

ASYLUM-SEEKERS AND PEOPLE-SMUGGLING – FROM ST LOUIS TO THE TAMPA*

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Abstract

This paper will consider the Australian response to people smuggling against the backdrop of the events of September 11 and the so-called war on terrorism, in which Australia is an enthusiastic participant. Border protection became the key issue in the recent federal elections, the result of the coincidence of September 11 and the almost contemporaneous saga involving the rescue ship, the *MV Tampa*. In the aftermath of the *Tampa* case, the government introduced mandatory minimum sentences for people smuggling, and introduced specific measures retrospectively removing any possible claim for compensation or unlawful action in relation to the detention of the *Tampa*. Importantly, parts of Australia most accessible by boat from Indonesia, namely, Christmas Island, Ashmore Reef and the Cocos Islands, were removed from the country's migration zone, making it impossible to apply for a protection visa from those parts of Australia. The government also strengthened the regime of mandatory detention, a regime strongly criticised by the Australian Commonwealth Ombudsman as conferring fewer privileges than those enjoyed by convicted criminals, and placing women and children at risk. Australia's image as a decent humanitarian nation has been severely damaged by these affairs. Amnesty International has been especially critical of Australia's policy on refugees.

INTRODUCTION

On 27 August 2001 the master of the Norwegian freighter *MV Tampa*, Captain Arne Rinnan, acting in the best traditions of the sea and of Norwegians,¹

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¹ Michael White QC, "The *MV Tampa* and the Christmas Island incident," *Proctor*, 2001, November, at 14.

responded to a request from the Australian search and rescue agency (AUSSAR) and rescued 433 people from an overcrowded vessel in distress eighty nautical miles from Christmas Island. The island is located two thousand six hundred kilometres north west of Perth and three hundred and sixty kilometres from Java, Indonesia. Captain Rinnan sought advice from AUSSAR as to where he should disembark the refugees. Agency officers said they did not know. Rinnan set sail for Indonesia. Desperate pleas from asylum-seekers (some threatening suicide) caused him to set course for nearby Christmas Island, an Australian Territory, in the northern Indian Ocean. The *Tampa* was denied entry clearance by the Australian government and instructed to remain in the contiguous zone outside the Australian territorial limit. On 28 August Rinnan put out a distress signal, and the following day proceeded into Australian territorial waters. Australian SAS commandos boarded the vessel 4 miles off Christmas Island and took control.

On 31 August, the Victorian Council for Civil Liberties sought orders on behalf of the detainees from the Federal Court by way of mandamus, habeas corpus and injunctive relief. Mandamus was sought to compel the relevant Minister to permit the detainees to be brought within Australia's migration zone. Injunctive relief was also sought to prevent the detainees removal from Australian territorial waters. On 3 September the detainees were transferred to the Australia naval supply vessel HMAS *Manoora* which set sail for Papua New Guinea. On 11 September, a few hours before the terrorist attack on the United States, the federal court ruled that the detention of refugees on board the *Tampa* was unlawful, and ordered their return to Australia for processing. On 21 September, the decision was reversed by majority decision of the full bench of the Federal Court of Australia (Black CJ dissenting).² The majority held that habeas corpus did not lie, because the detainees had no right to enter Australia. Moreover, the court held that the refugees were not detained as a result of anything done by the Australian government. Those rescued by the *Tampa* have since been transferred to processing centres in Nauru (a small island state in the Pacific) and New Zealand.

Dr Michael White, an expert of maritime law, recently summarised the results of the *Tampa* incident as follows:³

The Australian government failed to comply with international conventions obliging it to render assistance to vessels in distress, to give humanitarian assistance and process the persons according to Australian law. It may have broken international obligations by using armed force to board the *Tampa*. Australia set an unfortunate precedent about rescue at sea, and the Australian government damaged Australia's international standing from which it might take some time to recover its reputation as a humanitarian nation.

