

“WE REQUEST YOU TO TAKE MERCY”:^{*}
HUMAN FLOTSAM AND INHUMANE JETTISON
IN THE TAMPA INCIDENT

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* Open letter from the rescues on board the *Tampa* to the government and people of Australia: “You know well about the long time war and its tragic human consequences and you know about the genocide and massacres going on in our country and thousands of us innocent men, women and children were put in public graveyards, and we hope you understand that keeping view of above mentioned reasons we have no way but to run out of our dear homeland and to seek a peaceful asylum. ... We request from Australian authorities and people, at first not to deprive us from the rights that all refugees enjoy in your country. In the case of rejection due to not having anywhere to live on the earth and every moment death is threatening us. We request you to take mercy on the life of 438 men, women and children.” See full text of the letter at <<http://www.smh.com.au/news/0109/03/national/national103.html>>.

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1. The *Tampa* saga¹

On 22 August 2001 the Norwegian container vessel *MV Tampa*, owned and operated by Wilhelmsen, was steaming from Fremantle to Singapore. The vessel was under the command of Norwegian Captain Arne Rinnan, had 27 crew members on board and was carrying New Zealand and Australian goods destined for the Asian market.

As the *Tampa* neared Indonesia, Australian Search and Rescue (AusSAR) in Canberra requested assistance for a vessel in distress. On 26 August, some 158 miles from the Indonesian mainland and 85 miles north of Christmas Island, the *Tampa* found an overloaded and damaged 20-metre wooden Indonesian boat with 438 people on board. The boat people were taken onto the *Tampa* with some difficulty and the wooden vessel was abandoned. In Rinnan's words:²

They sent a plane to direct us to the sinking boat. When we arrived it was obvious to us that it was coming apart. Several of the refugees were obviously in a bad state and collapsed when they came on deck to us. 10 to 12 of them were unconscious [sic], several had dysentery [sic] and a pregnant woman suffered abdominal pains.

Rinnan ordered empty containers on the deck to be opened for shelter and the rescuees were given food and water. The survivors included 26 women (2 of whom were pregnant) and 43 children (the youngest about 1 year old). One of the male rescuees was suspected to have a broken ankle. The *Tampa* had no ship's doctor, and limited supplies of medical aid, food, water and blankets. When informed by Rinnan that he intended to take them to Indonesia, the rescuees began "acting in an aggressive and highly excited manner". He contacted the AusSAR in Canberra and informed them of the situation. He was apparently told that he should make "for the nearest port and it was the Master's decision."³

Faced with this pressure, Rinnan steamed on 27 August to Christmas Island, an Australian territory in the Indian Ocean close to Indonesia. Although he

¹ For a more detailed discussion of the facts surrounding the *Tampa* incident, see White "M.V. *Tampa* and Christmas Island Incident, August 2001": [http://www.ila.org.au/exchange/The%20M.V.%20Tampa%20and%20the%20Christmas%20Island%20Incident%20\(Updated\).PDF](http://www.ila.org.au/exchange/The%20M.V.%20Tampa%20and%20the%20Christmas%20Island%20Incident%20(Updated).PDF); White "The *Tampa* and the Law" (2001) *Seaways* 5.

² Steffensen "*Tampa's* captain finally back home in Norway", November 20, 2001: http://norwaytoday.net/article_39.shtml.

³ Audio interviews with Rinnan regarding the rescue and conditions on board at http://media.f2.com.au/smil/smh/news_4594.ram and <http://media.f2.com.au/smil/smh/4607.ram>. Although he refused to be drawn into political discussions by the media, Rinnan did express his "private view" at the time that he was a "little bit disappointed" with the Australian government. Rinnan was later named "Newsmaker of the Year" in Australia, ahead of Osama bin Laden: see Steffensen "*Tampa's* captain finally back home in Norway", November 20, 2001: http://norwaytoday.net/article_39.shtml.

could not berth at the small port in Christmas Island, he was hoping to come in close to the coast and land the refugees in small craft. He was, however, instructed by the Australian government to remain in the contiguous zone and not to enter Australian territorial waters. Rinnan became increasingly concerned for the welfare of the rescuees as he did “not have enough blankets to keep them warm” at night and there were “people passing out” from dehydration. His repeated requests for assistance over the next two days were ignored. On 29 August, he issued a distress call for his ship and its personnel and AusSAR indicated that it would provide assistance. Rinnan expressed fears that the rescuees would “go crazy” and carry out their threats to jump overboard. By now the male rescuees were on a hunger strike and Rinnan thought the “situation was getting out of control”. He entered Australian territorial waters and steamed to within 4 miles of the port.

