

Legal aspects of maritime boarder security and counter-terrorism

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LEGAL ASPECTS OF MARITIME BORDER SECURITY AND COUNTER-TERRORISM

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Maritime terrorism has emerged as a formidable threat in the world, targeting both civilian and naval vessels...

Institute for the Analysis of Global Security, 24 January 2005

Al Qaeda is known to have exploited weaknesses in the system of international ship ownership to own merchant vessels and use them to carry operatives, weapons, money and supplies to support cells of the terrorist network.

Asia-Pacific Defence Reporter, October 2003²

Introduction

Both New Zealand and Australia are island nations. This provides us with many natural benefits including a feature that has proved itself over centuries to be the most effective security fence on the planet, a large moat. In New Zealand's case, that moat is one of the most formidable on Earth. Our nearest neighbours are Australia to the west and New Caledonia to the north. Those two countries are approximately 1600 kilometres and 1800 kilometres away respectively. Added to that, the oceans lying between New Zealand and all its neighbours are known for their often turbulent character. Australia's moat is also important to her security but less formidable than New Zealand's, being situated at the foot of South East Asia in relatively close proximity to the Indonesian archipelago.

These geographical features provide both New Zealand and Australia with great advantages in protecting the security of our borders as compared with other States which lack them. However, this is not a cause for complacency. To varying degrees, both countries face an increasing array of threats to their national security and well-being, which can range from the spread of disease, to illegal immigration, to terrorism in its various forms. The recent hoax foot and mouth scare on Waiheke Island, a short ferry ride from this conference venue, brought into sharp focus the devastating effects which bio-terrorism of that nature could have on New Zealand, and the need to remain vigilant and be prepared to react swiftly should the need arise.

It follows from the foregoing that, to protect our vital national interests, both New Zealand and Australia must maintain a capability to police our surrounding sea areas, tailored to our own specific circumstances. This was recognised by the New Zealand Government in the whole-of-government *Maritime Patrol Review*,³ which it conducted in

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² Sam Bateman, 'Countering maritime terrorism' (2003) 29(7) *Asia-Pacific Defence Reporter* 16.

³ Department of Prime Minister and Cabinet, February 2001.

February 2001. In response to that review, the Government decided to purchase seven additional vessels to be operated by the Royal New Zealand Navy, six of which (offshore and inshore patrol vessels) will be largely dedicated to maritime patrol in conjunction with other relevant agencies, such as the New Zealand Customs Service and the Ministry of Fisheries. The purpose of this paper is to examine the legal framework under which these assets, and other existing force elements of the New Zealand Defence Force, may contribute to the security of New Zealand's maritime borders against an old but increasingly dangerous threat – maritime terrorism.

Defining the border

The first step in any examination of the legal powers available to forces protecting maritime border security or conducting counter-terrorism operations offshore is to define the applicable border. In contrast to the position in respect of land borders, every coastal State has a number of concentric maritime borders around its coasts. The further each successive border is from the coast of the relevant State, the less jurisdiction that State may lawfully exercise over the water and sea floor enclosed by it. These zones of maritime jurisdiction with their associated borders and appurtenant bundles of rights are defined under international law by the *United Nations Convention on the Law of the Sea*⁴ (UNCLOS), to which both New Zealand and Australia are parties.

All maritime borders are measured from baselines, drawn in accordance with Part II Section 2 of UNCLOS. The baselines and the borders calculated from them must be claimed by the coastal State, as they have been by both New Zealand and Australia. The general rule is that the baseline is the low-water line along the coast as marked on large-scale charts.⁵ The International Hydrographic Organisation interprets this as chart datum, or the lowest astronomical tide.

The first zone of maritime jurisdiction is internal waters, the seaward border of which is the baselines.⁶ This includes ports, harbours and river mouths. Within internal waters, domestic law applies as it does on the coastal State's land territory. There is no right of innocent passage and foreign warships require diplomatic clearance from the coastal State before entering.

The second zone is the territorial sea, the border of which is 12 nautical miles seaward of the baselines.⁷ Again, domestic law applies within the territorial sea as it does on the coastal State's land territory. However, warships enjoy a right of innocent passage through the territorial sea, subject to certain limitations.⁸

The third zone is the contiguous zone, the border of which is 24 nautical miles seaward of the baselines.⁹ Domestic law does not apply within the contiguous zone, except to

⁴ Opened for signature on 10 December 1982, [1994] ATS 31 (entered into force generally and for Australia on 16 November 1994 and for New Zealand on 18 August 1996).

