JESSICA RODGER

DEFINING THE PARAMETERS OF THE NON-REFOULEMENT PRINCIPLE

LLM RESEARCH PAPER
INTERNATIONAL LAW (LAWS 509)

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ABSTRACT

This paper examines in detail the principle of non-refoulement, which protects refugees from being returned to places where their lives or freedoms could be threatened. It looks in detail at the principle itself; its status at international law and in what circumstances it applies; before going on to look at state practice with respect to non-refoulement. The basic thesis of this paper is that the parameters of the principle need to be clarified if refugees are to be protected from refoulement. It is argued that current policies being implemented by states, such as temporary protection and the safe third country rule, are endangering the principle, and the refugee regime itself. The paper also considers ways in which the current system could be changed in order to protect the non-refoulement principle, while still catering to the needs of states.

STATEMENT OF WORDS

The text of this paper (excluding contents page, footnotes, and bibliography) comprises approximately 15,578 words.

I INTRODUCTION

During the last days of August this year, a humanitarian drama unfolded in the Indian Ocean. 433 asylum-seekers were stranded aboard a Norwegian freighter, the MV Tampa, which had rescued them from a sinking Indonesian ship. They had requested refugee status from the government of Australia when they entered Australian waters, but their request had been denied. Despite pressure from the United Nations High Commissioner for Refugees, the United Nations Secretary-General, and the international community in general, the Australian government stood by its decision. The crisis was only resolved when the governments of Nauru and New Zealand agreed to process the asylum-seekers, with Australia providing financial assistance and transport[1].

The Tampa incident brought home to many in the Asia-Pacific region a fact that those in Europe and Africa have long known. The issue of asylum-seekers and the granting of refugee status is an incredibly complex problem which the international community, as of yet, is not fully equipped to deal with. This paper will examine the international law regime which has been developed to deal with refugees. The cornerstone of this regime, and the focus of this paper, is the principle of non-refoulement. Non-refoulement is the idea that it is illegal for states to expel or return ("refouler") refugees who have a well-founded fear of persecution. Over recent years this principle, and the refugee regime itself, has found itself increasingly under threat.

An examination of some of the more recent situations of mass refugee flows, and also of the restrictive refugee policies being implemented by Western nations, will help to illustrate both the importance of the non-refoulement principle and the problems which the states themselves face when trying to live up to their

international obligations. Both states and refugees often find themselves on uncertain legal ground when attempting to invoke the non-refoulement principle. The reason for this is that the parameters of the principle are not clearly defined. This has become especially problematic recently as refugee flows have increased and states have become more reluctant to accept asylum-seekers. States are therefore using the grey areas of the non-refoulement principle to get around their international obligations.

This paper will not attempt to provide solutions to all the problems which the refugee regime is experiencing. What I will attempt, however, is to illustrate the importance of the non-refoulement principle, and propose a way in which the current Refugee Convention, and especially the non-refoulement provision, can be modified in order to meet the demands of both states and refugees. In Chapter II, the basis of the non-refoulement principle will be discussed. Chapter III will move onto look in detail at state practice with respect to non-refoulement in recent years, looking at both situations of mass influx and individual determination procedures. Chapter IV will analyse some of the key problems facing the non-refoulement principle, including temporary protection and the safe third country rule. Finally, in Chapter V, some proposals for reforming the refugee system, and the non-refoulement principle in particular, will be discussed.

[1] New Zealand Herald 'New Zealand and Nauru to take Refugees' 2 September 2001 <http://www.nzherald.co.nz> (last accessed 3/9/01)

II THE NON-REFOULEMENT PRINCIPLE

A Development of the Principle

The principle of non-refoulement is seen by most in the international law arena, whether governments, non-governmental organisations or commentators, as fundamental to refugee law. Since its expression in the Refugee Convention in 1951, it has played a key role in how states deal with refugees and asylum seekers. But what does the principle really involve? An expert in refugee law defines it as the idea that 'no refugee should be returned to any country where he or she is likely to face persecution or torture'[2]. A hypothetical example could be useful to clarify. At its most basic level, the principle prevents the government of State A from returning refugees from State B to State B, where there is a valid concern that they could be in danger should they be returned. Debate surrounds many aspects of this principle, including whether or not a refugee has to be found on the territory of State A, or can merely be attempting to enter, and also what standard should be used to judge what danger warrants not returning the refugee.

Prior to the 1930s this principle did not exist at international law[3]. In order to understand the principle it will be useful to look at the circumstances and reasons surrounding its development. During the first half of this century the idea that it was fundamentally wrong to return refugees to places where they would clearly be in danger was mentioned occasionally by states in agreements or statutes, or was evident in the practice of some states. Although by 1905 it had been enshrined in a UK statute that refugees with a fear of persecution for political or religious reasons should be allowed into the country, it was not until later that the idea of non-refoulement of

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[2] Guy S. Goodwin-Gill *The Refugee in International Law* (2 ed, Clarendon Press, Oxford, 1996) 117.

[3] Robert L. Newmark 'Non-Refoulement run afoul: The Questionable Legality of Extraterritorial Repatriation Programs' (1993) 71 Wash U.L.Q.833,837.

such people became widely accepted[4]. It was first expressed at international law in the 1933 Convention relating to the Status of Refugees which, however, was ratified by very few states[5].

The massive refugee flows produced by the ructions of World War II provided an impetus for a thorough examination of the rules relating to refugees. Prior to this time states had been very aware of the extent to which consent to rules, especially international rules, relating to refugees, would impact on their sovereign right to determine who was allowed to reside within their boundaries[6]. Although many appeared to have accepted that there was a moral duty to accept refugees, and not return them, this was done largely on an ad hoc basis[7]. However, in the first few years of its creation, the United Nations showed its concern with the refugee issue. In 1946 the General Assembly passed a resolution stating that refugees should not be returned when they had 'valid objections'[8]. This concern, prompted largely by the huge number of refugees in Europe following the war, eventually led to the drafting of the United Nations Convention Relating to the Status of Refugees, which was signed in 1951[9].

B 1951 Refugee Convention

The Convention itself deals with various aspects of law relating to refugees, and remains the primary instrument of refugee law. It was intended to consolidate the various international laws and practices impacting on refugees and asylum-seekers. It was also recognised that certain countries bore a much bigger burden than

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[4] Goodwin-Gill, above, 118.
[5] Goodwin-Gill, above, 118.
[6] Robert L. Newmark 'Non-Refoulement run afoul: The Questionable Legality of Extraterritorial Repatriation Programs' (1993) 71 Wash U.L.Q.833,837.
[7] Guy S. Goodwin-Gill *The Refugee in International Law* (2 ed, Clarendon Press, Oxford, 1996) 119.
[8] Goodwin-Gill, above, 119.
[9] Robert L. Newmark 'Non-Refoulement run afoul: The Questionable Legality of Extraterritorial Repatriation Programs' (1993) 71 Wash U.L.Q.833,838.

others with respect to the refugee flows, therefore it was imperative that an international approach to the problem be taken[10]. The Convention defined who exactly was to be viewed as a refugee, and spelled out what rights these people would have. In 1967, by way of a Protocol, the Convention was amended and signatories were given the opportunity to remove the geographical and temporal restrictions present in the original document[11].

For our purposes Article 33 of the Convention is of primary relevance. The first paragraph of this article states that:

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

Although this was intended to be an absolute right, states remained concerned about the erosion of their sovereignty that this could create[12]. Therefore a second paragraph was tacked on, providing that the right of non-refoulement could not be claimed by someone who was seen as a risk to the security of the country, or who had been convicted of a 'particularly serious crime'.

Since 1951, 137 states have signed the Convention, thereby accepting the principle of non-refoulement expressed therein[13]. However problems have arisen regarding the interpretation of Article 33. Debate continues to surround the issue of whether or not a refugee must be *inside* the state in order for the right to accrue to them. If so then states would be perfectly within their rights to turn away asylum-seekers at the borders or ships at sea[14]. There was also discussion as to whether a refugee had to meet the strict requirements of the Convention before they could be granted the right of non-refoulement. However, through the work of the United

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[10] United Nations Convention Relating to the Status of Refugees (28 July 1951) 189 UNTS 137.
[11] United Nations Protocol Relating to the Status of Refugees (31 January 1967) 606 UNTS 297.
[12] Guy S. Goodwin-Gill *The Refugee in International Law* (2 ed, Clarendon Press, Oxford, 1996) 120.
[13] United Nations High Commissioner for Refugees 'Treaty Status' <http://www.unhcr.ch/html/menu3/b/treaty2ref.htm> (last accessed 19/9/01)
[14] See for example: Robert L. Newmark 'Non-Refoulement Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs' 71 Wash.U.L.Q.833.

Nations High Commissioner on Refugees, and general state practice, it has been accepted that Article 33 applies to all refugees, whether of not they fit the prescribed definition[15].

C Other Instruments

The 1951 Convention was only the first example of non-refoulement being enshrined in international law. Subsequently numerous treaties and conventions, dealing either directly or indirectly with the rights of refugees, have repeated the principle. In some cases it has been a direct transfer of the wording of the Convention, while in others the principle has been broadened somewhat. As the issues of human rights and regional organisation continue to gain strength in international discussion, these instruments will become increasingly important. They are also extremely relevant as they illustrate the various options open to both refugees and states when dealing with problems of non-refoulement.

Article 13 of the International Covenant on Civil and Political Rights (ICCPR) states that anyone who is lawfully within the territory of a state shall not be expelled from that state without due process[16]. However, this rule does not have to be followed if national security is at stake. The article does not mention refugees specifically, and only refers to aliens 'lawfully' within a state. Therefore the article's application is somewhat limited. It is important, though, in that it specifies what action must be taken before anyone can be forcibly expelled. Article 7 of the ICCPR is also relevant as it protects against torture. The Human Rights Committee has taken this provision into account when dealing with cases of expulsion and extradition[17].

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[15] See for example: Todd Howland 'Refoulement of Refugees: the UNHCR's lost opportunity to ground temporary refuge in human rights law' (1998) 4 U.C.Davis J.Int'l L &Pol'y 73.
[16] International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171.
[17] David Weissbrodt and Isabel Hortreiter 'The Principle of Non-Refoulement: Article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or

The relationship between torture and refugees is even more relevant when the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is considered[18]. Article 3(1) of this Convention provides that 'no State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'. The article also provides that authorities must look at whether there is a consistent pattern of serious human rights violations in the country in question. As one writer has pointed out, any state returning refugees to a state where torture is being practiced would become an accomplice to the crime of torture[19]. Article 3(1) provides broader protection than the 1951 Convention in that it is an absolute right, however, its effect is restricted in that it only applies to situations involving torture[20].

On a regional level, Africa is seen as leading the pack with regard to refugee protection by virtue of the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa[21]. The principle of non-refoulement is enshrined in Article 2(3) of this Convention. The principle is not as limited as its equivalent in the UN Convention. There is no requirement that there be a 'fear of persecution', and the five reasons for leaving the previous state are greatly expanded. Furthermore, there are no situations in which a breach of the rule will be accepted. Refugee crises on the African continent are common, therefore it was essential that there was a convention which applied specifically to Africa. It is interesting to note that the OAU Convention, unlike many other instruments, explicitly recognises that particular

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Punishment in Comparison with the Non-Refoulement provisions of other international human rights treaties' (1999) 5 Buff.Hum. Rts.L.Rev.1, 43.

[18] Convention against Torture or other Cruel, Inhuman or Degrading Treatment (10 December 1984) 1465 UNTS 113.

[19] Roman Boed 'State of Necessity as a Justification for Internationally Wrongful Conduct' (2000) 3 Yale Human Rts. & Dev.L.J.1, 21.

[20] Weissbrodt and Hortreiter, above, 8.

[21] Organisation of African Unity Convention governing the specific aspects of refugee problems in Africa (10 September 1969) 1001 UNTS 45.

countries will have to call for help when they are over-burdened with refugees, and it imposes a duty on the other states to assist[22].

