Australian National University

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Mr David Sullivan
Committee Secretary
Foreign Affairs, Defence and Trade Committee
By email:
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Dear Mr Sullivan,

Senate Foreign Affairs, Defence and Trade References Committee

'Inquiry into the breach of Indonesian territorial waters'

I refer to your letter of 17 March 2014 inviting me to make a submission to the Committee with respect to its 'Inquiry into the breach of Indonesian territorial waters'.

In this submission I shall consider Australia's entitlements under the international law of the sea to interdict vessels bringing asylum seekers to Australia, the capacity of Australia to exercise control over those vessels once an interdiction has taken place, issues associated with the entry of Australian government vessels into Indonesia's territorial sea and exclusive economic zone (EEZ), and issues arising from the use of lifeboats to return asylum seekers to Indonesia.

In preparing this submission I have not had the benefit of being aware of how significant on-water operational aspects of Operation Sovereign Borders (OSB) are being conducted. As a result, some of my remarks and conclusions are qualified.

The overarching legal framework for the law of the sea is governed by the 1982 United Nations Convention on the Law of the Sea (LOSC) [1834 United Nations Treaty Series 397] to which both

Australia and Indonesia are parties. For Australia, the convention is the basis from which Australia's vast maritime zones encompassing the exclusive economic zone and continental shelf have been proclaimed. In sum, Australia's maritime domain encompasses an area of over 13 million km^2, which is one of the largest among the world's nations. In addition to enjoying equivalent entitlements to LOSC maritime zones, the convention is particularly significant to Indonesia as it provides the legal framework upon which archipelagic baselines have been declared. These baselines encompass the outer limits of the Indonesian archipelago from which its maritime zones have been proclaimed.

The LOSC creates the legal framework for the three major maritime zones that have proven significant for OSB:

- The 12 nautical mile (22km) territorial sea;
- The 24 nautical mile (44km) contiguous zone; and
- The 200 nautical mile (364km) exclusive economic zone.

The outer limits for each of these zones are uncontested under the international law of the sea. Only in the case of the exclusive economic zone does the Australian and Indonesian claim overlap and temporary boundary arrangements are in place dealing with the relevant area between Christmas Island, Ashmore Reef and the Indonesian Archipelago.

Each one of these maritime zones are proclaimed from baselines around the Australian and Indonesian coast, which in the case of Indonesia include the archipelagic baselines which consistently with the LOSC connect up islands such as Timor and Rote. It is therefore important to note that Indonesia's maritime zones are not exclusively delimited from its coastline, but are predominantly proclaimed from its archipelagic baselines which have gone through various phases since Indonesia ratified the convention in 1986, and most recently were updated with the UN in 2009.

A key dimension of the LOSC is the balancing of the rights and interests of coastal states over their maritime zones, and the rights and interests of the international community to enjoy navigational freedoms. The balancing of these respective interests is found in various navigational regimes throughout the convention. Within the territorial sea, foreign vessels enjoy a right of innocent passage. As such a foreign vessel is entitled to pass through Australia's territorial sea, including for the purpose of entering an Australian port, if it conducts itself in a manner that is "not prejudicial to the peace, good order and security of the coastal State." (Article 19(1), LOSC).

Importantly for OSB, a vessel entering Australia's territorial sea with the purpose of unloading persons contrary to the Migration Act 1958 (Cth) would not be engaged in innocent passage. Consistent with the LOSC, Australia is entitled to "take the necessary steps in the territorial sea to prevent passage that is not innocent" (Article 25 (1), LOSC). This could extend to ordering the delinquent ship to remove itself from the territorial sea, or physically removing the ship by taking control of it. A similar right exists in the case of the contiguous zone, where Australia can rely upon its capacity to "prevent infringement" of its immigration laws within the territorial sea (Article 33 (1(a)).

What is unclear from the LOSC is the extent of ongoing control that can be exercised over a delinquent ship that has been interdicted in the territorial sea or the contiguous zone. It cannot be in dispute that under the law of the sea Australia has a capacity to remove asylum seeker boats from the territorial sea and contiguous zone and direct them to Australia's EEZ. Absent flag state consent, what is unclear is the extent to which continuing control can be exercised over those vessels within the Australian EEZ or the Indonesian EEZ.

The interdiction and seizure of asylum seeker vessels within the Australian EEZ is legally dubious absent:

- consent being given by the flag state,
- the breach of specific Australian laws that apply within the EEZ, or
- conduct that would be subject to universal jurisdiction such as piracy.

The persons on board such a vessel could give their consent to a boarding by the Australian Navy to, for example, provide assistance in the case of a safety of life at sea scenario. However, that consent would be limited to deal with that particular matter. It would not extend to consent being granted to control being exercised over the vessel and the persons on board being returned to the place from where they had come.

