

# The Singular Plight of Sea-borne Refugees

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## Introduction

On 17 June 1980, the RAN destroyer escort, HMAS *Swan*, en route from Singapore to Hong Kong, encountered seventy-two Vietnamese refugees on a dangerously overloaded vessel in the South China Sea. According to a report of a statement<sup>1</sup> made by a representative of the Royal Australian Navy, the refugee boat was so over-crowded that the deck was only 30 cm above the water and the vessel rolled considerably under the weight of the people on board, even in fairly calm conditions. The refugees had such obviously limited chances of survival should they have encountered bad weather that the officer commanding the HMAS *Swan* decided to take them on board. When the *Swan* berthed in Hong Kong harbour, the refugees were transferred to a transit camp. The then Australian Minister for Immigration and Ethnic Affairs, Mr Ian MacPhee, announced shortly after the rescue that Australia would accept responsibility for the refugees in accordance with current international arrangements in terms of which the country where the rescue vessel was registered was obliged to offer guarantees for the resettlement of all the refugees in the group.<sup>2</sup>

It appears, though, that not all governments can be taken to be in agreement with the Australian Minister as to what constitutes 'current international arrangements' in this regard. Doubts concerning this practice surfaced as early as December 1979, when the British tanker, *Entalina*, rescued 150 Vietnamese refugees from a vessel that was in the process of sinking in the Java Sea. When the *Entalina* attempted to disembark the refugees at Darwin, the Australian Government stated that it was prepared to offer the refugees temporary accommodation at the Darwin Quarantine Station on condition that the British Government accept responsibility for their eventual resettlement.<sup>3</sup>

Refugees with serious medical conditions were immediately allowed ashore, but those not ill enough to be admitted to Darwin hospital were forced to remain on board the *Entalina* pending the outcome of negotiations between the Australian and British Governments. These negotiations proved to be rather protracted. Part of the problem arose from the British Government's reluctance to guarantee that it would resettle the refugees. The British Government made it quite clear to the Australian authorities that it did not regard the practice of flag state resettlement as an established

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1. *Sydney Morning Herald* 27 June 1980.

2. *The Canberra Times* 18 June 1980.

3. *Sydney Morning Herald* 5 December 1980.

principle of international law.<sup>4</sup> They appear initially to have considered that the practice was geographically limited to South-East Asia, where all possibility of local resettlement was ruled out; in other cases in other regions they considered that the principle of first port of call responsibility should apply.<sup>5</sup>

This incident serves to illustrate the fact that as long as international law and practice remain unsettled, the real victims, the refugees (who in this case had fought off two pirate attacks and who, at the time of their rescue, had been without food and water for a week), will be left to languish while governments squabble over which one should accept responsibility for their welfare.

Even so, the victims aboard the *Entalina* were, in one sense, fortunate. They, at least, had been rescued. If recent reports concerning the fate of seagoing refugees are accurate, many refugees from South-East Asia are being allowed to drown by the world's merchant shipping fleets and government ships alike. There is ample evidence to suggest that while the flow of asylum-seekers crossing the high seas in South-East Asia continues, proportionately fewer of them are being rescued by a decreasing number of ships. Furthermore, available statistics indicate that merchant ships have been responsible for only two per cent of Vietnamese boat refugees rescued to date;<sup>7</sup> this despite the fact that many refugee vessels traverse sea routes routinely used by these fleets.

One episode involving a tragic loss of life occurred in May 1980, when several Singapore navy patrol boats were reportedly involved in an incident in which a Vietnamese refugee vessel was deliberately allowed to sink. The vessel had set out from Southern Vietnam. Its destination was one of the several island camps for Indo-Chinese refugees in Indonesia's Riau archipelago, south of Singapore. The vessel's engine broke down off the Singapore coast and the boat started to leak. A Singapore navy ship approached but refused to tow the refugee boat to safety or to assist in repairing the engine. The refugees were warned not to enter Singapore waters.

Over the next few days, as the refugee boat rode at anchor, different Singapore navy vessels kept it under surveillance. On 4 May, a violent squall struck and a hole that had appeared in the side of the refugee boat became enlarged. When yet another storm broke the following morning, the boat began to sink. A Singapore navy patrol boat about 100 metres away stood by without offering assistance. An hour later, when all the refugees were in the

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4. *The Australian* 5 December 1980.

5. In the event the British Government did accept for ultimate resettlement in the UK any refugees not resettled in other countries: Goodwin-Gill, unpublished text of a lecture given at a UNHCR Refugee Law Course at the International Institute of Humanitarian Law, San Remo, 22 Nov - 4 Dec 1982, 7.

6. Feldman, Chief of the Resettlement Section UNHCR. Report on the Meeting of a Working Group of Government Representatives on the Question of Rescue of Asylum-seekers at Sea (EC/SCP/21 of 24 Aug 1982), 6.

7. Statement of de Haan, UNHCR representative at a Meeting of Experts on Rescue Operations for Refugees and Displaced Persons in Distress in the South China Sea, Geneva, Aug 1979 (hereinafter referred to as the Mtg on Rescue Operations).

water, a lifebuoy attached to a rope was hurled towards them from the patrol boat. Two children were lifted aboard but several men and women holding onto a rope ladder hanging over the side of the boat or treading water nearby were refused permission to board. A short while later, the two children were lowered back into the water. The patrol boat pulled away without leaving even a lifebuoy behind. Several of the refugees drowned. The survivors were later rescued by the Indonesian crew of a Panamanian registered tanker assisted by the crew of an American owned yacht.<sup>8</sup>

For the master of any ship, be it government or privately owned, to allow people to perish in such a manner is a flagrant dereliction of international law and humanitarian principles. Despite this, it is undoubtedly true that, in particular, masters of passing freighters have ignored refugee vessels in distress on the high seas. As a result, thousands of refugees have drowned at sea.<sup>9</sup> Many have been left, adrift in small, unseaworthy craft, to their fate on waters made additionally hazardous by weather, sharks and pirates,<sup>10</sup> through the crass indifference of passing ships to their plight.

The reasons behind the tardiness displayed by masters of private vessels in fulfilling their international humanitarian obligations to rescue persons in distress at sea will be examined shortly. Without doubt, however, financial considerations have played a part. It is common knowledge that considerable expenditure may be incurred through the initial rescue at sea in respect of which the ship's master may harbour scant hope of reimbursement. But by far the greater expense is incurred due to the reluctance of many coastal states to grant even temporary disembarkation facilities to rescued refugees pending the extension of resettlement guarantees by the flag state. In such cases ships' masters may be forced not only to keep the unfortunate refugees on board but are also delayed for lengthy periods from continuing their voyages. There are many instances documented of merchant ships that had picked up refugees at sea being refused admittance to Asian ports, even when they had cargoes to unload. Other instances are reported of such ships being kept under close guard, the crew not being allowed to disembark.<sup>11</sup>

Pugash<sup>12</sup> suggests that

“(t)he refugees and the ship captains who could save them are both victims of an anomaly growing out of two well-known principles of international law. It is well settled that the master of a ship is duty bound to rescue anyone in danger of being lost at sea. It is no duty to admit unwanted refugees. The plight of the Vietnam refugee draws the two principles together in the Catch 22 of the law of the sea. The shipmaster

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8. *The Age* 16 May 1980.