Europe has also been a source of important agreements regarding refugees. Article 3 of the European Convention on Human Rights prohibits torture or other cruel, inhumane or degrading treatment, and therefore provides similar protection for refugees as the Torture Convention[23]. However, the European Convention differs in some respects. The European Commission on Human Rights has used Article 3 in order to deal with the non-refoulement issue, which is not itself specifically mentioned in the Convention[24]. Also, the right which the Convention creates (to be protected from torture) is absolute and non-derogable, as is the right to be protected from refoulement in the OAU Convention.

There have also been several European Union instruments dealing specifically with the problem of asylum and refugee flows. One example is the Council of Europe's Resolution on Minimum Guarantees for Asylum Procedures 1995. Article II (1) provides that the member state's asylum procedures will fully comply with the Refugee Convention 1951, and especially with the non-refoulement provision. Furthermore, Article II (2) states that a potential refugee will not be expelled until a decision on their status has been made. Despite the abundance of agreements dealing with refugees produced by the EU, many commentators remain concerned about the direction Europe is taking with regard to their international duties[25].

Another regional agreement dealing with refugees is the American Convention on Human Rights, which in Article 22(8)

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[22] Paul Kuruk ' Asylum and the Non-Refoulement of Refugees: The case of the missing shipload of Liberian refugees' (1999) 35 Stan.J.Int'l L.313, 332.
[23] European Convention on Human Rights (4 November 1950) 213 UNTS 221.
[24] David Weissbrodt and Isabel Hortreiter 'The Principle of Non-Refoulement: Article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement provisions of other international human rights treaties' (1999) 5 Buff.Hum. Rts.L.Rev.1, 28.
[25] Maryellen Fullerton 'Failing the test: Germany leads Europe in dismantling Refugee protection' (2001) 36 Tex.Int'l L.J 231, 232.

deals with non-refoulement[26]. The article states that 'in no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinions'. This provision seems closest to the UN Convention in that it gives specific reasons why the 'alien' would be in danger when returned. Although the provision itself does not state that there are situations in which the rule can be breached, Article 27 allows derogation in certain circumstances of war or emergency. It has been suggested that this provision could possibly be interpreted to allow derogation during massive refugee crises, which would seem to defeat the purpose of the provision[27].

The non-refoulement principle has clearly undergone substantial development since its emergence as a vague morality-based rule. Not only is it described as the foundation of the foremost international legal instrument relating to refugees, but it has also been transplanted into other treaties. Although this indicates the importance of non-refoulement internationally, its expression in so many different ways and in so many different instruments, also serves to undermine its effectiveness. As things currently stand, refugees are in a position to shop around to see which state has the most obliging refugee laws and in particular the widest interpretation of their non-refoulement obligations. This problem, as well as others caused by the differing definitions of non-refoulement in the various instruments, may be overcome if it could be shown that the non-refoulement principle had attained the status of a customary rule. In the following chapter, I will attempt to elucidate state practice in this area, before moving on to reach some solid conclusions about the existence and exact parameters of any customary non-refoulement rule.

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[26] American Convention on Human Rights (18 July 1978) 1144 UNTS 123.

III STATE PRACTICE

At the level of international law, it must be shown that the practice of states is fairly uniform and consistent in order for there to be a customary rule[28]. Therefore, in order to establish whether or not the non-refoulement principle has customary status we must look at examples of where states have had to deal with refugee issues, specifically cases involving refoulement. This will also highlight some of the key challenges which face the principle of non-refoulement today, both from a refugee and state perspective. For the purposes of this analysis it is useful to divide state practice into two groups; the first looks at how states react to mass influxes of refugees, while the second is concerned with the individual determination procedures of states on a day-to-day basis. I will look not at every state, but rather at a few examples which have raised important issues for the law relating to refugees.

A Situations of Mass Influx

The problem of huge numbers of refugees pouring out of a country or countries at one time, usually as a result of war or ethnic cleansing, is not a new one. Indeed it was the major refugee crises of WWII which prompted the international community to deal with the refugee issue by way of the 1951 Refugee Convention. These crises usually make front-page news, and often lead to changes in the social or ethnic demographic of a country or region. They also place states in a very difficult position. They are faced with a problem which they are usually bound by law to deal with. Often, however, they are either financially or socially unable to do so. In this section I will look at three examples of such crises; the exodus of Rwandan

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[27] Weissbrodt and Hortreiter, above, 47.
[28] Ian Brownlie *Principles of Public International Law* (5 ed, Oxford University Press, New York, 1998) 5.

refugees, Liberian ships fleeing civil conflict, and the Macedonian reaction to large numbers of Kosovars spilling over the border as a result of ethnic cleansing.

1 The Exodus of Rwandan Refugees

The refugee crisis caused by the civil turmoil in Rwanda was thought to have produced up to three million refugees[29]. The conflict began with the massacre of an estimated 500,000 Rwandans in 1993. Most of those killed were Tutsi, which therefore prompted retaliation from the Tutsi community and ultimately an extremely bloody civil war[30]. The majority of refugees fleeing the country over the ensuing months were Hutu, and therefore viewed by many as the perpetrators of the original massacre. The primary receivers of refugees at this time were Zaire (now Democratic Republic of Congo), Burundi and Tanzania. The massive scale of the refugee flows was such that it was impossible for these states to make individual determinations as to whether each person satisfied the requirements of the 1951 Refugee Convention or the OAU Convention[31].

During the height of this crisis these three countries responded reasonably well to the pressures placed on them, assisted in large part by the work of the United Nations High Commissioner for Refugees (UNHCR). It was only when the refugee flows kept coming, and when the issue of repatriation was raised, that problems arose. A possible breach of the non-refoulement principle occurred in Tanzania during this mass exodus. In 1995 the Tanzanian government closed its borders to a group of more than 50,000

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[29] Microsoft Encarta Online Encyclopedia 2001 "Rwanda" 2001 <http://www.encarta.msn.co.uk >(last accessed 21/8/01)

[30] Microsoft Encarta Online Encyclopedia 2001 "Rwanda" 2001, see above.

[31] Todd Howland 'Refoulement of Refugees: the UNHCR's lost opportunity to ground temporary refuge in human rights law' (1998) 4 U.C.Davis J.Int'l L &Pol'y 73, 78.

Rwandan refugees who were fleeing renewed violence[32]. The refugees were mostly from a refugee camp which had come under attack[33]. Tanzania was estimated to have already been hosting 500,000 refugees at this time. The government stated that it was simply unable to accept more on account of the dangers posed to the environment, regional tension and, probably above all, national security[34]. Some blamed the border closure on the failure of the international community to give adequate support to Tanzania[35]. Amnesty International reported that this state of affairs continued throughout 1995 and 1996, with the border remaining closed to Rwandan refugees[36].

Another breach of the principle was thought to have occurred as a result of the (in many cases forced) repatriation of Rwandan refugees. It was reported that around 500,000 refugees were returned to Rwanda from Zaire in late 1996, which prompted Tanzania to also repatriate hundreds of thousands[37]. These repatriations came within the context of civil unrest in Zaire, though it was not the first time such actions had been taken. In 1995 the President of Zaire was criticised for returning 15,000 Hutus to Rwanda[38]. As unrest escalated in Zaire, so did the numbers of Rwandans returning, many of them voluntarily. What is of concern, however, is the forced repatriations of refugees orchestrated by the governments of Zaire, Tanzania and Burundi.

Concern has been expressed from many quarters on this situation. International pressure was applied to Zaire when the

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[32] Roman Boed 'State of Necessity as a Justification for Internationally Wrongful Conduct' (2000) 3 Yale Human Rts. & Dev.L.J.1, 2.
[33] Boed, above, 2.
[34] Boed, above, 2.
[35] Bonaventure Rutinwa 'Beyond Durable Solutions: An Appraisal of the New Proposals for Prevention and Solution of the Refugee Crisis in the Great Lakes Region' (1996) 9 J. REFUGEE STUD. 312, 316 .
[36] Amnesty International, Amnesty International Country Report 1997: Tanzania <http://www.amnesty.org>(last accessed 21/8/01)
[37] Amnesty International 'Human Rights Overlooked in Mass Repatriation' <http://www.amnesty.org>(last accessed 21/8/01)
[38] Microsoft Encarta Online Encyclopedia 2001 "Rwanda" 2001 <http://www.encarta.msn.co.uk >(last accessed 21/8/01)

decision was first made to repatriate Hutus[39]. At first this had the effect of stopping the policy, but as the country began to face its own problems, repatriation occurred again. Amnesty International expressed its concern that the likelihood of human rights violations occurring upon return to Rwanda had not fully been taken into account by the three states[40]. Probably most concerning, however, was the role of the UNHCR in the repatriations. It has been suggested that the UNHCR acquiescence to the Zaire repatriations prompted Tanzania to adopt the same policy[41]. Furthermore, the UNHCR actually assisted in the return of refugees from Tanzania[42]. It has been alleged that the organisation supposed to be acting as the watchdog of refugee law in fact failed to properly apply the principle of non-refoulement in the case of the Rwandan returnees[43]. It could be argued, however, that it was better that the repatriations took place under the guidance of the UNHCR, rather than purely at the whim of the states themselves. The international community remained reasonably silent during these mass repatriations, which suggests that the principle can be violated with no adverse consequences[44].

2 *Liberian Ships Fleeing Civil Conflict*

Since 1989 a brutal civil war has raged in the West African state of Liberia. The main players are the National Patriotic Front of Liberia (NPFL) led by Charles Taylor and the United Liberation Movement for Democracy in Liberia (ULIMO), though Amnesty International

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[39] Microsoft Encarta Online Encyclopedia 2001 "Rwanda" 2001, above.
[40] Amnesty International 'Human Rights Overlooked in Mass Repatriation' <http://www.amnesty.org> (last accessed 21/8/01)
[41] 'Human Rights Overlooked in Mass Repatriation', above.
[42] Todd Howland 'Refoulement of Refugees: the UNHCR's lost opportunity to ground temporary refuge in human rights law' (1998) 4 U.C.Davis J.Int'l L &Pol'y 73, 85.
[43] Howland, above, 87.
[44] Howland, above, 87.

reported in 1997 that there were as many as eleven factions involved[45]. The conflict has resulted in huge numbers of refugees, estimates range at around 700,000, adding to the number of West African displaced persons which was already large as a result of the conflict in neighbouring Sierra Leone[46]. Being a coastal state, many of those attempting to escape the violence in Liberia have done so by boat, though there have also been thousands crossing borders into neighbouring countries. It is estimated that for the last ten years the Ivory Coast has been hosting a minimum of 120,000 Liberian refugees[47]. Ghana, Togo and Nigeria have also been sheltering large numbers[48].

The text of the OAU Convention relating to refugees suggests that African states are fairly cognizant of their obligations under international law and, furthermore, are willing to go further by recognising that there is a duty to accept refugees who flee for reasons not as specific as personal persecution. Four years ago Amnesty International stated that "historically, the response of most African countries and communities towards the displaced has been generous, reflecting African values of hospitality and long-standing ethnic, political and cultural links between refugees and host populations"[49]. One commentator noted Africa's 'liberal view' towards refugees and non-refoulement in 1993[50]. However, over the last few years the pressure placed on many African states by the burden of refugee-hosting has simply proved too much. The Rwandan case is an example, though not an isolated one.

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[45] Amnesty International 'AFRICA:In search of safety The forcibly displaced and human rights in Africa' < http://www.amnesty.org> (last accessed 22/8/01)
[46] Amnesty International'AFRICA:In search of safety The forcibly displaced and human rights in Africa' < http://www.amnesty.org> (last accessed 22/8/01)
[47] CNN 'Ivory Coast appeals for help for refugees' 20 June 2001 <http:// www.cnn.com> (last accessed 22/8/01)
[48] Paul Kuruk ' Asylum and the Non-Refoulement of Refugees: The case of the missing shipload of Liberian refugees' (1999) 35 Stan.J.Int'l L.313, 315.
[49] Amnesty International 'AFRICA:In search of safety The forcibly displaced and human rights in Africa' < http://www.amnesty.org> (last accessed 22/8/01)
[50] Robert L. Newmark 'Non-Refoulement Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs' 71 Wash.U.L.Q.833, 850.