Some hours later the *Tampa* was boarded by 45 Australian Army SAS personnel who, after a cursory medical examination of the rescuees, decided that none of them required urgent medical attention, and invited Rinnan to leave the Australian territorial sea with the rescuees still on board. He refused, on the ground that the vessel was not legally permitted to carry a large number of rescuees and did not have the safety equipment and toilet facilities to make it seaworthy:⁴

First we were told to bring them to Christmas Island, then they changed their minds and said that the refugees were not allowed to disembark at any account. I got mad. ... I have seen most of what there is to see in this profession, but what I experienced on this trip is the worst. When we asked for food and medicine for the refugees, the Australians sent commando troops onboard. This created a very high tension among the refugees. After an hour of checking the refugees, the troops agreed to give medical assistance to some of them. The soldiers obviously didn't like their mission.

The Australian Navy controlled access to the *Tampa*, refusing access to the insurer's representatives, the media, and lawyers. However, the Norwegian Consul to Australia and Army medical teams visited the ship. After a stand-off of 5 days, Prime Minister Howard announced a “Pacific solution”, in terms of which Australia, New Zealand and Nauru had agreed on a process of resettlement of the rescuees.⁵ On 3 September, the rescuees were unloaded into the *HMAS Manoora* and taken to Nauru. The *Tampa* was allowed to proceed on its original commercial voyage. The owners of the *Tampa* are

⁴ Steffensen “*Tampa's* captain finally back home in Norway”, November 20, 2001: http://norwaytoday.net/article_39.shtml.

⁵ The “solution” involved transshipment of the rescuees via Papua New Guinea either to Nauru, where their asylum claims would be processed and they would be settled at Australia's expense, or to New Zealand (which agreed to accept 150 family members as part of its annual voluntary quota). See Hancock *Current issues Brief No. 5 2001-2002: Refugee Law – Recent Legislative Developments* (Department of the Parliamentary Library, Canberra, 2001) 2: <http://www.apf.gov.au/library/pubs/cib/2001-02/02cib05.htm>.

estimated to have lost at least A\$1 million dollars as a result of the incident. The *Manoora* also took on board other boat people who were rescued at sea. Somewhat ironically, the Indonesian crew rescued by the *Tampa* were landed on Christmas Island and were charged with people smuggling.

2. Court Challenges

On 31 August, while the *Tampa* was still waiting off Christmas Island, the Victorian Council of Civil Liberties Incorporated and Eric Vadarlis applied for a writ of habeas corpus, an injunction to restrain the expulsion of the rescuees from Australia, an order for mandamus compelling the Executive to bring the rescuees into the Australian migration zone and detain them under the Migration Act 1958 (Cth), and an injunction and order for mandamus allowing Vadarlis to give legal advice to the rescuees.

On 11 September 2001, North J found that the applicants did not have standing to bring any of the applications except in respect of the writ of habeas corpus. On this issue he held that the Commonwealth had acted illegally in detaining the rescuees on the *Tampa*, and ordered that they be brought back to mainland Australia.⁶

The Australian government immediately appealed. On 17 September, the Full Bench of the Federal Court upheld the appeal by a majority of two to one.⁷ Beaumont and French JJ were of the view that, in controlling the movement of the *Tampa*, the Commonwealth was acting within its executive power under s 61 of the Australian Constitution to exclude and expel aliens from Australia and to detain them for the purposes of exclusion or expulsion. It followed that the rescuees on board the *Tampa* had not unlawfully detained while in the Australian territorial sea. Chief Justice Black, dissenting, took the view that the Commonwealth required specific legislative authority rather than a general executive power to prevent the rescuees from entering Australia. He held that, since the powers provided in the Migration Act 1958 (Cth) had not been relied upon as the lawful basis for the government's actions in relation to the *Tampa*, the rescuees had been unlawfully detained.

