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M.V. Tampa and Christmas Island Incident, August 2001

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The Background¹

The terrorist activities in the USA on 11 September 2001 and the continuing drama of the 'boat people' off the Australian coast drove the initial incident of the *M.V. Tampa* rescuing some 433 asylum seekers and 4 or 5 crew from near Christmas Island on 26 August 2001 from the media. But the incident has important aspects and this article concentrates on the events relating to the *Tampa* and the handling of the issue by the Australian government.

On 22 August 2001 the *M.V. Tampa*, a Norwegian flagged RoRo and container vessel,² was on voyage from Fremantle, Western Australia, on a northerly course in the Indian Ocean steaming for Singapore,³ via the Sunda Straits under the command of Captain Arne Rinnan, a Norwegian. As the *Tampa* neared Indonesia it was requested by Australian Canberra Rescue and Coordination Centre to proceed to a vessel in distress with, so it was said, some 80 persons onboard. The Master did so and, on 26 August some 158 miles from the Indonesian mainland and 85 miles north of Christmas Island, found a 20 metre wooden Indonesian vessel dangerously overloaded with damage to the stern and superstructure. There were 438 persons onboard, including women and children in various states of health and stress. The distressed persons were taken on board the *Tampa* and the other vessel abandoned. The First Officer put his personal safety at risk in helping effect the transfer of these persons to safety on board the *Tampa* in a large swell.

The Master ordered 5 empty containers on the deck to be opened for the shelter of the survivors and blankets, water, hot soup, bread were given to adults and milk and chocolate to children. The survivors included 26 females (2 pregnant) and 43 children (youngest approximately 1 years old). The spokesperson for the rescuees thanked the Master for their rescue but also acted aggressively and demanded to be taken to Christmas Island. The Master had intended continuing on to Singapore but acceded to this pressure and steamed to Christmas Island. When the vessel arrived in the early hours of 27 August he expected assistance from Australian authorities.

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¹ Many aspects of the this article were also contained the article of this name in 'Asia Pacific Shipping', October 2001, Baird Publications, Australia.

² Large RoRo vessel with containers on the weather deck, of 262 metres overall, 44,013 DWT, owned by Wilh. Wilhelmsen ASA, Norway, operated by Wallenius Wilhelmsen, built in 1984, full cargo of Australian and New Zealand exports for Asia.

³ From Singapore the *Tampa* was bound for Hong Kong and Asian and Japanese ports. The author is indebted to Ms Yvette Farrell, Sydney, and Emil Gamborg, Norway, for assistance on the accuracy of the facts concerning the vessel and the incident.

Christmas Island is an Australian territory, being a small island in the Indian Ocean, close to Indonesia, with a small port and a satisfactory airport.

At 0945 on that day the Master was told by the Australian authorities not to enter Australian territorial waters (12 nm). The Master was concerned for the welfare of the rescued persons as he understood that one of the rescued persons had a broken ankle and another was unconscious with suspected dehydration. His request to the Australian authorities for assistance, medical and otherwise, were not met and no assistance was provided as the vessel waited offshore for two days. On 29 August, the Master issued an actual distress call for his own ship and its personnel and the Australian Search and Rescue indicated that it would provide assistance. The spokesperson for the rescued persons informed the Master that they would start jumping overboard if no medical assistance came to their aid. By that time it appears there were 10 unconscious persons, much fatigue and exhaustion as well as some highly agitated and nervous behaviour by the rescued persons and the Master felt the 'situation was getting out of hand'.⁴ The Master then took the *Tampa* into the territorial sea to within 2 miles of the port (Flying Fish Cove).

At 1135 on 29 August, with the Master expecting emergency assistance for his distressed vessel and personnel boats were seen coming offshore. The gangway was lowered but it was the Australian Defence personnel (Army SAS) who then boarded the *Tampa*. The Master was invited to sail but with the rescued persons still on board. The Master maintained the ship's position as he considered that the vessel was not legally permitted to carry the survivors and did not have the 'safety equipment and toilet facilities to make it seaworthy'.⁵ The Army personnel then stayed on the vessel conducting themselves politely and professionally.⁶ Australian naval vessels were then brought up over the next few days and took station nearby. Access to the *Tampa* was controlled by the military personnel, who had the boats, and certain persons, including the insurer's representatives, the media, lawyers to advise the rescued persons as to their rights in Australian law as refugees, were not given access.⁷

Why the Australian government had declined any real assistance and directed the vessel not to enter into the Australian territorial sea around Christmas Island was because the Australian government had taken control of the matter from the hands of the Australian Search and Rescue personnel. The government wished to make a political stand against unwanted incursions by immigrants from other countries. There was a traffic in illegal immigrants and the Australian government had, until then, done little about preventing it but wished now to make a stand against it. It was thought that most of the rescued 'boat people' were refugees from Afghanistan and neighbouring countries seeking asylum in Australia. They had transited through a number of countries, including Indonesia. The Master of the *Tampa*, his own vessel now being in distress with hundreds of extra people, sought assistance. The Australian government refused it except for some basic supplies and medical attention.