Recently Paul Kuruk documented the fate of two particular shiploads of Liberian refugees who fled in 1996[51]. Both ships, the Bulk Challenge and The Zolotitsa, attempted to dock at numerous West African ports, including Ghana, Togo and Ivory Coast. In all cases the states were unwilling to accept them. Some allowed the ships to dock temporarily in order for urgent supplies and assistance to be given, but they were not allowed to remain and the UNHCR was denied access to them. In the case of the Bulk Challenge, Ghana eventually succumbed to international pressure and allowed the refugees ashore. The Zolotitsa, however, was forced to return to Liberia when none of the states would accept its cargo of refugees. As with the Rwandan case, the states involved offered various justifications for their actions. Ivory Coast and Ghana were allegedly both concerned that the boats were carrying armed militias which could be a danger to their national security. Kuruk concluded, however, that these arguments were not made in good faith and should therefore not be seen as excusing the states from their non-refoulement obligation[52].

One would have hoped that these incidents would have drawn sufficient condemnation from the international community to prevent such a problem occurring again. Unfortunately this was not the case. In June of this year, a Swedish ship named the Alnar, reportedly carrying 186 Liberian refugees, was shunted from port to port in an attempt to find refuge[53]. The ship spent three weeks at sea, after it was refused access to its primary destination of Ghana. Togolese officials prevented the ship from sinking when its propellers were caught in fishing nets, and provided urgent medical attention to the passengers. They were skeptical, however, as to the

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[51] Paul Kuruk ' Asylum and the Non-Refoulement of Refugees: The case of the missing shipload of Liberian refugees' (1999) 35 Stan.J.Int'l L.313.
[52] Kuruk, above, 331.
[53] CNN 'Stricken refugee ship 'saved'' 22 June 2001 <http://www.cnn.com >(last accessed 22/8/01)

bona fide nature of the passengers' claims to be refugees[54]. Eventually the Nigerian government stated that they were willing to accept the boat. Interestingly, the Nigerians claimed that were taking 'humanitarian action' as opposed to simply following the requirements of international law[55]. The parallels between the Alnar and the Tampa crisis are indicative of the fact that problems of mass influx by boat are becoming a global concern.

3 *Macedonian Border Closures*

Incidents of refoulement are in no way confined to the African continent. One European example springs from the ethnic cleansing campaign and resulting NATO airstrikes in Kosovo in 1999. This came at the end of an extremely bloody decade for the Balkans, where nationalist and secessionist sentiments led to wars throughout the former Yugoslavia. Kosovo experienced tensions throughout the decade, beginning with the revocation of its position as a semi-autonomous republic of Serbia in 1989[56]. These tensions came to a head ten years later, with attacks on ethnic Albanians increasing and the implementation of an ethnic cleansing program. As well as the huge numbers of people killed, people fled the small province in large numbers. It was reported that over 650,000 Kosovars were forcibly expelled from their homes and over the border between March and May 1999[57]. Most fled to the neighbouring states of Macedonia, Albania and Montenegro[58].

Macedonia, to a large extent, bore the brunt of this mass exodus. In May 1999 the UNHCR reported that the country was already holding close to 250,000 refugees, and yet more were

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[54] CNN 'Stranded Liberians hope to land soon' 24 June 2001 <http://www.cnn.com> (last accessed 22/8/01)

[55] CNN 'Nigeria allows refugee ship to dock' 19 June 2001 <http:// www.cnn.com> (last accessed 22/8/01)

[56] Microsoft Encarta Online Encyclopedia "Kosovo," 2001 http://encarta.msn.co.uk (last accessed 28/8/01)

[57] Microsoft Encarta Online Encyclopedia 2001 "Kosovo" , above.

flooding over the borders[59]. The response of the Macedonian government was the same as that of the Tanzanian government in 1993. They attempted to close their borders. Throughout May 1999 the Macedonia/Kosovo border was repeatedly closed, leaving thousands of Kosovars stranded in Kosovo[60]. It has been suggested, however, that this was more of a symbolic gesture that a genuine attempt to prevent the Kosovars from entering[61]. Whatever the motives, it was clear that Macedonia was denying entry to a group of people who would have had a very strong basis for a claim that their lives would be in danger if they remained in Kosovo.

So what were the justifications used by the Macedonian government in this case? Firstly, there was the concern that Macedonia simply did not have enough resources to cater for extra residents, be they temporary or permanent[62]. Secondly, there was the worry that an influx of Kosovar Albanians would affect the already unstable ethnic balance within Macedonia, where Albanians are a minority[63]. The Macedonian government insisted from the outset that they would only accept as many refugees as could be taken in by third states[64]. Apparently the purpose of the border closures was to draw attention to the fact that the international community was not living up to its promise to evacuate as many refugees from Macedonia as possible[65]. However, some have argued that the Macedonians had darker motives for the border closures. It was suggested by a BBC correspondent that the action was actually

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[58] Kathleen Sarah Galbraith 'Moving People: Forced Migration and International Law' (1999) 13 Geo. Immigr. L.J. 597, 598.

[59] BBC 'Macedonia expects more refugees' 25 May 1999 <http://www.bbc.com > (last accessed 28/8/01)

[60] BBC 'Amnesty attacks Macedonia over Kosovo refugees' 19 May 1999 <http://www.bbc.com >(last accessed 28/8/01)

[61] BBC 'Macedonia Re-opens border' 7 May 1999< http://www.bbc.com> (last accessed 28/8/01)

[62] BBC 'Macedonia using refugees as 'lever'' 6 May 1999 <http://www.bbc.com> (last accessed 28/8/01)

[63] BBC 'Macedonia using refugees as 'lever'' 6 May 1999 <http://www.bbc.com> (last accessed 28/8/01)

[64] BBC 'Macedonia Re-opens border' 7 May 1999 <http://www.bbc.com> (last accessed 28/8/01)

taken in retaliation for the fact that an aid package from the World Bank was not as extensive as the Macedonian government had expected[66].

These three examples of exclusion or return of refugees show clearly the practical problems faced by the international community in this area. On one hand there is the humanitarian argument whereby all states should accept refugees regardless of the situation. On the other hand, we must look at the practical problems facing the host states themselves, many of whom are experiencing similar frictions as the refugee-producing state. This fundamental debate, which in many ways comes down to a balancing of domestic and foreign policy interests, does not just operate on the mass influx level. Even some of the world's most developed nations who are dealing with a smaller amount of asylum-seekers, are still feeling the need to change their policies towards refugees. We will look at three examples of this trend before moving on to look at its impact on the non-refoulement principle.

B Restrictive Policies Towards Asylum-Seekers

Over the course of the past ten years or more, a change in attitude towards asylum-seekers can be seen in many of the world's industrialised nations. For the purpose of this examination we will look at only three examples; the European Union, the United States and Australia. All of them have illustrated, in some way, their desire to change the way refugee law works within their scope of jurisdiction. In some cases the methods used and programs put in place are very similar. What is of concern, however, is that they also appear to be endangering the principle of non-refoulement.

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[65] BBC 'Macedonia using refugees as 'lever'' 6 May 1999 <http://www.bbc.com> (last accessed 28/8/01)

It was in Europe where the push for a consolidation of refugee law first started, as a result of the massive WWII refugee flows. It is in Europe also that the first signs of a dramatic turnaround are evident. At both an institutional and national level, members of the EU have expressed their concerns about refugee problems and have attempted to change the current system. However, the 'refugee problems' that I refer to are not the problems of the refugees themselves, but rather the problems that the refugees are causing for host countries. This becomes more evident when we look at the reasons behind the changes in policy by the EU.

Firstly, from the mid-1980s there was what some describe as a 'globalisation' of the refugee problem[67]. That is, due to the increased use of air travel, more and more asylum seekers were finding their way to the developed European nations[68]. These refugees were coming from as far afield as Africa and Asia. This 'globalisation' has become even more predominant in recent years due to the emergence of illegal smuggling rings[69]. Secondly, the numbers of refugees arriving was increasing at an exponential rate. Statistics from Germany alone show a jump from 121,000 immigrants in 1989, to 438,000 in 1992[70]. Reasons for this increase, aside from the 'globalisation' factor already mentioned, include the breakups of the Soviet Union and the former Yugoslavia[71]. Furthermore, from the mid-1980s many European states were facing internal problems of their own. To a large degree they were mainly

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[66] BBC 'Macedonia using refugees as 'lever'' 6 May 1999 <http://www.bbc.com> (last accessed 28/8/01)
[67] Sandra Lavenex *Safe Third Countries* (Central European University Press, Budapest, 1999) 19.
[68] Maryellen Fullerton 'Failing the test: Germany leads Europe in Dismantling Refugee Protection' (2001) 36 Tex.Int'l L.J. 231, 235.
[69] 'Not My Problem' (8 September 2001) *The Economist* London, 60.
[70] Fullerton, above, 236.
[71] Matthew J.Gibney 'Between Control and Humanitarianism: Temporary Protection in Contemporary Europe' (2000) 14 Geo.Immigr.L.J.689, 693.

economic, with unemployment rising[72]. Add to that the fact that many states' welfare systems were struggling to cope with the increasing numbers of refugees, and we have a basic explanation for anti-refugee sentiments[73].

As a result of these pressures, policy changes began to be made in Europe on both an institutional and national level. There have been numerous agreements, and even more proposals discussed, regarding how the EU as an organisation can deal with the refugee problem. The issue mainly came to a head as a result of the decision to open up the EU's internal borders. One of the most important factors considered when this decision was made, was that external border controls of all nations had to be harmonious[74]. This therefore led to a crackdown to prevent all 'undesirables' from being able to cross any international border into the EU. Asylum-seekers found themselves lumped together in the 'undesirable' category with drug traffickers, international criminals and terrorists[75]. Lavenex suggests that the agreements made to deal with border issues were often made without public scrutiny, as they were not conducted through the main public organs of the EU, but rather through meetings between ministers[76]. This has not been so in all cases, however, with important resolutions like the Dublin Convention being negotiated publicly and subject to affirmation by national legislatures.

Developments have also taken place on a national level within the EU. The leader of the pack, in this respect, has been Germany. Indeed, Germany is something of a guinea pig as the rest of the EU watches to see what effect its new policies will have[77]. It is in some ways logical that Germany would be the first to change

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[72] Kathleen Marie Whitney 'Does the European Convention on Human Rights Protect Refugees from "Safe" Countries?' (1997) 26 Ga.J.Int'l & Comp.L. 375, 375.
[73] Whitney, above, 375.
[74] Sandra Lavenex *Safe Third Countries* (Central European University Press, Budapest) 1999, 62.
[75] Lavenex, above, 64.
[76] Lavenex, above, 64.
[77] Maryellen Fullerton 'Failing the test: Germany leads Europe in Dismantling Refugee Protection' (2001) 36 Tex.Int'l L.J. 231, 233.

its refugee laws, as it had been the destination for over half of the total number of refugees entering the EU[78]. Germany attempted to get changes made on an EU level and pushed the idea of a burden-sharing arrangement among EU nations[79]. Ultimately the other EU nations were not interested in such proposals, hence Germany was left to deal with the problem domestically. From 1993 Germany undertook a massive overhaul of its asylum law, and the system now in place makes it extremely difficult for refugees to even enter the country on a temporary basis[80]. Even those who do manage to enter the country will not face a warm welcome, as Amnesty International has reported numerous examples of police brutality towards asylum seekers[81].

