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A Dimension of the Refugee Issue: *MV Tampa* Incident Examined

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CONTENT

1. INTRODUCTION

There is a story hidden behind with the hype that surrounded the terrorist attacks in the US on 11 September 2001. Another human drama unfolded in Australia when asylum seekers from Afghanistan were rescued from their sinking wooden boat by a Norwegian registered merchant ship,

*) We are grateful to Dr Mary Crock who assisted us in the details of this case in the context of the Australian immigration law and to Associate Professor Donald R Rothwell for insightful comments and advice. We also thank Ms Katalin Virag for proofing this paper. However, all responsibilities regarding this essay are reserved to the authors.

MV Tampa. The rescued people wanted to go to Australia to seek protection on the ground that they were refugees. Although it had rescued the boat people in response to a call from Australian authorities, the *MV Tampa* with the rescuees on board was refused permission to enter the Australian territory of Christmas Island. Australian public interest advocates initiated litigation challenging the decision. On the very day of the terrorist attacks in New York, the Federal Court of Australia delivered a judgment to the effect that the rescuees were to be brought into the Australian territory. An appeal was made by the government to the Full Federal Court of Australia, resulting in the first judgment being set aside.

The terrorist attacks on 11 September had an immediate and obvious impact on the attitude of the Australian people towards the *MV Tampa* asylum seekers. Public support for the government's refusal to allow the boat to land was overwhelming. It may be that the fear generated by the terrorist attacks in New York also influenced the Full Federal Court. Whether or not this is the case, the *MV Tampa* incident represented a significant milestone in historical context of the treatment of asylum seekers in Australia. Australia has experienced three waves of asylum seekers coming by boat: the first came after the fall of Saigon at the end of the Vietnam War; the second from Asia with the troubles in Cambodia and People's Republic China between 1989 and 1993; and the third involved asylum seekers from the Middle East including Afghanistan. In response to each wave, Australia has formed its own national procedures for determining refugee status, gradually putting a distance between its domestic laws and its international obligations. The Australian response to the *MV Tampa* incident demonstrated a dramatic change in attitude toward its international obligations, due presumably to political considerations. It shall be shown that the *MV Tampa* incident reveals a new dimension to the refugee issue in its history, having ramifications upon the development of international law.

The exceptional character of the *MV Tampa* incident can be brought out in sharp relief by the juxtaposition in the refugee history of Australia. Part 2 of this article will briefly describe how Australia has shaped its immigration and refugee policies and procedures and the kinds of difficulties

Australia has been faced up with until 2001. Based on this general brief description of the immigration policies and laws in Australia, Part 3 will introduce the *MV Tampa* case in details. Part 4 deals with legal issues raised by the response of the Australian government to the *MV Tampa* incident, which are divided into three fields of international law: the law of the sea, international refugee law and international human rights law. Based on the clarification of the arguments by which the Australian actions during the *MV Tampa* incident are held illegal, Part 5 will deal with the political dimension of the incident from a legal point of view and consider its ramifications upon international law in Australia.

2. A Brief History of the Refugee Issue in Australia

There has persistently been a conflict between the proposition of freedom of movement and the proposition of exclusionary sovereignty of states over the centuries. Although there had been little to support the exclusionary proposition until the late 19th century, the peak of emigration from Europe and the Orient to the US and the United Kingdom gave rise to the exclusionary proposition which originated from common law precedents and supported by the emerging concept of sovereignty, whilst the European continent and Latin America persisted in the proposition of freedom of movement.[1] As a country inheriting the common law tradition, Australia has persistently stood by the exclusionary proposition from the time of its federation. It is said, in effect, that one of the more pressing reasons for favouring the federation was a desire to achieve uniformity in immigration law and policy.[2] This is evident from the fact that one of the first pieces of legislation passed by the Federal Parliament was the *Immigration Act 1901*.

While this conflict seemed to be settled with the victory of the exclusionary proposition, the conflict has in the last century transformed into a new dimension in which the exclusionary proposition based on the con-

1) James A R Nafziger, "The General Admission of Aliens under International Law," *American Journal of International Law*, Vol. 77, 1983, pp. 807-816.
2) Mary Crock, *Immigration and Refugee Law in Australia*, (Sydney: The Federation Press, 1998), p. 13.

cept of state sovereignty is challenged by humanitarian considerations including refugee protection. The issue of refugee protection has arisen since the end of World War I, and the central issues have been the approach to the refugee definition, the procedure for the determination of refugee status, and the definition of refugee itself. Having adopted an individualist approach to the refugee definition,[3] the 1951 *Convention relating to the Status of Refugees*[4] and the 1967 *Protocol relating to the Status of Refugee*[5] have faced difficulties in assessing refugee status in cases of a mass influx of asylum seekers. The individualist approach to refugee status, in contrast to the general approach which allows *prima facie* determination of refugee status, requires the input of significant national resources including administrators and the management of detention centres.[6] Also, where detailed background information and the credibility of asylum seekers remain hard to ascertain, much care tends to be taken of the ramifications to foreign and domestic policies rather than the humanitarian goal of refugee protection.[7]

This has also been the case in Australia, in which an individualised procedure has been adopted to assess refugee status as an integral part of its immigration policy and law. Article 36 of the *Migration Act* 1958 (Cth) as amended in 2001 provides protection visas reflecting the obligations of Australia under the *Refugee Conventions*, which requires asylum seekers to take "all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently". Therefore, every asylum seeker is required to take all steps in the visa application process as an

3) Guy S Goodwin-Gill, "Nonrefoulement and the New Asylum Seekers," in David A Martin (ed), *The New Asylum Seekers: Refugee Law in the 1980s*, (Martinus Nijhoff Publishers, 1988), p. 103. Hathaway divides the approach to refugee definition into three perspectives: juridical perspective, social perspective, and individualist perspective. James C Hathaway, *The Law of Refugee Status*, (Butterworths Canada Ltd, 1991), pp. 2–6.

4) *United Nations Treaty Series*, Vol. 189, p. 150 (entered into force 21 April 1954) (*'Refugee Convention'*).

5) *United Nations Treaty Series*, Vol. 606, p. 267 (entered into force 4 October 1967) (*'Refugee Convention'*).

6) Goodwin-Gill, op. cit. note 3, p. 107.

7) Ibid, p. 107.

individual, and all applicants are assessed one by one, with their background and fear of persecution taken into account.

Although it is said that Australia has never been faced with a mass influx of asylum seekers, Australia has experienced three waves of asylum seekers by boat. The first influx was Vietnamese boat people who fled the end of the Vietnam War in the late 1970s. It is recorded that 2087 Vietnamese nationals arrived in boats on the North Coast of Australia between April 1976 and April 1981.[8] The Minister for Immigration and Ethnic Affairs automatically accepted their resettlement as refugees in Australia due presumably to the fact that Australia stood by the South Vietnamese Government as an ally of western states. It is not until this time that Australia incorporated by legislation the definition of refugee contained in the *Refugee Conventions* as section 6A (1) (c) into the *Migration Act* 1958 (Cth), though not all parts of the Conventions have been enacted and the grant of refugee status has remained a matter of Ministerial discretion.

The two coincidental affairs caused the second influx of boat people into Australia. The withdrawal of the Vietnamese army from Cambodia and movements of the United Nations toward a resolution of the civil conflict generated by the genocidal regime of the Khmer Rouge triggered the influx of Cambodian boat people. Also, the Tiananmen Square massacre in the People's Republic of China on 4 June 1989 gave rise to a number of refugee applications within Australia as well as boat people seeking asylum in Australia. The Australian government, while tolerant in granting protection visas to Chinese students studying in Australia, tightened its attitude toward asylum seekers arriving by boat. This tightened government attitude can be found in its response to two judicial decisions in the High Court of Australia relating to refugee claims: *Chan Yee Kin v Minister for Immigration and Ethnic Affairs*,[9] and *Chu Kheng Lim v*

8) Crock, op. cit. note 2, p. 127.