Dr White noted that Captain Arne Rinnan, his officers and crew conducted themselves in accordance with the best traditions of the sea and of Norwegians. It is very sad to say that the same cannot be said of the Australian government.

² *Ruddock v Vadarlis* [2001] FCA 1329.

³ Michael White QC, *Proctor*, *supra* n. 1 at 14-15.

On 10 November, the conservative coalition led by Prime Minister John Howard was returned with a slightly increased majority. During a xenophobic election campaign, many senior politicians including the Minister for Defence and the Minister for Immigration sought to characterise the refugee policy as an anti-terrorism measure, raising the spectre of so-called sleeper agents entering the country by refugee vessel. One of the ugliest sides of the debate on boat people in Australia concerned the child-throwing incident. A few weeks after *Tampa* a boat in distress was approached by an Australian navy vessel. It was warned away from Australian territorial seas and pointed towards Indonesia. Subsequently, reports surfaced that some refugees had thrown their children into the water in an attempt to force the Australian navy to rescue them. The authorities released some still shots from a video as proof. The Prime Minister stated on national television that he did not want people like that in Australia. It subsequently transpired that no such incident had occurred. There was some suggestion that at some point the Australian navy vessel had fired shots over the bow of the vessel, causing some refugees to leap overboard. The video was not released prior to the election, but on election eve the government was forced to admit that the incident, as originally described, had not occurred at all.

Law of the Sea and Customary International Law

The law of the sea relating to obligations arising from and associated with the act of rescue is a tangle of contradictions. On the one hand, it is well established that the master of a vessel has an obligation to rescue those in peril on the seas. The obligation is recognised in various international conventions⁴ and supported by domestic legislation.⁵ It arises even in times of belligerence and in relation to asylum seekers and refugees. On the other hand, there is no international obligation to admit unwanted refugees, and it is far less clear who has ultimate responsibility for refugees rescued on the high seas who are either stateless or wish not to be repatriated to their former domicile.

At one time it was accepted that persons rescued at sea would be offloaded at the next scheduled port of call, from whence they would be repatriated to their home state. However, this assumes that rescuees wish to return home. In 1979 as many as 8,600 boat people were picked up in the South China Sea, rising to 14,500 in 1980.⁶ Confusion as to the responsibility of flag states and ship owners led to persistent breaches of the duty to rescue. In 1979 the UNHCR reported that as many as 90% of vessels navigating in the area were ignoring requests for assistance from persons in peril.⁷ In fact, statistics released by the UNHCR suggested that only two percent of Vietnamese boat people were rescued by merchant ship, despite the large volume of commercial traffic on such routes.⁸

⁴ *International Convention of Maritime Search and Rescue*, Annex, chapter 2.1.10; the *International Convention on Salvage* 1989, art.10, and the *United Nations Convention on the Law of the Sea* 1982, UNCLOS, art. 98.

⁵ Navigation Act 1912 (Cth), ss 265, 317A.

⁶ Jean-Pierre Fontayne, 'Asylum-seekers afloat in uncertainty', *The Canberra Times*, 30 August 2001.

⁷ *Ibid.*

⁸ R.P. Schafer (1983) 8 *Australian Yearbook of International Law* 213, at 214.

Surprisingly, the Law of the Sea does not give a clear answer to the question of ultimate responsibility. In the 1980s the Australian position appears to have favoured placing primary responsibility for the ultimate relocation of refugees upon the flag-state of the rescuing vessel. In 1980 HMAS Swan rescued a number of boat people and disembarked them in Hong Kong and subsequently indicated that it would accept responsibility under international law.⁹ When in 1979 the British registered tanker *The Entalina* rescued 150 Vietnamese boat people in the Java Sea, the Australian government allowed temporary disembarkation in Darwin only for the sick, and pressured the British government to accept ultimate responsibility for their resettlement, as the nation where the ship was registered.¹⁰ The British government accepted the rescuees for resettlement, but continued to argue that flag state responsibility for resettlement was not an established principle of international law, and that the principle of first port of call should prevail.