There are numerous changes that have been made within Germany and within the EU. However, there are two main policies which are of particular concern when discussing the non-refoulement principle. Firstly, there is the safe third country rule. This policy is being used by Germany, and has been adopted by the EU through the Dublin Convention and subsequent agreements. Basically, the idea is that if an asylum-seeker arrives in a state, say for example, Ireland, by way of another EU member state, such as the United Kingdom, then the asylum-seeker will be sent back to lodge their application in the state in which they first arrived. This system was set up to prevent refugees from 'shopping around' for the best destination and to cut down on the expenses caused by more than one country processing the same application[82]. The policy has now been extended beyond the EU, with states able to theoretically designate any nation as 'safe'. Many EU members simply require that a state be a party to both the European Convention on Human Rights and the Refugee Convention before they are granted the

[78] Fullerton, above, 232.
[79] Fullerton, above, 236.
[80], Maryellen Fullerton 'Failing the test: Germany leads Europe in Dismantling Refugee Protection' (2001) 36 Tex.Int'l L.J. 231, 237.
[81] Amnesty International 'Germany 1997 Country Report'< http://amnesty.org> (last accessed 31/8/01)

status of 'safe third country'[83]. Furthermore, some states, including Germany, have also adopted a 'safe country of origin' policy. This policy requires that if an asylum-seeker is fleeing from a state designated as a 'safe country of origin' then there will automatically be a presumption that they are not fleeing persecution. The onus is therefore on the asylum-seeker to rebut that presumption[84].

As well as the safe third country policy, the idea of temporary protection is being increasingly used by the EU and its members. This was largely developed as a response to refugee crises in the former Yugoslavia[85]. It is basically a stop-gap measure by which states can allow refugees to remain for an allocated (usually fairly short) amount of time, hopefully until the crisis from which they have fled has run its course. In this way it is seen by many as an alternative to the Refugee Convention system[86]. The system can differ from country to country, thus there is pressure for the EU member states to harmonise their policies regarding temporary protection[87]. At present most states use the idea of temporary protection to overcome the narrow definition of refugee in the Refugee Convention, and as an interim response to mass influx[88]. However, although this is no doubt a useful policy for many states, concerns remain regarding the extent to which this temporary protection policy is undercutting the traditional idea of refugee protection expressed in the Convention[89].

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[82] Sandra Lavenex *Safe Third Countries* (Central European University Press, Budapest, 1999) 65.
[83] Kathleen Marie Whitney 'Does the European Convention on Human Rights Protect Refugees from "Safe" Countries?' (1997) 26 Ga.J.Int'l & Comp.L. 375, 387.
[84] Maryellen Fullerton 'Failing the test: Germany leads Europe in Dismantling Refugee Protection' (2001) 36 Tex.Int'l L.J. 231, 256.
[85] Matthew J.Gibney 'Between Control and Humanitarianism: Temporary Protection in Contemporary Europe' (2000) 14 Geo.Immigr.L.J.689, 689.
[86] Gibney, above, 689.
[87] Joan Fitzpatrick 'Temporary Protection of Refugees: Elements of a Formalised Regime' (2000) 94 Am.J.Int'l L. 279, 280.
[88] Fitzpatrick, above, 287.
[89] Matthew J.Gibney 'Between Control and Humanitarianism: Temporary Protection in Contemporary Europe' (2000) 14 Geo.Immigr.L.J.689, 695.

2 *United States*

A change in refugee policy has also been evident in the United States, for similar reasons to those which prompted EU reforms. The United States has been facing increased numbers of refugees since the 1980s. Most of these refugees have come from Central America, especially Cuba and Haiti, as a response to major political frictions in these states[90]. Again this influx has led to what many see as an 'undue burden' on the US[91]. As well as the burden on the welfare resources of the state, there has also been major concern about the ability of the US immigration service to deal adequately with the large numbers of asylum-seekers[92]. Tied in with this was the belief of many Americans that a large percentage of asylum claims were bogus. It was felt that these claims were merely made to allow the alleged refugee to stay in the United States longer[93]. At the same time as these concerns became a matter of public discussion, terrorism was also an issue. For many it appeared that the danger posed by terrorists with political agendas, often not directly concerning the United States, and the presence of large numbers of refugees in the country, were very much intertwined issues[94]. With the recent unprecedented terrorist attacks on New York and Washington, it is likely that this will again have an impact on refugee policy.

As a result of these concerns, various policy shifts have been made by the US government regarding asylum. Since 1980 the US has had legislation in effect which makes its international law obligations (under the 1967 Refugee Protocol) applicable in domestic law. Various reforms have been made to the asylum

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[90] Andrea Rogers 'Expolitation v Expulsion: The Use of Expedited Removal in Asylum Cases as an answer to a compromised system' (1998) Wm.Mitchell L. Rev 789

[91] Kathleen M.Keller 'A Comparative and International Law Perspective on the United States (Non)Compliance with Its Duty of Non-Refoulement' (1999) 2 Yale Human Rts.&Dev.L.J. 183, 184.

[92] Rogers, above, 793.

[93] Keller, above, 184.

system established by this legislation since 1980. They have taken place both via legislation and through the decisions of the Courts. Temporary protection, for example, is becoming increasingly popular in the US as a way to deal with asylum-seekers[95]. Also, in 1994 regulations were passed in an attempt to 'streamline' the asylum process, and make it easier to weed out bogus or frivolous claims[96]. However, these reforms were not seen to be sufficient, hence the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) was passed in 1996[97]. This act was said to have made 'profound changes' in the law applicable to asylum-seekers arriving in the US[98]. Among these changes were the introduction of an expedited removal process[99], and numerical limitations placed on certain classes of refugee[100].

Again there are certain policies which are of specific concern to our discussion of non-refoulement. Firstly, a policy for which the US has been often criticised is that of interdiction of boatloads of asylum-seekers. Mostly this has impacted on those fleeing Haiti. The US Coastguard is authorised to intercept vessels believed to be carrying asylum-seekers, and send them back to Haiti, before they can even cross into the territorial waters of the United States. The legality of the policy was directly challenged in *Sale v Haitian Centers Council*[101], which reached the Supreme Court. That case argued that the United States was breaching its international law obligation of non-refoulement, which was enshrined in the 1980 Refugee Act, by intercepting ships from Haiti and summarily

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[94] Andrea Rogers 'Expolitation v Expulsion: The Use of Expedited Removal in Asylum Cases as an anser to a compromised system' (1998) Wm. Mitchell L. Rev 794 .
[95] See for example, Joan Fitzpatrick 'Temporary Protection of Refugees: Elements of a Formalised Regime' (2000) 94 Am.J.Int'l L. 279.
[96] Rogers, above, 795.
[97] Kathleen M.Keller 'A Comparative and International Law Perspective on the United States (Non)Compliance with Its Duty of Non-Refoulement' (1999) 2 Yale Human Rts.&Dev.L.J. 183, 195.
[98] Andrea Rogers 'Expolitation v Expulsion: The Use of Expedited Removal in Asylum Cases as an answer to a compromised system' (1998) Wm. Mitchell L. Rev 797.
[99] Rogers, above, 786.
[100] Heather A. Leary 'The Nature of Global Commitments and Obligations: Limits on States Sovereignty in the Area of Asylum' (1997) Ind. J. Global Legal Stud. 297.

returning them without adequately screening to ascertain whether any of the asylum-seekers had valid claims to refugee status. The Supreme Court, however, found in favour of the Federal Government, by reading the non-refoulement principle to only apply once an asylum-seeker had entered the United States[102].

Concerns have also been expressed about the changes made in the IIRAIRA concerning exceptions to the principle of non-refoulement. The UN Convention provides that if it can be shown that an asylum-seeker is guilty of a 'particularly serious crime', a war crime or crime against humanity, a serious non-political crime and/or is seen as a danger to the security of the host state, then their right of non-refoulement can be revoked[103]. Obviously this is intended to protect states and their residents from dangerous individuals. However, Kathleen Keller has suggested that the IIRAIRA and the US courts have gone too far in applying these exceptions[104]. In an effort to deal with the terrorist threat discussed above, the IIRAIRA includes a provision which specifies that any person who has been, or is likely to be, involved in any way with terrorists or terrorist activities, shall not be allowed to apply for refugee status[105]. Furthermore, the courts have taken a hard-line view on what constitutes a crime for the purposes of the non-refoulement principle. Instead of dealing with the crime on a case by case basis, the Courts have instead compiled a list of crimes which they class as 'particularly serious'[106]. The IIRAIRA accepted this approach and also stated that crimes incurring a penalty of at least five years would also be classed as 'particularly serious'[107]. The risk

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[101] *Sale v Haitian Centers Council, Inc* (1993) 509 US

[102] *Sale v Haitian Centers Council, Inc.*, see above.

[103] United Nations Convention Relating to the Status of Refugees (28 July 1951) 189 UNTS 137.

[104] Kathleen M.Keller 'A Comparative and International Law Perspective on the United States (Non)Compliance with Its Duty of Non-Refoulement' (1999) 2 Yale Human Rts.&Dev.L.J. 183.

[105] 8 U.S.C.A. 1182(a)(3)(B)(ii)-(iii).

[106] Keller, above, 196.

[107] Kathleen M.Keller 'A Comparative and International Law Perspective on the United States (Non)Compliance with Its Duty of Non-Refoulement' (1999) 2 Yale Human Rts.&Dev.L.J. 196.

of persecution that a person may face if returned to the country from which they fled is not taken into account.

3 *Australia*

When you consider Australia's location, surrounded by sea and at the bottom of the world, it is somewhat surprising that the country would be at all concerned with issues of asylum-seekers and refugee law. However, the recent public vilification regarding the Tampa, and previous concerns expressed by the United Nations Committee on Human Rights show that Australia is indeed a useful case study when looking at asylum law. Despite the relatively small numbers of refugees which the country processes each year, Australian governments in recent years have taken a hard-line stance towards asylum-seekers.

The reasons for this stance are similar to those given by the US. The costs of processing and caring for refugees is an issue, maybe even more so due to the fact that Australia's population and income is fairly small when compared to the US and Europe[108]. Another major concern was that of 'forum-shopping'. It was widely expounded in the Australian media that refugees were simply shopping around to see who offered the best lifestyle[109]. Again there was also the increase in refugee numbers the world over, which did have an effect on Australia[110]. Finally, there was the concern that those seeking asylum in Australia, often boat people, were linked with criminal activities such as extortion, slave-trading and child prostitution[111].

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[108] Angela Cranston 'Refugees in Crisis' (2000) 3 Alt L.J 121, 121.
[109] Jonathon Hunyor ' Warra Warra: refugees and protection obligations in relaxed and comfortable Australia' (2000) 5 Alt. L. J. 227, 227.
[110] Cranston, above, 122.
[111] Hunyor, above, 227.

The Australian immigration system is in large part based on the Migration Act 1958. Over recent years, through amendments and regulations, changes have been made to this system to make it harder for asylum-seekers to obtain either a Permanent Visa or a Temporary Protection Visa. Some of these changes include the Migration Reform Act 1992, and the more recent Border Protection Legislation Amendment Act 1999. The latter was passed mainly to deal with the increasing numbers of boat people leaving from Indonesia for Australia[112]. Many of the reforms were designed to curb the judicial activism which saw judges overturning decisions of the Refugee Review Tribunal, allowing more refugees to obtain visas[113]. The Australian Government has persisted with its reforms of the asylum system despite the UNHRC decision against it in 1997[114].

Like the EU, Australia has also implemented a safe third country policy. In many ways, the policy is the same as that adopted in the EU. However, the Australian system appears to be even more restrictive than that of the EU. Section 36(3) of the Border Protection Legislation Amendment Act 1999 states that Australia will have no obligation to protect an asylum-seeker who has 'not taken all possible steps to avail himself of a right to enter and reside in...any country apart from Australia'. On the face of it, this provision appears to require that the refugee must go to every other country and ask for asylum before they can legitimately apply in Australia[115]. Furthermore, if the asylum-seeker has dual nationality or right of residence in another state, they can be summarily

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[112] Jonathon Hunyor ' Warra Warra: refugees and protection obligations in relaxed and comfortable Australia' (2000) 5 Alt L.J. 227, 227.
[113] Andrew N. Langham 'The Erosion of Refugee Rights in Australia: Two Proposed Amendments to the Migration Act' (1999) 3 Pac.Rim L & Pol'y J. 651, 659.
[114] A v Australia 560/1993, U.N.Doc. CCPR/C/59/D/560/1993, Apr. 30, 1997 cited in Andrew N. Langham, see above.
[115] Jonathon Hunyor ' Warra Warra: refugees and protection obligations in relaxed and comfortable Australia' (2000) 5 Alt. L.J. 227, 229.

returned to that state, regardless of whether they may be persecuted there[116].