9. See statement of High Commissioner, Mtg on Rescue Operations.

10. Keesing's *Contemp Arch*, 10 Sept 1982, 31691, notes UNHCR estimates that during 1981, 455 small boats left Vietnam for Thailand carrying 17,000 refugees. 80% of those boats were attacked by pirates, some of them on several occasions. 571 refugees were killed. 243 women abducted, 590 women raped. Other estimates indicated a much higher incidence of death in pirate attacks on boats.

11. Keesing's *Contemp Arch*, 8 Feb 1980, 30076.

12. Pugash, "The Dilemma of the Sea Refugee: Rescue without Refuge" (1977) 18 *Harv Int LJ* 577 at 578.

of a freighter in waters off Indonesia is obliged to rescue Vietnamese sea refugees, but no nation is bound to take refugees once they have been rescued.”

It is my intention in this paper to analyse the rules of international law concerning rescue at sea in order to show that the ‘anomaly’ which is of such concern to Pugash is one which, through concerted international effort to resolve the problem, may yet prove to be apparent rather than real.

### **International legal norms**

The international obligation to rescue persons in distress at sea developed originally in response to the needs of victims of ‘ordinary’ ship-wrecks. As long as most of these victims remained nationals of one state or another, which were both willing and able to afford them protection, few difficulties arose as regards the implementation of this duty. Once, however, refugees, especially refugees in large numbers, become the victims of ship-wrecks, the problem assumes a further and novel dimension. States become reluctant to admit responsibility for them, especially where the possibility of a large-scale influx of refugees exists. The international community has still to work out a viable and generally acceptable solution. Until such time that this is done, the plight of the sea-going refugee can only grow more desperate. And until this is done the urgent plea of the United Nations High Commissioner for Refugees to the effect that “those in distress must be rescued before they die” and that the “masters of vessels in the area must scrupulously observe the law of the land in this regard”<sup>13</sup> will simply go unheeded.

The humanitarian duty to rescue those in danger at sea was first given legal expression with the signing in 1910 of the Brussels Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea.<sup>14</sup> Prior to this maritime law imposed only a moral obligation to save life at sea<sup>15</sup> except if a member of a ship’s crew had fallen overboard, in which case the ship’s master was duty bound to attempt to save him.<sup>16</sup>

Article 11 of the Salvage Convention stipulates:

“Every master<sup>17</sup> is bound, so far as he can do so without serious damage to his vessel, her crew and passengers, to render assistance to everybody, even though an enemy, found at sea in danger of being lost.”

This provision has become the cornerstone of the duty to rescue at sea. The Convention has been ratified by sixty-three nations.<sup>18</sup> Since then similar provisions have been endorsed by most major international agreements

13. See statement of High Commissioner, Meeting on Refugees and Displaced Persons in South-East Asia, Geneva, 1979.

14. UKTS 1913, No 4 (hereinafter cited as the Salvage Convention).

15. Robinson G, *Handbook on Admiralty* (1939), 722.

16. Prosser W, *Law of Torts* 4th ed (1971), 341.

17. It should be noted that this duty is imposed solely on the ship’s master. Art 11 specifically exempts the owner of the vessel from liability.

18. Australia acceded to the Salvage Convention in its own right by an instrument deposited on 24 Oct 1930: Aust TS 1971, No 1. Parry and Hopkins, *Index of British Treaties* (1970). Vol 2 559, give the date as 9 Sept 1930.

pertinent to safety of life at sea. These latter provisions have generally taken the form of more detailed or qualified directives of the general principle enunciated in Article 11.

The 1929 International Convention for the Safety of Life at Sea<sup>19</sup> provides,<sup>20</sup> for example, that the master of a ship, on receiving a *wireless* distress signal from any other ship, is bound to proceed with all speed to the assistance of those in distress.

The 1960 International Convention for the Safety of Life at Sea<sup>21</sup> is phrased in broader terms, thereby extending this obligation further. It provides<sup>22</sup> that the master of a ship at sea

“on receiving a signal *from any source* that a *ship* or *aircraft* or *survival craft* thereof is in distress, is bound to proceed with all speed to the assistance of the persons in distress informing them if possible that he is doing so. If he is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, he must enter in the log book the reason for failing to proceed to the assistance of the persons in distress.”<sup>23</sup>

It is noteworthy that in most instances a specific clause has been added to the text of these latter conventions to the effect that the application of the latter convention shall not prejudice the operation of the Salvage Convention, particularly the obligation to render assistance imposed by Article 11 of that Convention.<sup>24</sup> From this it follows that the provisions of the latter conventions should be applied not in place of but rather in conjunction with the Salvage Convention. These provisions should be interpreted as enlarging upon rather than restricting the scope of the obligations imposed by the Salvage Convention.

The duty to rescue persons in distress at sea has also found expression in the 1958 Convention on the High Seas.<sup>25</sup> The International Law Commission, which prepared the draft articles, noted that it reflected the state of international law at the time it was written.<sup>26</sup> Article 12(1) of the 1958 Convention embodies Article 11 of the Salvage Convention and elaborates on it. It stipulates that every state party to the 1958 Convention is obliged to require the master of a ship sailing under its flag, in so far as he can do so without danger to the ship, the crew or passengers:

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19. 136 LNTS 82.

20. Art 45(1).

21. Aust TS 1968, No 7.

22. Chap V, reg 10a.

23. Art IV of this Convention contains further reference to the duty to rescue at sea, as does Art IV of the 1948 International Convention for the Safety of Life at Sea: Aust TS 1960, No 1. These provisions, although placing a *prima facie* duty on the master of the rescuing vessel to assist those in distress, tend to suggest that the onus lies on him to assess whether the other vessel is really in need of assistance. If this is so, it may well provide a ready excuse for masters who are less than eager to carry out their international obligations in this regard. Such an interpretation would certainly aggravate the plight of the sea refugee.

24. See Art 45(6) of the 1929 International Convention for the Safety of Life at Sea; also reg 10(e) of the 1960 International Convention for the Safety of Life at sea.

25. Aust TS 1963, No 12.

26. Report of the ILC to the GA (8th Sess), 11 GAOR, Supp (No 9) 27; UN Doc A/3159 (1956).

- “(a) to render assistance to any person found at sea in danger of being lost;
- (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;
- (c) after a collision, to render assistance to the other ship, her crew and her passengers and, where possible, to inform the other ship of the name of his own ship, her port of registry and the nearest port at which she will call.”

This provision was incorporated in almost identical terms in the Informal Composite Negotiating Text<sup>27</sup> by the Second Committee of the Conference on the Law of the Sea,<sup>28</sup> and is now entrenched as Article 98 of the United Nations Convention on the Law of the Sea.<sup>29</sup> The most recent statement of the law thereby clearly reiterates the international obligation to render assistance to any person found at sea in danger of being lost. The plethora of international conventions, repeating as they do the duty to rescue at sea, constitute irrefutable evidence of the widespread acceptance of and respect for this practice as customary international law.

