

# **TERRORISM, PROTEST AND THE LAW**

## **(In a Maritime Context)**

The following discussion has its genesis in a study by this author of the supposed terrorist threat to shipments of nuclear materials by sea<sup>1</sup> (and particularly on dedicated ships), which examined a wide range of imagined scenarios with a view to determining their plausibility in the context of what is known about the security arrangements that attend such shipments. Broadly, it was concluded that the likelihood of an attack of the kind envisaged resulting in a significant release of radioactive material was extremely small. Equally, it was noted that all recent examples of interference (or attempted interference) with the transportation of nuclear materials (both maritime and overland) had involved the activity of protest groups, rather than that of persons seriously intent on diversion or theft, or the deliberate release of radioactive material.

With the strengthening of the law in respect of international terrorism, there arose a question as to what extent some of this ‘protest’ activity might fall within its ambit. Insofar as this is so, it is taken to be undesirable, since protesters do not generally intend diversion, theft, or environmental contamination, although they may be careless in regard to these possibilities. On the other hand, it is argued that some activities of protest groups constitute such a danger to the public, and to the interests of citizens and organisations, that they ought to be restrained, or accept self-restraint. In the maritime context, this extends beyond the more direct manifestations of opposition to nuclear power, to protests concerning fisheries (and especially whaling), forestry and mineral extraction. Again in the maritime context, it is accepted that this is not likely to become a matter of law but it may be a matter of the acceptance of a code of conduct. Possibilities for such a code are briefly examined.

### **Protest and the Nuclear Terrorism Convention**

As noted above, none of the terrorist scenarios envisaged in the extensive study of the supposed terrorist threat to maritime nuclear cargoes has actually been exemplified but it is nonetheless clear that the actions described (which included attempts at

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<sup>1</sup> Smith R C, ‘Terrorism and Maritime Shipment of Nuclear Material’, *Packaging, Transport, Storage and Security of Radioactive Material*, Vol 18, No 4 (February 2008).

diversion or sabotage, as well as other kinds of interference) would be terrorism under the International Convention for the Suppression of Acts of Nuclear Terrorism, which has been in force since July 2007. More particularly for present purposes, it is arguable that the terms of the Convention might cover some kinds of maritime protest action. The crucial feature of the Convention as far as this is concerned is that it defines ‘nuclear facility’ as *any plant or conveyance used for the transport of radioactive material*. (Art 1, 3, b) This definition would clearly include dedicated nuclear transport ships, as well as well as specialist vehicles (both road and rail) which carry nuclear materials over land.

The following is amongst the schedule of ‘offences’:

Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally .... uses or damages a nuclear facility in a manner which releases *or risks* the release of radioactive material:

- (i) With the intent to cause death or serious bodily injury; or
- (ii) With the intent to cause substantial damage to property or to the environment; or
- (iii) With intent to compel a natural or legal person, an international organisation or a State to do or refrain from doing an act. (Art 2, 1(b))

From this we might take the offence of *using* ... a nuclear facility in a manner which ... risks the release of radioactive material ... with intent to compel a natural or legal person, an international organisation or a State, to do or refrain from doing an act.

The concept of recklessness with regard to outcomes, which is inherent in this form of words, was made more explicit in the original drafting of New Zealand legislation to implement its obligations under the Convention<sup>2</sup>. Under this, an offence is committed by someone who:

“without lawful authority, commits an act, or threatens to commit an act against a nuclear facility, with intent to cause, or being reckless as to whether it causes death, serious injury, or substantial damage to property or to the environment.”  
(Art 13C(1)g)

This form of words gave rise to a fear that the legislation might inappropriately categorise ‘genuine protest action’ as criminal and terrorist, and might

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<sup>2</sup> Terrorism Suppression Amendment Act, 2007.

expose activists to the risk of serious penalties, in the event of conviction (up to 10 years imprisonment, or a fine of up to \$500,000, or both).

The issue was raised explicitly in a New Zealand newspaper article, from a local Greenpeace writer:

“... a shipment of nuclear materials heads through the Tasman Sea, full of hundreds of kilograms of plutonium from France, posing a terrorist risk and also an environmental threat to the Pacific Ocean. A peace flotilla of New Zealanders decides to carry out a peaceful protest. Under the new law, the shipment would be called a “nuclear facility” and the protest could be considered “interference” with the “nuclear facility” and could, therefore, be considered an act of nuclear terrorism.