After a delay of some further 5 days, on 3 September, the rescued persons were unloaded into the Australian naval vessel H.M.A.S. *Manoora* and steamed to Nauru. The *Tampa* was then allowed to proceed on its original commercial voyage. The *Manoora* also took on board some 200 other boat people who were rescued at sea. Other boat people were also on the way from Indonesia and Australian naval vessels rescued those in danger of being lost at sea. The Indonesian crew who were saved by the *Tampa* were landed on Christmas Island by the authorities and charged with

⁴ 'MS Tampa: Sequence of Events of the MS Tampa's Melbourne to Fremantle passage' and beyond; Schedule provided by Wallenius Wilhelmsen to author.

⁵ 'MV Tampa', Schedule, above. Entry for 29 August.

⁶ The Army personnel were protection against any unlawful conduct by the rescuees towards the ship or its crew.

⁷ However, the Norwegian Consul to Australia, some Army medical teams and other persons were given assistance and access to visit the ship.

‘people smuggling’. The Nauruan government agreed to accept the rescued persons and process them, at Australian expense. This later occurred. The total expense to the Australian taxpayer has not been revealed at the time of writing but is thought to be a multiple of the cost of processing the rescued persons at Christmas Island.

In the meantime humanitarian groups had commenced actions in the Federal Court of Australia, in Melbourne, on behalf of the asylum seekers. (*Victorian Council of Civil Liberties Inc. v Minister for Immigration & Multicultural Affairs & Others*. No. V 899 of 2001. *Valardis v Minister & Ors*. No. V900 of 2001.). After several days of evidence and argument the judge, on 11 September 2001, held that the Australian government had acted illegally in detaining the rescued persons on the *Tampa* and ordered their release from government control.⁸ The owners of the *Tampa* did not join in this action, as they may well have done, to seek release of the vessel and damages for its detention.

The Australian government immediately appealed. The Federal Court commenced an urgent sittings of three judges to form a Full Court, and the appeal argument commenced on 13 September. The Full Court gave judgment on 18 September and, by a majority of two to one, upheld the appeal and set aside the judgment of the trial judge.⁹

The majority judges, Justices Beaumont and French, concluded that the Commonwealth was acting within its executive power, under s 61 of [the Constitution](#), in the steps it took to prevent the landing of the rescuees. It followed that the majority concluded that the rescuees were not unlawfully detained by the Commonwealth. The minority, Chief Justice Black, dissented. He took the view that whilst the power to expel people entering Australia illegally is undoubted, it is a power that derives only from laws made by the Parliament and not from powers otherwise exercisable by the executive government. He held that since the powers provided in the [Migration Act 1958](#) had not been relied upon as the lawful basis for the government actions, the Commonwealth government had no power to detain those rescued from the *Tampa*. It followed that he considered that there was an unlawful detention by the Commonwealth since it was not justified by the powers conferred by the Parliament under the [Migration Act](#) it was not justified by any other law. No arguments were put as to the lawfulness of the boarding of the *Tampa* by the Australian armed forces or the failure to relieve the vessel immediately of the dangerous number of people onboard.

At the time of writing (5 October 2001) the *Manoora* is sailing from Nauru as the rescued persons have been unloaded and are in detention camps. The New Zealand government has agreed to take some 150 persons and they have been flown there. The saga is still unfolding.

On or about 27 September the Commonwealth Parliament passed 7 Bills (variously entitled ‘Border Protection’ and ‘Migration’ amendment Bills) before rising for an election. One Bill, ‘Border Protection (Validation and Enforcement Powers) Bill 2001’, includes in its short title that it is ‘to validate the actions of the Commonwealth and others in relation to the *MV Tampa* ...’. The validation is retrospective and effected from 27 August,¹⁰ which is when *Tampa* arrived off Christmas Island, and the right of court action is removed for any action taken by the Commonwealth or its officers in relation to the *Tampa*, amongst other things.¹¹ Another effect of the Bills is to exclude the rule of law about refugees from Christmas and other offlying islands and reefs. It is expected that the Bills will receive the necessary assent and come into effect shortly. One result probably is that the some A\$1 million dollars that the owners of the *Tampa* have lost will not be recoverable in Australian courts. However, there may still be a right of

⁸ The decision is on the web page under www.fedcourt.gov.au/, as case number [2001] FCA 1297.