9) *Commonwealth Law Reports*, Vol. 169, 1989, p. 379 (*'Chan'*). Chan Yee Kin belonged to a faction of the Red Guards which lost the struggle for control of that organization in his local area. He was detained several times between 1968 and 1973. In 1974 he escaped from that area, and eventually entered Australia illegally in 1980. Although he applied for refugee status on November 1982, his application was re-

Minister for Immigration, Local Government and Ethnic Affairs.[10]

In *Chan*, the High Court of Australia concluded that the decision of the Minister was so unreasonable that no reasonable person could have so exercised the power.[11] As the Tiensanmen Square massacre in Beijing happened before this judgment was delivered, it would be reasonable to see that, "the ruling in *Chan Yee Kin* strongly reflects the feelings of revulsion and sympathy that prevailed in Australia at the time of massacre".[12] The normative impact of the High Court's ruling on the refugee definition, however, prompted the Australian government to restrict the role of the courts in the review of not only refugee decisions but also immigration decisions as a whole.[13] A critical change to be noted here was the amendment in 1991 of the *Migration Act* 1958 (Cth), which introduced the terms conferring more discretion on the Minister such as "if the Minister has reason to believe"[14] and "if the Minister is satisfied"[15]. This

jected. He challenged this refusal, which was upheld in the trial judgment of the Federal Court, but rejected in the appeal judgment of the Federal Court. *Chan*, pp. 380–381. This was the first case in which the High Court of Australia considered in detail the definition of refugee and represented the height of judicial activism. Crock, op. cit. note 2, p. 134.

10) *Commonwealth Law Reports*, Vol. 170, 1992, p. 1 ('*Law*').

11) *Chan*, pp. 431–435 (McHugh J, to whom others concurred in substance).

12) Mary Crock, "Apart from Us or a Part of Us? Immigrants' Rights, Public Opinion and the Rule of Law," *International Journal of Refugee Law*, Vol. 10, Nos. 1–2, 1998, p. 55.

13) Ibid, p. 56.

14) See section 18 (former section 22A) of the *Migration Act* 1958 (Cth), which provides:

(1) *If the Minister has reason to believe* that a person (in this subsection called the first person) is capable of giving information which *the Minister has reason to believe* is, or producing documents (including documents that are copies of other documents) which *the Minister has reason to believe are*, relevant to ascertaining the identity or whereabouts of another person whom *the Minister has reason to believe* is an unlawful non-citizen, the Minister may, by notice in writing served on the first person, require the first person, . . . (emphases added).

15) See, eg, clause 785 (temporary protection visa) and clause 866 (protection visa) of the *Migration Regulations* 1994 (Cth), in which it is provided as a criterion which applicants must satisfy that:

The Minister is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugee Convention (emphasis added) (clauses 785.221 and 866.211).

change resulted in putting a certain distance between the refugee definition of the *Refugee Conventions* and the decision made by the Minister,[16] as was revealed in the High Court's decision in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*.[17] Mary Crock analyses the impact of the *Chan*'s decision, observing that, "the impact of this decision is manifest in the extreme reluctance to intervene that is now apparent in Federal Court decisions involving refugees".[18]

The wave of amendments to the *Migration* Act 1958 (Cth) ensued. When Cambodian boat people came to Australia, the Australian authorities placed them in detention centres, alleging that the troubles in Cambodia were under control. The Cambodian asylum seekers, Chu Kheng Lim and thirty five others, applied to the Federal Court of Australia more than two years later whilst in detention on the basis that their continued detention was unlawful. On 5 May 1992, two days before the case was due to be heard by the Federal Court, the Australian government rushed through the Parliament the *Migration Amendment Act* 1992 (Cth), which introduced Part 2 Division 4B (now Part 2 Division 6) of the Act, prescribing:

1) that 'designated persons'[19] must be kept in immigration deten-

16) Crock, op. cit. note 2, p. 126. Crock, op. cit. note 12, p. 57.

17) *Commonwealth Law Reports*, Vol. 185, 1996, p. 259. The majority of the Court held that:

['T]he Minister's power to make a refugee status determination was now expressly conditioned upon the Minister being "satisfied" that a person was a refugee as defined. . . .

The grafting of what might be seen as the *Chan* test onto the new statutory power to make refugee status determinations *reveals* the true nature of the Minister's decision-making function in the present case. This is, that if the Minister is satisfied that a person has a genuine fear founded upon a real risk of persecution, then the Minister may determine in writing that the person is a refugee. *A condition of determination is the Minister's satisfaction* (emphasis added). Ibid, p. 274.

18) Crock, op.cit. note 12, p. 58.

19) Section 177 in Division 6 of the *Migration Act* 1958 (Cth) amended in 2001 provides that, designated person means a non-citizen who: (a) has been on a boat in the territorial sea of Australia after 19 November 1989 and before 1 September 1994; and (b) has not presented a visa; and (c) is in the migration zone; and (d) has not been granted a visa; and (e) is a person to whom the Department has given a designation by: (i) determining and recording which boat he or she was on; and (ii) giving him or her an identifier that is not the same as an identifier given to another non-citizen who was on that boat; and includes a non-citizen born in Australia whose mother is a designated person.

tion[20] and can be held in detention for 273 days of application custody (extendable by a further 90 days)[21] and;

2) that a court is not to order the release from immigration detention of 'designated persons'.[22]

Lim questioned the constitutionality of the amendments in the High Court on the basis that the detention of non-citizens necessarily involves an exercise of judicial power which should have been reserved to the courts. Although the High Court responded that authority to detain an alien in custody constitutes an incident of the executive power without infringement of the judicial power,[23] it found that the detention before 5 May 1992 might have been unlawful. As the applications were made to the High Court seeking damages for wrongful detention before 5 May 1992, the government responded by enacting section 54RA (now section 184) of the Act, stipulating that any damages payable for wrongful detention be limited to one dollar per day. Incidentally, the majority of the Court found that the attempt in section 54R (now section 183) to exclude curial scrutiny of detention was an usurpation of the judicial power and therefore unconstitutional.[24]

Another boat load of Cambodian people, on the other hand, applied to the International Human Rights Committee based on article 5 (1) of the *First Optional Protocol to the International Covenant on Civil and Political Rights*,[25] alleging that the continued detention of the Cambodian asylum seekers was arbitrary within the meaning of article 9 (1) of the *International Covenant on Civil and Political Rights*[26] and that the impossibility to challenge the lawfulness of the applicant's detention owing to section 54R (now section 183) of the *Migration Act* 1958 (Cth) was in violation of article 9 (4). In contrast to the decision in the High Court of Australia, the International Human Rights Committee held:

> In any event, detention should not continue beyond the period for which the State can provide appropriate justification. . . . Without such factors [justification] detention may be considered arbitrary, even if entry was illegal. In the instant case, the State party has not advanced any grounds particular to the author's case, which would justify his continued detention for a period of four years, during which he was shifted around between different detention centres. The Committee therefore concludes that the author's detention for a period of over four years was arbitrary within the meaning of article 9, paragraph 1.[27]

Also, the International Human Rights Committee observed that the introduction of section 54R (now section 183) of the *Migration Act* 1958 (Cth) was in violation of article 9 (4), as that provision requires that the court be empowered to order release if the detention is incompatible with the requirements in other provisions of the ICCPR including article 9 (1).[28] As can be seen in the two cases decided respectively in the High Court of Australia and in the International Human Rights Committee concerning the same issue, the wave of amendments by the legislature has forced the Australian judiciary to put a certain distance even between the human rights standards internationally required to observe for every person and the human rights standards for aliens in Australia.