In defining terrorism like this, the bill loses its legitimacy, opens up the potential for abuse and interferes with our civil rights.”<sup>3</sup>

### **Protest and the law**

Assuming that there was no intent to cause death, serious injury, or substantial damage to property or the environment, the issue would turn on whether the protesters could be said to have been “reckless” with regard to such consequences of their actions, or, in relation to the words of the Convention, whether the protestors had ‘used’ the facility in such a manner as to risk significant environmental contamination. (It is taken that protestors *do* generally have an intent to compel parties to ‘do or refrain from doing’ certain things. That is the point of the activity. The matter is taken up below, under the heading ‘Civil Protest’.) Whether an offence had been committed would clearly depend on, specifically, what was done in a particular case. In the maritime context, merely standing off a nuclear vessel and displaying banners, etc., could hardly be anticipated to have such a consequence but what might be said of deliberately obstructing navigation with the possibility of collision or grounding of a nuclear cargo vessel? Something along these latter lines seems to have occurred in July 1999, when the Pacific Nuclear Transport vessel, *Pacific Teal*, carrying a cargo of MOX fuel bound for Japan, was forced to turn back to the English port of Barrow because of safety concerns arising from a Greenpeace

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<sup>3</sup> Bunny McDiarmid, ‘Right way to tackle terror is not to trample over civilians’, *The New Zealand Herald*, 20 August 2007.

protest. In this case, the protesters towed a raft (on which there was a large inflatable white elephant!) across the ship's path<sup>4</sup>.

To take a different example, the ships of the 'Nuclear-free Tasman Flotilla, which set sail from Opuia in the Bay of Islands in February 2001, planned to form a 'symbolic chain' (with Australian yachts) but said that they would not 'stop or obstruct' the ships.<sup>5</sup> In the event, they failed to find the nuclear cargo ships at all, so we do not know what they might have done had they succeeded in intercepting their quarry. On the face of it though, what was intended would not have fallen within the New Zealand definition of terrorism, as originally proposed. As it happened, the same MOX cargo passed through the Tasman Sea again some eighteen months later on its way back to the United Kingdom. In this case Australian Greenpeace protesters 'buzzed' the ships for some hours using Zodiacs. Two protesters (one a New South Wales Senator) also threw themselves into the water just ahead of the ships. Again, whatever else might be said of these activities, they would not have been 'terrorism'.

The July 1999 (*Pacific Teal*) case, above, is different. Here it might be argued that the protest group were at least careless ('reckless') as to the consequences of their actions, which could have resulted in injury or damage to property, or, particularly, in this kind of case, damage to the environment through the release of radioactive material. It even might be said that they were 'using' the ship and the 'risk' to achieve their ends. Of course, such an argument would crucially turn on the facts of the case. Ironically, the best defence that activists would have, would be to argue that the conditions of transportation of MOX fuel on PNTL ships are such that the possibility of the release of radioactive material (even in the event of collision or grounding) is in the highest degree remote. They were not, in this sense, reckless, since they knew this very well. The argument strikes this writer as very plausible, especially in the Barrow 1999 case. The defence might not work so well in the case of damage to property, or harm to individuals, both of which are easily foreseeable in a situation where navigation is obstructed in confined waters. In this case, it is arguable that the offence would have been terrorism (under New Zealand law as proposed), notwithstanding the fact that there was no *nuclear* threat.

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<sup>4</sup> NZPA-Reuters, 19 July 1999. Bizarrely, this is not the only use of this whimsical tactic. Inflated animals were also used by Greenpeace in a timber protest in Spain in 2002.

<sup>5</sup> *New Zealand Herald*, 19 February 2001, page A 7.

In relation to New Zealand domestic law, some of the above discussion is moot. The wording of the relevant paragraph (Article 13) of the Terrorism Suppression Act, 2002, as amended, now follows much more closely that of the Convention, and, more particularly, the Act also provides:

‘To avoid doubt, the fact that a person engages in any protest, advocacy, or dissent, or engages in any strike, lockout, or other industrial action, is not, by itself a sufficient basis for inferring that the person ... intends ... to compel (actions or abstentions) .. or cause outcomes (such as contamination with radioactive materials) (Art 5, 5).<sup>6</sup>

All of this is not to say that the protestors in the ‘Barrow 1999 case, above, do no wrong. Arguably, actions of this kind have the potential to do considerable damage, not only to commercial interests but also to individuals and the environment.

It is also arguable that the Article 5.5 provision of the New Zealand Terrorism Suppression Act (cited above) actually fails in its purpose, in that persons engaged in protest, etc, frequently *do* intend to compel actions or abstentions. This, as noted earlier, is precisely their purpose. The protesters at Barrow *were* intending to prevent the ship from sailing, just as picketers blocking the entrance to a New Zealand supermarket or port, over pay or the use of (say) non-union labour, are intending to *compel* owners to comply with their demands. Similarly in the maritime context, the activities of *Sea Shepherd* can hardly be interpreted as other than having the objective of *forcing* the whaling companies to desist.