In 1980 the UN Commissioner for Refugees set up a special Working Group to consider the matter. The Group noted that there was considerable support for the principle of disembarkation at the next convenient port of call, and rejected the principle that the flag state of the rescuing vessel was responsible for granting “durable asylum” to those on board.¹¹ Furthermore, the United Nations High Commission for Human Rights stated, some twenty years ago:

While... there is a clear duty for ship's masters, their owners and their Governments to rescue asylum-seekers at sea, there is no obligation under international law for the flag State of a rescuing vessel to grant durable asylum to rescued refugees. It is, of course, correct that by boarding a vessel, the refugee comes under the jurisdiction of the flag State which is considered to exercise jurisdiction over the ship on the high seas. There is, however, no valid legal basis for considering that by boarding a vessel a refugee has entered the territory of the State exercising jurisdiction over the ship.¹²

In the *Tampa* case, the law of the sea is unclear as to whether Australia, Indonesia, Singapore, or Norway, should be treated as having primary responsibility to provide resettlement. Christmas Island (an Australian territory) was closest *and* the port of disembarkation chosen by the *Tampa's* master; Indonesia was the registration state of the rescued vessel *and* the port of origin of the rescued boat; Singapore was the next scheduled destination; and Norway was the flag state of *MV Tampa*. The Australian government's suggestion that Australia's obligations in the *Tampa* incident were subordinate to those of Norway (and Indonesia) is not inconsistent with previous Australian practice.

One commentator has suggested that the Australian government's refusal to allow the *Tampa* to enter the Australian port at Christmas Island for the purpose of

⁹ Schafer, *supra* n. 8 at 213.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² High Commission for Refugees, “Problems Related to the Rescue of Asylum-Seekers in Distress at Sea”, EC/SCP/18, 26 August 1981, available at <http://www.unhcr.ch/refworld/unhcr/scop/18.htm>.

disembarking the rescuees is arguably in breach of the obligation of *non-refoulement* (non-return) contained in Article 33 of the 1951 Refugee Convention.¹³ The measures taken by the Government, namely boarding the vessel and thereby preventing entry have been subsequently validated by legislation, presumably because there was a real concern that such measures could not be justified by the law as it then stood. The present Australian policy of turning vessels away is indistinguishable from a policy of closing a land border. This has been repeatedly condemned as a violation of Article 33.¹⁴ However, in *Ruddock v Vadarlis*,¹⁵ the federal court noted that the refugees had no enforceable right to enter Australia. Citing the principle that a court would not assist a litigant to achieve by indirect means that which could not be achieved by direct means, the court declined to grant an order that the rescuees be brought to Australia for processing.

The legislative response to the Tampa incident

In the wake of the *Tampa* incident, the Australian government has introduced a package of laws with various effects. Some parts of Australia have been removed from the so-called migration zone, making it impossible to claim a protection visa in those territories. The excised parts of Australia include Christmas Island, Ashmore Reef and the Cocos Islands – the islands most accessible from Indonesia by boat. The legislation also removes any possible claim for compensation or unlawful action in relation to the detention of the *Tampa* or its crew, or human cargo. This legislation is retrospective, and would therefore prevent the owners of the *Tampa* from recovering from the Australian government in a domestic court any part of their considerable commercial losses arising from the rescue at the behest of the Australian search and rescue agency. The legislation prevents offshore asylum seekers from applying for asylum and it removes legal doubts about the expulsion of people from Australian waters.

People smuggling

People smuggling has been the subject of resolutions of the General Assembly,¹⁶ the Secretary General,¹⁷ the Economic and Social Council,¹⁸ the International Maritime Organisation,¹⁹ and the subject of a proposed protocol to a draft international convention on transnational organised crime.²⁰ In the United States,

¹³ Fontayne, *supra* n.6: see also Michael White, "The *MV Tampa* and the Christmas Island incident", *supra* n.1.