20) Section 178 in Division 6 of the *Migration* Act 1958 (Cth) amended in 2001.
21) Section 181 in Division 6 of the *Migration* Act 1958 (Cth) amended in 2001.
22) Section 183 in Division 6 of the *Migration* Act 1958 (Cth) amended in 2001.
23) The court held that, "[t]he reason why that is so is that, to that limited extent, authority to detain in custody is neither punitive in nature nor part of the judicial power of the Commonwealth." *Lim*, p. 32 (Brennan, Deane and Dawson JJ).
24) *Lim*, pp. 36–37 (Brennan, Deane and Dawson JJ).
25) *United Nations Treaty Series*, Vol. 999, p. 302 (entered into force 23 March 1976) ('*Optional Protocol*'). Article 5 (1) of the *Optional Protocol* provides that, "[t]he Committee shall consider communications received under the present Protocol in the light of all written information made available to it by the individual and by the State Party concerned." Australia acceded to the *Optional Protocol* on 25 September 1991 and the Protocol came into force for Australia on 25 December 1991. For Australia's instrument of accession to the *Optional Protocol*, see *Australian Treaty Series*, 1991, No. 39.
26) *United Nations Treaty Series*, Vol. 999, p. 171 (entered into force 23 March 1976) ('ICCPR').
27) *A v Australia*, Communication No.560/1993, views adopted on 30 April 1997, Human Rights Committee, 59th session, UN Doc CCPR/C/59/D/560/1993, para. 9.4 ('*A v Australia*'). The Committee confirmed that the notion of 'arbitrariness' must not be equated with 'against the law' but be interpreted more broadly to include such elements as inappropriateness and injustice. See also, *Van Alphen v the Netherlands*, communication No.305/1988, views adopted on 23 July 1990, Human Rights Committee, 39th session, UN Doc CCPR/C/39/D/305/1988, para. 5.8.
28) *A v Australia*, para. 9.5.

The third influx was represented by nationals of the oppressive regime in Iraq and Afghanistan. Unlike the Cambodian and Chinese boat people in the early 1990s, it is reported that more than 90 per cent of the boat people from Iraq and Afghanistan were recognised as refugees in Australia since 1998.[29] At the same time, however, this increasing trend of refugee recognition in Australia inevitably involved fears of loss of border control in the Australian public. In response, Australia has paid Indonesia to intercept asylum seekers in boats in Indonesia before arriving in Australia, resulting in the apprehension of around 1,500 people by the Indonesian authorities over a period of 18 months up until August 2001.[30] In coping with the *MV Tampa* incident which happened in this context, the Australian government forcefully carried through its tougher policy toward asylum seekers arriving by boat than it did in response to the Cambodian and Chinese asylum seekers, involving legal ramifications in international law as well as the Australian municipal law.

3. *MV Tampa* Case

3–1 Facts[31]

On 26 August 2001, a wooden fishing boat carrying 433 people was sinking in the Indian Ocean about 140 km north of Australia's Christmas Island Territory. The people were mainly from the Afghani religious and ethnic minority groups, who were recognised as one of the most persecuted minority group in the world by the United Nations High Commissioner for Refugees (UNHCR). A Norwegian registered container ship, the *MV Tampa*, which was in the area at the time, received a call from Australian authorities asking Captain Arne Rinnan to rescue the people

29) Mary Crock and Ben Saul, *Future Seekers: Refugees and the Law in Australia*, (Federation Press, 2002), p. 33.

30) Ibid, p. 35.

31) The facts are derived from the following. Philip Lynch and Paula O'Brien, "From Dehumanisation to Demonisation: The MV Tampa and the Denial of Humanity," *Alternative Law Journal*, Vol. 26, No. 5, 2001, pp. 215–216. Ryszard Piotrowicz, "The Case of MV Tampa: State and Refugee Rights Collide at Sea," *Australian Law Journal*, Vol. 76, No. 1, 2001, pp. 12–13. *Victorian Council for Civil Liberties Incorporated v Minister for Immigration & Multicultural Affairs, Australian Law Reports*, Vol. 182, 2001 (*'VCCLI v MIMA'*), pp. 624–633, paras. 14–43.

from the sinking boat. He was told it had eighty people on board. He agreed to assist and was guided to the boat by the Australian authorities.

When the *MV Tampa* arrived at the location of the sinking boat, it took on board the 433 people and inquired from the Australian Search and Rescue (AUSAR), which is operating under the Australian Maritime Safety Authority (AMSA), where they should be taken. But the Australian officers replied that they did not know. Notwithstanding the objection by some of the rescuees, the *MV Tampa* then headed for Indonesia. But as the rescuees said they would commit suicide if the Captain did not change course for Christmas Island, the Captain decided to head for Christmas Island. When the *MV Tampa* was within the Australian contiguous zone, but still while outside Australian territorial waters, the Captain was advised by Australian authorities that the Australian territorial sea was closed to the *MV Tampa*.

The owners of the *MV Tampa* then instructed James Neil, a solicitor, to act on their behalf. While the solicitor communicated with the Department of Immigration and Multicultural Affairs (DIMA) about the Captain's position and the rescuees' situation, the *MV Tampa* was lying offshore, 13.5 nautical miles from the Island, abiding by the instructions of the Australian authorities. In the meantime, the Harbour Master ordered, according to the request from the Australian Government and on the basis of section 5 of the *Shipping and Pilotage Act* 1967 (WA), to prohibit all boat movements in and out of the Christmas Island port at Flying Fish Cove.

The Captain was concerned about not only the welfare of his crew but also the deterioration in the condition of the rescuees. It is reported that several of the rescuees were unconscious, that one had a broken leg and that two pregnant women were suffering pains. Although the Captain requested that the rescuees receive urgent medical and humanitarian assistance, no such assistance was forthcoming. Because of his increasing concerns, just after issuing a second distress call at 0845 on 29 August, he took his ship into Australian territorial waters and stopped about four nautical miles from the Island. Within two hours, forty five Special Armed Services (SAS) troops from the Australian Defence Force boarded the *MV Tampa*.

On 31 August, the Victorian Council for Civil Liberties Inc and a solicitor, Mr Vadarlis, filed applications in the Federal Court of Australia. Their applications claimed injunctions, mandamus, interlocutory relief and a writ of habeas corpus directed to the respondents (the Commonwealth, the Minister for Immigration and Multicultural Affairs and the Secretary and Chief Executive Officer of the DIMA) commanding them to release the rescuees from custody. On that day, North J made an interlocutory order restraining the respondents, until the following day, from taking any steps to remove the *MV Tampa* from Australian territorial waters. Meanwhile, it was announced on the same day that the Australian Government had reached an agreement with the Governments of New Zealand and Nauru for the processing of the rescuees. In accordance with this agreement, the rescuees were transferred from the *MV Tampa* to the naval vessel, HMAS Manoora, which then began to travel to Papua New Guinea under an agreement made between the Australian Government and the Government of Papua New Guinea for transhipment of the rescuees to Port Moresby and then by aircraft to Nauru and New Zealand.

North J had continued the final hearing until 5 September and delivered judgment on 11 September. On the same day, however, appeals were instituted against his Honour by the respondents. In response to this appeal, a Full Court convened to hear the appeal on 13 September and delivered its judgment on 17 September.

3–2 Judgement made in the Federal Court

The case was heard by North J, who delivered five points of the issue: the order for release argument based on the writ of habeas corpus, the argument against the lawful authority to expel the resucees, the argument on the duty to bring the rescuees into the migration zone,[32] the argument on the duty to take the rescuees into detention as unlawful non-citizens

32) Section 245F (9) of the *Migration Act* provides that, "[i]f an officer detains a ship . . . under this section, the officer may also detain any person who is found on the ship . . . and bring the person, or cause the person to be brought, to the migration zone." It is to be noted that Australian has set up the migration zone different from its territorial boundary.

attempting to enter the migration zone,[33] and the argument on the right to freedom of communication.

As can easily be found, the five issues raised by the applicants were devoted to the single purpose of bringing the resucees into the Australian migration zone so that they could be assessed for their refugee status in pursuance to the *Migration Act*. Although arguments (2) to (4) were dismissed on the basis that the applicants lacked standing,[34] the order for release argument based on the writ of habeas corpus was successful. As a result, it was held that there was no practical need for judging the freedom of communication argument. North J reasoned the decision on the order for release argument as follows.