The second part of the clause is more difficult to interpret. If certain ‘outcomes’ are plausible consequences of certain actions, how can it be inferred that they were not intended?

### ‘Civil’ protest

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<sup>6</sup> It may also be noted in passing that protest action would generally not be terrorism under British law. In this case, the relevant clause provides:

A person commits an offence, if in the course of or in connection with the commission of an act of terrorism or for the purpose of terrorism, he uses or damages a nuclear facility in a manner which –

(a) causes a release of radioactive material; or  
(b) creates or increases a risk that such material will be released.

(UK Terrorism Act 2006, Part I, 10 (2))

This is broadly the distinction between legitimate political activity in civil society and illegality. Somewhere between the two is civil disobedience, which (following Held) is taken to be ‘violation of law justified in terms of conscience, rather than personal gain’.<sup>7</sup> Arguably, this is an empty category in democratic societies, since such societies provide civil means to change law and policy. Of course, this does not apply where (for whatever reason) the concept of civil order does not apply.

The general problem with political activists is that they tend to be unable to tolerate a world that does not conform to their ideals, so they cannot limit themselves to persuasion. This is what activists have in common with terrorists. Terrorists cannot accept a world in which (say) Islam is not dominant. Equally, Greenpeace activists (say) cannot accept a world in which civilian nuclear activities (or the killing of whales or the felling of native forests) continue. Both are thus driven to activities which are (in their various ways) coercive, and the reason why, even in the case of protest groups, this cannot be accepted, is that it is subversive of the whole notion of a civil order. Attempts to coerce persons whose activities are not illegal (and who cannot be persuaded) inevitably risk harm and loss. This arises either through the resistance of the persons concerned, or through the defensive activities of law enforcement or security agencies. Notwithstanding that it is hard to accept, the principle here is that, in a civil society, if we cannot persuade our fellow citizens, then we must accept that things will not change. The principle has a familiar utilitarian basis, in that it will be generally in the interests of citizens (even those with minority interests) to accept policies or practices of which they disapprove, rather than to live in a society where matters of public policy are determined by trials of strength.

Of course, this principle is difficult to accept where we have strong opinions on the substantive matter. Here, we may be inclined to think that some latitude should be accorded where the cause is manifestly a ‘good’ one and where those who support it are relatively weak in their capacity to influence events. This is sometimes described as the application of a ‘sliding-scale’ and the concept was dramatically illustrated in the Kingsnorth Power Station case (2008)<sup>8</sup>. In this case Greenpeace

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<sup>7</sup> Virginia Held, ‘Civil Disobedience and Public Policy’, in Edward Kent (ed), *Revolution and the Rule of Law*, page 92.

<sup>8</sup> For full detail of the case see [http://www.sourcewatch.org/index.php?title=Kingsnorth\\_Power\\_Station](http://www.sourcewatch.org/index.php?title=Kingsnorth_Power_Station)

activists scaled a power station chimney to paint a slogan against coal-fired power generation. They were removed from the chimney before they were able to complete the job and prosecuted in Maidstone Crown Court. In a surprising turn of events, they were acquitted by the jury on grounds of ‘lawful excuse’, specifically, that they acted against the greater damage of anthropogenic global warming.

Even if we are persuaded by an apparent consensus on the dangers of climate change (and this author is not) we might wonder about the desirability of allowing such extra-legal activity and, especially, in a democracy. It must surely encourage a perception that all campaigners, for whatever cause, may claim ‘lawful excuse’ to impose harm (costs or damage to interests) on individual, organisations, or society as a whole in course of the promotion of that cause. On the other hand, if we don’t wish to do this, we need to take a strong line with the sliding-scale, especially in the context of a stable democratic society. This may be a more difficult project in the relative anarchy of the oceans but if we wish to lessen that anarchy, it may be worth the attempt.