⁹ The decision is on the web page at www.fedcourt.gov.au/, as case number [2001] FCA 1329.

¹⁰ Section 4.

¹¹ Sections 5, 7.

action in international courts and tribunals for breaches of international treaties, as to which breaches see under.

As mentioned, this article addresses the maritime law responsibilities of the incident concerning the Australian government and the Tampa only. The issues about how a country should handle incursions of refugees and about how the governments of the Indonesia (a transit country), Norway (flag State) and Afghanistan (country of origin) should have assisted in the matter are for other writers and other occasions.

Obligation to Rescue those in Danger At Sea

There is a long maritime tradition that lays an obligation on those who may safely do so without imperiling their own vessel or crew to go to the assistance of those in peril on the sea. This tradition has been incorporated into maritime and international practice and law. The *International Convention on Maritime Search and Rescue*, Annex, Chapter 2.1.10, provides that parties are to ensure assistance is provided for those in distress at sea.¹² The *International Convention on Salvage* 1989, Article 10, has a similar obligation.¹³ The obligation is also to be found in Article 98(1) of the *United Nations Convention for the Law of the Sea*, 1982 (UNCLOS)¹⁴. It provides that 'Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: ... to render assistance to any person found at sea in danger of being lost ... and to proceed with all possible speed to the rescue of persons in distress, if informed of their need for assistance, in so far as such action may reasonably be expected of him.' Article 98(2) requires that every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service. Australia is a party to these conventions.

Australia has given effect to this obligation on a Master to rescue at sea in s.317A of the *Navigation Act* 1912.¹⁵ Norway has also given effect to such obligations albeit in a more limited manner.¹⁶ In the result there was an obligation on the Australian authorities to deal with the vessel in distress and it discharged the obligation by requesting a passing merchant ship, the M.V. Tampa, to diverge from its voyage to the rescue scene. There was an obligation on the Master to rescue the persons in danger at sea and he discharged the obligation by rescuing the persons and taking them on to his own ship.

Position of a Master with Numerous Persons Rescued from Danger At Sea

¹² Australian became a party to this convention on 22 June 1985. Australian Treaty Series 1986 No. 29. Annex Chapter 2.1.10 provides: 'Parties shall ensure that assistance be provided to any person in distress at sea. They shall do so regardless of the nationality or status of such person or the circumstances in which that person is found.'

¹³ Article 10(1) provides: 'Every master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea.' Article 10(2) provides: 'The States Parties shall adopt the measures necessary to enforce the duty set out in paragraph 1'. Article 11 provides: 'A State Party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for cooperation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general.' Australia became a party to the *Salvage Convention* 1989 on 8 January 1998.

¹⁴ Australian became a party to the UNCLOS on 16 November 1994.

¹⁵ S.317A provides that 'The Master of a ship shall, so far as he or she can do so without serious danger to his or her ship, its crew and passengers (if any), render assistance to any person, even if such person be a subject of a foreign State at war with Australia, who is found at sea in danger of being lost.' It further provides, in s.317A(2), that a master who fails to comply 'shall be guilty of an offence punishable on conviction by a fine not exceeding \$20,000 or imprisonment for a period not exceeding 10 years, or both.'

¹⁶ I am indebted to Professor Erik Rosaeg, Scandinavian Institute of Maritime Law, University of Oslo, Norway for his assistance. The obligations are implemented in Norway mainly in respect of emergencies arising out of collision or other ship manoeuvring only, see the Maritime Code, 1994, sec. 135 (third paragraph) and 164, and the Penal Code, 1902, sec. 314. It is possible that the master of a ship registered in Norway that passes boat refugees without helping them could be prosecuted under sec. 387, cfr sec. 12, of the Penal Code.

