa*, Australia made no effort to determine the individual circumstances of the asylum seekers or the validity of their asylum claims—most of which were later found to be genuine.³⁴ Instead, Australia used its financial and political clout to persuade the Government of Nauru to land and detain the refugees. None of the asylum seekers on board had any connection to Nauru, and none had ever passed through its territory prior to being disembarked there. Nauru is not a party to the Refugee Convention or its 1967 Protocol and has no procedures for processing asylum seekers. All Nauru offered was detention—with no clarity about how long the detention might last or where people would go at the end of their stay. By diverting boatloads of people to the detention center in Nauru (and later Papua New Guinea)—in exchange for huge sums of money—Australia seems to have perpetuated the very trafficking of human misery that it claims it is seeking to prevent.³⁵

III. THE LEGAL IMPLICATIONS OF THE *TAMPA* INCIDENT IN INTERNATIONAL HUMAN RIGHTS LAW

There are also serious concerns about Australia's compliance with international human rights law and other international standards during the *Tampa* crisis.³⁶ The asylum seekers were denied access to legal counsel,

³¹ Protection Obligations, *supra* note 21.

³² See *Conclusion on the International Protection of Refugees, No. 15 (XXX): Refugees Without an Asylum Country*, UNHCR Executive Comm., U.N. GAOR 30th Sess., U.N. Doc. A/AC.96/572 (1979), reprinted in GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 475 (2d ed. 1996) [hereinafter *Conclusion No. 15*]; *Conclusions on the Problem of Refugees and Asylum Seekers Who Move in an Irregular Manner From a Country in Which They Had Already Found Protection, No. 58 (XL)*, UNHCR Executive Comm., U.N. GAOR 44th Sess., Supp. No. 12A, at 11, U.N. Doc. A/44/12/Add.1 (1990).

³³ *Conclusion No. 15, supra* note 32.

³⁴ See *OFFENDING HUMAN DIGNITY, supra* note 24, at 8.

³⁵ Peyser, *supra* note 2, at 432, n.6.

³⁶ See *OFFENDING HUMAN DIGNITY, supra* note 24, at 12-14.

detained unlawfully on both the *Tampa* and HMAS *Manoora*, and denied the right to seek asylum in Australia. It is important to place the *Tampa* case in the wider context of Australia's policies and practices in refugee law. Arbitrary and unlawful detention, discrimination, and other deterrent measures are all part of the same approach, the very approach which underpins the *Tampa* case, and has the same consequence of restricting access to asylum.

A. *Discrimination*

The Australian Government openly admits that it intentionally discriminates between people who are "fleeing directly" and refugees making what it calls "unnecessary secondary movements."³⁷ The Government discriminates between asylum seekers by granting either permanent or temporary protection based on the circumstances of their arrival. It also discriminates by denying access to asylum seekers who arrive by boat from other safe countries en route to Australian territory, sending them instead to Pacific island nations where they are incarcerated. Australia's Prime Minister has cited Article 31 of the Refugee Convention as justification for this practice.³⁸ Australia discriminates by detaining those who manage to gain illegal access to Australian territory, often in remote detention centers—which have been the recent subject of serious national and international criticism.³⁹ It discriminates by only granting TPV status, instead of full refugee status to those it eventually finds to have legitimate refugee claims.⁴⁰ TPV status deprives

³⁷ See Protection Obligations, *supra* note 21.

³⁸ Article 31 of the Refugee Convention prohibits "penalties imposed on refugees." This Article can be interpreted as an obligation on States Parties to refrain from adopting practices designed to deter certain classes of asylum seekers from seeking refuge or discriminating against asylum seekers by differentiating between legal and illegal migrants. See Peyser, *supra* note 2, at 440. Philip Ruddock stated, however, that "[u]nderlying Australia's approach is the need to differentiate between those persons directly fleeing from countries in which they have persecution, and those who come to Australia via countries where they were safe. The Refugees Convention itself contemplates that difference in the reference to direct flight in Article 31." Philip Ruddock, Hard Choices—The Asylum Seekers Challenge, Speech at the meeting of the Commonwealth Lawyers' Association in London (Apr. 22, 2002), transcript available at http://www.minister.immi.gov.au/media/speeches/20020422_london.htm (last visited Jan. 18, 2003).