⁵ UNCLOS, article 5.

⁶ UNCLOS, article 8.

⁷ UNCLOS, article 3.

⁸ UNCLOS, Part II, Section 3.

⁹ UNCLOS, article 33.

the extent necessary to prevent and punish infringements of the coastal State's customs, fiscal, immigration and sanitary laws within its territory and territorial sea. Subject to that exception, all ships enjoy freedom of navigation within the contiguous zone.

The fourth zone is the exclusive economic zone (EEZ), the border of which is 200 nautical miles seaward of the baselines.¹⁰ Domestic law does not apply within the EEZ, except to the extent necessary in the exercise of the coastal State's sovereign rights to:

- (a) explore, exploit, conserve and manage the living resources in the EEZ;¹¹ and
- (b) construct and authorise the construction, operation and use of artificial islands and structures, such as oil and gas platforms.¹²

Subject to these exceptions, all ships enjoy freedom of navigation within the EEZ, as they do (without restriction) on the high seas over the continental shelf, which may be claimed up to an additional 150 nautical miles beyond the outer limit of the EEZ.¹³

It follows from the foregoing that, for most purposes, the maritime border of a coastal State in law enforcement terms is the outer limit of the territorial sea, but for some purposes it will be the edge of the contiguous zone and in other circumstances may even stretch out to the outer limit of the EEZ. That is important for the purposes of the analysis which follows.

Maritime security

The *Maritime Patrol Review* noted in February 2001 that:¹⁴

New Zealand, protected as it is by large ocean distances, enjoys a degree of isolation from many of the threats to maritime security that concern other countries. The Defence Policy Framework has reinforced other national strategic judgements that New Zealand is not directly threatened by any other country and is not likely to be involved in widespread-armed conflict. But a maritime nation can find its sovereign interests challenged indirectly in many ways such as:

- illegal resource exploitation;
- disregard of national or international law;
- illegal transportation of goods or people;
- creation of environmental hazards.

Seven months later a global terrorist network orchestrated the murder of over 3000 people and provided the catalyst for what has become known in some circles as the 'Global War on Terror'. This changed the strategic outlook of many States, if not all. The campaign which followed spawned a raft of measures, both in international law and the domestic law of States, to deal with the 'new' menace. While the degree of risk may be low, Australia and New Zealand both face the risk of a terrorist threat to vital shipping in their zones of maritime jurisdiction, or a threat to their port facilities or offshore oil and

¹⁰ UNCLOS, article 57.

¹¹ UNCLOS, article 73.

¹² UNCLOS, article 60.

¹³ UNCLOS, article 76. Such claims extend only to the sea floor and subsoil – not the water column.

¹⁴ Above note 3, 5.

gas platforms by shipping, laden with hazardous cargo, used as weapons in the same manner as the al-Qaeda attacks of 11 September 2001.¹⁵ The gravity with which these threats are viewed by the international community is exemplified by the range of initiatives being pursued on the multilateral, bilateral and domestic planes, including the United States-led Container Security Initiative and the *International Code for the Security of Ships and Port Facilities* (ISPS Code), adopted by the States Parties to the *International Convention for the Safety of Life at Sea* in London on 12 December 2002.¹⁶ The remainder of this paper examines the legal framework which now exists to empower the authorities to deal with an attack by maritime terrorists at or within our maritime borders.

International law of maritime counter-terrorism

Exactly 20 years ago tomorrow, four terrorists of the Palestinian Liberation Front seized control of the passenger liner *Achille Lauro* in the Mediterranean off Egypt, while she was sailing from Alexandria to Port Said. The terrorists held the passengers and crew hostage, directing the vessel to sail to Tartus in Syria and demanding the release of 50 Palestinians then in Israeli custody. Refused permission to dock at Tartus, the terrorists killed a wheelchair-bound American Jew, Leon Klinghoffer, and threw his body overboard. The *Achille Lauro* then headed back to Port Said and, after two days of negotiations, the terrorists agreed to release the vessel in return for safe conduct to Tunisia on board an Egyptian commercial airliner. This airliner was intercepted by US Navy fighters on 10 October 1985 and ordered to land at a NATO airbase in Italy, where the terrorists were arrested by the Italian authorities.