A Master who has rescued persons in danger at sea has a wide discretion as to how he or she conveys them to a place of safety. The Master may continue on with the voyage to the port of destination, and the rescued persons have no right of complaint. However, the discretion in the Master is to be exercised in the light of all of the circumstances. If the Master steams the vessel for the nearest suitable port that is entirely reasonable. This is especially so if health and safety considerations prevail over other considerations. Rescuing 2 or 3 people from a yacht, which is fairly common, is a far cry from having to rescue some 438 of them. It seems that the Master of the *Tampa* initially proceeded on his voyage towards Singapore but the rescued persons, or some of them, put pressure on the Master to go to Christmas Island. As the Master was entitled to expect support from the Australian government authorities at Christmas Island it was entirely reasonable, and in fact desirable, that he should steam for that destination. Had he proceeded towards Singapore he had a much greater distance to steam and he could have placed the health and safety of the rescued persons, the crew and the whole ship in jeopardy.

A Master has, in traditional maritime and international humanitarian law, a right to expect support from a coastal State to assist with the support of the persons rescued at sea. The amount of the support will depend on the circumstances. In this case a Master of a cargo vessel with 27 officers and crew who rescues some 438 persons in danger at sea can expect the support from the coastal State to be quite substantial. The Master could reasonably expect that the coastal State immediately would relieve the ship of the persons rescued. Had the Master proceeded to an Indonesian port or on to Singapore he would have been entitled to that support from those governments but, as the circumstances turned out, he arrived off an Australian territory.

The Master can also expect support from the States whose nationals he has rescued from danger. The national States of the rescued persons seem to include Indonesia, Pakistan and Afghanistan. The crew of the abandoned vessel were Indonesian nationals, it was an Indonesian vessel and had departed from an Indonesian port. It is an obligation on the government of the relevant States, not the Master, to determine the solution to difficult questions of status of large numbers of rescued persons and crew. Many of the rescued persons were claiming refugee status.¹⁷ The flag State of the *Tampa* is Norway and the Norwegian Government has rights to go to the assistance of ships flagged with it. Those rights may well extend to taking other States to an international forum or tribunal if there be dispute over some aspect of the situation, including a failure to give emergency assistance.

Australia's Rights and Obligations as the Coastal State

A 'coastal State' is the State whose shores are adjacent to the seas in question. Australia was, therefore, the coastal State to the position in which the *Tampa* found itself off Christmas Island. Australia was also the country of departure for the voyage. Article 24 of UNCLOS deals with some of the duties of the coastal State, mainly dealing with the right of innocent passage of foreign ships, such as the *Tampa*. Innocent passage is defined in Article 19 in that passage is innocent if it is not prejudicial to the 'peace good order or security' of the coastal State. In effect, it mainly relates to vessels like the *Tampa* going about their commercial operations and passing through the seas, including the territorial sea (12 miles from the base lines). The *Tampa* was certainly on innocent passage before it was requested to rescue the persons in peril at sea. Under Article 25 of UNCLOS, Australia has the right to take necessary steps in its territorial sea to prevent passage that is not innocent. Passage which is "not innocent" is defined in Article 19(2) of UNCLOS to include "(g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State." Article 25(2) also gives the coastal States powers in relation to vessels proceeding to or from its

¹⁷ The claims of the rescued persons to be refugees from oppression were not able to be assessed off Christmas Island as the Australian government refused to assist lawyers and human rights personnel to establish communications with the rescued persons or to get to the *Tampa* to determine the position and give advice.

ports (or internal waters). These powers include the right to take steps to prevent any breach of conditions to which those ships are subject.

However, when the *Tampa* arrived off Christmas Island it was a vessel in distress and it was not claiming innocent passage. It was claiming under the obligation of a coastal State to give support to a ship that has rescued those in danger at sea. In this case the ship was seeking that Australia take off the 438 persons rescued at sea. In ordinary circumstances those persons would have had no right, apart from humanitarian ones, to enter Australian territorial sea. Australia has a right to protect its borders from unwanted incursion. However, there are two relevant exceptions; namely, that they are refugees and/or they are distressed persons in danger at sea. As to the refugee position, see under. As to the issue of being in danger at sea, the rescued persons had a right, in humanitarian considerations, to temporary assistance to alleviate the danger and distress to which they have been subjected at sea. Further, the *Tampa* crew, had become in danger at sea because of the large number of persons they had rescued, as to which also see under.