³⁹ See, e.g., *Human Rights and Immigration Detention in Australia*, Report of Justice P.N. Bhagwati, Regional Advisor for Asia and the Pacific of the United Nations High Commissioner for Human Rights, Mission to Australia, May 24-June 2, 2002; Concluding Observations of the Human Rights Committee: Australia, U.N. Doc. A/55/40, paras. 498-528 (2000); 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]; Concluding Observations of the Committee on the Rights of the Child: Australia, U.N. Doc. CRC/C/15/Add.79 (1979); AUSTRALIAN HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, THOSE WHO'VE COME ACROSS THE SEAS: DETENTION OF UNAUTHORISED ARRIVAL (1998).

⁴⁰ Article 34 of the Refugee Convention, *supra* note 29, provides that "[t]he Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings." This provision, together with other obligations under the Refugee Convention, comprise what may be understood as "full refugee status," that is, permanent resettlement in the host country.

refugees of basic Refugee Convention rights: certainty of status, the right to leave and return to Australia,⁴¹ family reunion,⁴² and certain social benefits.⁴³

Non-discrimination provisions are found in the International Covenant on Civil and Political Rights ("ICCPR")⁴⁴ and the International Covenant on Economic, Social and Cultural Rights ("ICESCR").⁴⁵ Both anti-discrimination provisions proscribe discrimination on the grounds of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."⁴⁶ Australia has admitted that such discrimination is precisely what it is practicing; therefore, Australia is knowingly violating both conventions.

Australia has suggested that its discriminatory approach is supported by Article 31 of the Refugee Convention.⁴⁷ That provision expressly prohibits the imposition of penalties on persons arriving in a country illegally, who, coming directly from a country where their life or freedom was threatened, enter or are present in a new country without authorization, provided they present themselves without delay and show good cause for their illegal entry or presence.⁴⁸ Many of those who seek to enter Australia have been recognized as having failed to obtain effective asylum elsewhere, and therefore could be said to have good cause to have arrived illegally. Their flight from their country may also be said to be *direct* in the sense that it has not been meaningfully interrupted by effective protection in another country of asylum.

⁴¹ Article 28(1) of the Refugee Convention, *supra* note 29, provides:

[t]he Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence.

⁴² "Refusal to allow family reunification may be considered as an interference with the right to family life or to family unity, especially where the family has no realistic possibilities for enjoying that right elsewhere." *Summary Conclusions on Family Unity*, UNHCR Global Consultations on International Protection, Geneva Expert Roundtable, para. 5 (Nov. 8-9, 2001).

⁴³ Refugee Convention, *supra* note 29, arts. 20-24 (providing for rationing, housing, public education, public relief, labor legislation, and social security).

⁴⁴ International Covenant on Civil and Political Rights, G.A. Res. 2200A (xxi), 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (1966) (entered into force Mar. 23, 1976) [hereinafter ICCPR].

⁴⁵ International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, G.A. Res. 2200, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1967), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

⁴⁶ ICCPR, *supra* note 44, art. 2; ICESCR, *supra* note 45, art. 2(1).

⁴⁷ Ruddock, *supra* note 38 and accompanying text.

⁴⁸ Refugee Convention, *supra* note 29, art. 31(1).