In the wake of this terrorist act, the *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* ('the Rome Convention') and the *Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf* ('the Rome Protocol') were negotiated and signed in Rome on 10 March 1988.¹⁷

The Rome Convention applies to ships navigating or scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a State Party.¹⁸ It also applies to offenders who are found in the territory of a State Party.¹⁹

Article 3 of the Rome Convention creates a number of international crimes relating to terrorist attacks against shipping, including:

- Seizing control of a ship by force;

¹⁵ Ali M. Köknar, 'Maritime Terrorism: A New Challenge for NATO' in *Energy Security*, 24 January 2005, <<http://www.iags.org/n0124051.htm>>.

¹⁶ [2003] ATNIF 11 (not yet in force). The Commonwealth Parliament has passed the Maritime Transport and Offshore Facilities Security Act 2003 to permit Australia to bring the ISPS Code into force. The New Zealand Parliament has enacted the Maritime Security Act 2004 for the same purpose.

¹⁷ [1993] ATS 10, 11. Entered into force generally on 1 March 1992. Entered into force for Australia on 20 May 1993. Entered into force for New Zealand on 8 September 1999.

¹⁸ Rome Convention, article 4(1).

¹⁹ Rome Convention, article 4(2).

- Destroying a ship or causing damage to a ship or its cargo which is likely to endanger the safe navigation of the ship;
- Other acts which might endanger the safe navigation of a ship; and
- Injuring or killing any person in connection with any of the aforementioned offences.

Article 2 of the Rome Protocol creates similar international crimes in respect of fixed platforms located on the continental shelf.

Article 5 of the Rome Convention and article 1 of the Rome Protocol require States Parties to incorporate the offences in article 3 and article 2 of the respective treaties into their domestic law. New Zealand did this by the enactment of the Maritime Crimes Act 1999, which came into force on 1 September 1999. In Australia, the relevant statute is the Crimes (Ships and Fixed Platforms) Act 1992 (Cth). However, article 9 of the Rome Convention states that:

Nothing in this Convention shall affect in any way the rules of international law pertaining to the competence of States to exercise investigative or enforcement jurisdiction on board ships not flying their flag.

This is a reference to UNCLOS. Article 94 of UNCLOS provides that the default criminal jurisdiction over a ship is that of the flag State. In New Zealand, this currently accounts for 2479 vessels, although all but a handful of those are relatively small pleasure craft.²⁰ In general terms, a coastal State has no powers to enforce its criminal law beyond the outer limit of its territorial sea. Furthermore, article 27 provides that a coastal State may not exercise law enforcement powers over a ship flying a foreign flag in respect of an offence committed in its territorial sea, unless:

- The consequences of the crime extend to the coastal State;
- The crime is of a kind to disturb the peace of the country or the good order of the territorial sea;
- The assistance of the local authorities has been requested by the master or by a diplomatic representative of the flag State;
- The crime in question is against the coastal State's anti-drugs laws, such as New Zealand's Misuse of Drugs Act 1975; or
- The ship was passing through the territorial sea after having left the coastal State's internal waters.

Attack on a ship in New Zealand's territorial sea

It follows that, if an *Achille Lauro*-type terrorist attack occurred in New Zealand's territorial sea on board a ship flying a foreign flag, the prudent course for the New

²⁰ Maritime New Zealand, *New Zealand Register of Ships*, 31 December 2004.

Zealand authorities would be to seek the approval of the flag State through its diplomatic representative before taking any action to deal with the situation.²¹ However, a more robust approach could be taken if the vessel had New Zealanders on board as passengers or crew – then it could justifiably be argued that ‘the consequences of the crime extend to the coastal State’.

The lead agency for all such terrorist incidents in New Zealand is the New Zealand Police. An *Achille Lauro*-type terrorist attack on a ship in New Zealand’s territorial sea would inevitably involve the commission of one or more offences against section 4 of the Maritime Crimes Act 1999. In such a case, the Police, and any person assisting them, would have the power to board the vessel for the purposes of effecting an arrest without warrant.²² If the Police required the assistance of, for example, the Royal New Zealand Navy, to lodge a Police boarding team on the vessel, that could be done at the request of the Police. However, if the operational situation dictated that the boarding team include or be entirely comprised of members of the Armed Forces exercising Police powers, for example members of the Counter-Terrorist Group of 1 New Zealand Special Air Service Group (CTG), that would require the specific authority of the Prime Minister pursuant to section 9(4) of the Defence Act 1990.