### **A Maritime Code**

A maritime code<sup>9</sup> would concern all sea areas beyond the territorial waters around states and would govern all activities directed towards securing political ends in the maritime environment, where at least one of the parties is not a state party. It would thus not encompass piracy (where the motivation is taken to be criminal, rather than political), nor would it encompass acts of war. Instead, it would aim to regulate what might be termed ‘maritime civil disobedience’, where the term ‘civil’ denotes what has been called in the context of action within states, a ‘partial claim’ of justification. The claim of (morally) justified law breaking is thus based on an ‘exception’ principle. The specific cause is exceptionally morally worthy and the law breaking is an exception to the general acceptance of an obligation to obey the laws of the land.<sup>10</sup> The civil disobedient is thus neither an anarchist nor a revolutionary, since

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<sup>9</sup> The word ‘code’ is used here to indicate that the provisions of such a document would not be *legally* binding but would rather set out an ideal of behaviour for all parties.

<sup>10</sup> This is essentially the position of Gandhi and followers such as Martin Luther King:

The lawbreaker breaks the law surreptitiously and tries to avoid the penalty, not so the civil resister. He ever obeys the laws of the state to which he belongs, not out of fear of sanctions but because he considers them to be good for the welfare of society. But there come occasions, generally rare, when he considers certain laws to be so unjust as to render obedience to them a dishonour. He then openly and civilly breaks them and quietly suffers the penalty.

both of these make a total claim with respect to the authority of the state, though the reasoning in each case is different. The anarchist denies any authority to the state on the grounds that it takes from his personal (moral) authority. The revolutionary, on the other hand, merely denies the status of a *particular* sovereign administration. He does not deny state authority *per se*. Indeed, he may aspire to become such an authority himself.

Of course, the anarchist impulse to accord primacy to individual moral authority is a matter of degree. In the maritime context, this is illustrated by the activities of Paul Watson and the Sea Shepherd Conservation Society

In formulating such a code, general principles of civil conduct apply and the foremost of these is, that where differences of opinion exist with regard to policies or practices, these differences are resolved by processes which are essentially persuasive, rather than coercive, and that this requirement applies to all parties, both informal and institutional.

Adoption of such a principle may be justified by reference to what may be taken as the fundamental principle of moral action: the principle of non-malevolence. This states that all members of a moral community have a duty to avoid intentional harm to other members of that community. For present purposes it is taken that the moral community in question is the whole of humanity. It does not include the animal, or natural world. It is thus taken that practices to which there may be objection, such as certain kinds of exploitation of the oceans (whaling, mineral extraction), or the transportation of what may be perceived as dangerous materials (oil, nuclear materials), or transportation in connection with undesirable practices, such as logging, may be seen as 'harms' to human interests, rather than (from a moral point of view) harms to the natural world.

From this starting point we may seek to establish a set of secondary moral principles, which effectively lay out a code of conduct for the international maritime environment by analogy with the Geneva Convention rules for international conflict. In this connection it may be noted that the initial 1864 Convention statement occupied only one page. Further down the track, it may be envisaged that such a code could evolve into a convention which might, in turn, be taken up into domestic law, which

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For present purposes it is taken that the principle may be applied to the breaking of civil order or trespass laws in order to protest against policies or practices which may be taken as obnoxious.



would make the citizens of a particular country liable to legal sanction in their own country in respect of their activities in the international domain.

It is also worth noting that international humanitarian law distinguishes *jus ad bellum* from *jus in bello*. It is proposed to follow this practice by distinguishing ‘causes’ (say opposition to whaling, or the international transportation of nuclear materials), from what may or may not be done in the maritime environment to promote the cause. Thus any supposed right to political action is limited by a general requirement to do no intentional (or reckless) harm.

### **Greenpeace opposition**

As indicated earlier (page 3), limitations of the sort envisaged here are likely to be seen by protest groups as an infringement of their civil rights. Greenpeace has already signalled this in a memorandum to the International Maritime Organisation, in which they say that even a *non-binding* code would be an unwarranted limitation on freedom of expression. The extent of the freedom of expression that they claim is illustrated in the example that they give of legitimate (‘non-violent’) protest (‘a fundamental tenet of all Greenpeace activities’) as apparently sanctioned in a 1998 judgement of the European Court of Human Rights. In this leading case a group of grouse-shooting protesters are said to have deliberately walked into the line of fire of the shooters and were subsequently restrained. The Court held:

It is true that these protests took the form of physically impeding the activities of which the applicants disapproved, but the Court considers nonetheless that they constituted expressions of opinion ... The measures taken against the applicants were, therefore, interferences with their right to freedom of expression.<sup>11</sup>

This is a judgement that might be politely called ‘counter-intuitive’. The situation clearly risks serious harm to protesters, even if it is a risk they are apparently willing to take. It also risks harm to grouse-shooters, in that they may inadvertently shoot a protester and this may be a serious harm (phrases like post traumatic stress come to mind). In this case there is nothing to signify that the grouse shooters were willing to take this risk. Again, the details of the situation remind us again of the

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<sup>11</sup> Case of *Steel and Others v. The United Kingdom*, Strasbourg, 23 September 1998, paragraph 92 (67/1997/851/1058)

fundamental similarities between Greenpeace activists and terrorists. The episode has some of the hallmarks of what has come to be called ‘martyrdom operations’.