B. *Arbitrary and Unlawful Detention*

The Australian Government has made it plain that it is seeking to deter people smugglers. Its implementation of this deterrence policy includes the imposition of penalties without charge or trial, including detention, on asylum seekers attempting to enter Australia to seek asylum. To deprive a person of their liberty, without charge or trial, as a penalty or simply in the name of deterrence, is in direct violation of international human rights law.⁴⁹

Amnesty International has long held the view that the Australian policy and practice of mandatory detention is contrary to international human rights standards. Freedom from arbitrary detention is enshrined in the UDHR⁵⁰ and codified in the ICCPR.⁵¹

Furthermore, the Convention on the Rights of the Child⁵² prohibits the detention of children, except as a last resort and, in such an event, for the shortest possible period of time.⁵³ Australia routinely detains children for prolonged periods while their families are processed. International guidelines on detention of asylum seekers adopted by the UNHCR's Executive Committee (of which Australia is a member) call for detention to be used only in exceptional circumstances, to be justified in each individual case, and to be subject to the safeguard of an independent review.⁵⁴ Neither Australia's detention policy nor the detention regime exported to Nauru respect these criteria.

Deprivation of liberty is not just an assault on human rights. It is widely recognized that prolonged detention, particularly when people are already traumatized by past persecution and do not know what the future holds for them, can lead to serious irreparable psychological damage.⁵⁵ The Australian Human Rights Commissioner, the Australian Commonwealth Ombudsman, the Australian Parliamentary Committees and other non-governmental organizations have repeatedly pointed to the sense of deep frustration and despair among asylum seekers in detention centers—the kind of hopelessness and helplessness that has driven people to sew their lips together.⁵⁶

⁴⁹ See, e.g., ICCPR, *supra* note 44, art. 14.

⁵⁰ UDHR, *supra* note 28, art. 9.

⁵¹ ICCPR, *supra* note 44, art. 9.

⁵² Convention on the Rights of the Child, Nov. 20, 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (1989), 28 I.L.M. 1448 (1989).

⁵³ *Id.* art. 37(b).

⁵⁴ UNHCR, *UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers* (Feb. 1999), at <http://www.unhcr.ch/cgi-bin/texis/vtx/home/+cwwBmeNEmawwwwwwwhFqA72ZR0gRfZNFqrpGdBnqBAFqA72ZR0gRfZNCfQtmnBnDBodDawDmaoDBnGDwBodDwcatlomncoDn5DzmxwwwwwwlFqmRbZ/opendoc.pdf>.

⁵⁵ For a discussion on the detention, see Adrienne McEntee, Comment, 12 PAC. RIM L. & POL'Y J. 261 (2003).

⁵⁶ See, e.g., Press Release, Professor Alice Tay, President, and Dr. Sev Ozdowski, Human Rights Commissioner, Woomera Immigration Detention Centre—Report of Visit by HREOC Officers (Feb. 6, 2002), at <http://www.unhcr.ch/html/menu3/b/a-ccpr.htm>.

Five years ago, on April 30, 1997, the United Nations Human Rights Committee made a finding that this very same legislation put Australia in violation of its obligations under the ICCPR.⁵⁷ The finding clearly established that Australia's mandatory detention policy does not comply with international human rights standards. Notwithstanding this, the Human Rights Committee's finding has been ignored by the Australian Government. In 2000, Australia's human rights practices (both in relation to refugees and asylum seekers as well as indigenous Australians) were roundly criticized by a number of treaty bodies, including the Committee on the Elimination of Racial Discrimination,⁵⁸ the Human Rights Committee,⁵⁹ the Committee on the Rights of the Child,⁶⁰ and the Committee on Economic, Social and Cultural Rights.⁶¹ Australia's response was a joint Ministerial announcement in August 2000 that Australia would be more selective in the future as to how it would report to treaty bodies.⁶²

These responses reflect a growing disrespect in Australian politics for international standards, and disregard for the role which Australia itself played in their establishment. The *Tampa* crisis is consistent with this disrespect. The treatment of the *Tampa* asylum seekers was a knee-jerk response, which was politically motivated, for the benefit of public opinion.