Ship-borne attack on New Zealand port

The legal situation would be somewhat different if the New Zealand authorities became aware that a ship headed for a New Zealand port was carrying hazardous cargo intended for use in an attack on that port. This would have to be the nightmare scenario in anyone’s language. In this part of the paper I examine the law as it would apply to a terrorist-controlled vessel carrying high explosives or a lethal chemical or biological agent or nuclear device, approaching the New Zealand coast from offshore.

If a terrorist organisation undertook an operation of this type in order to coerce, deter, or intimidate the Government of New Zealand or any other country for the purpose of furthering a political aim outside New Zealand, for example to compel the withdrawal of New Zealand forces from Afghanistan or elsewhere, the Commissioner of Police could advise the Prime Minister that the approaching vessel constituted an international terrorist emergency which required the exercise of emergency powers under the International Terrorism (Emergency Powers) Act 1987 (ITEPA). If Ministers approved this measure under section 6 of ITEPA, the Police would then have the powers to:

- Direct the evacuation of the port and surrounding areas;²³
- Board, by force if necessary, the approaching vessel;²⁴ and
- Destroy the high explosive or weapon of mass destruction.²⁵

²¹ The RNZN could in fact board and seize a foreign ship on the high seas if requested to do so by the ship’s flag State – high seas freedoms under international law inure in the flag State, not the ship or its owner.

²² Section 315(2) of the Crimes Act 1961.

²³ Section 10(2)(d) of ITEPA.

²⁴ Section 10(2)(b) of ITEPA.

²⁵ Section 10(2)(e) of ITEPA.

The Police could also arrest the terrorists under section 315(2) of the Crimes Act 1961 for a variety of offences, depending on the circumstances, such as participating in a terrorist group contrary to section 13 of the Terrorism Suppression Act 2002.

The powers under ITEPA could also be exercised by members of the Armed Forces assisting the Police,²⁶ such as a frigate commanding officer or members of the CTG, but only if this was authorised by the Prime Minister under section 9(4) of the Defence Act, as explained previously.

The only drawback with the use of ITEPA powers in a maritime terrorist emergency is that the Act does not purport to apply outside the territorial sea and therefore, in accordance with the normal presumption against the extra-territorial application of statutes, does not. This leaves the question as to what action, if any, New Zealand could take against a terrorist-controlled vessel fitting this profile if it were detected beyond the 12-mile limit. Would we be compelled to wait until it reached our territorial sea?

The Customs and Excise Act 1996 provides a partial answer. Section 139(1) of the Customs and Excise Act provides that:

Any Customs officer and any authorised person assisting the officer may at any time board a craft that is within New Zealand if—

- (a) The craft has arrived in New Zealand from a point outside New Zealand; or
- (b) The craft is departing from New Zealand to a point outside New Zealand, including while the craft is travelling within New Zealand en route to a point outside New Zealand; or
- (c) The craft (not being a craft to which paragraph (a) or paragraph (b) of this subsection applies) is carrying any domestic cargo or international cargo while the craft remains within New Zealand; or
- (d) The Customs officer has reasonable cause to suspect that the craft (not being a craft to which paragraph (a) or paragraph (b) or paragraph (c) of this subsection applies)—
 - (i) Is carrying any dutiable, uncustomed, prohibited, or forfeited goods; or
 - (ii) Has been, is being, or is about to be, involved in the commission of an offence against this Act—

for the purpose of performing any function or exercising any power that the officer may be required, authorised, or empowered to perform or exercise under this Act.

For the purposes of this provision and the other provisions of the Act which are discussed in this paper, the maritime border of New Zealand extends to the edge of the contiguous zone.²⁷

It would therefore be lawful for the Comptroller of Customs to appoint the members of the CTG 'authorised persons',²⁸ for the purpose of searching for and seizing prohibited imports, such as:

- Nuclear explosive devices;²⁹

²⁶ Section 12 of ITEPA.

²⁷ Sections 3 and 8A of the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977. It will be recalled that the enforcement of customs law in this zone is permitted under article 33 of UNCLOS.

²⁸ Section 6 of the Customs and Excise Act.