In the light of the earlier conventions, the Inter-Governmental Maritime Consultative Organisation (IMCO)<sup>30</sup> devised a manual<sup>31</sup> which tabulated the various obligations regarding assistance at sea. These responsibilities were prefaced by the statement<sup>32</sup> that “it is accepted as the normal practice of seamen, indeed, there is an obligation on masters, that they render assistance within their power in cases where a person or persons are in distress at sea.”

As this summary of current international law and practice indicates, the duty to render assistance at sea evolved without any thought being devoted to refugees at sea. Despite this, nothing operates to exclude refugees from the ambit of this duty. The duty to rescue is based on purely humanitarian considerations and few could seriously argue that refugees are not deserving beneficiaries. Political and financial factors should in no way be allowed to derogate from the operation of this humanitarian principle. The rule is a simple one — assistance should be rendered to every person in distress at sea provided only that this can be achieved without seriously endangering the vessel or the lives of the crew on board. The position was restated recently by the Executive Committee of the High Commissioner’s Programme in the conclusions adopted in its report on the thirty-second session<sup>33</sup> thus:

“It is recalled that there is a fundamental obligation under international law for ships’ masters to rescue any persons in distress at sea, including asylum seekers, and to render them all necessary assistance. Seafaring

27. Article 98.1.

28. UNCLOS III, Sixth Session, 23 May - 15 June 1977: UN Doc A/CONF. 62 WP.10 with Corr. 1-3: text in (1977) 16 ILM 1108.

29. A/CONF. 62/122 of 7 Oct 1982: text in (1982) 21 ILM 1261.

30. Subsequently renamed the International Maritime Organisation (IMO).

31. *The Merchant Ship Search and Rescue Manual* (MERSAR).

32. Intro, 1, para 0.3.1.

33. Report of the Thirty-Second Session of the Executive Committee of the High Commissioner’s Programme (A/AC. 96/601 of 22 Oct 1981), 18.

States should take all appropriate measures to ensure that masters of vessels observe this obligation strictly.”

### **Australian municipal law**

In the Commonwealth of Australia, as in many other countries, municipal legislation has been enacted to implement internally the country's international obligations. This is in accordance with the general rule in Anglo-Australian law that treaties imposing new rights and obligations on individual citizens need to be incorporated into municipal law. The provisions of the Salvage Convention, Article 12 of which explicitly requires states parties to enact legislation that will prevent infringements of Article 11 of the Convention, were originally incorporated into Australian law under a 1920 amendment to the Navigation Act 1912. The relevant provisions of the Navigation Act have subsequently been amended to give effect to the obligations contained in regulation 10 of Chapter V of the 1960 Safety of Life at Sea Convention and Article 12 of the 1958 Geneva Convention on the High Seas. Sections 265 and 317A of the Navigation Act are now the two provisions central to the duty to provide assistance to vessels and persons in distress at sea.

Section 265(1) obliges the master of a ship registered in Australia or engaged in the coastal trade, who has reason to believe that persons on or from a vessel are in distress, to proceed with all practicable speed to the assistance of those persons. Section 265(2) empowers the master of a vessel in distress, after consultation with the masters of ships which answer his call for assistance, to requisition such of those ships as he considers best able to render assistance. Failure to comply with either sub-section has been made an indictable offence. It can be seen that no distinction has been drawn by the legislature between government and privately owned vessels. The test is whether the ship has been registered in Australia. Indeed, it would appear from the wording of s 265(1) that the obligation to rescue extends not only to Australian registered ships but encompasses as well foreign registered ships engaged in trade off the Australian coast.

Section 317A makes it an indictable offence for the master of a vessel registered in Australia to fail to render assistance to *any person* who is found at sea in danger of being lost, even if such person is a subject of a foreign state at war with the country. A fortiori this provision must apply in the case of failure to assist refugees in distress at sea who are not subjects of foreign states at war with Australia.

Although it remains unlikely, due to practical considerations,<sup>35</sup> that many violators will ever be prosecuted in Australia, these laws are at least a manifestation of the government's serious intention to abide by and to implement its international obligations. And by the simple expedient of the government issuing, from time to time, a notice to owners and masters of ships flying the Australian flag, drawing attention to the municipal law

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34. No mention is made in s 317A of foreign registered ships plying the coastal trade.

35. For a resume of these considerations, see Pugash, *op cit*, 580. No one has yet been prosecuted in Australia under these laws.

provisions and stressing their applicability to refugees, the necessary encouragement may be given to ships' masters to carry out their duty so that a potential loss of life may be averted.

In this regard it is interesting to note certain suggestions made at the recent meeting of the Working Group of Government Representatives on the Question of Rescue of Asylum-Seekers at Sea, held in Geneva in July 1982, as part of the Executive Committee of the High Commissioner's Programme.<sup>36</sup>

During the ensuing discussion, the unqualified nature of the duty to rescue at sea was unanimously recognised. One speaker stated his belief that the obligation to rescue was not sufficiently clearly defined at international law and should be appropriately strengthened by placing a clearer responsibility on ships' owners in addition to the existing responsibility of ships' masters.<sup>37</sup> While there was general agreement that ships' masters should not in any way be held liable for undertaking rescue missions, it was nevertheless considered that to seek to redefine the international obligation would be inappropriate and that the most effective means was legislation at the national level.

Those remarks serve to highlight the need for governments to work hand in hand with international organisations in order to establish and maintain effective measures in relation to the duty to rescue at sea.

### **Search and rescue: the active/passive debate**

Most states have recognised the fundamental importance, from the humanitarian standpoint, of the need publicly to broaden the international duty to rescue people in distress at sea by including refugees and displaced persons within the ambit of that duty. To this end they have pledged in international forums to take steps to ensure that masters of ships flying their flag be reminded of these obligations.<sup>38</sup>

Despite this, in certain cases information regarding the presence of refugees in danger at sea, relayed by aircraft forming part of a country's search and rescue operations, has been disregarded by merchant ships in the vicinity. Since it is considered essential that all ships render assistance when called on to do so by search and rescue units operating in particular areas, some form of incentive to comply with the duty to rescue must be found. States have generally indicated their willingness to issue the appropriate directives in this regard to the master and crew of all ships flying their flag. But most states have expressed doubts as to the need to establish 'active' search and rescue operations for the express purpose of rescuing refugees in danger of being lost at sea. Alternatively, some states have indicated that their governments are not in a position to make special search and rescue units available for this purpose.<sup>39</sup>

There appear to be delicate political issues surrounding initiation of *active* search and rescue programmes, at least in the vicinity of the South China Sea.

36. Report on the Meeting of the Working Group of Government Representatives on the Question of Rescue of Asylum-Seekers at Sea (EC/SPC/21 of 24 Aug 1982), 4-5.