Obviously it is impossible to cover every application of the non-refoulement principle by states in recent years. What this chapter has attempted to do is provide an overview of some of the problems and issues which are at the forefront of international concern today. What can be seen is that states are taking a much more restrictive view of their international obligations towards asylum-seekers. This is happening globally and is not confined solely to underdeveloped nations. But what does this say about the status of non-refoulement? This question, along with the changing parameters of the rule, will be discussed in the following chapter.

[116] Hunyor, above, 230.

IV IMPACT OF STATE PRACTICE ON NON-REFOULEMENT

We have seen in our examination of state practice that there are many examples of the non-refoulement principle being breached, or at the very least, endangered. So does this mean that states no longer adhere to the non-refoulement principle? Has the change in attitude towards asylum-seekers been so severe as to make redundant one of the founding principles of refugee law? Although this is the picture painted by the previous chapter, I will argue here that this is not in fact the case. The non-refoulement principle is being increasingly breached, but a breach alone does not rob it of its character as international law. Furthermore the way in which the countries above have dealt with the principle illustrate that it does have the status of customary international law. However, what is equally clear from the examples is that in order for the principle to be of practical use, the parameters of its applicability need to be defined.

A General customary rule

It is clearly of grave importance to prove that non-refoulement has gained the status of custom. If we can show we have a customary rule then the problems caused by inconsistent implementation of this principle become less significant. Numerous commentators have examined the principle of non-refoulement to establish whether it is now custom. Their results have been mixed. Professor Goodwin-Gill, after a detailed analysis of arguments for and against, reached the conclusion that "there is substantial, if not conclusive authority that the principle is binding on all states, independently of specific assent"[117]. His view seems to have been

[117] Guy S. Goodwin-Gill *The Refugee in International Law* (2 ed, Clarendon Press, Oxford, 1996) 167.

accepted by many commentators since then[118]. Furthermore, the United Nations High Commissioner on Refugees believes that non-refoulement has gained customary status, and may even be *jus cogens*[119]. Also, in 1954 when negotiating the Convention on the Status of Stateless Persons, the parties did not find it necessary to include a non-refoulement provision as they saw Article 33 as a 'generally accepted principle'[120]. However, although many acknowledge that the non-refoulement principle is at least in part accepted as custom, concerns remain about the exact parameters of this rule[121]. This concern is a common one. Boed points out that although states may have a duty to accept refugees in general, the rules may be different in respect of a mass influx[122]. Other writers have concluded that although there is a customary norm that states must provide at least temporary safe-haven for refugees, there is no clear framework for how this rule is to be applied[123].

Having just examined some examples of state practice in this area, and the opinions of academics, we are in a fairly good position to ascertain whether or not non-refoulement has customary status. On the face of it the state practice examined in Chapter III is evidence of a uniform disrespect for the non-refoulement principle. However, two further factors must be considered. Firstly, only breaches of the rule were examined, to order to illustrate fully the problems facing the non-refoulement principle. Secondly, after taking a closer look at the examples it is still arguable that the principle is custom. This becomes clear when one looks at the behaviour of the states seeking to erode or breach the non-

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[118] See for example: Sandra Lavenex *Safe Third Countries* (Central European University Press, Budapest, 1999) 12.
[119] Robert L. Newmark 'Non-Refoulement Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs' 71 Wash.U.L.Q.833, 845.
[120] Kathleen Marie Whitney 'Does the European Convention on Human Rights Protect Refugees from 'Safe' Countries?' 26 Ga.J.Int'l & Comp. L. 375, 380.
[121] Newmark , above, 837.
[122] Roman Boed 'State of Necessity as a Justification for Internationally Wrongful Conduct' (2000) 3 Yale Human Rts. & Dev.L.J.1, 9.
[123] Todd Howland 'Refoulement of refugees: the UNHCR's lost opportunity to ground temporary refuge in human rights law' (1998) 4 U.C.Davis J.Int'l L &Pol'y 73, 81.

refoulement principle. In none of these cases did a state come outright and say 'we have no duty under any circumstances to accept refugees'. Instead they said, 'we are unable to accept these particular refugees because...'. The fact that they offered justifications for their actions supports the argument that they knew what they were doing was in breach of international law.

Firstly, we have the mass influx example. All the states involved in closing borders or turning back ships gave some reasons for their actions. Tanzania, for example, cited national security, regional tension and environmental damage as reasons why it could accept no more refugees[124]. Even the Tampa incident saw Australia providing at least some justifications for its actions. Early on in the crisis Australian Prime Minister stated that "our capacity to take unauthorised arrivals is at breaking point[125]." Secondly, those countries who have implemented restrictive policies towards asylum-seekers have never attempted to completely rebut their non-refoulement obligations. On the contrary they continue to reinforce the importance of the principle, as this statement by the US delegate to a 1998 UNHCR meeting illustrates:

> We underscore the fundamental importance of the principle of non-refoulement, which prohibits the expulsion and return of refugees to countries or territories where their lives or freedom would be threatened[126].

But to return to the Tampa example for a moment, there was never any mention in the initial discussions of a 'duty' on Australia to take in the refugees . There were, of course, suggestions that the nation had a humanitarian obligation to those on the ship, but a reading of the news reports would suggest that there was no legal

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[124] Roman Boed 'State of Necessity as a Justification for Internationally Wrongful Conduct' (2000) 3 Yale Human Rts. & Dev.L.J.1, 2.

[125] One News 'Australia Flies Aid to Boat People' 29 August 2001, <http://onenews.nzoom.com> (last accessed 5/9/01)

[126] United States Department of State, U.S. Delegation to the Meeting of the UNHCR Standing Committee on International Protection June 23-25, 1998 <http://www.state.gov/www/global/prm/refugee_protect_9807.html> (last accessed 5/9/01)

obligation on Australia. Even the UNHCR was quoted as saying that the legal situation surrounding the boat people was unclear[127]. Taking this into account it is difficult to agree with the UNHCR's view that non-refoulement has reached the level of *jus cogens*. Rules such as the law against genocide have this status, as they are seen as 'fundamental', 'inalienable' and 'inherent' to the international legal system[128]. The increasing violations of non-refoulement, and the unclear nature of the rule, undermine its claim to be a peremptory norm. However, this does not necessarily mean that there is no customary principle of non-refoulement. It is simply evidence of the fact that the parameters of the rule need clarification.

B Defining the Parameters of Non-Refoulement

Having therefore concluded that we have a customary rule, we must be able to state clearly and in a way that can be practicably applied, what the rule requires. This is where the international community is currently running into problems. Previously, when the refugee numbers were fairly low and situations of mass influx less common, there was less pressure on states to press the limits of the rule. Today, however, with domestic and foreign policy factors forcing states to re-evaluate their asylum laws, the principle of non-refoulement is finding itself being reviewed and in some circumstances, eroded. It is necessary, therefore, to highlight what the exact parameters of the rule are, so that we are clear exactly when and in what way the rule comes into play. The situations discussed in Chapter III illustrate four of the current debates which surround the parameters of non-refoulement; debates which must be settled if we are to have a coherent system of asylum law.

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[127] 'Boat People's Fate in Balance' (29 August 2001) *The Evening Post* Wellington, 7.
[128] Ian Brownlie *Principles of Public International Law* (5 ed, Oxford University Press, New York, 1998) 514.

1 *Justifications and Exceptions*

As was mentioned earlier, states often have very good reasons for breaching the non-refoulement principle. One can hardly expect, for example, a small state with limited resources, which is already coping with large numbers of refugees, to accept on its own another mass influx. The states discussed in Chapter III all gave justifications for why they simply could not accept any more refugees, or why they had to cut down on the numbers they were accepting. Furthermore, we must also accept the fact that states need to hold a discretion to exclude certain persons from invoking the non-refoulement principle. However, what is of main concern is that these justifications and exceptions are in danger of being stretched so far that they begin to make the principle itself redundant.

Firstly, let us look at what justifications and exceptions are clearly prescribed by international law. As was discussed when we looked at the United States' interpretation of exceptions, Arts 33 and 1(F) of the Refugee Convention provide that persons guilty of certain crimes or who pose a 'danger to the security of the country' cannot claim the benefit of the non-refoulement principle. A state would therefore be justified in returning such an individual to the country from which they came. But what other justifications are legally valid? Professor Goodwin-Gill asserts that 'national security and public order have long been recognised as potential justifications for derogation'[129]. Also the ILC Draft Articles on State Responsibility provide that a breach of an international law obligation is justified in extreme cases of necessity[130]. But again we find ourselves in uncertain territory. How much of a threat to public order or national security is required? What would be classed as an

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[129] Guy S.Goodwin-Gill *The Refugee in International Law* (2 ed,Clarendon Press, Oxford, 1996) 139.

[130] International Law Commission, ILC Draft Articles on State Responsibility <http://www.un.org/law/ilc/reports/1996/chap03.htm#doc38 > (last accessed 6/9/2001)

extreme case of necessity? The 'necessity' justification is a useful one to illustrate the importance of circumscribing limits to exceptions and justifications.

ILC Draft Article 33 requires that the situation (in our case, refugee influx) must endanger an 'essential interest' of the State and place it in 'grave and imminent peril'[131]. Only then can a state invoke necessity as a justification. Roman Boed has considered in detail the impact of Draft Article 33 on the non-refoulement principle, particularly in cases of mass influx[132]. When considering the element of 'essential interest' he considered that internal stability, which could be endangered, as in Macedonia's case, by a large influx of persons of a certain ethnicity, would fall into the category[133]. Other 'essential interests' mentioned were economic stability and environmental protection. He noted, however, that whether something was an 'essential interest' would have to be determined on a case by case basis[134]. Boed went on to consider the ramifications of 'grave and imminent peril', concluding that this element is also 'fact-specific'[135].

So is this a good way to provide states with a 'safety valve' should the pressure on them become to much to bear[136]? I would say that it is. The test applied is a fairly strict one. 'Grave and imminent peril' implies a rather serious danger. It would be hard to imagine that the Australian government could have justified the refusal of the Tampa on this basis. Furthermore, it is useful that the test is set out clearly, with commentary provided as to the scope of the article. The fact that both elements of the test are dependent very much on the particular fact situation could be seen to leave too much room for movement. However, it would be impossible to envisage every

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[131] International Law Commission, see ILC Draft Articles on State Responsibility, above.
[132] Roman Boed 'State of Necessity as a Justification for Internationally Wrongful Conduct' (2000) 3 Yale Human Rts. & Dev.L.J.1,
[133] Boed, above, 26.
[134] Boed, above, 27.
[135] Roman Boed 'State of Necessity as a Justification for Internationally Wrongful Conduct' (2000) 3 Yale Human Rts. & Dev.L.J.1, 28.
[136] Boed, above.

possible circumstance which would constitute 'grave and imminent peril', for example. Obviously it must be required that any claim of necessity be made in good faith, and not simply to avoid the financial burden or political backlash which acceptance of refugees may create. This test appears to strike a reasonable balance, so as to ensure that refugees are protected while not imposing too harsh a responsibility on those states accepting them.