It could be argued that as many of the asylum seeker vessels that depart Indonesia en route to Australia are unregistered and do not fly the Indonesian flag, that they are without nationality and fall within the right of visit provisions of the LOSC that apply within the EEZ and high seas (Article 110, LOSC). Even stronger grounds for interdiction can be found in Article 8 (7) of the 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime ([2004] Australian Treaty Series 11). This would certainly enhance Australia's right to board and search such vessels. Yet while the Protocol permits Australia to take "appropriate measures in accordance with…international law"

with respect to these vessels and the persons aboard, the extent of those measures is unclear. While Indonesia is also a party to the Protocol and along with Australia has obligations to "prevent and suppress" people smuggling, there is no evidence to suggest that Indonesia has given its consent to such vessels being returned to Indonesia under Article 7.

Indonesia also has equivalent rights and obligations to Australia within its maritime zones. In that respect it needs to be made clear that the mere presence of an Australian Navy ship within the Indonesian territorial sea is not a violation of international law. Australian Navy ships enjoy a right of innocent passage within the Indonesian territorial sea and the right of archipelagic sea lanes passage within recognised sea lanes that run through the Indonesian archipelago. These navigational rights are critical to Australian trading interests in Southeast Asia and are also a component of Australia's maritime security. However, the entry into Indonesia's territorial sea by an Australian Navy or Customs ship that has control over an asylum seeker boat by way of a tow line, with the intention of returning that boat to Indonesia, would not be consistent with the right of innocent passage. In that instance, Indonesia could take the "necessary steps" to prevent such passage, including interdiction by its Navy.

Indonesia could also assert that any tow back operation being conducted by Australia within the Indonesian EEZ is not consistent with the freedom of navigation being exercised within those waters. In this respect the characterisation of OSB as a "military-led, border security operation" in which Australia asserts sovereignty over its borders, necessarily leads to the conclusion that Australia is asserting an aspect of its sovereignty within the Indonesian EEZ if a tow back or escort operation is conducted. By way of contrast, this is not a towing or escort operation following the completion of a hot pursuit and law enforcement operation where a vessel detained in the Indonesian EEZ could be towed or escorted back to Australia for arrest. Likewise, this is not a commercial towing operation following a salvage or by a tugboat. Rather what may be taking place under OSB is an Australian Navy or Government ship towing a vessel, which may include a lifeboat, into the Indonesia EEZ and at some point that activity is discontinued with the intention that the towed vessel make its way towards the Indonesian territorial sea and eventual landfall. Such an activity cannot be characterised as Australia exercising the freedom of navigation but rather bringing another vessel into the Indonesian EEZ without consent.

The recent apparent deployment under OSB of lifeboats into which asylum seekers have been transferred and returned to Indonesia raise additional legal issues. In addition to whether transferring asylum seekers to lifeboats is consistent with Australia's interdiction rights within its maritime zones, these actions raise more direct questions with respect to Australia's responsibility

under international law for the control that it has exercised over the asylum seekers, providing them with a lifeboat by which they are directed to return to Indonesia, and the safety and security of that lifeboat to complete that return journey. This would extend, for example, to whether Australia has provided them with a seaworthy lifeboat, and whether it is adequately provisioned with fuel, food and water. It also raises questions as to whether the persons placed in control of the lifeboat have the seamanship skills to be able to successfully navigate their way back to the Indonesian coast. Variables would also need to be taken into account such as the prevailing sea conditions and the weather, both at the time of release of the tow line but also in the coming hours and days. If a maritime disaster was to strike one of these lifeboats then Australia's responsibility under international law could be considerable.

As I initially observed, this legal analysis of the law of the sea dimensions of Australia's conduct of OSB is limited by the material that is in the public domain. Nevertheless, on the basis of official statements it is assumed that Indonesia has not given its consent to those aspects of OSB that may be conducted within the EEZ or territorial sea of Indonesia.

With that qualification, by way of conclusion the following can be stated:

1. Australia has a firm legal basis under the law of the sea to interdict asylum seeker vessels within the Australian territorial sea, contiguous zone, or EEZ
2. Australia has a firm legal basis to be able to exercise control over those vessels to remove them from Australia's territorial sea and contiguous zone
3. Australia's ability to exercise continuing control over asylum seeker vessels interdicted within the Australian EEZ, or taken from Australia's territorial sea and contiguous zone into the EEZ, is limited
4. Australia has no legal basis to tow back asylum seeker vessels into the Indonesia territorial sea, and Indonesia would have a legal basis to object to this activity being conducted within its EEZ
5. Australia's transfer of asylum seekers to lifeboats for the purposes of being towed back to Indonesia raise issues as to the legality of the transfer and significant issues of state responsibility in the event of an incident at sea involving that lifeboat.

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