37. The IMO representative stated that his headquarters had advised that no member state had thus far made any such proposals for consideration by the IMO.

38. Mtg on Rescue Operations, Summary Report 1.

39. Ibid.



Many ASEAN countries are convinced that such a programme would merely stimulate an increased outflow of boat people from Vietnam and other arenas of international conflict, thereby increasing their already disproportionately heavy refugee burden. Their argument is that news of 'successful' rescue missions filters back to Vietnam and lends credence to the belief, however inaccurate, that sea-going refugees have an excellent chance of being rescued and resettled in countries of their choice, and this without refugees having to endure the agonies of an interminable wait in transit camps.

Orders by President Carter on 19 July 1979 to US warships and aircraft operating in South-East Asian waters to keep a special watch for Vietnamese boat people and to pick them up whenever possible aroused widespread criticism, especially as US broadcasts in Vietnamese gave precise information about the position of the ships. Statements issued by Tan Sri Ghazali, the Malaysian Home Minister, on 30 July, by the Vietnamese Foreign Ministry on 2 August and by the Indonesian Foreign Ministry on 6 August pointed out that the presence of the US rescue ships coupled with the publicity given to them would encourage Vietnamese to leave the country. These beliefs were to some extent confirmed by refugees picked up by the US ships, who said that they had decided to leave Vietnam after hearing broadcast reports of President Carter's order. Furthermore, shipping circles in Singapore, quoted by *The Daily Telegraph* (London) on 30 July, suggested that upon the President lay the responsibility for the drowning of many of the people who were thus induced to put to sea in small boats at a time when tropical storms were frequent in the South China Sea.<sup>40</sup>

These criticisms, if true, are undoubtedly of a serious nature. However, whether the mere possibility of rescue at sea would materially influence the decision of people to leave their country of origin and venture out upon the ocean in patently unseaworthy vessels is debateable in view of the fact that such decisions are based on a large number of factors related primarily to conditions prevailing in the refugees' countries of origin. It is no easy task to assess how much weight should be attached to the possibility of rescue at sea as a factor inducing the flight of refugees in the light of all these other factors. Events in the past few years have shown, for example, that hostile reactions on the part of neighbouring states and other members of the international community aimed at discouraging refugees have not had any appreciable effect in deterring South-East Asian refugees from fleeing their countries of origin. And news of such hostile reactions has, without doubt, been reported in South-East Asian countries. The promise and hope of a better life has proved to be a powerful magnet to flee, and this despite all the risks involved. On the other hand, it is difficult to refute the argument that any notable increase in successful sea rescue operations is likely to result in the increase of incidents of deliberate scuttling by refugees of their boats. However, this factor alone is not 'serious' enough to warrant the abandonment of efforts to promote more effective search and rescue operations.

The practice of states in regard to 'active' or 'passive' search and rescue operations varies widely. The United States of America is one of the few

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40. Keesing's Contemp Arch, 8 Feb 1980, 30082.

countries to have initiated 'active' search and rescue missions in regard to sea-going refugees. The ships and aircraft of the United States Seventh Fleet have in the course of their regular missions over a lengthy period of time been helping Indo-Chinese refugees in trouble at sea. Existing directives to render assistance to vessels in distress and, if unseaworthy, to embark their passengers, were strengthened when President Carter issued the Seventh Fleet with orders directed to long range reconnaissance flights and increased patrolling designed to locate and seek help for refugee boats in distress. In compliance with the President's orders, long range maritime patrol aircraft were dedicated exclusively to daily surveillance missions intended to detect and, where necessary, to facilitate assistance to refugee boats in the South China Sea. In addition, all naval commanders adjusted formations to increase opportunities for detection<sup>41</sup> and assigned their embarked helicopters and carrier patrol aircraft to refugee boat surveillance and assistance missions while transiting these waters.

When US surveillance aircraft discovered refugee boats in trouble, this information was referred to US Naval Surface Units in the area so that they could render assistance. If no such units were available, the aircraft commander communicated with the Air Force Search and Rescue Co-ordination Centre at Clark Air Force Base. This Centre, in turn, broadcast the location of the vessels on the high frequency international distress channel in order to alert passing ships which might come to the rescue of the refugee boats. Alternatively, if any merchant ships were in the vicinity, the aircraft commander might have attempted to communicate with them on the high frequency channel, or to convey the message by means of lights, flares, circling the boat, wagging wings and flying in the direction of the boat in distress.

American aircraft commanders met with mixed success in these endeavours. Some ships in the vicinity that had been alerted to the presence of refugee vessels in distress had altered course to investigate. Others appeared not to have understood the intention behind the aircraft manoeuvres. Still others had apparently decided, for whatever reason, not to stop at all. Most of the latter had been ships flying flags of convenience.<sup>42</sup>

Most states have not instituted such elaborate 'active' search and rescue operations. The majority have been content merely to issue instructions to both government and private vessels to rescue refugees in danger of being lost at sea in accordance with existing international practice. The Canadian Government, for example, has required its vessels which happen to be on the spot to render assistance to refugees in distress in South-East Asian waters, but it has not sent ships or warships to the area for the sole purpose of assisting refugees. The Australian situation appears to be similar to that of Canada.

In some countries where there are no government plans for 'active' search and rescue programmes, registered voluntary agencies have been operating

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41. This has taken the form *inter alia* of dispersed formations and daylight transits of likely areas.

42. See statement of USA representative at the Mtg on Rescue Operations.

their own missions. One such Norwegian voluntary agency operating a vessel out of Singapore saved 252 refugees on its first voyage, all of whom were subsequently accepted for resettlement by Norway.

Certain countries, notably Japan, appear to be precluded from initiating 'active' search and rescue programmes on constitutional grounds: the Japanese constitution precludes the Government from despatching military forces overseas. This ban is regarded as covering even such humanitarian activities as the rescue of refugees. This legal obstacle could perhaps be avoided if rescue operations were to be carried out by Japanese coast guard vessels not forming part of the Japanese navy.

Whether 'active' search and rescue operations are required to be carried out by states under current international law is a moot point. The Salvage Convention merely obliges masters of vessels to render assistance to everybody "*found at sea in danger of being lost*"<sup>43</sup>. No 'active' duties in the sense discussed above could be implied from this provision.

Certain of the subsequent international instruments do, however, seem to require *some* form of 'active' search and rescue units to be established by coastal states. In terms of the 1974 International Convention for the Safety of Life at Sea<sup>44</sup> each contracting government undertakes "to ensure that any necessary arrangements are made for *coast watching* and for the rescue of persons in distress at sea *around its coasts*". These arrangements include "the establishment, operation and maintenance of such maritime safety facilities as are deemed practicable and necessary having regard to the density of the sea-going traffic and the navigational dangers and should, as far as possible, afford adequate means of locating and rescuing such persons."<sup>45</sup>

The obligations contained in this Convention are limited in that they are confined to rescue operations in the coastal waters of each contracting party and as a result would not be of much assistance to the majority of sea-going refugees who find themselves in danger on the high seas. Nonetheless, they could be invoked against states parties to the Convention to prevent incidents, such as the Singapore navy incident mentioned earlier in this paper, from taking place.