The applicants applied for special leave to appeal to the High Court of Australia. Their application was refused by the High Court on 27 November 2001, but no order was made as to costs. The Commonwealth promptly sued the applicants for costs, but the majority of the Full Court of the Federal Court

⁶ *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* [2001] FCA 1297.

⁷ *Ruddock v Vadarlis* [2001] FCA 1329. For a critique of the decisions, see Evans "Constitutionalism, the Rule of Law and the *MV Tampa*": <http://www.law.unimelb.edu.au/icil/tampa/simonevans.html>; Rubinstein "Citizenship, Sovereignty and Migration: Australia's Exclusive Approach to Membership of the Community": <http://www.law.unimelb.edu.au/icil/tampa/kimrubinstein.html>.

held on 21 December 2001 that the usual costs rule should not apply because of the public interest nature of the litigation. The Commonwealth's argument that the litigation amounted to an interference with an exercise of the executive power of the Commonwealth was rejected.⁸

3. Legislative Response

The Australian government took advantage of the "period of media frenzy"⁹ following the *Tampa* incident to introduce or push through a package of seven asylum-related Bills during August and September 2001. After one or two initial hiccoughs,¹⁰ most of the key measures were enacted, including:

- The Migration Legislation Amendment Act (No 6) 2001 which significantly narrows the domestic law definitions of key concepts such as "refugee", "persecution", "serious harm" and the category of "membership of a particular social group" under the Refugee Convention,¹¹ and simultaneously broadens the categories of non-political crimes that exclude the protection of the Refugee Convention.
- The Border Protection (Validation and Enforcement Powers) Act 2001

⁸ See press release by Australian Attorney-General Williams at <http://www.law.gov.au/aghome/agnews/2001newsag/tampacosts.htm>: "... I am a strong supporter of pro bono legal work. Practitioners involved in the Tampa litigation have done so on a pro bono basis. However the Commonwealth sought its legal costs against the litigants, and not their legal representatives. The fact that an applicant is represented pro bono cannot and should not determine whether costs should be sought or awarded against them. Similarly, the fact that an applicant is actually a lawyer or a group of lawyers cannot and should not mean that they should be somehow immune to the risk of having costs awarded against them in the event they are unsuccessful. That is a risk that all applicants run in bringing proceedings and lawyers who bring proceedings should be in no different position."

⁹ Crock "Contract or Compact: Skilled Migration and the Dictates of Politics and Ideology" (2001) 16 *Georgetown Immigration Law Journal* 133, 154 n 7.

¹⁰ The Border Protection Bill 2002, aptly described as "ill-considered, draconian and unconstitutional" was introduced on 29 August and defeated in the Senate on the same day. On the Bill, see Hancock *Current issues Brief No. 5 2001-2002: Refugee Law – Recent Legislative Developments* (Department of the Parliamentary Library, Canberra, 2001) 4: <http://www.aph.gov.au/library/pubs/cib/2001-02/02cib05.htm>; and Kingston "A Legal Minefield" (Evans' critique of the Bill) 30 August 2001 <<http://www.smh.com.au/news/webdiary/0108/30/A59512-2001Aug30.html>>. The Bill's key provisions were, however, re-introduced and enacted as the Border Protection (Validation and Enforcement powers) Act 2001 (Cth). See Evans "Constitutionalism, the Rule of Law and the MV Tampa": <http://www.law.unimelb.edu.au/icil/tampa/simonevans.html>; SAHRDC/HRDC "Legislating for Exclusion: Australia's Flight from the Refugee Convention": http://www.europarl.eu.int/meetdocs/delegations/aunz/20020117/02d_en.pdf.