At first, North J affirmed its jurisdiction, holding that, "[t]he respondents did not contest that this Court has jurisdiction in this case to make an order of such a nature".[35] The respondents instead argued the rescuees were not detained in the sense required for making such an order. Having examined every possible means of escape available for the rescuees, North J held:

> In my view the evidence of the respondents' actions in the week following 26 August demonstrate that they were committed to retaining control of the fate of the rescuees in all respects. . . . The respondents took to themselves the complete control over the bodies and destinies of the rescuees.[36]

Also, North J confirmed that the level of restraint required for a writ of habeas corpus has long been recognised as less than close physical confinement, referring to the US Supreme Court judgment in *Jones v Cunningham*,

33) Section 189 of the *Migration Act* provides:
(1) If an officer knows or reasonably suspects that a person in the migration zone is unlawful non-citizen, the officer must detain the person.
(2) If an officer reasonably suspects that a person in Australia but outside the migration zone:
(a) is seeking to enter the migration zone; and
(b) would, if in the migration zone, be an unlawful non-citizen;
the officer must detain the person.

34) *VCCLI v MIMA*, pp. 647–650, paras. 123–137.

35) Ibid, p. 635, para. 55.

36) Ibid, p. 639, para. 81.

which took a view that, "[habeas corpus] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose — the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty".[37] In addition, North J held that there was no right to expel the rescuees without statutory authority.[38] As a result, it was held that the applicants were entitled to a remedy requiring the release of the rescuees.

3-3 Judgement made in the Full Court of the Federal Court

The majority in the Full Court, comprising Beaumont and French JJ, held that the appeals should be allowed and set aside the decisions made by North J. The majority of the judges concluded that Australia was acting within its executive power under section 61 of the Australian Constitution in the steps it took to prevent the landing of the rescuees. The majority also concluded that the rescuees were not detained by the Commonwealth of Australia. On the other hand, the Black CJ dissented on the ground that, since the powers provided in the *Migration Act* 1958 (Cth) had not been relied upon, the Commonwealth Government had no power to detain the rescuees, and that the detention which was not justified by the powers conferred under the *Migration Act* 1958 (Cth) was not justified by law.

Having contended that a prerogative power had to be conferred by statute and that there was no residual prerogative right without statute,[39] Black CJ concluded that there was no non-statutory executive authority

37) *Jones v Cunningham, Reports of Cases in the Supreme Court*, USA, Vol. 371, 1963, p. 243. North J also referred, as similar to the present situation, to *Chin Yow v United States, Reports of Cases in the Supreme Court*, USA, Vol. 208, 1907, p. 8, in which the question arose whether a Chinese person detained unlawfully on a ship in the port of San Francisco to be sent to China was imprisoned for the purpose of a petition of habeas corpus, having been decided affirmative.

38) *VCCLI v MIMA*, pp. 644–647, paras. 110–122.

39) Black CJ referred as authority to *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs, Commonwealth Law Reports*, Australia, Vol. 176, 1992, p. 19 (per Brennan, Deane and Dawson JJ), *Laker Airways Ltd v Department of Trade, Law Reports, Queen's Bench Division*, United Kingdom, 1977, p. 643, *Attorney-General v De Keyser's Royal Hotel Ltd, Law Reports, House of Lords, Appeal Cases*, United Kingdom, 1920, p. 508

for the detention of those rescuees. In response to the argument against the issue of a writ of habeas corpus that they were free to proceed to any other destination, Black CJ held that, "[i]t is clear from the authorities that, unlike an action for false imprisonment, it is not necessary to show actual detention and complete loss of freedom to found the issue of a writ of habeas corpus. Rather, custody or control are the requisite elements".[40] Black CJ referred to *Ex Parte Lo Pak* in which Windeyer J held that, "[c]ompelling him to stay on board the ship is exactly what the applicant complains of as an illegal restraint upon his liberty".[41] Also, reference was made to the decision in the European Court of Human Rights in *Amuur v France*, in which it was held that, "[t]he mere fact that it is possible for asylum seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty . . . Furthermore, this possibility becomes theoretical if no other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in".[42]

Beaumont J, on the other hand, argued against its jurisdiction issuing a writ of habeas corpus, stating that "the jurisdiction of the High Court to entertain an application for *habeas corpus* could only arise as an incident of the High Court's original or appellate jurisdiction under other provisions, and did not derive from section 33 (1) (f) of the Judiciary Act".[43] Nevertheless, Beaumont J went on to say, "provided the original jurisdiction of this Court is properly invoked, this Court could entertain a claim for an order *in the nature of* a writ of habeas corpus"[44] (emphasis added) presumably based on section 23 of the *Federal Court of Australia Act* 1976 (Cth), whereby the Court is given "power, in relation to matters in which it has jurisdiction, to make orders of such kinds . . . and to issue, or direct the issue of, writs of such kind, as the Court thinks appropriate". Beaumont J

40) *Minister for Immigration and Multicultural Affairs & Ors v Eric Vadarlis, Australian Law Reports*, Vol. 183, 2001 (*'MIMA v Vadarlis'*), p. 20, para. 69.

41) *Ex Parte Lo Pak, New South Wales Law Reports*, Vol. 9, 1888, pp. 247–248

42) *Amuur v France, European Human Rights Reports*, Vol. 22, 1992, p. 558.

43) *MIMA v Vadarlis*, p. 28, para. 102.

44) *MIMA v Vadarlis*, p. 29, para. 106.

then focused attention on relationships between its jurisdiction and the power to compel the entry of those persons into the migration zone established under the *Migration Act* 1958 (Cth). Beaumont J criticised the honour of Black CJ to the effect that, instead of inquiring whether there was a substantive right in the occupants, his Honour erroneously focused upon the scope of Executive power and that Black J should have enquired whether at common law there was a legal right in the occupants to enter Australia.[45] Referring to *Musgrave v Chun Teeong Toy*[46] and so on, Beaumont J concluded that an alien had no common law right to enter Australia and that international law imposed no obligation upon the coastal state to resettle those rescued in the coastal state's territory.[47]

By the same token, French J started his argument with the scope of the executive power of the Commonwealth of Australia. French J argued that the executive power of the Commonwealth, even in the absence of statutory extinguishment or abridgement, would extend to a power to prevent the entry of non-citizens and to do such things as are necessary to effect the exclusion of aliens.[48] Subsequently, French J addressed another question as to whether, if a power to exclude or prevent the entry of a non-citizen to Australia and the power incident thereto existed in the absence of statute, it had been abrogated by the *Migration Act* 1958 (Cth). As the Act does not provide for rights of entry except for cases under the *Refugee Conventions* and provides a comprehensive regime for preventing unlawful non-citizens from entering into Australia and for their removal from Australia, it was contended that it could not be taken as intending to deprive the Executive of the power necessary to do what was done in this case.[49] After confirming the absolute executive power of the Commonwealth, French J examined the meaning of detention. Based on the recognition that whether the authority was to be regarded as imposing restraint on a person's freedom of movement for the purposes of the writ might involve a cause and effect analysis, French J concluded that the actions of the Commonwealth were properly incidental to preventing the rescuees from landing in Australian territory where the rescuees had no right to go.[50]

45) *MIMA v Vadarlis*, p. 30, para. 111.
46) *Musgrave v Chun Teeong Toy, Law Reports, House of Lords, Appeal Cases*, United Kingdom, 1891, p. 272.
47) *MIMA v Vadarlis*, pp. 30–32, paras. 112–126.
48) *MIMA v Vadarlis*, pp. 48–52, paras. 181–193. French J referred to *Ling v Commonwealth, Federal Court Reports*, Australia, Vol. 51, 1994, p. 88, in which Gummow, Lee and Hill JJ held that, "it is presumed that the Legislature does not intend to deprive the Crown of any prerogative right or property unless it expresses its intention to do so in explicit terms or makes the inference irresistible." Ibid, p. 92.

4. Legal Dimension of the *MV Tampa* Incident

4–1 Analyses Based on the Law of the Sea

Despite the absence of arguments in the course of litigation in the Australian courts, the *MV Tampa* incident involved a couple of issues concerning the law of the sea. As a number of international treaties including the *United Nations Convention on the Law of the Sea*[51] have provided for comprehensive and established rules of maritime law, arguments in several aspects of the incident concerned the interpretation of treaty provisions. Donald R Rothwell divides the incident into four stages by virtue of clarifying legal arguments: the search and rescue operation, the closure of the Australian territorial sea to the *MV Tampa*, the *Tampa's* eventual entry into the territorial sea, and the boarding of the *MV Tampa* by the Australian troops.[52] As his analyses comprehensively deal with the issues which the *MV Tampa* incident raised in relation to the law of the sea, it is convenient to follow his categorisation to arrange the arguments raised in relation to the incident.