The 1958 Convention on the High Seas and the United Nations Convention on the Law of the Sea contain virtually identical provisions which appear to extend the obligation to promote search and rescue operations even further. Article 12(2) of the former convention as well as Article 98(2) of the latter Convention oblige coastal states to "promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety *on and over the sea*, and where circumstances so require, by way of mutual arrangements, co-operate with neighbouring States for this purpose". Search and rescue duties in terms of these provisions are clearly not confined to coastal waters. However, the wording of these articles is such that they may be given a broad or narrow interpretation, depending on the proclivity of the various states. The use of the verb "promote" is exhortatory

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43. Art 11 (emphasis supplied).

44. Chap II, reg 15 (emphasis supplied).

45. *Ibid.*

rather than immediate in its effect. And this factor may enable states to avoid incurring international liability through lack of an 'active' search and rescue programme, provided only that such states can prove that some steps have been taken (however few and halting) to promote the establishment of search and rescue units.

### **Financial considerations**

Government vessels do, by and large, comply with the international obligations to rescue. As has already been noted, merchant shipping vessels are often not so forthcoming. This apparent derogation of duty does, to a large extent, flow from financial considerations. Rescue ships could be exposed to the risk of considerable financial loss through an interruption of their normal operations. Two basic costs are involved here. The first relates directly to the actual rescue operation. The second is the cost associated with delayed disembarkation procedures. Rescue costs increase dramatically where lengthy delays occur before rescued refugees and displaced persons are disembarked. If ships' masters felt confident that they would be able to land refugees at their first scheduled port of call without incurring additional delay-associated costs, they might be readier to discharge their own international obligations to rescue in the first instance. But, as the matter stands at the moment, states have not been uniformly forthcoming with guarantees of resettlement or even of temporary asylum. Without such assurances there can be no doubt that the possibility of resultant financial losses will, in so far as the owners and masters of merchant ships are concerned, act as a disincentive to rescue.

Prior to the Salvage Convention the life salvor was generally not entitled to claim any pecuniary compensation from the individuals he had rescued.<sup>46</sup> The Salvage Convention laid the legal foundation for life salvage compensation by providing generally that "(e)very act of assistance of salvage which has had a useful result gives a right to equitable remuneration".<sup>47</sup> Article 9 provided even more specifically that "salvors of human life who have taken part in the services rendered on the occasion of the accident, giving rise to salvage or assistance, are entitled to a fair share of the remuneration awarded to the salvors of the vessel, her cargo and accessories". In the case of refugees being rescued at sea, the problem is that these rights are of little practical worth to the salvor. For one thing, no remuneration is due to him under the above-mentioned provisions of the Salvage Convention from the persons whose lives have been saved,<sup>48</sup> although the Convention does not invalidate provisions of municipal law to the contrary.<sup>49</sup> For another, even if they were

46. See Jarrett, "The Life Salvor Problem in Admiralty" (1954) 63 Yale LJ 779; and Pugash, *op cit.*, 582.

47. Salvage Convention, Art 2.

48. Art 9.

49. *Ibid.* The Australian Navigation Act 1912 provides for payment of a reasonable sum by the owner of the ship or vessel to the salvor who assists the ship or saves any wreck (s 317), but also provides that salvage in respect of the preservation of life, when payable by the owner of the rescued ship, shall be payable in priority to all other claims for salvage (s 315 (2)).

legally bound to compensate their rescuers, most sea-going refugees would not have the financial resources to do so. Similarly, the right of life salvors to a fair share of the remuneration awarded to the salvors of the vessel and her cargo would be of practical value only in the few instances where the owners of the stricken vessel would be liable for such remuneration. Where the refugees themselves own the stricken vessel, even this limited right to compensation becomes worthless.

Such losses might possibly be recouped under existing 'mutual insurance' arrangements and, in particular, by the facilities provided by maritime Protection and Indemnity (P and I) Clubs. Unfortunately, little information is available on which to base an authoritative comment although the matter is important enough to warrant consideration.

One feasible solution to the problem of compensation would be for individual governments to establish state-controlled funds for this purpose. Merchant ship owners sailing under their flags would then be entitled to apply to their governments for reimbursement of expenses arising out of attempts to rescue refugees. This approach was recently adopted by the Norwegian Government in response to an appeal made to it by Norwegian ship owners whose fleets had been involved in the rescue of refugees at sea. By acting in this way even though not strictly bound to do so, the Norwegian Government has set a commendable example to the international community. It has abided by the spirit of all the various international instruments which aim to promote the establishment, operation and maintenance of adequate and effective search and rescue services on and over the sea.

Another type of solution would be for the international community as an integrated whole to undertake the primary responsibility for compensating individual ship owners. To some extent this is already taking place in that funding arrangements have been established under which the UNHCR reimburses ship owners for incidental expenses incurred in the disembarkation of refugees. This reimbursement is presently limited to US\$5000 per ship and is available only on the basis that such claims are not recoverable from any other sources. Suggestions have also been made at various international forums to expand the DISERO scheme to include a funding arrangement (DISERFO) to meet costs associated with rescue, disembarkation and temporary admission, but nothing has as yet come of these.<sup>50</sup>

While some thought should also be given to the possibility of state-owned ships being eligible to claim such compensation, the major effect of an international body such as UNHCR setting up a central compensation fund is undoubtedly that its very existence will serve to encourage private shipping companies to comply with their international obligations to rescue refugees in distress at sea. Shifting the financial risk in this way from individual shipping companies, insurance companies and even states with large merchant shipping fleets to the international community as a whole is certainly to be

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50. Preliminary Report on Suggestions Retained by the Working Group of Government Representatives on the Question of Rescue of Asylum-Seekers at Sea (EC/SPC/24 of 1 Oct 1982), 2.

regarded as a fairer and more equitable system of loss distribution. In policy terms it is undoubtedly more in line with the concept of international burden-sharing currently being developed as one solution to the problems caused by the mass exodus of refugees and other displaced persons from one country to another. In practical terms it ensures that private shipping lines will not suffer excessively in a financial sense and will not have to rely on individual governments being forthcoming with offers of financial assistance. Moreover, an international compensation fund will assist in lightening the financial burden of states which are possessed of large merchant shipping fleets and may assist in encouraging rescue missions by ships flying flags of convenience.

### **Duties of coastal states**

Perhaps even greater than the costs involved in the initial rescue attempts at sea are those costs, measured in time and sheer effort as well as in money, associated with the disembarkation of rescued refugees. Prompt and orderly disembarkation procedures must therefore be regarded as key elements in any successful rescue operations. The prospect of stark refusals or lengthy delays by the authorities at scheduled ports of call to accept at least temporary charge of the rescued refugees must, without doubt, be viewed by ships' masters and the operators of the world's merchant shipping fleets as further serious disruptions of maritime commercial activities. In particular, in the case of any large-scale influx of sea-going refugees, such refusals or delays on the part of coastal governments could result in placing in jeopardy the entire commercial operations of such companies. Seen in this light, the prospects for disembarkation must be a vital consideration with ships' masters in deciding in the first instance whether to abide by their international obligations to render whatever assistance may be possible to refugees in distress at sea.