Is it fair or necessary for Australia to adopt a tough detention policy restricting the rights and privileges of refugees? There is nothing fair about locking up hundreds of children, women, and men—without charge or review by a court—simply because they lack a visa, especially considering that the vast majority of the people who are detained are later found to be valid refugees according to Australian authorities. There is nothing fair about labeling asylum seekers as “queue jumpers” when there is no queue they could have joined in the first place. There is nothing fair about playing on public fears to build a negative image of refugees. There is nothing fair about trading in human misery, by paying to transfer people to detention centers on Nauru or Manus Island.

So what purpose does mandatory detention serve? It was meant as a deterrent. However, it has failed to be an effective deterrent, with the numbers of those arriving in Australia without visas rising in 2000 and 2001. Precisely because the Government found that mandatory detention did not stop the asylum seekers, it decided to intercept and divert the boatloads elsewhere.

⁵⁷ Communication No. 560/1993, *supra* note 39.

⁵⁸ Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia, CERD/C/304/Add.101 (2000).

⁵⁹ Communication No. 560/1993, *supra* note 39.

⁶⁰ Concluding Observations of the Committee on the Rights of the Child: Australia, CRC/C/15/Add.79 (1997).

⁶¹ Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia, E/C.12/1/Add.50 (2000).

⁶² See Joint Press Release FA97, Alexander Downer, Australian Minister for Foreign Affairs, Daryl Williams, Attorney-General, and Philip Ruddock, Minister for Immigration and Multicultural Affairs, Improving the Effectiveness of United Nations Committees (Aug. 29, 2000).

Interception and detention are a set of measures now being used to deny access to Australian territory.

The combination, however, is not sustainable because the “Pacific Solution”—the transfer and detention at Nauru and Manus Island of asylum seekers who were on their way to Australia—does not provide a long-term solution. Indeed, it provides no solution for the refugees and asylum seekers. It is not clear what will happen to the valid refugees or those who are found not to be refugees but cannot be sent home. By early August 2002, the Australian Government was claiming that a “number of countries have indicated a willingness to consider cases for resettlement.”⁶³ Efforts to find resettlement places for refugees from camps in Manus Island or Nauru, however, have so far made little progress. In addition, there is still no proposal on what to do about those hundreds of people determined not to be refugees, including those who may be entitled to international protection on the basis of broader international human rights principles.⁶⁴

IV. THE WAY FORWARD?

The dramatic and drastic actions of the Australian Government have been driven by the concern that human smuggling of asylum seekers is undermining, and might even overwhelm, immigration control. The challenges of preventing trafficking in migrants and smuggling of persons are unquestionably enormous. These challenges are only exacerbated by the fact that States increasingly choose to invoke their sovereign prerogative to control borders. A long-term solution, however, lies in recognizing the failures of refugee processes and resettlement and rectifying these. Anne Gallagher describes smuggled and trafficked persons as “survival migrants.”⁶⁵ Moreover, there is a growing body of evidence that severely restrictive immigration policies are more likely to fuel, rather than curb, organized, irregular migration.⁶⁶ Importantly, traffickers and smugglers service a market in which there are both buyers and sellers. People smuggling is the inescapable consequence of the lack of effective protection and solutions in the countries where refugees first arrive, and their struggle to survive, year upon year, in bleak, miserable conditions in camps or squalid

⁶³ Press Release DPS 55/2002, *Refugees Arrive in Australia from Nauru*, Australian Immigration (Aug. 2002).

⁶⁴ For example, Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides for an absolute prohibition on return of a person to torture. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, art. 3, U.N. Doc. A/39/51 (1984), *reprinted in* 23 I.L.M. 1027 (1984), and *in* 24 I.L.M. 535 (1985). *See also* ICCPR, *supra* note 44; and U.N. Hum. Rts. Comm., General Comment 20, U.N. HCHR, 44th Sess., (1992), *replacing* General Comment 7, *Torture or Cruel, Inhuman or Degrading Treatment or Punishment* (1982). *See also* OFFENDING HUMAN DIGNITY, *supra* note 24, at 11.