¹¹ 1951 UN Convention Relating to the Status of Refugees and 1967 Protocol Relating to the Status of Refugees. See heading 4.3 below.

which introduces new powers to detain persons found on ships or aircraft. The Act provides that vessels may be prevented from arriving in or removed from Australian territorial waters – using “reasonable force” if necessary – if suspected of carrying “unlawful” immigrants. The Act specifically excludes such people from being defined as being held in “detention”, thereby effectively removing the opportunity to resort to regular visa-claiming procedures. Section 6 of the Act retrospectively validates all actions taken by the Commonwealth and Commonwealth officers and agents from 27 August 2001 onwards in relation to the *MV Tampa*, and section 7 prohibits the commencement of civil or criminal proceedings in “any court” against the Commonwealth or other parties who receive the benefit of section 6 validation.

- The Migration Amendment (Excision from Migration Zone) Act 2001 excises Christmas Island, the Ashmore and Cartier Islands, the Cocos (Keeling) Islands and any other external territory, island or Australian sea or resource installation from the Australian migration zone. Any people reaching “excised territory” are precluded from the regular process of applying for refugee status.
- The Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001 gives discretionary power to officers to detain “offshore entry persons” who enter or seek entry into an “excised offshore place” if they are suspected “unlawful non-citizens”. Such people may be taken to a declared country. This “does not amount to immigration detention”. The “declared country” needs to satisfy certain criteria for the Minister for Immigration but it does not necessarily have to be a signatory of the Refugee Convention. The Act also creates a “hierarchy of rights” which is “intended to deter further movement from, or the bypassing of, other safe countries”. According to these provisions, “unauthorised arrivals” who may be fleeing persecution but who have bypassed other safe countries are only eligible for successive temporary protection visas and are therefore prevented from applying for any of the key protection, refugee and humanitarian visas.

4. Legal Issues

The *Tampa* incident gives rise to a “complex mix of constitutional, administrative and international legal challenges”.¹² I have tried to tease out some of these under broad headings below:

¹² Blay “The Case of *MV Tampa*: State and Refugee Rights Collide at Sea” (2001) 76 ALJ 12.

4.1 *Safety of Life at Sea*

Australia is a party to the 1974 International Convention on the Safety of Life at Sea (SOLAS) which lays down minimum safety equipment requirements for vessels. The Australian Maritime Safety Authority (AMSA) is mandated to detain vessels visiting Australian ports which do not meet SOLAS standards. It therefore seems more than a little bizarre and unfortunate that the Australian government would attempt to “persuade” the master of the *Tampa* to put to sea while allegedly not meeting minimum SOLAS requirements. It should also be of grave concern to maritime and constitutional lawyers that, as the matter escalated, it seems to have been entirely taken out of the hands of independent agencies such as AusSAR and AMSA which have the proper legislative authority and expertise to deal with maritime safety issues.

4.2 *International Law of the Sea*

Australia is a party to the 1982 UN Convention on the Law of the Sea (UNCLOS) and the 1979 International Convention on Maritime Search and Rescue.¹³ Art 98 of UNCLOS imposes an obligation on all vessels flagged to a contracting State 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 of assistance, in so far as such action may reasonably be expected”, without causing serious danger to the ship, crew or the passengers.¹⁴ This fundamental obligation of the law of the sea has also been translated into domestic rules in most maritime jurisdictions.¹⁵

UNCLOS is silent, however, about which State takes responsibility for resettlement of rescuees once the rescue has taken place. This point was emphasised by Beaumont J in a postscript to his judgment in *Ruddock v Vadarlis*:¹⁶

Finally, it should be added that this is a municipal, and not an international, court. Even if it were, whilst customary international law imposes an obligation upon a coastal state to provide **humanitarian assistance** to vessels in distress, international law imposes no obligation upon the coastal state to **resettle** those rescued in the coastal state’s territory.

¹³ See Rothwell “The Law of the Sea and the MV Tampa Incident: Location, Location, Location!”: <http://www.law.unimelb.edu.au/icil/tampa/donrothwell.html>

¹⁴ See also the International Convention on Maritime Search and Rescue, Annex, Chapter 2.1.10 to similar effect.