People other than refugees and displaced persons, rescued at sea in the 'ordinary' course of events, will in general have a country to return to as well as a national government prepared to extend to them its full protection. In these instances the authorities at the rescue ship's scheduled ports of call will not be confronted with the possibility of having to care for such individuals on any indefinite basis. In practical terms this means that the problems associated with disembarkation are peculiar to refugees and solutions will have to be developed within the framework of refugee law.

Ships' masters can merely be expected to render assistance to all persons whom they might find in distress at sea. They cannot be asked to shoulder the additional burden of negotiating disembarkation guarantees should those they rescue turn out to be refugees or other displaced persons. Disembarkation in such circumstances will inevitably involve questions of asylum or temporary refuge and any such matters quite properly fall within the responsibility of states, not individual companies.

The problem is that international law in this regard remains unsettled and the practice of states varies considerably. The predominant point of view aired at international forums seems to be that refugees rescued at sea should normally be disembarked at the next port of call of the rescue vessel, provided

that the port at which disembarkation is being sought is scheduled in the course of the ship's normal business.<sup>51</sup> The rationale behind this view is the application of the principle that those in search of asylum should always receive at least temporary admission. However, as observed by the IMO representative at a working group established under the auspices of the UNHCR, which met in Geneva in July 1982 with the object of studying the problem and elaborating principles and measures which would contribute to solutions, no "formal multilateral agreement" is yet in existence containing provisions to the effect that people rescued at sea should be disembarked at the "next scheduled port of call".<sup>52</sup>

State practice is also unclear. Some states have at times refused to allow the landing of any refugees who arrived by sea.<sup>53</sup> Other places, like Hong Kong, have not only provided temporary shelter to many thousands of sea-going refugees but have moreover accepted many of them for permanent resettlement. Yet other states have expressed their willingness to provide temporary disembarkation facilities subject to guarantees by flag states to resettle the refugees on a permanent basis within a reasonable period of time.<sup>54</sup>

Indications are that the international community has begun to recognise that the refugee problem cannot be resolved by well-intentioned states acting on an individual basis. While it is inevitable that countries in the geographical vicinity of the rescue operations will be called on to bear the initial brunt of any mass influx of sea-going refugees, ultimately the burden must be shared amongst the entire international community. It was in this spirit that the Executive Committee, meeting in Geneva in October 1981 for the thirty-second session of the High Commissioner's programme, recommended that "(i)n cases of large-scale influx, asylum seekers rescued at sea should always be admitted, at least on a temporary basis. States should assist in facilitating their disembarkation by acting in accordance with the principles of international solidarity and burden-sharing in granting resettlement opportunities."<sup>55</sup>

International solidarity can assume many forms. One manifestation would be for the international community to provide financial assistance to countries of first asylum. Such assistance would have the effect not only of alleviating the immediate administrative and financial burden placed on coastal states but would also serve to encourage them to allow at least the temporary disembarkation of refugees rescued at sea by assuring such states of tangible international support. A fund controlled by an international organisation such as UNHCR would probably be well suited to this task.

The feasibility of establishing holding centres for refugees rescued at sea has also been mooted as a partial solution to the problems of disembarkation.

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51. Ibid, 1.

52. Report on the Meeting of the Working Group of Government Representatives (EC/SPC/21 of 24 Aug 1982), 4-5.

53. Keasing's Contemp Arch. 26 Mar 1976, 27647, cites Malaysia, Thailand and Singapore in this regard.

54. The delay by the Australian authorities in allowing refugees aboard the *E italina* to disembark in Darwin pending negotiations with the British Government tends to indicate that this is the Australian approach.

55. A/AC. 96/601, 18.

The primary benefit of the holding centres lies in the fact that once coastal states felt assured of being able to transfer rescued refugees to such centres with a minimum of delay, they would be more inclined to facilitate disembarkation of these unfortunates. Speedier disembarkation would in turn provide the incentive to ships' masters to rescue refugees in the first instance.

Singapore has offered to make available for use as holding centres the islands of Jalang and Tara but to date no advantage has been taken of this offer. Should the idea be implemented, some form of international regime would have to be worked out to ensure the efficient functioning of the holding centres. For example, provision would have to be made for firm guarantees of ultimate resettlement, for without such guarantees the refugees could, theoretically at least, languish indefinitely in a legal no-man's land.

Alternatively, the holding centres scheme would simply collapse. Arrangements would also have to take into account the need to avoid the possibility of "queue-jumping": refugees who find themselves in holding centres should not receive preferential treatment above other refugees as regards ultimate resettlement. The sanctioning of queue-jumping would not only have the effect of encouraging refugees to attempt to escape by sea but would cause unrest and provoke violence among the vast majority of refugees resident in other camps. Queue-jumping could also have the disastrous consequence of alienating the governments of countries where so many refugee camps are already situated, such as Thailand and Singapore.

### **Duties of flag states**

There is a growing but by no means uniform international practice on the part of flag states to offer the opportunity of permanent resettlement to refugees rescued by ships flying their flags.<sup>56</sup> This practice indicates that many states have publicly accepted responsibility for refugees in distress at sea and it may in time be regarded as forming the basis of a new international custom. As the legal position stands at present, however, the international obligations of flag states beyond the duty to rescue are neither explicit nor implicit.<sup>57</sup> Certain states<sup>58</sup> have extended this duty by assuming a moral responsibility for refugees rescued by ships of their ownership but flying the flag of another country. The Federal Republic of Germany, for example, is prepared to guarantee resettlement to refugees picked up by ships owned or chartered by the Federal Republic and having a German captain and crew. Where refugees are picked up by a German vessel chartered by some other country, or by a transnational corporation,<sup>59</sup> then the position is more complex: the German Government would regard the question of deciding who has responsibility for the refugees as a matter for negotiation.

56. Such is the practice *inter alia* in Australia, Norway, Sweden, Denmark, Canada, Israel, Switzerland and Germany. Cp the UK which has refused, as a matter of principle, to give any general undertaking to resettle refugees.

57. See statement of Bari, UNHCR Legal Adviser for SE Asia, in Report of the Meeting on the Rescue of Asylum-Seekers at Sea (EC/SPC/21), 4.

58. Notably the USA and Switzerland.

59. For example, an oil company.



As a matter of procedure, guarantees of resettlement will generally be given by the flag state to the authorities of the coastal state which has allowed refugees rescued at sea to be disembarked. Usually the guarantees will be made subject to the proviso that the refugees have not been accepted for resettlement elsewhere. Very often, refugees rescued at sea will have been accepted by third states. Prior acceptance of this type will depend to a large extent on preceding events as well as the eligibility criteria adopted by those states. For example, under the so-called family reunion criteria, many states will allow refugees to be reunited with the other members of their families already resident in those countries.

