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# BOFAXE



## Land in Sight? The Cap Anamur case and the obligation to maritime salvage

### Replies and Comments

Sybill Pauckstadt  
Legal Intern

For comments  
[sybill@pauckstadt.com](mailto:sybill@pauckstadt.com)

Tel: +49.234.3227956

In July 2004 the crew of the vessel "Cap Anamur" rescued 37 African asylum seekers from their unseaworthy boat in the Mediterranean Sea and took them aboard. The "Cap Anamur", which belongs to a German relief organisation with the same name, sails under German flag. It performed a test run after undergoing maintenance repairs in a Maltese harbour.

With the intention to debark the Africans, who claimed to be Sudanese, the ship called at the Sicilian port "Porto Empedolce". Italy, however, denied access, stating that the real location of the rescue was closer to Malta than to the Italian coast. The "Cap Anamur" would therefore be obliged to debark the rescued persons in Malta. Furthermore Italian officials stated that the Africans did not come from Sudan, but from Nigeria, Niger and Ghana.

On 12 July 2004 - after drawn-out negotiations - the ship was finally allowed to call at the Italian harbour. Once landed, the Italian police arrested the captain, the chief mate and the head of the NGO "Cap Anamur" and seized the vessel on the charge of assisting illegal immigration. The 37 Africans were brought to a deportation camp. While the members of the organisation "Cap Anamur" have been released, the ship is still confiscated. The applications for asylum of the 37 Africans were rejected by the Italian administration; 14 persons are to be immediately deported.

### On the Web

<http://www.ifhv.de>

Justifying his actions, the captain of the "Cap Anamur" referred to international law, under which he felt obliged to rescue the 37 persons.

### Focus

#### Tampa-Case

In 2001 the Norwegian cargo ship *M/V Tampa* rescued over 400 mostly Afghan asylum-seekers from a sinking ship that was sailing in Indonesian waters, approximately 100 miles away from Christmas Island, which belongs to Australia. When the Tampa reached Australian waters, it was refused entry and a week-long standoff between Norway, Indonesia, and Australia about the responsibility for the rescued people ensued. Finally New Zealand, Papua New Guinea and the insular state Nauru accepted to house these persons, partly after Australia paid huge amounts for the admission.

As a matter of fact, international treaties contain such a captain's duty: Both the *1989 Salvage Convention* (Article 10 (1)) and the *1974 Safety of Life at Sea Convention* (SOLAS, chapt. V, reg. 33 nr.1) contain a direct duty for the master of a ship to render assistance. Whereas the *UN Convention on the Law of the Sea* (UNCLOS) requires the States-parties to form such an obligation for the masters of all ships sailing under their flags (Article 98 para. 1 a) UNCLOS). Germany has ratified every one of these international treaties and has adopted a corresponding ship master's duty in the German *Schiffssicherheitsgesetz*. Paragraph 323(c) of the German Criminal Code penalises every wilful default of a possible assistance. According to paragraph 4 of the German Criminal Code this regulation also applies to persons on board ships, which are sailing under German flag. Further, many authors deduce the duty to render assistance from customary international law and hold the view that this duty constitutes one of the cornerstones of seafaring.

Assuming that the 37 Africans were indeed in deadly peril, the captain of the "Cap Anamur" was obliged under national and international law to render assistance to them.

However a much more difficult question to answer is which State is responsible to debark the rescued persons. None of the above-mentioned treaties embodies a regulation regarding the debarkation of rescued people. This omission causes problems in particular in a situation, when private vessels rescue refugees, stowaways, asylum seekers and illegal immigrants, who do not want or are not able to return to their home countries. According to international law, and particularly pursuant to the principle of sovereignty, every State is entitled to deny aliens access to its territory. Italy's blockade could nevertheless be deemed illegal, if the Africans had a right to seek asylum. Yet, even if these 37 persons would indeed derive from the flash point Darfur, Sudan, and, hence, could be considered as refugees according to the Geneva Refugee Convention this treaty does not entitle them to seek asylum; neither does Article 14 of the Universal Declaration on Human Rights, although its wording seems to grant such a right. Even though many authors hold the view that this formerly non-binding declaration as a whole has become part of customary international law, this does not apply to Article 14, because most States do not recognise an individual's right to asylum. Thus, in international law the term "right to asylum" means in fact the right of States to grant asylum.

Anyway it is interesting, that - according to press reports - Italy based its refusal solely on the allegation, that the place of salvage was closer to Malta than to Italy. It seems that the Italian government acted on the assumption that the closest coastal State bears the responsibility for the debarkation of rescued people - corresponding to the Norwegian point of view in the *Tampas* case. However, this opinion is neither unanimous nor mandatory. Other scholars argued *inter alia* that the assisting ship should call at the next scheduled harbour on its primary route to debark the rescued people. As the "Cap Anamur" was on a test run after being overhauled in Malta it should have probably returned to this Maltese harbour. Thus, following the latter opinion, Malta would have had the responsibility for the debarkation of the rescued Africans.

In 2002, the USA and Australia defeated an international arrangement concerning the responsibility of the coastal States for rescued people, arguing that they preferred a case-by-case strategy. However in 2004 amendments to SOLAS and the *1979 Search and Rescue Convention* (SAR) concerning States' responsibility for the debarkation of rescued people were agreed upon. These amendments are expected to go into effect in 2006.

Hence, hope remains that these new regulations will contain unambiguous regulations about the responsibility of States; leaving the ship masters no longer alone with their duty to render assistance. Otherwise these persons could be discouraged to rescue people in distress by the unpredictable behaviour of the coastal States.

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### Responsibility

BOFAXE are published by the Institute for International Law of Peace and Humanitarian Law of the Ruhr-University Bochum: IFHV, NA 02/33 Ruhr-Universität Bochum, 44780 Bochum, Germany. Tel: +49.234.3227366, Fax: +49.234.3214208.

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