Search and Rescue Operations (SAR operations) have a long history, and the rules in regard to these operations have been embodied in several international treaties. Among them the *International Convention on Maritime Search and Rescue* creates specific obligations pursuant to article 98 of

49) *MIMA v Vadarlis*, pp. 54–55, para. 202.
50) *MIMA v Vadarlis*, pp. 57–58, paras. 211–213.
51) *United Nations Treaty Series*, Vol. 1833, p. 397 (entered into force 16 November 1994) ('UNCLOS').
52) Donald R Rothwell, "The Law of the Sea and the MV Tampa Incident: Reconciling Maritime Principles with Coastal State Sovereignty," *Public Law Review*, Vol. 13, No. 2, 2002, p. 119.

the UNCLOS, providing:

> 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 a person or the circumstances in which that person is found.[53]

There is no doubt that Captain Rinnan on the Norwegian registered ship and Australian authorities acted in accordance with these rules, as both countries are parties to the relevant treaties. These rules do not deal with the issue of disembarkation of the rescuees, leaving it unclear where they should be taken: port of flag state, nearest port, next scheduled port of state. Although practice suggests rescuees are taken to the nearest port,[54] the matter would be left to the wide discretion of a captain who rescues persons as a matter of convenience.[55] The nearest coastal state was Australia, by virtue of Christmas Island being only 75 nautical miles from where the rescue took place, compared with 246 nautical miles to the nearest Indonesian port, Merak. The Prime Minister of Australia suggested that there was a clear obligation under international law for the rescuees to be taken to the nearest possible point of disembarkation, arguing that it was the Indonesian port of Merak.[56] While this statement lacks a factual basis and its attitude is contrary to customary practice

53) *International Convention on Maritime Search and Rescue, United Nations Treaty Series*, Vol. 1405, p. 119, Annex Chapter 2.1.10 (entered into force 22 June 1985). Article 98 of the UNCLOS imposes a general obligation on state parties to:
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:
(a) to render assistance to any person found at sea in danger of being lost;
(b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him.
See also, *International Convention for the Safety of Life at Sea, United Nations Treaty Series*, Vol. 1184, p. 278 (entered into force 25 May 1981).

54) Rothwell, op.cit. note 52, p. 120.

55) See, Michael White, "The MV Tampa and the Christmas Island Incident," *Proctor*, Vol. 21, No. 10, 2001, p. 15. Jean-Pierre L Fonteyne, "All Adrift in a Sea of Illegitimacy: An International Law Perspective on the Tampa Affair," *Public Law Review*, Vol. 12, No. 4, 2001, p. 250.

56) Rothwell, op.cit. note 52, p. 121.

which has been observed to date, the rejection of the *MV Tampa* from entering Australian territory raises questions, even separate to the issue of SAR operations.

The next issue is whether it was justifiable to have rejected the entrance of the *MV Tampa* to the Australian territorial waters as such under the UNCLOS. Some have argued that the manner in which the passage of the *MV Tampa* was carried out was considered to be prejudicial to the peace, good order or security of Australia, applying article 19 (2) (g) of the UNCLOS which provides, "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"[57] (emphasis added) shall be considered to be prejudicial to the peace, good order or security of the coastal states.[58] Opposing this view, others have argued that the fact that the *MV Tampa* was engaging in a humanitarian operation should preclude its alleged prejudicial character to the Australian security.[59] Having pointed out the fact that Australian authorities had requested the *MV Tampa* to rescue the people from the sinking boat, furthermore, it is contended that it was doubtful that Australian authorities could persuasively regard the manner in which the *MV Tampa* operated as threat to Australian security.[60]

Even if we assume that the manner in which the *MV Tampa* operated was considered to be innocent in the meaning used in article 19 (2) of the UNCLOS, article 25 (3) of the UNCLOS allows coastal states to suspend the innocent passage of foreign ships in specified areas of their territorial seas under the condition that "such suspension is essential for the protection of its security". Had the closure of the Australian territorial waters been seen as necessary to protect its security, it could be a lawful measure

57) UNCLOS, article 19 (2) (g).

58) Cameron Moore, "Law of the Sea Issues," (Speech delivered at the 10th Annual Meeting of the Australian & New Zealand Society of International Law, Canberra, 15 June 2002).

59) An opinion expressed at the 10th Annual Meeting of the Australian & New Zealand Society of International Law, Canberra, 15 June 2002.

60) An opinion expressed at the 10th Annual Meeting of the Australian & New Zealand Society of International Law, Canberra, 15 June 2002.

to maintain the Australian security. However, the denial of the right of innocent passage "must be non-discriminatory, so that ships of certain states or individual ships cannot be singled out".[61] Assuming that the *MV Tampa* carried out innocent passage, it would be difficult to justify the discriminatory closure of the Australian territorial waters which was directed toward only the *MV Tampa*.

There is another question as to whether the closure of the Christmas Island port at Flying Fish Cove to all shipping other than authorised activities was lawful. It is an act of sovereignty to choose to either close or open its ports in so far as the act is directed to all ships on a non-discriminatory basis.[62] Even if the closure of the Christmas Island port to all shipping could be justified on the basis of an act of sovereignty, it could alternatively be argued that the *MV Tampa* was in distress. While some may argue that the *MV Tampa* was in distress and had a right of access to the port without any doubt, it is important to step back and consider whether the recognition of the ship as being in distress would prohibit a state from closing its ports and, if so, what constitutes 'distress'.

If international law provides a certain justification for the entry of a ship in distress to ports, whether it is formulated as a right or as a circumstance precluding wrongfulness, it is recognised that a state is prohibited from closing its ports. Robin Rolf Churchill and Alan Vaughan Lowe conceived of the justification as a clear customary right of entry to ports.[63] Even though we presuppose the right of entry to ports, a state would be able to rely on a justification of the necessity to close its ports to all ships including those in distress, precluding its wrongfulness. The justification of the necessity on the part of the state consists in a grave and imminent

61) Rothwell, op.cit. note 52, p. 122. See also, D P O'Connell (I A Shearer, ed), *The International Law of the Sea, Vol. II*, (Oxford University Press, 1984), p. 848.

62) O'Connell, ibid, p. 848. Cf. *Saudi Arabia v Aramco, International Law Reports*, Vol. 27, 1963, p. 117, in which the arbitration cited the remark by Guggenheim as follows:
> According to a great principle of public international law, the ports of every State must be open to foreign merchant vessels and can only be closed when the vital interests of the State so require.

Ibid, p. 212.

63) R R Churchill and A V Lowe, *The Law of the Sea*, 3rd ed., (Manchester University Press, 1999), p. 63.

peril not to perform certain international obligations to protect the essential interests of the state.[64] As the justification of the necessity can be easily abused in association with state sovereignty, however, it has to be restricted to very limited circumstances. The relevance of the justification of necessity, therefore, would have to be assessed in a municipal court in conjunction with the question of whether the situation where a ship enters into a port in contrary to the will of the state constitutes distress, as has been the cases of distress in the past.[65] No matter what would be a conclusion in the case where a municipal court had assessed those justifications, it is undoubtedly hard to find an example that a state actually prevented the entry of a ship in distress to a port.

In the meanwhile, so long as the manner in which the *MV Tampa* operated was contrary to innocent passage, Australia is entitled to take the necessary steps in its territorial sea to prevent the passage.[66] It is true that significant limitations exist upon the use of armed force against merchant ships and aircrafts. However, what the cases which are often referred to for the purposes of vindicating this proposition, *Canada v United States* (*The I'm Alone* case)[67] and *The Red Crusader* case[68], indicate is that the use of armed force should not be excessive even in the territorial waters of a coastal state, and that necessary and reasonable use of force might be entirely blameless. It is possible, therefore, to argue that the SAS boarding on the *MV Tampa* was a necessary and reasonable use of armed force to prevent prejudicial passage in Australian territorial waters.

4–2 Analyses Based on the International Refugee Law

The issues which the *MV Tampa* incident raised regarding the interna-

64) See James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, (Cambridge University Press, 2002), pp. 178–186.