Guarantees of resettlement on occasion have taken the form of including provisos which aim to ensure that the guarantees will apply only to refugees who had expressed a wish to settle in the territory of the flag state. This type of proviso raises a number of issues. The first is the question whether refugees should be entitled to stipulate a preferred country of eventual resettlement and, if so, what weight should be given by states to their preferences. The second relates to the international duties of flag states and the question in what circumstances states should be able to excuse themselves from these duties.

These issues may be highlighted by several incidents occurring in recent months, in which oil tankers registered in Kuwait and Bahrain picked up South East Asian refugees on the high seas. Very soon after the rescues it became apparent that not only had those two countries wanted nothing to do with the refugees (and indeed did not allow them to resettle), but that the refugees in question on their part had expressed serious misgivings at the possibility of having to establish their homes in Kuwait or Bahrain.

On the one hand, the problem is that if such refugees and others in similar circumstances are forced against their will and in the face of a state's opposition, to settle in foreign countries whose ships have just chanced to rescue them at sea, so much ill-will might be engendered that flag states might look to alter adversely their practices regarding resettlement. On the other hand, it is without doubt impracticable to allow all refugees the right of resettlement in countries of their own choosing. The difficulty lies in balancing the interests of states and refugees. Within limits it should be possible to allow refugees to stipulate where they would prefer to settle and they should be given the opportunity to apply to those countries. But there can obviously be no promises in this regard. As far as states are concerned the simple answer is that, since there is at present no international law obliging flag states to offer any guarantees of resettlement, the fact that such guarantees may come with certain conditions can, a fortiori, not be faulted legally. This does not mean that such practices are above criticism. But perhaps a more constructive approach here would be to concentrate on the principle of international burden-sharing, which implies that all states, including those not directly involved in any particular rescue mission, should co-operate in the final resettlement of refugees. Application of the principle of burden-sharing would result in a large proportion of rescued refugees being accepted for resettlement in other countries. It would amount to recognition by third states that to place total responsibility on flag states in relation to resettlement

guarantees, although relieving the burden on coastal states, would nevertheless result in a distortion of the principle of equitable burden-sharing and would, in particular, involve an undue burden for those countries having a large maritime trade. The quid pro quo for such international co-operation should then be the introduction of the rule that where it proves to be impossible to accommodate the wishes of the refugees in a given situation and where it proves to be impracticable for third states to resettle the refugees, the flag state should accept responsibility.

A related problem for flag states has arisen out of the recent practice in certain countries of rescue vessels being especially chartered by groups of idealistic private citizens or by like-minded voluntary associations. In the Federal Republic of Germany, for example, groups of German citizens, who have received considerable financial support from the German public, have for many months been engaged in rescue operations in South-East Asian waters. One of the vessels chartered by them, the *Cap Anamour*, has reportedly rescued over 2,000 refugees. An American<sup>60</sup> registered vessel, the *Akuna*, presently operating out of Singapore, was similarly chartered by a non-government voluntary association with the specific objective of rescuing refugees in the South China Sea. (No figures are available regarding its success rate.)

If there can be said to be an emerging rule of international law that flag states have an obligation to offer guarantees of resettlement to refugees rescued at sea, then it follows that flag states would be obliged to extend resettlement guarantees to all refugees rescued by the crews of privately chartered rescue vessels which are registered in those countries. Apparently, offers of resettlement by flag states in these circumstances have not to date been readily forthcoming — one disturbing aspect of these private rescue missions being the reports that the rescuers have been concerned not merely with the initial rescue of sea-going refugees, but have moreover instructed the refugees in the art of entering countries of refuge illegally. Alternative practice has been for the rescuers to provide the refugee vessels with additional food and other necessary items coupled with advice on where to head for and how to get there.

The latter practice is not very alarming in the sense that there is a fair amount of evidence that many states have themselves indulged in similar conduct. It is common knowledge that several South-East Asian states have sent on boatloads of refugees after first refueling and revictualing the refugee vessel. The practice of assisting refugees in entering countries illegally may, however, prove counter-productive in the long run to the interests of refugees generally. However laudable the motives behind these actions, the danger is that the effect might be to antagonise and alienate formerly sympathetic governments as well as the general population. Admitting refugees in the course of lawful resettlement programmes involves quite different considerations from coping with illegal immigrants.

Should these activities and their associated problems become too widespread, governments may feel obliged to attempt to curtail the operations of

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60. This vessel was originally registered in Australia.

specially chartered vessels.<sup>61</sup> One possible means of doing so would be to deregister the vessels in question. The problem for governments wishing to pursue such a course remains that any such move might be seen to denigrate the spirit, if not the letter, of current international law and practice. Similar objections would attach to any attempt to prosecute the charterers and captains of such vessels under provisions of existing municipal legislation relating to the importation of prohibited immigrants into the country.<sup>62</sup>

Where the flag states *have* offered resettlement guarantees, the mechanics of resettlement processing have not appeared to present any major difficulties. Once the flag state has offered guarantees to resettle refugees and other displaced persons rescued at sea, actual processing either on board ship or in a territory where refugees are allowed to disembark on a temporary basis would generally be limited to practical arrangements for onward movement. It goes without saying that whatever measures are adopted for speeding up resettlement processing greatly improve the physical and emotional well-being of the refugees.

A more difficult issue does arise in relation to the problem of quotas. Where the flag state provides resettlement guarantees for refugees rescued at sea over and above its existing refugee quota, the question of priorities for resettlement will not normally occur. Where, however, after disembarkation, refugees and displaced persons are required to undergo resettlement processing within pre-existing quotas, the matter becomes one of greater complexity. In such cases, coastal countries in the areas which are host to other refugees might be reluctant to allow even temporary disembarkation as this would in effect reduce the number of refugees likely to be resettled from their territory.<sup>63</sup> On the other hand, should flag states be prepared to accept refugees rescued at sea in addition to their pledged quotas, this move might do much to encourage coastal states to be more receptive to granting rescued refugees temporary refuge and allowing them to pass through their processing centres.

Yet another aspect of the matter relates to the fact that if refugees rescued at sea were to be resettled by flag states within existing quotas rather than over and above those quotas, then, unless sufficient care was taken to avoid the possibility of queue-jumping, other refugees and displaced persons, who might have been waiting to be resettled for considerable periods of time, may be disadvantaged.

The problem of quotas is bound to remain difficult to solve. As long as the number of refugees rescued at sea remains relatively low and thus without appreciable effect on existing refugee relief programmes, states will presum-

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61. As Australian law now stands, charterers of Australian ships are under an obligation to rescue: Navigation Act 1912, s 265A.

62. S 21(1) of the Migration Act 1958 empowers the Minister to order the master, agent, owner or charterer of a vessel in which prohibited immigrants have arrived to remove them from the country at no charge to the Commonwealth. S 28(a) provides further that where a person enters Australia from a vessel and, by reason of his not being the holder of an entry permit, that person becomes, upon entry, a prohibited immigrant, the master, owner, agent and charterer of the vessel are each deemed guilty of an offence carrying a maximum fine of \$1000. See, too, in this regard s 22 and s 30.