¹⁵ See eg s 317A, Navigation Act 1912 (Cth).

¹⁶ [2001] FCA 1329 (original emphasis).

Is resettlement the responsibility of the flag State (Norway) as Australian commentators and politicians contended at the time of the *Tampa* incident? The UNHCR notes that:¹⁷

[w]hile ... there is a clear duty for ships' 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.

If the flag State is not *prima facie* responsible for resettlement, should the coordinating State (Australia) or the relevant coastal States (Indonesia and Australia) be responsible? While there have been some attempts to resolve this issue at international law, the position remains ambiguous.¹⁸ The UNHCR's view is that:¹⁹

[a] vessel rescuing persons in distress at sea would ... normally proceed to its next port of call, there to disembark the persons rescued. ... To permit the disembarkation of boat people in the most liberal manner would be fully in line with these provisions. By the same token, to refuse disembarkation or to permit it only under strict resettlement guarantee conditions would not be in the spirit of accepted international principles, since this might indirectly discourage rescue at sea.

Art 24 of UNCLOS requires coastal States to allow "innocent passage" of foreign ships. Art 25, however, provides that a coastal state may "without discrimination in form or fact among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security." Art 25 further provides that a "coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent".

The key concept of "innocent passage" is defined in Art 19 as passage which is not prejudicial to the "peace, good order or security" of the coastal State. Passage which is "not innocent" includes under Art 19(2)(g) "the ... unloading of any ... person contrary to the ... immigration laws and regulations of the coastal State".

¹⁷ High Commissioner for Refugees "Problems Related to the Rescue of Asylum-Seekers in Distress at Sea" (EC/SCP/18): <http://www.unhcr.ch/>.

¹⁸ See eg the DISERO and RASRO schemes set up by the UNHCR to deal with problems associated with the rescue of Vietnamese and Cambodian boatpeople in the 1970s and 1980s: see Blay "The Case of MV Tampa: State and Refugee Rights Collide at Sea" (2001) 76 ALJ 12, 16-17.

¹⁹ High Commissioner for Refugees "Problems Related to the Rescue of Asylum-Seekers in Distress at Sea" (EC/SCP/18): <http://www.unhcr.ch/>.

It seems unlikely that Art 19(2)(g) of UNCLOS was ever intended to apply to a legitimate search and rescue operation. Even if the Tampa's entry into the Australian territorial sea did, strictly speaking, constitute passage which was "not innocent", the provisions of UNCLOS should be interpreted in the context of other international treaty obligations, for example safety obligations under the SOLAS Convention, discussed above, and the Refugee Convention, discussed below. On the facts, the master was entitled to rely on Art 18(2) of UNCLOS, which permits stopping and anchoring in the territorial sea "rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress"; on the general customary international law right of necessity; and on the defence that he was acting under duress or coercion.²⁰ It is also doubtful whether Australia had the right to close its territorial sea under Art 25 as its "security", at least in the sense in which it is usually understood at international law, was hardly being threatened.

4.3 *International Refugee Law*

Australia is a party to the 1951 UN Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees. The key provisions are Arts 31-33. Art 31 requires contracting States not to impose penalties, on account of their illegal entry or presence, on refugees who come directly from a territory where their life or freedom is threatened. Art 32 provides that, once a refugee is lawfully within the territory of a contracting State, that State shall not expel the refugee save on grounds of national security or public order and only in accordance with "due process of law". The core obligation of *non-refoulement* is contained in Art 33 which requires contracting States not to "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".