Moving on to look at the exceptions to the non-refoulement principle, there is a concern that even though they are set out in the Convention, they still lack clarity. Therefore there is a danger that they could be abused by states in order to circumvent their obligations. It is arguable that the United States comes dangerously close to doing this through the enactment of the IIRAIRA. The problem is that the provisions themselves leave wide room for interpretation. As one commentator has noted, the Refugee Convention gives no indication of what types of crime legitimate the invocation of Art 33(2)[137]. The recent trend of asylum-seekers being linked with criminal activity makes this issue even more important. To quote from a letter to the editor of the Sydney Morning Herald during the Tampa crisis, "Those boat people are not illegal immigrants, nor refugees, alleged or otherwise. They are pirates, hijackers and thieves"[138]. Although this was solely the opinion of a member of the public, official rhetoric also focused on the criminal nature of the asylum-seekers on board the Tampa. This example of pre-judging refugees in order to gain support for a political decision should be of major concern to the international community.

To return to the situation in the United States, the approach taken by the courts and the legislature through the IIRAIRA is also concerning. As Kathleen Keller points out, the way in which the system now works, with a list of crimes being specified as causing danger to the security of the country, means that there is no

[137] Paul Kuruk ' Asylum and the Non-Refoulement of Refugees: The case of the missing shipload of Liberian refugees' (1999) 35 Stan.J.Int'l L.313, 330.

balancing of the crime with the risk that the refugee could be persecuted if returned[139]. This means there can be a real danger that the non-refoulement principle could be repeatedly breached as a result of this rule. It would therefore seem that the US has in fact gone too far, and could be said to be acting contrary to their international obligations. On the other hand, however, states obviously have an interest in protecting their citizens. The exceptions were purposely included in the Refugee Convention to give both states *and* refugees protection. However, in order to do this it appears that the exceptions need to be clarified.

Any clarification of these exceptions which takes place in the current political climate is likely to be influenced by the terrorism issue. As was discussed earlier, terrorism and refugees are often seen as intertwined issues. Obviously there could be concerns that persons applying for refugee status who have fled a state known for its use of terrorism, such as a Palestinian, could be in some way linked to terrorism and could therefore be a danger to the commununity. This indeed appears to have been the approach taken by the US in implementing its anti-terrorist provision, which entirely excludes all members of the Palestinian Liberation Organisation from applying for refugee status[140]. It has been argued, however, that this attempt to protect the United States from terrorists goes too far, and increases the danger of the non-refoulement provision being breached[141]. It therefore seems necessary to consider carefully ways in which any clarification of the exceptions to non-refoulement can adequately protect refugee rights while also protecting the host-state's population from terrorist attacks.

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[138] One News 'Australia Flies Aid to Boat People' 29 August 2001, <http://onenews.nzoom.com> (last accessed 5/9/01).

[139] Kathleen M.Keller 'A Comparative and International Law Perspective on the United States (Non)Compliance with Its Duty of Non-Refoulement' (1999) 2 Yale Human Rts.&Dev.L.J. 183, 197.

[140] 8 U.S.C.A. 1182(a)(3)(B)(ii)-(iii).

[141] Jaya Ramji 'Legislating away International Law: The Refugee Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act' (2001) 37 Stan.J.Int'l L. 117,147.

2 *Temporary Protection*

Another issue of major concern is the increasing use of temporary protection systems. Numerous countries are now turning to temporary protection as an alternative to the Refugee Convention regime. One commentator has taken the view that temporary protection has itself gained the status of a customary norm[142]. As well as the EU, Australia and the United States also have in place temporary alternatives to permanent residence. In Australia, for example, those who arrive in the country illegally are only able to apply for a temporary visa[143]. Although, from a state perspective at least, temporary protection offers many benefits, refugee rights advocates are concerned about the effect temporary protection is having on the traditional refugee regime, and particularly on non-refoulement. As one commentator put it "where temporary protection is offered as a diluted substitute protection for Convention refugees, it represents a threat to the 1951 refugee regime"[144].

As was discussed in Chapter II, temporary protection was largely developed to deal with cases of mass influx. States often found themselves in a difficult situation when large numbers of people, often fleeing internal conflict, applied for refugee status. As well as the basic fact that it is virtually impossible in such cases to individually screen each person, there was also the added problem of the restrictive definition of refugee in the Refugee Convention. In the case of Rwanda, for example, some people would have had a valid argument that they fell within the definition. However, a large number of the Rwandan refugees were simply attempting to get as far away from the violent conflict as possible, so as not to get caught up in it. The Refugee Convention definition does not allow refugee

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[142] Todd Howland 'Refoulement of refugees: the UNHCR's lost opportunity to ground temporary refuge in human rights law' (1998) 4 U.C.Davis J.Int'l L &Pol'y 73,81.
[143] Angela Cranston 'Refugees in Crisis' (2000) 3 Alt L. J 121,123.
[144] Joan Fitzpatrick 'Temporary Protection of Refugees: Elements of a Formalised Regime' (2000) 94 Am.J.Int'l L. 279, 280.

status for those escaping civil turmoil. Therefore, states had to create a new category of refugee or else face a humanitarian disaster.

States soon found, however, that the temporary system could be beneficial in other ways. For example, it allows states to be seen to be acting in a humanitarian manner, while still restricting whom is allowed to permanently reside within their borders[145]. States are able to accept the refugees knowing that they will only be a burden on the state for a certain period of time and therefore will cost them less[146]. Furthermore, because temporary protection is an ad hoc system that is mainly developed on a crisis-by-crisis basis, states have a large amount of discretion as to what rights they will grant the asylum-seekers[147]. Probably the main benefit, from a state perspective, is that the idea of temporary protection is generally more easily accepted by the domestic population of a host state.

Not surprisingly, these benefits for states are often seen as drawbacks for asylum-seekers. The list of criticisms leveled at temporary protection systems is a long one, and I will only deal with the main issues here. Firstly, there is the danger that the use of the temporary protection system will completely bypass the Refugee Convention, making the traditional system, and the rights guaranteed by that system (including non-refoulement), applicable only in very limited circumstances[148]. Obviously this is a major concern. If states feel that they can somehow get around the Refugee Convention then surely they also think they can get around their non-refoulement obligation. Some commentators have suggested this is not in fact the case, as most states, as well as the UNHCR, have accepted that their non-refoulement obligations are also owed to non-Convention refugees[149]. Despite this, there are still concerns

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[145] Matthew J.Gibney 'Between Control and Humanitarianism: Temporary Protection in Contemporary Europe' (2000) 14 Geo.Immigr.L.J.689, 690.
[146] Joan Fitzpatrick 'Temporary Protection of Refugees: Elements of a Formalised Regime' (2000) 94 Am.J.Int'l L. 279, 280.
[147] Gibney, above, 690.
[148] Angela Cranston 'Refugees in Crisis' (2000) 3 Alt L. J 121,123.
[149] Todd Howland ' Refoulement of Rwandan Refugees: The UNHCR's Lost Opportunity to Ground Temporary Refuge in Human Rights Law' 4 U.C.Davis J. Int'l L&Pol'y 73, 86.

that the move from an established system to the uncertain territory of temporary protection poses a threat to non-refoulement.

Secondly, the temporary protection systems used by various states are in no way harmonious, and states appear reluctant to codify an international temporary protection system[150]. This is connected to another issue which is that decisions regarding what rights the temporary refugees should have and, most importantly, when the protection should end, are left largely to the discretion of the state[151]. There is a danger, therefore, that states may be swayed more easily by domestic opinion, and that the interests of the refugees may be considered less important[152]. The dangers posed to non-refoulement by this system become evident when you consider that many states impose strict time limits on those who are granted temporary protection. The decision to return them therefore becomes less about whether it is safe, and more about time being up[153]. It is therefore vitally important to clarify what rights the temporarily protected do in fact have and, ideally, to create an internationally recognised temporary protection system which can strike a balance between the interests of both states and asylum-seekers.

3 Safe Third Countries

The safe third country principle, used extensively in Europe, as well as in Australia, is causing just as many headaches for refugee advocates as temporary protection. The legality of the idea is debatable, and many believe it has no basis whatsoever in international law[154]. For non-refoulement in particular it is an

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[150] Randall Hansen 'Report on Workshop on Refugee and Asylum Policy in Practice in Europe and North America' (2000) 14 Geo.Immigr.L.J. 801, 802.
[151] Howland, above, 86.
[152] Joan Fitzpatrick 'Temporary Protection of Refugees: Elements of a Formalised Regime' (2000) 94 Am.J.Int'l L. 279, 285.
[153] Fitzpatrick, above, 285.
[154] Maryellen Fullerton 'Failing the test: Germany leads Europe in Dismantling Refugee Protection' (2001) 36 Tex.Int'l L.J. 231, 243.

especially dangerous development. However, due to the fact that it has been accepted and widely used within the EU, it is unlikely to be a passing phase. It is therefore necessary to look at its benefits and drawbacks and attempt to ensure that the system manages to protect the rights of asylum-seekers, especially their right not to be returned to face persecution.

The benefits for states in implementing a safe third country principle are, in some cases, extensive. For countries like Germany, for example, which previously found itself handling the lion's share of refugee applications, it is a useful way to redistribute refugees. Also, for isolated yet attractive destinations like Australia, the system has few drawbacks. For other states, however, especially those bordering refugee-producing states, the safe third country rule would not be seen as beneficial at all. The safe third country idea was originally mooted ostensibly to prevent 'forum-shopping'. It has no doubt served this purpose, as well as putting off those migrants who wish to abuse the refugee system so as to move to a more comfortable or economically-viable location. For many states the most fundamental benefit of the principle is that it can drastically reduce the number of asylum applications, and therefore save them large amounts of time and money.

These savings and benefits are gained largely, one could argue, at the expense of the non-refoulement principle itself. The basic objection to the safe third country principle is that it often leads to non-refoulement due to the less than stringent standards required of a 'safe' country. The various countries which use the principle do not necessarily apply the same test when deciding if a country should be designated as 'safe'. Australia, for example, requires a report from the UNHCR that the third country will provide 'effective protection' to refugees[155]. The EU generally requires that 'safe' countries have signed the European Convention

[155] Jonathon Hunyor 'Warra Warra: refugees and protection obligations in relaxed and comfortable Australia' 5 Alt L. R. 227, 230.

on Human Rights and the Refugee Convention[156]. However, these requirements do not always guarantee safety. For example, states such as the Czech Republic and Poland, designated as safe countries by Germany, have signed the Refugee Convention fairly recently and have yet to set up effective refugee-screening procedures[157]. Furthermore, some states have granted safe third country status to states with questionable human rights records, such as Pakistan, Turkey and Liberia[158]. The danger of asylum-seekers being returned to their home state from these third countries, or being subject to persecution in the third country itself, is a very real one.

Concerns have also been raised about the motivations for designating certain states as 'safe'. In many cases the decision would ultimately be a political one, designed to improve inter-state relationships, as opposed to protecting refugees[159]. Furthermore, when you consider the fact that all the countries surrounding Germany have been designated as safe, one wonders whether these decisions are really made in good faith or are rather made simply to substantially reduce the number of asylum-seekers making it to German territory[160]. There is also a more fundamental problem with the safe third country principle. That is, the principle designates a country as safe for everyone. However, it is not necessarily true that just because a country is generally considered safe, every asylum-seeker will be free from persecution there[161]. Unless a country allows an asylum-seeker to demonstrate why they should not be sent to a third country, there is another real danger of refoulement. In

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[156] Kathleen Marie Whitney 'Does the European Convention on Human Rights Protect Refugees from "Safe" Countries?' (1997) 26 Ga.J.Int'l & Comp.L. 375, 389.
[157] Maryellen Fullerton 'Failing the test: Germany leads Europe in Dismantling Refugee Protection' (2001) 36 Tex.Int'l L.J. 231, 247.
[158] Whitney, above, 389.
[159] Savitri Taylor ' Australia's Safe Third Country Provisions: Their Impact on Australia's Fulfillment of Its Non-Refoulement Obligations' (1996) 1 U Tas LR 196, 221.
[160] Maryellen Fullerton 'Failing the test: Germany leads Europe in Dismantling Refugee Protection' (2001) 36 Tex.Int'l L.J. 231, 244.
[161] Taylor, above, 221.

fact, very few, if any, countries allow asylum-seekers to argue their case before being transferred[162].