⁶⁵ Anne Gallagher, *Trafficking, Smuggling and Human Rights: Tricks and Treaties*, 12 FORCED MIGRATION REV. 26, 28 (2002).

⁶⁶ *Id.*

urban areas of countries like Pakistan, Iran, Jordan and Kenya. There are not enough resettlement opportunities to go around, and returning home is too dangerous. Failure to remove the demand for trafficking and smuggling services, while engaging in (sometimes armed) interception of those who use these services, is at best misguided, and at worst actively hypocritical.

Even in the negotiations around the Palermo Protocols on smuggling and trafficking,⁶⁷ the fact that governments were reluctant to build in safeguards for the protection of refugees and asylum seekers, as well as rights of victims of smuggling and trafficking, is indicative of the position of States on the problem. Savings clauses were built in but the extent to which they will be effective remains to be seen. Australia has not ratified any of these instruments.

Meanwhile, "keep them out at all costs" appears to be the policy of many governments like Australia. However, Rudd Lubbers, the United Nations High Commissioner for Refugees, says that the answer cannot simply be "keep them out."⁶⁸ "You need to organize it in a way that we go for the law and not for the law of the jungle."⁶⁹

Australia has the sovereign right to protect its borders, but it also has the sovereign obligation to respect international law, including the human rights of citizens and non-citizens. It cannot pick and choose which rights it will apply, and how and when. The sovereign powers of a state, including the grant of asylum, must be exercised responsibly in all places where the state exercises effective control and jurisdiction. In these places, the state must exercise its control in accordance with international standards and treaties to which it has voluntarily subscribed. Sovereignty cannot be raised as a defense to acts which would otherwise be unlawful as a matter of international law. Nor can it be raised as a shield to protect states from liability for action exercised extra-territorially. Sovereignty carries with it responsibility.⁷⁰ That should be the most important lesson from the *Tampa* crisis.

Experience shows that measures to stabilize refugee flows are only successful if they provide a meaningful alternative to refugees and protect their rights. By this simple test, it is clearly time to review Australian policies. A refugee is a refugee because of the protection she needs, not because of the way

⁶⁷ See *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the U.N. Convention Against Transnational Organized Crime*, U.N. Doc. A/53/383, at 53 (2000), reprinted in 40 I.L.M. 335 (2001); *Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the U.N. Convention Against Transnational Organized Crime*, U.N. Doc. A/55/383, at 62 (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.

⁶⁸ *U.N. Attacks Australia's Asylum Policy*, BBC NEWS ONLINE, Nov. 16, 2001, at <http://news.bbc.co.uk/1/hi/world/asia-pacific/1659410.stm>.

⁶⁹ *Id.*

⁷⁰ See, e.g., Jens Vedsted-Hansen, *Non-Admission Policies and the Right to Protection: Refugees' Choice Versus States' Exclusion*, in *REFUGEE RIGHTS AND REALITIES: EVOLVING INTERNATIONAL CONCEPTS AND REGIMES* 269, 274 (Frances Nicholson & Patrick Twomey eds., 1999).

in which she has entered a country. Thus, defining refugees as direct or indirect entrants is meaningless.

The real answer is for governments not to shirk refugee responsibilities but to share them. While Australia has been keen to hold a multilateral conference, involving Indonesia and Pakistan, to curb people smuggling, it has made no effort at these meetings to encourage and work with these countries to improve refugee protection by, for example, acceding to the Refugee Convention. It has approached Pakistan and Jordan to accept Afghan and Iraqi refugees but has not offered a meaningful increase in resettlement places that could dampen irregular movements. More efforts need to be made by governments and the UNHCR to strengthen protection through an approach that places protection at the center of the search for solutions and involves all parties. Through such initiatives, change can happen. It requires patience and dedication, and will not always happen quickly. Meanwhile, however, refugees should not be held hostages to a problem that governments do not have the political will to resolve.