Australia's international obligations under the Refugee Convention stand in stark contrast to its domestic immigration laws. At the time of the *Tampa* incident, the Migration Act 1958 (Cth) provided that unlawful non-citizens could only apply for a protection visa once they were within the "migration zone" which was defined as being above the mean low water line of

²⁰ Triggs and Shearer, quoted in "Australia Has Right to Board Vessel" 30 August 2001: <http://www.smh.com.au/news/0108/30/national/national5.html>; White "M.V. Tampa and Christmas Island Incident, August 2001": [http://www.ila.org.au/exchange/The%20M.V.%20Tampa%20and%20the%20Christmas%20Island%20Incident%20\(Updated\).PDF](http://www.ila.org.au/exchange/The%20M.V.%20Tampa%20and%20the%20Christmas%20Island%20Incident%20(Updated).PDF). Contra Freshfields "Public International Law News", September/October 2001: http://www.freshfields.com/practice/pil/publications/pil_news/200110.pdf, arguing that the Tampa's passage was not innocent, that Australia was entitled to prevent it, and dismissing media analysis to the contrary as an illustration of "how 'junk' public international law arguments can be raised in the press and damage the reputation of a state or company".

Australian territory. The purpose of this restrictive definition of “migration zone” was to prevent boat people such as those on board the *Tampa* from applying for refugee status whilst within the Australian territorial sea. As discussed above, after the *Tampa* incident the Migration Amendment (Excision from Migration Zone) Act 2001 was passed to exclude Christmas Island, the Ashmore and Cartier Islands, the Cocos (Keeling) Islands and any other prescribed external territory, island or Australian sea or resource installation from the Australian migration zone to further restrict the ability of boat people to apply for refugee status.²¹

Does this highly cynical, artificial and complicated²² redrawing of Australia’s immigration borders breach international law? The Refugee Convention is silent on the exact details of when and where an application for refugee status has to be considered by a contracting State.²³ However, Australia’s immigration legislation arguably conflicts with several general principles of the Vienna Convention on the Law of Treaties. In particular, Art 31 of the Vienna Convention provides that a State is bound to carry out its treaty obligations in good faith, and interpret treaties in a purposive fashion. Importantly, Art 28 provides that a treaty is binding in respect of a State’s *entire territory*. Further, a State may not invoke its internal laws as justification for their failure to perform a treaty (Art 27).

It seems reasonable to assume that the Refugee Convention was intended to apply at least once an applicant is within the relevant State territory, *as generally understood in international law*. In the light of Australia’s assertion of sovereign rights and jurisdiction over its territorial sea in all issues other than selective migration matters, the provisions of the Migration Act which excise parts of Australia’s territorial seas (and now its landmass) would seem to amount at least to a violation of the spirit, if not the letter of the Refugee Convention.²⁴ Rights of enforcement and redress under international law are,

²¹ Blay “The Case of MV Tampa: State and Refugee Rights Collide at Sea” (2001) 76 ALJ 12, 15-16.

²² Rubinstein “Citizenship, Sovereignty and Migration: Australia’s Exclusive Approach to Membership of the Community”: <http://www.law.unimelb.edu.au/icil/tampa/kimrubinstein.html>: “The Alice in Wonderland contortion and the extent to which the legislation strains to call a spade a sea anchor, or anything other than what it is, will over time, if not already, take its toll on the credibility of the laws enacted in haste.”

²³ This is hardly surprising. As Triggs points out, international law “does not lend itself to technical niceties. Who of the delegates negotiating the Refugee Convention more than 50 years ago could have imagined that Australia would legislate to deny a right to seek asylum to those within its territorial seas and to excise from relevant legislation those external territories most likely to be the first Australian haven or port for refugees? No express provision could be drafted to take account of such contrivances.” See Triggs “International Law and the Tampa Affair: A Legal Twilight Zone”: <http://www.law.unimelb.edu.au/icil/tampa/gilliantriggs.html>.

²⁴ Contra Blay “The Case of MV Tampa: State and Refugee Rights Collide at Sea” (2001) 76 ALJ 12, 14-15, 17-18 who argues that the Refugee Convention does not impose an

however, probably limited to making complaints to the IMO, the UNHCR or possibly the UN Human Rights Commission, as Norway did at the time of the incident.