Art 33 of the Refugee Convention protects refugees from being returned either directly or indirectly to places where they may be persecuted. It is clear therefore, that the safe third country principle is doing much to undermine non-refoulement. Even if states are not seen as directly violating non-refoulement, the safe third country rule provides a way to circumvent international law. As with temporary protection, there is no universally applied standard that countries must comply with when implementing the policy. However, the benefits of the policy are such that states will be reluctant to retract it. It is therefore necessary to determine whether it is possible to make the safe third country principle compatible with non-refoulement.

4 *Extraterritoriality*

The final problem which needs to be addressed concerning the non-refoulement principle is whether or not it applies extraterritorially. The problem is a fundamental one as it determines whether rejection at the frontier, and the interdiction of ships, can be construed as non-refoulement. The wording of Art 33 gives us little help in this respect. It simply states that ' No contracting State shall expel or return
("refouler") a refugee in any manner whatsoever to the frontiers of territories....'. On a basic reading it appears relatively clear that states will be held responsible if their actions lead, directly or indirectly, to the return of a refugee. However, many states over the years have read the provision much more restrictively, with the US policy examined in *Sale v Haitian Centers Council* being just one

[162] Maryellen Fullerton, 'Failing the test: Germany leads Europe in Dismantling Refugee Protection' (2001) 36 Tex.Int'l L.J. 231, 246.

example[163]. There are various arguments on either side, which I will now briefly examine.

To start with the restrictive approach, holding that non-refoulement only accrues to refugees once they are within the territory of the state, there appeared to be support for this interpretation at the 1951 Conference which negotiated the Refugee Convention. Several European nations, including Switzerland, Belgium and the Netherlands, advocated this approach at the Conference[164]. As was evident from the *Sale* case, the US now takes the same view. The Supreme Court felt that it would be going too far to give states obligations which applied beyond their borders[165]. Australia also recently illustrated its adherence to this approach, by intercepting an Indonesian ship carrying asylum-seekers in the wake of the Tampa crisis[166]. Obviously this is a key concern for many states who recognise the fact that 'non-rejection at the frontier implicates fundamental sovereignty issues'[167]. As well as the theoretical idea of guarding state sovereignty, adhering to a non-refoulement obligation which does not include non-rejection at the frontier also confers the practical benefits of less refugees to process, less costs and, more often than not, the support of the domestic population.

However, despite these benefits, there is strong argument to suggest that non-refoulement does apply extra-territorially. Although it is generally accepted that this was not the case in 1951, it is suggested the principle has subsequently come to encompass non-rejection at the frontier[168]. For a start, the UNHCR takes the

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[163] Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993).
[164] Robert L. Newmark 'Non-Refoulement Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs' 71 Wash.U.L.Q.833, 841.
[165] Heather A. Leary 'The Nature of Global Commitments and Obligations: Limits on States Sovereignty in the Area of Asylum' (1997) Ind. J. Global Legal Stud. 297, 310.
[166] New Zealand Herald 'Australia keeps out second migrant ship' 9 September 2001, <http://www.nzherald.co.nz> (last accessed 10/9/01)
[167] Joan Fitzpatrick 'Temporary Protection of Refugees: Elements of a Formalised Regime' (2000) 94 Am.J.Int'l L. 279, 296.
[168] Guy S.Goodwin-Gill *The Refugee in International Law* (2 ed,Clarendon Press, Oxford, 1996) 123.

view that the principle applies to asylum-seekers both at the borders and within the territory[169]. A substantial amount of state practice also suggests that this is the case. For example, three of the states who opposed extraterritoriality at the refugee conference in 1951 now have procedures in place to ensure that rejection of bona fide refugees does not occur on their borders[170]. Also, Art 2(3) of the OAU Convention relating to refugees specifically rules out the possibility of rejection at the frontier[171]. International condemnation of the Tampa incident, and the situations concerning the Liberian ships, also support the argument that the international community generally disapproves of rejection at the frontier.

It could be argued, however, that disapproval of the actions of a state does not necessarily lead to the conclusion that those actions were illegal. Furthermore, the only thing clear about state practice is that it is not consistent, with the US taking one view, many European states taking the other, and some states changing their view depending on the circumstances. One commentator has argued that we need to clarify this area of non-refoulement so as to 'prevent protectionist, and ultimately short-sighted policies from prevailing'[172]. It could be suggested, however, that it is as much in the interests of states as asylum-seekers to sort out the problem, so as to ensure that if an incident like that involving the Tampa does occur again, states will be clear as to what their legal obligations are.

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[169] See for example,United Nations High Commissioner for Refugees, Executive Committee Report of UNHCR, 1977 <http://www.unhcr.ch/refworld/unhcr/excom/xconc/excom6.htm> (last accessed 9/9/01)

[170] Savitri Taylor " Australia's Implementation of its Non-Refoulement obligations under the Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights' 2 U NSWLR 432, 435.

[171] Organisation of African Unity Convention governing the specific aspects of refugee problems in Africa (10 September 1969) 1001 UNTS 45.

[172] Robert L. Newmark 'Non-Refoulement Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs' 71 Wash.U.L.Q.833, 858.

Extraterritoriality, the safe third country principle, temporary protection systems and justifications and exceptions are only examples of the need to define the parameters of non-refoulement. In all four cases the interests of states are pitted against those of refugees, with both sides having genuine concerns that need to be addressed. In the next chapter, I will attempt to put forward some practical proposals for clarifying non-refoulement. It is clearly necessary to look at any proposed changes in a way which takes into account the current political climate and realistically balances the needs of both refugees and states.

V PROPOSALS FOR CHANGE

It is a widely accepted fact that non-refoulement forms the foundation of refugee law. However, what is equally evident is that this basic principle is currently under threat from a large number of states who are, for various reasons, attempting to re-interpret, erode, or evade their obligations towards refugees. This is detrimental to refugees, and is leading to the situation where both states and asylum-seekers are on shaky ground when they attempt to rely on their international law rights. Numerous suggestions have been put forward of ways in which the refugee system can be changed to ensure that the non-refoulement principle, and the refugee system, can still be of practical use. In this chapter, some of these suggestions will be discussed, before I move on to recommend what could be done to make the refugee system more workable.

A Academic Comment

For several years commentators have recognised that the refugee system needs at least some changes made, if not a major overhaul. It is beyond the scope of this paper to go into all the suggested changes, though I will discuss some of the more relevant ideas here. It is the belief of many that the international community needs to shift focus from dealing with the refugees themselves, to dealing with the causes of refugee flows. That is, we need to focus our attentions on preventing the conflicts that commonly lead to large numbers of displaced persons[173]. Along with this suggestion is the idea that refugee law needs to be more directly based in human rights law, rather than being a subset of its own[174]. These are both extremely valid suggestions. However, I would argue that it would

[173] James C.Hathaway and R.Alexander Neve 'Making International Refugee Law Relevant Again: A proposal for collectivised and solution-oriented protection' (1997) 10 Harv.Hum.Rts.J.115, 202.

[174] Todd Howland 'Refoulement of refugees: the UNHCR's lost opportunity to ground temporary refuge in human rights law' (1998) 4 U.C.Davis J.Int'l L &Pol'y 73,73.

be irresponsible and unrealistic of the international community to assume that merely focusing all its attentions on conflict prevention will completely eliminate refugee problems. Some conflicts or events are entirely unpredictable and unpreventable and we need to have a strong system in place to care for those who are displaced by such events.

The concept of burden sharing is also gaining increasing support. The fact that certain states are having to cope with large numbers of refugees, while others are totally isolated from the problem, shows the importance of having an international system in place which evenly distributes the costs of hosting refugees throughout the international community[175]. Both the OAU Convention and the Refugee Convention refer, in different ways, to the need for the international community to co-operate when dealing with situations of mass influx. Despite these conventions, however, we have seen time and time again the failure of states to help out those struggling to cope. The case of the Liberian ships is just one example. However, there have also been situations where states have come to the aid of others. In Macedonia, for example, the United States provided resources and finance for a massive airlift of refugees to other states who were willing to take them[176]. Several academics in the area of refugee law have put forward proposals for burden-sharing systems[177]. It is clear from these proposals, and the criticisms subsequently leveled at them, that achieving consensus on how an international, or even a regional, burden-sharing system should work will not be an easy task. However, the importance of having in place a burden-sharing system, whether on a global or regional basis, which is actually adhered to by states, is undeniable.

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[175] Paul Kuruk ' Asylum and the Non-Refoulement of Refugees: The case of the missing shipload of Liberian refugees' (1999) 35 Stan.J.Int'l L.313, 341.

[176] Joan Fitzpatrick 'Temporary Protection of Refugees: Elements of a Formalised Regime' (2000) 94 Am.J.Int'l L. 279, 279.

[177] See for example: James C.Hathaway and R.Alexander Neve 'Making International Refugee Law Relevant Again: A proposal for collectivised and solution-oriented protection' (1997) 10 and Peter H.Schuck 'Refugee Burden-Sharing: A Modest Proposal' (1997) 22 Yale J.Int'l L. 243.

What comes through from both these suggestions is the importance of having a system that can be adequately enforced. At present any state thought to be breaching their non-refoulement obligations, or any other obligation owed to refugees, may be the target of international condemnation, but little more than that. Although one cannot undervalue the effect international pressure can have in some cases, it has been argued that there need to be more concrete enforcement mechanisms. It must be noted that in some respects these are already in place, with United Nations bodies, and quasi-judicial tribunals such as the Committee Against Torture, being able to accept individual complaints by refugees who feel that a state or states have breached their rights under an international law instrument. However, these are often limited by the extent of the instrument itself, and by the fact that only some states have agreed to allow complaints to be made against them. Some have argued that more high-profile bodies, like the European Court on Human Rights, need to take a more active role in ensuring that states adhere to the obligations owed to asylum-seekers[178]. It has also been suggested that the UNHCR should, in some way, become less dependent on government contributions, which could therefore allow it to be more critical of states' actions[179].

These are just some of the ideas which have been proposed in recent years to strengthen the refugee system. I would agree with a German politician who stated in 1998 that any change in international policy towards refugees needs to be 'guided by realism'[180]. To this end, the current climate dictates that any changes made which advance the cause of refugees, or even shore up their rights, will need to involve concessions in some areas. The domestic constituencies of western states are becoming less and less sympathetic towards asylum-seekers. Realistically, any changes will be affected by this.

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[178] Kathleen Marie Whitney 'Does the European Convention on Human Rights Protect Refugees from "Safe" Countries?' (1997) 26 Ga.J.Int'l & Comp.L. 375, 407.
[179] Bemma Dankoh 'A Half-Century of International Refugee Protection: Who's Responsible, What's Ahead' (2000) 18 Berkeley J.Int'l L.260, 265.
[180] Otto Graf Lambsdorff 'The Human Rights of Refugees' (1998) UNCRONCL 5051, 5051.

B Proposals for Change

Non-refoulement as a principle still exists. No one seems to be saying that it is now legal to return them to a place where they will face persecution. The proliferation of international and regional instruments incorporating the non-refoulement principle is evidence of this. Any new or revamped refugee system therefore needs to retain non-refoulement as its basic foundation. But, as Newmark suggests, and as this paper has illustrated, we need a 'consistent, universal definition' of non-refoulement[181]. In other words, we need to define the parameters. It is therefore necessary to consider, in a practical manner, the best way of achieving this objective.