65) See O'Connell, op. cit. note 61, pp. 853–857. For an analysis of recent state practice on this issue, see Aldo Chircop, "Ships in Distress, Environmental Threats to Coastal States, and Places of Refuge: New Directions for an *Ancien Regime*?" *Ocean Development and International Law*, Vol. 33, 2002, pp. 207–221.

66) UNCLOS, article 25 (1).

67) *Canada v United States, Reports of International Arbitral Awards*, Vol. 3, 1935, p. 1609 (*'The I'm Alone' case*).

68) *The Red Crusader Commission of Inquiry between Denmark and United Kingdom, International Law Reports*, Vol. 35, 1962, p. 485 (*'The Red Crusader'* case)

tional refugee law concerns articles 31 (1) and 33 (1) of the *Refugee Conventions*. Article 31 (1) of the *Refugee Conventions* prohibits that refugees shall be penalised solely by reason of unlawful entry or of unlawful stay so long as they lodge their applications for refugee status without delay. Article 33 (1) prohibits that states shall expel or return a refugee to the frontiers of territories where his or her life or freedom would be threatened for the reasons provided in article 1 (*'non-refoulement'*),[69] unless there are reasonable grounds for regarding them as a danger to the security of the country. Although both of the provisions on its face concern the treatment of refugees, who are recognised refugee status, it could be argued that these provisions are applicable to people who seek asylum outside their nations. Such an interpretation can be read from consulting the *travaux préparatoires* of the Conventions and subsequent state practice.

One may argue that Australia was in breach of article 31 (1) by reason of its denial of access to a particular group of asylum seekers with regard to the Australian territory and therefore to its immigration procedures.[70] The relevance of this argument is dependent upon the interpretation as to whether article 31 (1) prohibits also asylum seekers being penalised by reason of their unlawful entry or presence. While article 31 (1) is addressed to refugees on its face, the *travaux préparatoires* of the Conventions reveals that this provision included some concern with asylum seekers, connoting the right of asylum.[71] Even though it is dubious that

69) Article 1 (A) (2) of the *Refugee Conventions* defines a refugee as any person who: owing to a well-founded fear of being persecuted for reasons of race, religion, nationality or 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.

70) See, Graham Thom, "Human Rights, Refugees and the MV Tampa Crisis," *Public Law Review*, Vol. 13, No. 2, 2002, pp. 116–117. It has to be reminded that the Australian migration zone has the different scope from the Australian territory, as section 5 of the *Migration Act* 1958 (Cth) as of August 2001 provides that the migration zone "does not include sea within the limits of State or Territory but not in a port".

71) France in particular insisted repeatedly that the exemption from any punishment was the direct corollary to the right of asylum. Paul Weis (ed), *The Refugee Convention, 1951: The Travaux Preparatoires Analysed, with a Commentary by the Late*, (Cambridge University Press, 1995), pp. 281, 296.

this provision confers the right to be granted asylum in a foreign country upon individuals, it seems to be difficult to confine the scope of this provision to the prohibition of penalty for refugees' illegal entry or presence.

Provided that article 31 (1) is interpreted as prohibiting asylum seekers from being penalised due to their illegal entry or presence, the illegality of the denial of access to the immigration procedures would depend upon whether the denial is seen as a penalty on account of their illegal entry or presence. One argument to support the Australian action would be that the action is part of the administration procedures in the course of the so-called 'Pacific Solution', which aimed at delivering the resucees into the Pacific Island countries. Also, the *travaux préparatoires* of the Conventions indicates that the penalty refers only to administrative or judicial convictions on account of illegal entry or presence, excluding expulsion.[72] Considering that criminal convictions in certain cases involve deportation order, it would be still possible to argue that the rejection at the frontier constitutes a form of penalty if the entry is rejected solely by reason of one's unlawful entry or presence. The deprivation of opportunities to be assessed for their refugee status by reason of illegal entry could be seen as a form of penalty for illegal entry, resulting in the violation of article 31 (1) of the *Refugee Conventions*.

In turning to article 33 (1) of the *Refugee Conventions*, the question of whether the Australian conduct was in breach of this provision just by reason of its having rejected the asylum seekers at the border depends heavily on the attitude of interpretation of this provision. The advocates for constructive or positive interpretation of this provision, relying on the objectives of the *Refugee Conventions*[73] or subsequent statements[74] such as the UN Declaration on Territorial Asylum[75] and the Reports of the

72) Ibid, p. 302.

73) See, eg, Penelope Mathew, "Retreating from the Refugee Convention," in P Alston and M Chiam, (eds), *Treaty-Making and Australia: Globalisation Versus Sovereignty*, (Sydney: Federation Press, 1995), pp. 152–153.

74) See, eg, Guy S Goodwin-Gill, "Entry and Exclusion of Refugees: The Obligations of States and the Protection Function of the Office of the United Nations High Commissioner for Refugees," in *Transnational Legal Problems of Refugees*, (New York: Clark Boardman Company Ltd, 1982), p. 304.

Executive Committee supervising the activities of the United Nations High Commissioner for Refugee (UNHCR),[76] argue that the principle of *non-refoulement* includes non-rejection at the frontier and requires states to allow that asylum seekers have access to fair procedures for the determination of their refugee status. On the other hand, those who are suspicious about this broader interpretation persist in emphasising state discretion in their control over their borders, particularly in cases of a mass influx of asylum seekers.[77] As will be shown later, however, taking into consideration the protection of fundamental human rights to life of asylum seekers, it would be reasonable to presume the broader interpretation of *non-refoulement*, putting the burden of proof on the government's side to demonstrate that asylum seekers are likely to bring a danger to the security of the country.

In contrast to the US policy of interdicting Haitian asylum seekers on the High Seas, the Australian interdiction of the *MV Tampa* was carried out within the contiguous zone and eventually within the territorial waters by force. The Australian government also arranged the transportation of the asylum seekers to Pacific Island countries, allocating payment for the processing of the refugee applications. However, the inferior quality of refugee determination procedures established in Nauru and Papua New Guinea, and the untenable financial costs of the 'Pacific Solution' lead us to believe that the Australian government was in a better position to process the refugee application.[78] Even if we presume that non-rejection at

75) UN Declaration on Territorial Asylum, UN Doc A/Res/2312 (XXII) (1967), article 3 (1) provides:

> No person referred to in Article 1, paragraph 1 [persons who are entitled to invoke article 14 of the Universal Declaration of Human Rights] shall be subjected to measures such as rejection at the frontier, . . .

76) The Executive Committee, comprising representatives of states, in its conclusions repeatedly mentioned that the fundamental principle of *non-refoulement* included non-rejection at frontiers. See, eg, UN Doc A/32/12/Add.1, and UN Doc A/AC.96/601, para. 57 (2).

77) See, eg, Kay Hailbronner, "Nonrefoulement and 'Humanitarian' Refugees: Customary International Law or Wishful Legal Thinking?" in David A Martin (ed), *The New Asylum Seekers: Refugee Law in the 1980s*, (Martinus Nijhoff Publishers, 1988), pp. 126–128.

the frontier was not in breach of *non-refoulement* unless asylum seekers are forced to return to the place where they are likely to be persecuted, and that the interdiction of the *MV Tampa* and the arrangement made by the Australian government was lawful in terms of article 33 (1) of the *Refugee Conventions*, it is a costly option not only for asylum seekers but also or, even more so, for the Australian government.

4–3 Analyses Based on the International Human Rights Law

4–3–1 Habeas Corpus to Protect the Fundamental Human Rights

The rejection of access to the procedures for determining refugee status, as demonstrated in the *MV Tampa* incident, can be seen as a violation of fundamental human rights. This is evidenced by the fact that one of the crucial arguments raised by the applicants was whether the court should issue a writ of habeas corpus. The writ of habeas corpus is an old and traditional concept fostered in common law countries. Although its meaning has changed over the centuries, it has continuously been an important legal instrument for the judiciary to pursue justice.