5. Implications for New Zealand?

What are the implications for New Zealand? What would the legal position be if a similar incident occurred in this country? Because of our isolation and greater distance from other countries, the question is largely theoretical. There have, however, been one or two false alarms. On 15 June 1999, the Minister of Immigration announced that a vessel had left Honiara in the Solomon Islands with 102 Chinese nationals on board and the declared intention of landing in New Zealand. On 16 June 1999, Parliament enacted the Immigration Amendment Act (No 2) 1999 which brought into force on the same day amendments to the turnaround provisions in the Immigration Act 1987. The amendments allow for the 28 day period of detention permitted by s 128 of the Act to be extended by a District Court Judge either for seven days at a time or, where the person detained is a member of a group of people who arrived in New Zealand on the same ship or aircraft, for as long as the Judge thinks necessary in the circumstances “to allow all the persons in the group concerned to be properly dealt with”. It subsequently transpired that the vessel had landed in Papua New Guinea instead.²⁵

New Zealand is a party to the same relevant international instruments as Australia, and is therefore subject to the same international obligations in respect of search and rescue, humanitarian assistance, safety of life at sea, the international law of the sea and refugee law. In respect of the last category, however, New Zealand’s domestic legislation is quite different.

Part VIA of the Immigration Act 1987 gives domestic effect to the Refugee Convention. Section 129G of the Immigration Act provides that a claim for refugee status “is made as soon as a person signifies his or her intention to seek to be recognised as a refugee in New Zealand to a representative of the Department of Labour or to a member of the Police”. Section 129G is certainly not happily drafted. It could be interpreted expansively as conferring a right to claim refugee status even outside the New Zealand territorial sea, provided

international law obligation to *resettle* refugees, and still less in one’s own territory. On his analysis, Australia’s interception of the Tampa and implementation of Howard’s “Pacific solution” is “not inconsistent with its non-refoulement obligations under the Refugees Convention: they were not being returned to a territory where they faced prosecution”. While subsequent resettlement of refugees in third countries is a grey area, it is difficult to see how the initial refusal to process an application for refugee status while the boatpeople on board the Tampa were within the Australian territorial sea can be reconciled with a purposive interpretation of the Convention.

²⁵ See generally Haines “An Overview of Refugee Law in New Zealand: Background and Current Issues”: <http://www.refugee.org.nz/IARLJ3-00Haines.html>.

that the requisite intention is conveyed to an appropriate official. At the very least, it should allow boat people such as those on board the *Tampa* to apply for refugee status whilst in New Zealand's territorial sea.²⁶ This contrasts starkly with the more restrictive approach to applications for refugee status adopted in the Migration Act 1958 (Cth).

New Zealand cannot, however, afford to be too smug about its refugee record. Its knee-jerk and panicky legislative reaction to the rumours of arrivals of boat people in 1999 does not bode well for the quality of any immigration policy that might be promulgated if a flotilla of boat people ever were to arrive on our shores. And New Zealand's application of the detention provisions in the Immigration Act, while nowhere near as draconian and inhumane as Australia's compulsory detention policy for all asylum-seekers, is proving increasingly problematic.²⁷

6. Conclusion

The Tampa incident highlights a number of unfortunate gaps and grey areas in international and domestic law that urgently require attention. In particular:

- SOLAS obligations on the master to save lives at sea should carry with them clear rights for the master to decide how to deal with the situation once the rescue mission has been completed. In particular, the master should have an unquestionable right to land the rescuees at the nearest coastal State port, taking into consideration overarching safety and humanitarian concerns rather than coastal State self-interest. While there does appear to be an existing, rather nebulous customary rule that the master should proceed to the "next" or "nearest" port, as the *Tampa* incident illustrates, this rule will not be honoured by coastal States when it is not expedient for them to do so.
- Coastal states that are parties to SOLAS and UNCLOS should be required to accept sea rescuees automatically and expeditiously, even if only on a temporary basis while their claims are being processed under the Refugee Convention.

²⁶ On the other hand, "claim" is defined in s 129B for the purposes of Part VIA as being "a claim *in New Zealand* to be recognised as a refugee in New Zealand". If the italicised reference to New Zealand is interpreted as a geographical restriction on where the claim has to be *made* rather than *received*, boat people communicating their asylum claims to shore from vessels in the New Zealand territorial sea may be excluded. "New Zealand" is defined in s 2 as meaning "any land territory within the territorial limits of New Zealand" and includes the territorial sea and contiguous zone for specified sections of the Act only, which do not include s 129B.