More particularly, the general principle of allowing a party to ‘physically impede’ the legal activities of another on the grounds of moral objection, is an extraordinary one. It would be productive of considerable harm and damage (and, indeed, violence) as parties so impeded attempt to carry on their lawful business. It is thus not recognised in the suggested code below.

### **Some specific provisions of a maritime code**

(Commentary on content of code is carried in italics. It is understood that many of the activities referred to below are proscribed by international agreements, such as SOLAS, MARPOL, COLREGS, ISPS.)

1. Protest vessels may approach the vessels or equipment of other parties for the purpose of securing evidence, or displaying their opposition to practices or activities but they may not, in relation to such parties:

a) Approach closer than 500 metres

*[Incidents such as the 2002 attack on the USS Cole and the French oil-tanker Limburg illustrate the dangers of allowing inflatable speedboats of the kind also favoured by protest groups, to approach unchallenged. Ships that do this may risk serious damage if the approaching vessels are not challenged (and they turn out to be terrorists). On the other hand, protesters risk being mis-identified as terrorists and subjected to lethal fire, where the subjects of their protest are capable of this. The distance of 500m is not quite arbitrary. It is related to the turning circle of an average-sized ship. Closer approaches may interfere with safe navigation]*

b) interfere with the safe navigation or the equipment of any other vessel;

*[The two possibilities raise different issues. In regard to the interference with navigation equipment, there are direct possibilities of danger and harm, including harm to third parties. Interference with non-navigational equipment may give rise to harm to the operators of such equipment (or parties nearby), or harm may come from what such interference causes the victims to do.]*

c) intentionally or recklessly harm, or attempt to harm individuals, or damage or attempt to damage property or the environment;

d) attempt to remove or release materials from another vessel;

e) be equipped, or fitted with devices or attachments designed specifically to damage other vessels or their equipment.

f) Board, or attempt to board.

*[There have been several examples of this in both the nuclear transportation and the whaling context. On the face of it, merely getting on board a ship and (say) unfurling a banner, before being taken away by the authorities (as was the case with antinuclear protesters in the Baltic in 2007) might seem a minimal harm in relation to the major issue with which the protesters are concerned. On the other hand, serious danger could arise, if (for example) crew attempts to interfere with this process result in would-be boarders falling into the sea and coming close to the propellers. Again, boarding may be an essential part of a wider action which is intended to be more damaging, or which risks such damage, whatever the protesters may be intending. For example, on a recent occasion, whaling protesters in the Southern Ocean left behind a tracking device, intended to enable the protesters to find the fleet at a later date. If this happened to a nuclear cargo ship, protesting boarders (wittingly or not) might leave behind the means for terrorists to find the ship at sea, which could result in a quite different threat.<sup>12</sup>]*

2. Persons in difficulty, either because they are in the water or because their boat is disabled, must be given assistance by the nearest party able to give such assistance. After any such incident, persons thus aided (and their boat, or boats, if any) are to be returned to the vessel or vessels from which they came. It is forbidden to deliberately *contrive* the ‘persons in difficulty’ situation, as by jumping into the water ahead of another vessel.

*[Apart from the inherent danger of this situation, both to the protester and potential rescuers, it might also be seen as the maritime equivalent of Geneva’s ‘perfidy’]*

3. Where medical, or other assistance, is offered, parties so helped should be returned to their own vessel as soon as practicable.

4. In no case may persons be held as a hostage to coerce the future behaviour of another party.

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<sup>12</sup> But note the formidable problems that terrorists would still have in taking the ship or cargo (Smith R C, ‘Terrorism and Maritime Shipment of Nuclear Material’, *Packaging, Transport, Storage and Security of Radioactive Material*, Vol 18, No 4 (February 2008)).

5. There is a general obligation on Flag States and States within whose territorial waters proscribed events occur to take firm action with regard to protesters who infringe these rules.

*[Domestic authorities have frequently failed to discharge these responsibilities adequately, as in the case of the Atlantic Osprey carrying a cargo of nuclear material from the Swedish port of Studsvik (in October 2007), when the vessel was boarded TWICE in 24hrs as Swedish magistrates released arrested protesters so quickly that they had time to go back. Many of the above principles are also reflected in specific provisions in domestic and maritime law.]*