63. Mtg on Rescue Operations, Summary Report 4.

ably not quibble too loudly at the idea of accepting these refugees over and above existing quotas.<sup>64</sup> However, as soon as the number of refugees rescued at sea begins to show any steady rise, states may begin to stipulate that all such refugees can only be accepted for resettlement within existing quotas.

### Flags of convenience

Some special problems have manifested themselves on occasions when rescue ships have been sailing under flags of convenience. The problem is not so much that ships sailing under flags of convenience may be less inclined to rescue refugees at sea. Indeed, although Liberia and Panama, two principal states where ships of convenience are registered, are not parties to the Salvage Convention,<sup>65</sup> neither Government has in any way demonstrated any tendency to flout international law in this regard. On the contrary, the Liberian Government has issued instructions to masters of ships flying the Liberian flag to adhere strictly to international rules relating to the rescue of refugees at sea. These instructions have been backed up by threats by the Government to remove from the Liberian registry any vessels which consciously and deliberately refuse to rescue refugees in distress at sea.<sup>66</sup>

The real problem turns on the related matters of disembarkation and resettlement. Countries willing to register ships with flags of convenience have not, by and large, been forthcoming with guarantees of resettlement. The reasons for such reluctance are not altogether clear but may well relate to fears of being 'swamped' by boatload after boatload of refugees. Since a large proportion of the world's merchant shipping fleets are registered in these countries, such fears are not totally without foundation.

In an attempt to resolve the dilemma of disembarkation and resettlement in such cases, as well as in other instances where the flag state of the rescuing vessel could not reasonably be expected to provide guarantees of resettlement, a United Nations meeting was convened in Geneva in July 1982.<sup>68</sup> Delegates from the seventeen countries represented at the conference discussed a plan known as DISERO<sup>68</sup> under which the littoral countries of first asylum would allow the ships in question to disembark rescued refugees, while firm guarantees of their subsequent resettlement would be provided by a group of countries of ultimate resettlement.<sup>69</sup> This group of countries agreed to establish a special joint resettlement pool, the object of which was to enable resettlement opportunities to be provided at the request of the UNHCR without the need for normal resettlement processing, in this way

64. This is the situation in the Netherlands. Very few refugees have been rescued by Dutch ships and those who have been picked up have not been included as part of the existing Dutch quota for resettlement.

65. US Dept of State, *Treaties in Force* (1980), 314.

66. Consultative Meeting with Interested Governments on Refugees and Displaced Persons in South-East Asia, Geneva, Dec 1978, Summary Report.

67. See Un Doc A/34/627, paras 31-6, Annex I.

68. Disembarkation Resettlement Offers (scheme).

69. A follow-up meeting of experts in Aug 1982 proposed that consideration should be given to a further principle of responsibility for nationally owned vessels sailing under a flag of convenience: Goodwin-Gill, *op cit*, 6.

obviating some of the difficulties with which the Office of the High Commissioner had previously been confronted in the course of arranging for the disembarkation of persons rescued at sea in these circumstances.

It was never intended that DISERO should operate in place of "normal" guarantees of resettlement by flag states but rather as complementary to them. The pool consists essentially of a special reserve of resettlement places guaranteed by a number of states who were already active participants in the resettlement of refugees. The idea behind the scheme was for these extra places to remain at the disposal of the UNHCR for emergency use in consultation with the donor country. The UNHCR, on its part, promised that it would make every effort to ensure resettlement in any country with which the refugees had links before utilizing the guarantee. It expected that a substantial number of those refugees disembarked on the basis of a DISERO guarantee would ultimately be admitted to countries other than the one offering the guarantee, as nowadays so many refugees from South-East Asia are able to resettle in countries where they have family or other special links. Seen in this light, the DISERO guarantees constitute a reservoir of emergency places to be used only sparingly.<sup>70</sup>

## **Conclusion**

As long as there are wars and other situations of internal and international armed conflict, there will be refugees and displaced persons. Inevitably, many such refugees will attempt to escape by sea, and, tragically, too great a proportion of these sea-going refugees will fail to reach safer shores.

Apart from the natural dangers of the ocean, sea-going refugees face problems of a type not generally encountered by peer groups of refugees travelling overland.

International law, as it stands at the present time, has not yet developed sufficiently to cope with all these problems. Only one firm rule exists, that is, the duty placed on the masters of passing ships to render all practicable assistance to vessels in distress; and even this elementary humanitarian rule has been disregarded with impunity.

The solution to the uninitiated might appear simple : masters of ships should be 'encouraged' by the governments of countries in which their ships are registered to abide by their humanitarian obligations. This solution would not, however, go to the root of the problem and measures of this sort, by themselves, would therefore serve only to alleviate rather than to cure the plight of the sea-going refugee.

The 'cure' to the problem depends to a large extent on viable measures being worked out in relation to, first, the granting of temporary refuge or asylum to refugees rescued at sea and, ultimately, their permanent resettlement. Some steps have been taken in this respect, but, as yet, state practice has not achieved that degree of unanimity and repetition necessary for it to be accepted as being anything more than the foundation stone of what may

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70. To date the USA, NZ, Austria, France, Switzerland and Australia have become active participants in DISERO.

ultimately become international customary law. Most littoral states have allowed refugees to be disembarked. But most states have attached conditions to disembarkation. These conditions have been varied and often no disembarkation has been permitted without prior guarantees of ultimate resettlement having been obtained from flag states. And, as we have seen, not all flag states have been prepared to issue such guarantees.

Some might attempt to argue that the refusal of permission of littoral states to disembark rescued refugees and/or the absence of guarantees of resettlement by flag states may amount, in actual fact, to violations of the principle of *non-refoulement* of refugees. This principle has developed in recent years into a tenet of customary international law. In essence it obliges states not to return refugees in any manner whatsoever to territories in which their life or freedom may be endangered for reasons of race, religion, nationality, membership of a particular social group or political opinion.

On the other hand, if one views the situation in a realistic light, it is often not viable, in economic, political or social terms, for coastal states to permit disembarkation without attaching such conditions, nor for flag states always to guarantee resettlement.

The problem therefore remains one for the international community as a whole to solve. The refugee phenomenon is a global phenomenon. From time to time it may focus on particular parts of the world, but as political tensions ease in one region, so they increase in another, and, as this happens, the focus shifts. Nor can landlocked states be absolved from accepting some degree of responsibility for sea-going refugees. The fate of such refugees cannot be left to depend upon the vagaries of geography nor the fact that refugees may choose or be compelled to travel by sea rather than by land. The notion of international solidarity and burden-sharing assumes that every nation, large or small, rich or disadvantaged, with or lacking a coastline, contribute towards the resolution of the refugee problem. This contribution can assume different forms — in some cases it may mean allowing refugees to disembark, in others it may entail guarantees of permanent resettlement, in yet others it may involve the contribution of money to help ease the burden of other states. In all cases, however, the situation demands the involvement of all states, indeed, relies on that involvement as a prerequisite to any durable solutions.