¹⁴ Fontayne, *supra* n.6.

¹⁵ *Ruddock v Vadarlis* [2001] FCA 1329.

¹⁶ Measures for Prevention of the Smuggling of Aliens, Resolution 51/62 of 12 December 1996.

¹⁷ *Oceans and the Law of the Sea*, Report of the Secretary General, Document A/53/456 5 October 1998.

¹⁸ Official Records of the Economic and Social Council, 1998, Supplement No 10 (E/1998/30), annex III.

¹⁹ International Maritime Organisation Assembly, Resolution A.867 (20); Report of the 76th Session of the IMO Legal Committee, October 1997, LEG 76/12.

²⁰ *Draft Protocol against the Smuggling of Migrants by Land, Air and Sea*, Supplementing the United Nations *Draft Convention against Transnational Organised Crime*, 13 May 1999, A/AC.254/4/Add.1/Rev.1.

the issue has been addressed in various ways. The Racketeer Influenced Corrupt Organisations Act (RICO) was modified in 1996 to proscribe people smuggling as an organised crime offence, and to increase penalties for people smuggling under the *Immigration and Nationality Act*.

In Australia, in 1999 an offence of people smuggling was created and powers to board, search and detain ships and persons on board were extended.²¹ The 1999 Act makes it an offence for a person to carry non-citizens to Australia without documentation, to organise or facilitate the bringing or coming to Australia of a group of five or more persons knowing that they would become illegal immigrant. It is also an offence to present false or forged documents, to make false or misleading statements or to pass documents to help a group gain entry into Australia.²² In 2001 the *Border Protection (Validation and Enforcement Powers) Act* 2001 was passed with stiffer penalties against people smuggling. The Act introduces mandatory sentences of five years – eight years for a repeat offence. The legislation not only sets mandatory minimum sentences but also states mandatory non-parole periods. The people smuggling legislation operates against people over 18, but places the burden of proving age on the defendant on the balance of probabilities. It is interesting that this aspect of the legislation was passed almost without notice, because only a short time has lapsed since the controversy relating to the use of mandatory sentences in Western Australia and the Northern Territory.²³ The federal government placed enormous pressure on the self-governing Northern Territory to amend or modify its laws, in response to widespread concern about mandatory sentencing.

The relevance of these provisions to special-purpose rescue charter vessels under these provisions is worth considering. During the 1980s several privately chartered ships were engaged in rescue operations. Such activities are not illegal, although some have questioned the value of mounting active search and rescue operations that might encourage people to take to the seas in the hope of being rescued. Undoubtedly, in Australian municipal law the statutory duty to rescue is not excluded in relation to privately chartered vessels.²⁴ In the eighties, there was some evidence that such operations were also designed to equip the rescuees with the knowledge and means to enter countries illegally,²⁵ which might now lead to liability for people smuggling under accessory provisions. Under the so-called extra-territorial principle, Australian courts would have jurisdiction to try offences committed outside Australia where the conduct manifests within Australia.

Response to the Policy

The Australian annual refugee intake is about twelve thousand refugees, compared to some thirty thousand for Canada, and one hundred thousand for the United

²¹ *Migration Legislation Amendment Act* (No 1) 1999 (Cth); *Border Protection Amendment Act* 1999 (Cth).

²² See Nathan Hancock, *Border Protection Bill* 2001, Law and Bills Digest Group, No. 41 2001-02, at 3.

²³ Diana Henriss-Anderssen, "Mandatory Sentencing, the failure of the Australian legal system to protect the human rights of Australians" (2000) 7 *JCULR* 235.

²⁴ *Navigation Act* 1912 (Cth), s 265A; see Shaffer, *supra* n. 8, at 230-231.

²⁵ Shaffer, *supra* n.8 at 230.