²⁷ There has been at least one well-publicised hunger strike by refugees in Mt Eden Prison (on which, see Haines above) and the use of the detention provisions is currently the subject of a legal challenge by a human rights group.

- The definition of “innocent passage” in UNCLOS should make it plain that humanitarian and search and rescue missions will always amount to “innocent passage”, and coastal States’ “rights” to close their territorial waters to rescue vessels should be limited accordingly.
- The Refugee Convention needs to be updated to clarify, in an increasingly complicated world, exactly when and where the mandatory due process and *non-refoulement* obligations of parties to the Convention kick in, and it needs to be made plain that the geographical reach of such claims cannot be diminished by domestic legislation.
- In addition, the extent to which parties to the Refugee Convention are entitled to resettle refugees in third countries which are not parties to the Convention should be restricted, as such schemes as the “Pacific solution” will inevitably be used to indirectly deprive refugees of the substance of their Refugee Convention rights.

The *Tampa* incident also illustrates quite clearly that the orthodox taxonomy of international and domestic law does not cope well with “the phenomenon of ‘boat people’ ... Current legal analysis often leads to an artificial and tangential analysis. Rather there is a need for regional and global co-operative responses to the rights of asylum seekers.”²⁸ The traditionally “flat” structure of international law, and the lack of an effective central multi-issue/multi-treaty enforcement mechanism at international law, exacerbates the problem. While there is a growing trend for international and domestic tribunals to “read up” international human rights instruments, the response of international law commentators to the *Tampa* incident suggests that we have yet to achieve even a “soft” hierarchy of international law norms in incidents like this. In a more ideal world, it should have been crystal clear (to all but some Australian politicians seeking re-election) that humanitarian and safety considerations ought, at least until the immediate crisis had been resolved, to have trumped traditional law of the sea and immigration rules.

Apart from being incredibly ungracious and immoral, Canberra’s approach to the *Tampa* incident set a dangerous maritime precedent. In future, a more unscrupulous master or owner receiving a call from AusSAR, and potentially faced with the same Catch-22 situation as the *Tampa*, might be sorely tempted to quietly steam away or “fail to find” any boat people. It is also doubtful that Canberra’s new measures to prove that Australia is not a “soft touch” will have any impact on the problem at all. As Professor William Maley of the Refugee Council of Australia points out: “Those being smuggled don’t know

²⁸ Triggs “International Law and the Tampa Affair: A Legal Twilight Zone”: <http://www.law.unimelb.edu.au/icil/tampa/gilliantriggs.html>

about 'migration zones', and those who run [people smuggling] networks are unlikely to care".²⁹

From a personal perspective, the saddest aspect of the *Tampa* incident was the ugly underbelly of xenophobia and racism revealed in the talk-back radio wilderness of Australia and my adopted homeland of New Zealand. For Australasia, the boat people issue is a minor problem. "Australia and New Zealand are blessed with an island geography. They do not receive the numbers of refugees seeking entry to and indeed accepted by many other states."³⁰ There is no "flood" or "tsunami" of boat people descending on our shores, as the tabloid media are fond of hysterically proclaiming. Official UNHCR figures confirm that the highest refugee flows by far occur between poor countries in Africa and the Middle East. Pakistan is currently dealing with 3.5 million refugees from Afghanistan. Compared with that, Australia's annual *total* voluntary quota of 12,000 refugees (which is just one-tenth that of most European countries and is automatically reduced by the numbers of boat people arriving in Australia), constitutes a mere drop in the ocean.

²⁹ SAHRDC/HRDC "Legislating for Exclusion: Australia's Flight from the Refugee Convention":
http://www.europarl.eu.int/meetdocs/delegations/aunz/20020117/02d_en.pdf

³⁰ Feller "The Role of Adjudicators and Judges in International Refugee Protection":
<http://www.refugee.org.nz/IARLJ3-00Feller.html>