The term 'habeas corpus' began to appear by the early thirteenth century in civil court procedures in England. The term 'habeas corpus' at this early stage, however, meant to ensure the physical presence of a person in court on a certain day and was not connected with the idea of liberty as is meant nowadays.[79] Habeas corpus used by the central courts at this stage provided the possibility for a final determination and for overturning decisions of the inferior courts so that the central and superior courts could spread their control over local courts.[80] It was not until the late 16th century that habeas corpus was used by detained persons to obtain their release on bail. It remained to be determined, however, whether habeas corpus could be used to release the detained on bail, depending

78) Nauru is not a signatory to the *Refugee Conventions*, and Papua New Guinea has made considerable reservations on the Conventions. It is estimated that the Australian government paid about A$450 million, which is approximately A$500,000 for each asylum seeker. See, Crock and Saul, op.cit. note 29, pp. 49–50.

79) R J Sharpe, *The Law of Habeas Corpus*, 2nd ed, (Clarendon Press, 1989), pp. 2–3.

80) Ibid, pp. 4–6.

rather on the political convictions of judges.[81]

By the late 20th century, habeas corpus had started to be recognised as an important instrument to protect human rights. The writ of habeas corpus is generally defined as "a procedure that provides a judicial inquiry into the lawfulness of detention, and a remedy if the detention is unlawful".[82] This recognition is now shared in the world. In effect, a number of United Nations publications have stressed the need for legal systems to have a mechanism such as habeas corpus, and there have been attempts to argue for an international criminal court with a habeas corpus jurisdiction.[83] It is important to note that the African Commission on Human and Peoples' Rights in *Constitutional Rights Project and Civil Liberties Organisation v Nigeria*[84] described the writ of habeas corpus as follows:

> 22 The problem of arbitrary detention has existed for hundreds of years. The writ of habeas corpus was developed as the response of common law to arbitrary detention, permitting detained persons and their representatives to challenge such detention and demand that the authority either release or justify all imprisonment.
>
> 23 Habeas Corpus has become a fundamental facet of common law legal system. It permits individuals to challenge their detention proactively and collaterally, rather than waiting for the outcome of whatever legal proceedings may be brought against them. It is especially vital in those instances in which charges have not, or may never be, brought against the detained individual.
>
> 24 Deprivation of the right to habeas corpus alone does not automatically violate Article 6 [the right to liberty].[85] Indeed, if Article 6 were never violated, there would be no need for habeas corpus provisions. However, where violation of Article 6 is widespread, habeas corpus rights are essential in ensuring that individuals' Article 6 rights are respected.[86]

81) Ibid, pp. 9–13.

82) Gerald L Neuman, "Habeas Corpus, Executive Detention, and the Removal of Aliens," *Columbia Law Review*, Vol. 98, 1998, p. 969.

83) David Clark and Gerard McCoy, *The Most Fundamental Legal Right: Habeas Corpus in the Commonwealth* (Clarendon Press, 2000), p. 6.

84) The Government of Nigeria has prohibited any court in Nigeria from issuing a writ of habeas corpus through the *State Security (Detention of Persons) Amended Decree No. 14 (1994)*. It was alleged that the Decree was applied to detain without trial several human rights and pro-democracy activists and opposition politicians in Nigeria.

The African Commission on Human and Peoples' Rights thus regards the writ of habeas corpus as a human right having a procedural nature to ensure the human right to liberty. Also, the Commission went on to hold that the Nigerian legislation to prohibit any court in Nigeria from issuing a writ of habeas corpus is a violation of Article 26 which obliges state parties to ensure the independence of the judiciary.[87] Likewise, Gerald L Neuman contends that habeas corpus retains its central importance as a protection against abuse of executive power, and that courts must preserve their authority to evaluate the lawfulness of executive detention, even in the context of alien removal as well as alien exclusion.[88]

The writ of habeas corpus is an important legal instrument necessary to ensure the independence of judiciary and the protection of human rights. As a result, suspension of habeas corpus jurisdiction of the courts is conducive to the infringement of the right to liberty. It is true, on the other hand, that the limitation of habeas corpus jurisdiction could be legitimised on the ground of protecting a community interest as indicated in cases of the US courts dealing with habeas corpus.[89] However, the writ of habeas corpus has been formulated and exercised through the conflicts with the parliament and the executive to preserve its own independence as well as to protect the most fundamental human right of liberty. The

85) Article 6 of the *African Charter on Human and Peoples' Rights* provides:
> Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

86) *Constitutional Rights Project and Civil Liberties Organisation v Nigeria, International Human Rights Reports*, Vol. 8, No. 1, 2001, p. 227, paras. 22–24.

87) Ibid, p. 228, para. 30.

88) Neuman, op.cit. note 82, pp. 1044–1053.

89) See, eg. *Mbiya v INS, Federal Supplement (District Court Reports)*, United States, Vol. 930, p. 609. *Mathews v Eldridge, Reports of Cases in the Supreme Court*, United States, Vol. 424, 1976, p. 319. *Heikkila v Barber, Reports of Cases in the Supreme Court*, United States, Vol. 345, 1953, p. 229.

limitation of habeas corpus, therefore, should be judged by the initiative of the judiciary. This positive attitude of the judiciary embodied in the writ of habeas corpus has hardly been seen in the *MV Tampa* case, as will be examined below.

4–3–2 Habeas Corpus in the *MV Tampa* Case

The arguments in the *MV Tampa* case concerning a writ of habeas corpus seem to be divided into three points: the Federal Court's or High Court's jurisdiction to issue a writ of habeas corpus, the meaning of detention, and the scope of the executive power. Although the Australian Constitution and legislations do not provide habeas corpus jurisdiction as such for the High Court as well as the Federal Court,[90] having dealt with the *MV Tampa* case, North J succeeded in obtaining the agreement of both sides of the parties that they would refrain from arguing the habeas corpus jurisdiction of the Federal Court. The reason why the government side agreed on it would be, as North J is said to have indicated, that it otherwise would have prolonged the judgment, while the rescuees would have landed on the Australian soil. Based on this agreement, North J affirmed the Federal Court's jurisdiction 'to make an order of such a nature'. On the other hand, despite having found that it was arguable that the Federal Court had the habeas corpus jurisdiction in this case, Beaumont J could not help mentioning the possibility of issuing 'an order in the nature of a writ of habeas corpus'. This phrase of 'the nature of habeas corpus' has been used in the Federal Court, particularly in the last decade.[91] This curious phrase seems to indicate that the Court has found it impossible to be deprived of its habeas corpus jurisdiction even in the

90) The High Court may grant a writ of habeas corpus as an incident of either its original or its appellate jurisdiction according to section 33 (1) (f) of the *Judiciary Act* 1903 (Cth). Also, the Federal Court may be able to issue a writ of habeas corpus based on section 23 of the *Federal Court of Australia Act* 1976 (Cth). However, there is no statutory provision which provides the High Court or the Federal Court with habeas corpus jurisdiction as such.

91) See, eg, *Palmarka v Webb*, *Federal Law Reports*, Vol. 77, 1983, p. 306. David Clark and Gerald McCoy, *Habeas Corpus: Australia, New Zealand, the South Pacific* (Sydney: Federation Press, 2000), p. 27.

absence of an appropriate statute. In other words, it can be held that the Federal Court as well as the High Court have a residual jurisdiction or inherent jurisdiction as the supreme courts to grant a writ of habeas corpus.

The second and the third arguments are interwoven with a thread of individual rights and a thread of sovereignty. In the Full Court of the Federal Court dealing with the *MV Tampa* case, Black CJ began by examining the scope of the prerogative power. The other two judges, on the other hand, started with the examination of an individual right to enter Australian territory. This difference of approach to the case was crucial for respectively reaching a logical consequence.