States. The government asserts that the number of refugees accepted by Australia for resettlement is, per capita, second only to Canada.²⁶ However, for those “lucky” enough to make it to Australia, the mandatory detention that awaits them is grim. The Commonwealth Ombudsman slammed the policy in his 2000 Annual Report stated:

My investigation found evidence at every [Immigration Detention Centre] of self-harm by detainees, damage to property and fights and assault, which suggested that there were systematic deficiencies in the management of detainees...

I was particularly concerned to find that as at 30 June 2000, nearly 800 women and children were in detention and that there was little distinction between their treatment and that of the predominantly single male population...I found that women and children in particular were at risk in the detention environment. I also expressed the view that immigration detainees have lesser rights than convicted criminals held in gaols and that they were being held in an environment that appeared to have a weaker accountability framework.²⁷

Many have joined the criticism of the existing policy. The austere Joint Committee of Public Accounts and Audit has stated, in its recent review of Coastwatch, that “pushing people back to sea” is not a viable option, and that Australia should work within the existing international conventions and contribute to solving the refugee problem at its source.²⁸ Former leaders from both sides of politics have criticised existing policy, including former Prime Ministers Malcolm Fraser, Bob Hawke, and Paul Keating, and conservative leader John Hewson. One particularly outspoken critic of government policy is worthy of special mention. The former Director-General of the Department of Immigration and Multicultural Affairs (DIMA), Dr John Menedue recently described the policy as “cowardly”, noting that Australia responded very differently to the Vietnamese Boat People crisis in the eighties when more than 100,000 refugees were successfully resettled. He mocked the concept of queue jumping, pointing out that in most cases there is simply no queue to jump. Importantly, he questioned the moral outrage directed at people smuggling, noting that people smuggling was an ancient reality and had saved many Jews from the Nazi concentration camps.²⁹ He castigated those who condemn desperate parents for resorting to such desperate measures in the face of a total breakdown of civil order. For those seeking to save their children from the

²⁶ This did not prevent Pakistan’s military leader’s dry comment about the *Tampa* crisis that whilst his country had taken 2 million refugees from the Afghanistan conflict into its heartland, Australia had refused to accept 400.

²⁷ Commonwealth Ombudsman, Annual Report, 2000-2001, Department of Immigration and Multicultural Affairs (DIMA), at 79.

²⁸ Parliament of Australia, joint Committee of Public Accounts and Audit, *Review of Coastwatch*, Report No 384, August 2001, para.6.24, at 92.

²⁹ Australian Broadcasting Corporation, Television, *Late-line*, 6 November 2001.

Taliban, there might be simply no other way. Conduct considered irresponsible or reprehensible in normal times would take on a very different quality *in extremis*.³⁰

The *Tampa* is of course not the first refugee ship to be turned away from a safe harbour. The tale of the *Tampa* recalls that of another refugee ship, the *SS St Louis*. On 13 May 1939 she sailed from Hamburg with 937 Jewish refugees, bound for Havanna, Cuba. All had valid landing certificates. During the voyage the certificates were invalidated by the Cuban government, which introduced new regulations. Only twenty-two refugees were allowed ashore. In desperate straits she sailed for New York but the refugees were turned away. On 6 June 1939 it left US waters and set sail for Europe. On 13 June the Belgian King agreed to take two hundred refugees and thereafter the British, French and Dutch governments agreed to offer temporary asylum to the remainder. Six weeks after sailing from Hamburg the refugees disembarked in Antwerp, and were distributed almost equally between Belgium, France, Britain and the Netherlands. The Gestapo later rounded up many of the passengers that returned to Europe. The retrospective adjustment of Australia's migration and enforcement laws may be distinguished from the conduct of the pro-Fascist Cuban government. But sadly, very sadly for Australia, some may see it more as a matter of degree.

³⁰ One is reminded of a desperate scene from the Spielberg film *Schindler's List*. A Jewish baby from a train en route to Dachau is left on the train tracks by its despairing parents in the hope that someone might raise it as a beloved foundling.