- Chemicals which may be used as or in the manufacture of chemical weapons;³⁰ and
- Biological agents or explosives.³¹

In such a case, the CTG could assist a Customs officer, who could be ashore, by boarding a vessel on the instructions of that officer. Once the CTG was on board the suspect craft, it could search that craft 'using such force as in the circumstances is reasonable, [to] enter every part of the craft and open any package, locker, or other place, and may examine all goods found on the craft'.³² The boarding party could then remove any goods which contravene the Customs and Excise Act.³³

If the suspected terrorist vessel attempted to resist the boarding by turning away, Her Majesty's New Zealand ships operating at the request of the Comptroller of Customs would have all necessary powers to compel the vessel to bring to for boarding and detention, including the power to open fire as a last resort. Section 142 of the Customs and Excise Act provides:

The officer commanding or in charge of any craft in Her Majesty's service having hoisted and carrying or displaying the proper ensign or the Customs flag shall, at the request of the Chief Executive, within New Zealand, chase any ship where—

(a) The ship does not immediately bring-to when signalled or required to do so; or

(b) The master refuses to permit the ship to be boarded,—

and may, as a last resort after having fired a warning, fire at or onto the ship to compel it to bring-to.

In addition to naval vessels, the term 'craft' in section 142 would also apply to the SH-2G Seasprite helicopters in service with the RNZN, which can operate from the flight deck of a frigate and will be able to do so from the flight deck of the offshore patrol vessels currently building.

Act of State

The latter part of this paper has focused on the domestic laws which the New Zealand Defence Force, supporting Police and Customs, could use to defeat terrorism within New Zealand's various maritime borders. However, in addition to these domestic legal justifications for action against a terrorist vessel, it needs to be remembered that every State retains its inherent right of self-defence against an armed attack at all times, as is recognised by article 51 of the *United Nations Charter*. This right of self-defence may be exercised individually, or collectively, as it was in Kuwait and Iraq in 1991 and Afghanistan 10 years later. In some cases, such as where it was suspected that the vessel might be carrying a radioactive bomb, the decision might be taken not to rely on domestic law with its attendant complexities, but to commit New Zealand forces to remove the threat as an Act of State in self-defence. This could be done well beyond the maritime borders that constrain the actions of law enforcement agencies. Furthermore, in the unlikely event that any proceedings were brought as a consequence

²⁹ Section 6 of the New Zealand Nuclear Free Zone, Disarmament, and Arms Control Act 1987.

³⁰ Section 10 of the Chemical Weapons (Prohibition) Act 1996.

³¹ Section 25(1) of the Hazardous Substances and New Organisms Act 1996.

³² Section 140 of the Customs and Excise Act.

³³ Section 141 of the Customs and Excise Act.

in the New Zealand (or Australian) courts, there would in my view be little prospect of the proceedings surviving an application for strike out. To quote Lord Wilberforce in the seminal House of Lords decision, *Buttes Gas and Oil Co v Hammer and another* (Nos 2 & 3).³⁴

I find the principle clearly stated that the courts in England will not adjudicate on acts done abroad by virtue of sovereign authority.

That having been said, any action taken would have to be justifiable under generally accepted principles of international law. There is now clear authority from the House of Lords that, whatever else might be said about the Act of State doctrine – and much has both judicially and in the academic literature in recent years³⁵ – it will not shield a violation of international law from the scrutiny of domestic courts.³⁶

Conclusion

In his 2003 article, *Countering maritime terrorism*,³⁷ Sam Bateman noted that:

Shipping is a problem for the development of anti-terrorism measures, not just because ships and their cargoes are vulnerable and attractive targets, particularly in focal areas and “choke points”, but also because of the characteristics of modern international shipping that facilitate terrorism. These include the confusing and complex ownership arrangements that now characterize international shipping and problems with certifying and security checking international seafarers, many of whom come from countries where terrorist cells exist.

Since 2003, the international community has taken steps to put in place a stronger legal framework to counter the threat of maritime terrorism. More work needs to be done, particularly as exponents of this form of asymmetric warfare are constantly seeking weaknesses to exploit. However, the legal framework which existed even before 9/11 contains many powers which could be used to counter an actual threat, should the need arise.

³⁴ [1981] 3 All ER 616, 629 (HL).

³⁵ See, for example, the judgments of Keith and Tipping JJ in *Attorney-General for England and Wales v R* [2002] 2 NZLR 91 (CA).

³⁶ *Kuwait Airways Corp v Iraqi Airways Co (No 3)* [2002] 3 All ER 209 (HL), and particularly the speech of Lord Hope of Craighead at paragraphs 135-149. See recent judgment of the full court of the Federal Court of Australia in *Petrotimor Companhia de Petroleos SARL v Commonwealth of Australia* [2003] FCAFC 3 (3 February 2003), applying the *Buttes Gas* principle as qualified in *Kuwait Airways Corp*.

³⁷ (2003) 29(7) *Asia-Pacific Defence Reporter* 16.