1 How should changes be made?

Changes to the refugee system could be made in various ways. Some have suggested that a protocol to the Refugee Convention could be the way forward[182]. We could even go further and create an entirely new Refugee Convention, which properly deals with new developments like temporary protection and the safe third country idea. Another option would be a General Assembly resolution clarifying the grey areas of non-refoulement. For those concerned that the current international climate would dictate that any revision of the Refugee Convention would result in a severely limited system, this would seem to be the safest option. However, I would suggest that the best way to ensure that we have a workable system, which states are bound to adhere to, is to draft a new Convention. Not only would this provide us with, ideally, a workable and enforceable instrument, but also it would involve having a conference, or a series of meetings, where the views of all

[181] Robert L. Newmark 'Non-Refoulement Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs' 71 Wash.U.L.Q.833, 858.
[182] Newmark, above, 864.

states on the refugee issue could be aired. This is incredibly important, as recent efforts have illustrated that there are not just fundamental debates occurring between refugee advocates and states, but also amongst the states themselves[183]. This also would ideally provide us with a global solution. Although moves are being made to harmonise refugee systems, such as temporary protection, on a regional level, the global nature of the refugee problem means that any solution to the current problems needs to be consistent the world over.

2 *A New Non-Refoulement Provision*

At the core of the new Convention should be a re-formulated non-refoulement principle. The current provision, with its two short paragraphs, has clearly not been effective in providing states and advocates with sufficient direction regarding their rights and obligations. A new provision should clearly state what the parameters of the non-refoulement provision are. Although any new provision will ultimately be a result of intense negotiation and compromise, I would argue that it needs to include the following components in order to sufficiently protect the interests of both states and refugees.

(a) Reasons for fleeing home country should be extended

Currently, the 1951 Refugee Convention only applies to persons who fear persecution on the basis of their 'race, religion, nationality, membership of a particular social group or political opinion'. The narrow nature of this definition has caused major headaches for states and refugee organisations alike, and is partly responsible for the development of temporary protection systems. The UNHCR and some regional organisations have recognised the

[183] 'Not My Problem' (8 September 2001) *The Economist* London, 60.

fact that many of today's refugees are indeed in grave danger, though not for the reasons specified above. It has also been accepted that the non-refoulement provision applies to all refugees, regardless of whether they fit the Convention definition. I would therefore suggest that the new provision should recognise this, and give a broader range of reasons for flight. A possible model could be the OAU Convention which states that;

> the term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality[184].

(b) The provision should apply to refugees 'wherever found'

It is imperative that any new provision also settle the issue of extraterritoriality. This is a fundamental problem as it determines at what point a state becomes responsible for refugees. I concluded earlier that state practice in this area was fairly inconsistent. It is arguable, however, that if the opinion of states is leaning one way or the other, it is towards the applicability of non-refoulement extraterritorially. The purpose of the non-refoulement principle is to protect refugees from being returned to a place where their lives could be endangered. Allowing states to turn refugees away at the borders would completely undermine this purpose. From a practical perspective, it needs to be clear from the outset who is responsible for a particular refugee or group of refugees. If, as in the case of the Tampa, they are at sea, there should be rules as to when they come under state jurisdiction. If the current provision specified that the non-refoulement right accrues to a refugee 'wherever found', it

[184] Organisation of African Unity Convention governing the specific aspects of refugee problems in Africa (10 September 1969) 1001 UNTS 45.

would have been clear that by refusing to process the refugees Australia was in breach of its international obligations.

(c) The provision should incorporate the necessity test

As we have seen, states have used a raft of reasons to justify their refusal to admit asylum-seekers. It would be impractical to try and create a non-derogable non-refoulement provision as, not only would states be unlikely to accept it, but there are clearly certain circumstances in which violation of the non-refoulement principle would be justified. I would suggest that the new provision should contain a test which states can apply in order to ascertain whether or not their particular reason for wanting to refuse entry is actually valid at international law. Although states may wish to formulate an altogether new test for this purpose, I would argue that Article 33 of the ILC Draft Articles on State Responsibility would be sufficient. As was discussed earlier, it sets a fairly high standard while still allowing some leeway for altogether unforeseen circumstances.

(d) Provision should explicitly state that both direct and indirect refoulement is illegal

Although most states generally accept that they would be violating international law if they contributed, either directly or indirectly, to the refoulement of a refugee, it is arguable that the wording of the provision needs to be changed to make this clearer. As opposed to the current wording, which refers to the 'frontiers of states' and 'in any manner whatsoever', I would suggest that the new provision should specify that a country is liable if their actions result, either directly or indirectly, in the return or refoulement of refugees to a place where his or her life or freedom would be threatened. It should be absolutely clear that a state is equally culpable when they 'pass

the buck' to another state, who then returns the refugee, as they would be had they directly returned them themselves.

It is clear that what we are dealing with here are the ramifications of the safe third country rule. This practice is proving incredibly useful for many states and it is unlikely that they will be willing to abolish the rule entirely. Any new non-refoulement provision should therefore attempt to circumscribe limits to the rule. For a start, there should be a universally applicable standard that must be met before a state can be designated as 'safe'. This standard should incorporate both the requirements that the state has signed relevant human rights instruments, and also have in place an effective and tested refugee screening system. Hopefully this would get around the dual problems of political motivations prompting states to recognise other states as safe and asylum-seekers being subject to persecution in third states. There is still a remaining concern that some states may be unsafe for certain individuals. It should be possible for asylum-seekers facing transfer to a third state where they are afraid of persecution to make their case, ideally to a UNHCR official capable of preventing the transfer.

(e) Exceptions need to be clearly specified

It is likely that this aspect of the new provision will be the most problematic. It is necessary to balance carefully the needs of states to guard against criminal activity and internal disorder, with the needs of refugees to find safe-haven from whatever danger they have fled. The current provision, with its reference to 'danger to the security of the country' appears to be unnecessarily broad. It could be argued that if the necessity test advocated above is implemented, this would provide states with the discretion they need to protect their citizens. However, it is arguable also that the current exceptions with respect to crimes against humanity and serious, non-political crimes, should be retained as they are clearly valid reasons for exclusion. Furthermore, it would be overly cumbersome to

expect states to revert to the necessity test every time they consider an asylum-seeker to be unsuitable. I would agree with the comments made regarding the US approach, however, and emphasise the need to balance the seriousness of the crime with the seriousness of the danger. Although I may be advocating clarification of the exceptions, I do not consider that simply listing the crimes that are considered serious is the best way to achieve this.

In light of recent events, an exception referring to individuals involved in terrorist activity is likely to be included. Indeed, the connection between asylum-seekers and terrorism, whether imagined or not, has been the basis for many states' restrictive policies. It is suggested that if states are granted the ability to crackdown on asylum-seekers with possible terrorist connections, then they may, in turn, be more willing to accept the other restrictions on their sovereign ability to exclude individuals which this paper is advocating. However, any terrorist exception included in the new provision must attempt to ensure that bona fide refugees who no longer pose a security risk can be protected from refoulement. Blanket provisions, such as that relating to the PLO in the US statute, would be unnecessarily restrictive. The terrorism exception should require solid evidence of terrorist connections in order to justify exclusion.

3 *'Shoring Up' the Non-Refoulement Provision*

A new non-refoulement provision, on its own, will not cure all the ills of the current refugee system. Obviously there are bigger issues which need to be considered and, hopefully, dealt with by the new convention. Although it is beyond the scope of this paper to consider all of these issues, there are two in particular which need to be discussed because of their relation to the non-refoulement principle. The following questions need to be asked, and answered, if non-refoulement is to retain its status as the 'cornerstone' of refugee law.

(a) Should there be different rules for mass influx situations?

As we have seen in our examination of state practice, situations of mass influx often pose unique problems for states. It could therefore be suggested that it is unreasonable to expect the same rules to apply when one refugee is arriving as when 100,000 are. Although, on a practical level at least, it is clear that such different situations require vastly different approaches, I would argue that the basic rules should remain the same. With respect to non-refoulement, it has never been accepted that this rule ceases to apply in a situation of mass influx. On the contrary the Executive Committee of the UNHCR has expressly stated that in such cases 'the fundamental principle of non-refoulement...must be scrupulously observed'[185]. Given that the 1951 Convention itself was drafted in reaction to a mass refugee problem resulting from WWII, it seems strange to suddenly assume that these rules no longer apply in such situations. However, it is also arguable that the reasons behind, and nature of, large refugee flows, have changed considerably in the past fifty years and the new convention should reflect this.

(b) How should temporary protection be dealt with?

The temporary protection systems which are currently so popular among many states were created to deal with the situations of mass influx described above. Even the UNHCR has recognised it as a legitimate solution in such circumstances. One way to ensure that situations of mass influx are adequately dealt with, and that the

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[185] United Nations High Commissioner for Refugees 'Executive Committee Conclusion 22' <http://www.unhcr.ch/cgi-bin/texis/vtx/home/+awwBmeukZ69wwww3wwwwwwwwmFqh0kgZTnFqnnLnqoFqh0kgZTzFqlDdDe2hxxhd1cnMnDBawDmaDdDe2hxxznqBodDczmxwwwwwww/opendoc.htm > (last accessed 1/10/01)

indiscriminate use of temporary protection does not lead to non-refoulement, is to deal with temporary protection in the new convention. Many commentators have noted that harmonisation of temporary protection systems would eliminate many of the current problems[186]. Although states appear generally reluctant to do this, I would argue that a harmonised and, ideally, codified temporary protection system which is universally applicable should be a main focus of any changes made to international refugee law. Such a system will obviously need to cater to both the needs of states to determine who they allow to reside within their borders, and the needs of asylum-seekers to escape from persecution[187]. Strict requirements would also need to be set as to when it is safe to repatriate those given temporary protection. In this way, temporary protection would not be a way for states to get around their international obligations, and temporary protection would cease to be an ad hoc alternative to traditional refugee law.

A new convention dealing with the rights and duties of refugees and states appears to be the best way to deal with the current pressures being placed on the system. The non-refoulement principle is at the heart of this system, and should remain at the heart of any new system. However, the principle needs to be elucidated and clarified. Changes should be made in a way which takes full account of the limits on state resources, while still recognising the fundamental importance of protecting individuals from persecution. Any negotiations to create a new convention will not be easy, and will undoubtedly involve concessions from both sides. It is not an impossible task, however, and is one which requires immediate attention.

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[186] Joan Fitzpatrick 'Temporary Protection of Refugees: Elements of a Formalised Regime' (2000) 94 Am.J.Int'l L. 279, 279.

[187] Matthew J.Gibney 'Between Control and Humanitarianism: Temporary Protection in Contemporary Europe' (2000) 14 Geo.Immigr.L.J.689, 692.

VI CONCLUSION

There has, without doubt, been a major change in attitudes towards asylum-seekers. Where once they were viewed as innocent people to be protected and cared for, they are often now seen as a danger to a host states' economy and national security. This change in attitude has occurred the world over. The reasons for this change, which include increased numbers of refugees, a rise in international terrorism and the growing number of secessionist and ethnic conflicts, are unlikely to disappear in the near future. If anything, the refugee situation can only get worse.

It is for this reason that the international community needs to seriously consider undertaking a review of the current international refugee laws. Recent responses to mass influx, and the restrictive policies being implemented by many Western states illustrate the incompatibility of state practice with international rules. Most concerning is the threat posed to the founding principle of the refugee regime, non-refoulement. Ideas like temporary protection regimes and safe third country rules are severely increasing the risk that refugees could be expelled or returned to a place where they would be in danger of persecution.

A new convention, replacing the 1951 Refugee Convention, seems the best way to make the necessary changes to the system. This would ensure that approaches to asylum-seekers are harmonious the world over. The first step needs to be a long overdue clarification of the non-refoulement principle. At present states appear to be interpreting it in whichever manner best serves their immediate purposes. It is necessary to draft a new non-refoulement provision, which makes clear exactly what the principle requires and balances the interests of both states and asylum-seekers.

With the carnage and complete and utter terror caused by the attacks on the World Trade Center and the Pentagon on September

11, it is unlikely that reform of the international refugee system will be at the forefront of international concern for some time to come. If anything, the terrorist attacks will lead to an even more restrictive attitude towards immigration, especially in the United States. However, I would argue that now more than ever we need a system which ensures that those who are in genuine danger of persecution are protected. The parameters of the non-refoulement principle are in dire need of clarification. A new convention is the ideal way to ensure that both states' and refugees' needs are met, and that a crisis like that involving the Tampa never happens again.

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