The coastal State has the right contained in Article 25(2) of UNCLOS, which is to take steps to protect its water from ‘breach of conditions to which admission of those ships to internal waters (or ports).’ But this right is subject to the obligation contained in customary international law and in the conventions to which Australia is a party, to assist a vessel in distress. It has been suggested that the latter obligation does not necessarily amount to granting permission to dock or unload passengers but may simply extend to providing supplies and medical treatment. It is submitted that such an interpretation of the obligation might well apply to the situation where a vessel commences a voyage with asylum seekers on board, makes its way to Australia and becomes distressed. However, the interpretation is inappropriate in the present context where the vessel concerned was obliged to rescue persons and has thereby itself become a distressed vessel. In the result the size of the *Tampa* prevented it entering the small Christmas Island port, so Australian port State rights did not arise.

Both Australia and Norway are parties to the *International Convention on Safety Of Life At Sea* 1974 (SOLAS).¹⁸ Pursuant to that Convention, vessels are obliged to have on board certain safety equipment relative to the number of people the vessel is certified to carry and to maintain that safety equipment in good working order. The Australian Safety Maritime Authority (AMSA), exercising its Port State Control powers, regularly detains vessels that come into Australian Ports in breach of those obligations. In many cases AMSA has detained vessels for inadequate life saving equipment. It would seem a clear breach of international and maritime obligations to deliberately send a vessel out of our territorial waters in obvious breach of its safety obligations. To do so is clearly to put the health, safety and even lives of the persons on board at risk, as well as to risk the loss of the vessel itself and its cargo and, if the vessel be lost, possibly to create a marine environmental risk.

Commercial implications for the *MV Tampa*

The protracted nature of the dispute cost the Norwegian ship’s owner a significant amount of money by loss of the use of the vessel and the extra costs to which the ship was put. Further, whilst deviation to save life at sea is generally considered to be a justifiable alteration of the risk under marine insurance law, it is likely that an insurer would be reluctant to remain on risk for an extended voyage in these circumstances where there is obviously a significant increase in the risk to the vessel. The result could have been that the vessel was uninsured for any voyage it was forced to take with the rescued persons still on board if the Master had obeyed the Australian government direction to sail from Christmas Island.

Australia’s International Obligations in Relation to Refugees

¹⁸ Australia became a party to SOLAS on 17 November 1983.

Australia is a party to the *Convention Relating to the Status of Refugees 1951*¹⁹ (“the Refugee Convention”) and the *Protocol Relating to the Status of Refugees 1967*²⁰ (“the 1967 Protocol”). Australia’s international obligations in relation to refugees extend to Christmas Island.²¹

The term “refugee” is effectively defined by the Refugee Convention and 1967 Protocol as applying to “any person who...owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country...”.²² Given that the majority of those rescued by the Tampa were nationals of Afghanistan and nearby countries, many of them women, it was likely that some of those rescued fell within this definition of refugees.

Article 33 of the Refugee Convention is important. It relevantly provides that “[n]o 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.” Depending where the Australian government was requiring the *Tampa* to steam to, this could possibly have contravened this obligation in relation to any refugees on board. As it turned out, the Australian government paid monies to another country to take them ashore in that country, Nauru, so this provision was not contravened.

Article II(1) of the Protocol requires parties “to co-operate with the Office of the United Nations High Commissioner for Refugees ... and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol.” As the writer understand the facts, the UNHCR Commissioner requested the Australian government to process the rescued people at Christmas Island, which request was refused. If this was so this was a breach of the Refugee Convention.

Possible International Tribunals

Pursuant to Article IV of the 1967 Refugee Protocol parties accept the jurisdiction of the International Court of Justice (ICJ) to settle disputes relating to the interpretation or application of the Protocol. It was and is arguably open to Norway to take Australia to the ICJ in relation to the manner in which it treated the *Tampa*, a ship under its flag. The applicable law would be those of the international treaties and not of the countries’ domestic legislation.

Further on the question of taking Australian to an international tribunal, it is noted that the International Tribunal for the Law of the Sea (ITLOS) was and is also a possibility as having jurisdiction to hear a complaint by Norway against Australia. ITLOS was established in Hamburg in 1996 under UNCLOS, which gave several options to parties for dispute resolution.²³ Parties to a dispute could elect to proceed in ITLOS, under Annex VI, in the arbitral tribunals,

¹⁹ Australian Treaty Series 1954 No 5. Australia became a party to the Refugee Convention on 22 April 1954. The author is indebted to his colleague Mr Anthony Cassimatis for assistance with the legal aspects of refugee law.

²⁰ Australian Treaty Series 1973 No 37.