It should be recalled that the nature of habeas corpus has been the protection of a person from arbitrary detention, whether or not an original conduct of the person is lawful. Whether the original conduct of the person leading to his or her detention is lawful or not is the matter which should be decided in another trial. While the latter trial deals with a substantive matter, the former resolves a procedural matter. Beaumont and French JJ both seem to have confused these distinctions all together. A writ of habeas corpus would make no sense if the Court examined an original conduct causing detention in its habeas corpus jurisdiction. It is also to be noted that the grant of a writ of habeas corpus should depend on whether a detention is arbitrary, not whether a detention is lawful. This proposition is consistent with the opinion of the International Human Rights Committee held in *A v Australia*.[92]

Furthermore, provided that a matter of granting a writ of habeas corpus could be considered on the basis of the legality of the original conduct of the detainee, its logical consequence would have been that the detention was lawful because the original conduct of the detainee was unlawful. This consequence is enough of a basis to reject the granting of a writ of habeas corpus. However, the majority of the judges, *inter alia*, French J avoided this consequence in their line of argument. Having contended the causal relationship between the meaning of detention and the legality of the

92) See, above note 27.

original conduct, French J was successful in avoiding the argument reaching a conclusion that the detention was lawful. This complex line of argument would have been made presumably because the rescuees would have had opportunity to apply for a visa if the situation had been recognised as a lawful detention on the border.

Although it was affirmed that the Federal Court could not deny its habeas corpus jurisdiction as the Supreme Court, the argument on the legality of the original conduct was successful in preventing habeas corpus from performing its function, by veiling the nature of habeas corpus. However, the function which the writ of habeas corpus is expected to provide for and the obligation which the *Refugee Conventions* requires states to discharge are first and foremost the judicial enquiry into detention itself, putting aside the merits of the case. The scope of *non-refoulement* would expand when the protection of fundamental human rights is taken into account. In addition, the writ of habeas corpus, is the last resort available for the Judiciary for the purpose of preserving procedural fairness.

5. Political Dimension of the *MV Tampa* Incident: Ramifications upon International Law in Australia

The response of the Australian government to the *MV Tampa* incident is, as revealed in the above, likely to have been in breach of a couple of its international obligations, though some of the legal issues raised by the incident remain to be solved. It would have violated the fundamental right of asylum seekers by preventing them from access to a fair procedure for refugee status determinations, as embodied in the *non-refoulement* principle and the writ of habeas corpus. Also, Australia might have been in breach of article 31 (1) of the *Refugee Conventions* as it penalised asylum seekers solely by reason of illegal entry into Australian territory. In addition, preventing the distressed *MV Tampa* from landing on the Australian territory would be in contravention to maritime practice which has been respected for a long time, even if it is regarded as a legal resort to necessity or sovereign power. The true understanding of the *MV Tampa* incident, however, cannot be acquired without consideration of the political circumstances surrounding the incident.

As mentioned in the beginning of this study, the response to the *MV Tampa* incident, *inter alia*, the change of verdict in the Full Court of the Federal Court was affected to some extent by the international terrorist attacks of 11 September 2001. There were other factors of domestic political consideration to be noted, which are that an increasing number of asylum seekers aroused fears of loss of border control in the Australian public and that the federal election was due to be held in late 2001. There is no doubt that the response to the *MV Tampa* incident, in concert with the terrorist attacks of 11 September, helped the then government to be re-elected.[93] The extent to which border protection was of by far greater importance than refugee protection is evidenced by the fact that the opposition Labour Party first opposed to but later agreed on the government's hard line policy. It is not difficult to say that this affair is a good example that "domestic political considerations can all too easily overwhelm international obligations when the two appear to conflict sharply, and the prospects of shot-term gains are likely to prove alluring, even when long-term costs may be considerable".[94] It can be concluded that the decision of the Australian government on the treatment of the boat people was affected largely by political considerations rather than legal or even economic considerations.

In the immediate aftermath, the Australian government has attempted to validate the actions taken through passing such special retrospective legislations as follow:

— to allow for the interdiction and expulsion of vessels even beyond the territorial water to prevent asylum seekers coming onto the Australian territory;
— to remove certain Australian territory from the migration zone;
— to limit legal proceedings in the courts;
— to create new temporary protection visa with no right to sponsor

93) "In the Tampa's Wake," *Sydney Morning Herald* (Sydney), 24–25 August 2002, p. 28.
94) William Maley, "Receiving Afghanistan's Asylum Seekers: Australia, the Tampa 'Crisis' and Refugee Protection," *Forced Migration Review*, Vol. 13, June 2002, p. 20.

any family member to enter Australia and to apply for permanent residence, which is designated for boat peoples bound for but being outside Australia; and

— to confer the power of the Executive to act beyond legislation.[95]

It is evident from these legislative changes that the discrepancy between the Australian municipal law and its international obligations has widened. As the Australian Judiciary cannot incorporate international treaty obligations without legislation, the domestic mechanisms of Australia do not allow the Australian Judiciary to change the situation in which Australia is in breach of international obligations.

Also, the expected role of the Australian Judiciary is limited due to the lack of a Bill of Rights. It is argued that the significance of habeas corpus review is limited without a Bill of Rights if the power to detain is upheld as valid and has been used in a valid manner, even if the law and the detention based on the law appears to be arbitrary.[96] It is true that detainees on a ship would have opportunity to make communications addressed to the International Human Rights Committee, since Australia has ratified the *Optional Protocol*. However, the lack of a Bill of Rights in its municipal law has given rise to significant inconsistencies in Australian practice with generally recognised international obligations under the ICCPR and *Refugee Conventions*. While a Bill of Rights, assuming it would exist, could not be applied beyond the Australian territorial waters and therefore asylum seekers outside of the Australian territorial waters could not be brought by issuing the writ of habeas corpus, it would nonetheless be much better than the current situation in Australia in that the Australian Judiciary could issue the writ of habeas corpus without hesitation to bring asylum seekers who would have reached the Australian territorial waters and also in that there would be a possibility for the Judiciary to widen the interpretation of provisions in the Bill of Rights.

95) Section 7 (A) of the *Migration Act* 1958 (Cth) reads:
'The existence of a statutory power under this Act does not prevent the exercise of any executive power of the Commonwealth to protect Australia's borders, including, where necessary, by ejecting *persons* who have crossed those borders. (emphasis added)

96) Clark and McCoy, op. cit. note 91, p. 11.

6. Conclusion

The *MV Tampa* case has an exceptional character in the history of Australia's response to asylum seekers. Although Australia has tightened its policy toward asylum seekers over the decades, arguments on the treatment of asylum seekers have concentrated on the legitimacy of their detentions, the procedural fairness in the process of refugee status determinations, and the criteria for refugee status taken into account. Since the *MV Tampa* incident happened before reaching the stage of refugee determination process, however, these problems which have frequently happened in Australia did not happen to the rescuees on the *MV Tampa*. The question that was argued in this incident is whether the resucees are entitled to the procedural right to apply for refugee status determinations in international law, and if so on what basis their procedural right was infringed by the Australian's response to them.

Although the significance of the *MV Tampa* case lies in the denial of the procedural right to apply for refugee status determinations, irrespective of genuine refugee status of the rescuees, it would be useful to mention the results of their refugee applications. Among 302 people rescued by the *MV Tampa* and transferred to Nauru and Papua New Guinea, only 32 people are recognised as refugees by the UNHCR. This is presumably because the reason for refugee status has disappeared with the collapse of the Taliban regime in Afghanistan, as can be inferred from the fact that, of other 131 asylum seekers from the *MV Tampa* who were transferred in New Zealand and assessed before the collapse of the Taliban regime, all but one had been accepted as refugees by January. 2002.[97] It could be arguably speculated that the infringement of their procedural rights might have led to the failure of their refugee applications.

From the legal point of view, it can be argued that the procedural right of the people rescued by the *MV Tampa* to apply for refugee status determinations was infringed by the Australian government. From the political point of view, it can be argued that it was useful and even necessary for the Australian government to pursue its illegal and illegiti-

97) Crock and Saul, op. cit. note 29, p. 50.

mate policy of denying the entry of the resucees into the Australian migration zone for the sake of the forthcoming federal election. Also, this political consideration was accelerated by the memorable terrorist attacks on 11 September. However, there is no doubt that the breach of the procedural right for refugee status determination embodied in the *Refugee Conventions* and inferred from international human rights law necessarily involves various kinds of costs born by Australia, including the loss of its legal reliability, the undermining of its moral reputation and its financial loss. It is also to be noted that two significant aspects of the Australian legal system, superiority of the Parliament and the Executive to the Judiciary and the lack of a Bill of Rights contributed to the toleration of the Australian government being in breach of its international obligations.