²¹ Article 40 of the Refugee Convention is a territorial application clause that provides that “Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. ... ” Australia’s Instrument of Accession to the Convention, was deposited on 22 January 1954. Christmas Island did not become an Australian Territory until 1958; see the *Christmas Island Act 1958* (Cth). Article I(1) of the Protocol provides that “[t]he States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined.” The relevant Article of the Refugee Convention in relation to the current crisis is Article 33. The Protocol, in Article I(3), relevantly provides that “[t]he present Protocol shall be applied by the States Parties hereto without any geographic limitation”.

²² See Article 1A(2) of the Refugee Convention and Article I(2) of the Protocol.

²³ Part XV deals with settlement of disputes. Parties are obliged to settle disputes by peaceful means, Art. 279, and where no other means is chosen then the provisions of Part XV apply - Art. 281, 287.

under Annex VII, or in a special arbitral tribunal constituted under Annex VIII. Alternatively, the parties could proceed under the jurisdiction of the ICJ. If the parties in dispute have not selected a common procedure, or have made no selection, then the dispute must be submitted to arbitration (under Annex VII) unless the parties otherwise agree.²⁴ UNCLOS has compulsory dispute resolution mechanisms written into its terms so that accession to the Convention automatically commits the State Parties to the dispute resolution provisions. The Tribunal has special jurisdiction in a number of areas, one of which relates to the prompt release of vessels and their crews arrested in foreign ports and the prescription of provisional measures.²⁵ It also has special jurisdiction to prescribe provisional measures where there is urgency pending the constitution of an arbitral tribunal.²⁶

It is arguable that the *Tampa* was unlawfully boarded by the Australian armed forces and that they were in control. They maintained the ship was free to sail beyond the territorial sea, but the difficulties confronted by the Master about this have been mentioned above. If there was unlawful boarding and control, Norway had the option, acting for the shipowners, to seek release of the vessel by order from ITLOS under Article 292 (prompt release of vessels). It probably is still open for Norway to seek compensation, on behalf of the owners, from Australia for the delay in not taking off the rescued persons within a reasonable time of the request being made and to do this using the dispute resolution provisions of UNCLOS.²⁷

Comment

On arrival off Christmas Island the Australian government denied access to the territorial sea and landing the rescued persons at Christmas Island. It did provide some emergency relief to the rescued persons, on a minimal scale. The Australian Government subsequently required the vessel to proceed back to sea after it entered the Australian territorial sea. The rescued persons were a mixture of men, women and children. They were not in good health. Some of them may have been in a life-threatening situation. The 27 in number of Master and crew would have been at risk of aggressive behaviour from some of the 438 persons onboard. Probably some of the rescued persons claimed refugee status and Australia had an obligation to investigate whether this was so.

The attitude of the Australian Government towards the *MV Tampa* appeared to be a breach of Australia's international obligations. These obligations, in the present circumstances, overrode the rights concerning persons unlawfully entering its territorial sea.

A major issue is that a foreign flagged merchant vessel was itself in distress because it complied with its obligations under maritime and international law to rescue people. Australia owed the vessel a corresponding duty under maritime and international law to offer the vessel appropriate assistance. The most useful assistance Australia could have offered was to permit the vessel to offload the rescued persons on Christmas Island. Those persons could then be given succour and support on the island. When that has been attended to they could then be processed according to law on whether they were refugees or illegal entrants into Australia.

²⁴ Art. 287(5).

²⁵ UNCLOS Art. 292(1) provides: "Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree."

²⁶ UNCLOS Art. 290(5).

²⁷ The ITLOS web site has full details of its cases, see www.un.org/Dept/los. The several cases of applications to ITLOS for release of vessels may be found in the ITLOS judgments from this web site.

It is suggested that Australia was in breach of its obligations towards the *MV Tampa* under the principles of maritime and international law. The fact that there the persons rescued may well be asylum seekers is not relevant to the nature and extent of those obligations towards the *Tampa*.

It is advanced that the procedures that should have been followed were the usual procedures of civilized nations in these circumstances. The rescued persons should have been landed immediately and given medical and other humanitarian assistance. When their health and well-being had been attended to then they should have been given access to the usual legal assistance and processed through the usual procedures according to law and good administration. Those who are found not to have a legal right to be in Australia should have been deported. Those who claimed to be refugees should be subjected to the usual procedures and in accordance with the international convention concerning refugees.

A feature of the incident was the exemplary conduct of the Master, Officers and Crew of the *M.V. Tampa*. They should be commended for their competence in how the persons were rescued and their forbearance in the difficult situation created by the Australian government. They upheld the best traditions of the sea and humanitarian assistance to those in peril of the sea and it would be unfortunate if their conduct was not recognized.

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