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Comparative Approaches to Security and Maritime Border Control

Dale Stephens*

Remarkably perhaps, the question of maritime border protection attracted an unprecedented level of political debate during the course of the Australian federal election of November 2001, ultimately becoming a significant issue in deciding the outcome of that contest. Indeed, the election became, in essence, a referendum on the Federal Government's revised policy concerning strict maritime border protection measures designed to prevent the influx of illegal migrants arriving by sea into Australia. This issue was principally ignited by the Australian Government's stance in denying the admission into Australia of 433 illegal migrants rescued by the Norwegian container ship *MV Tampa*¹ in August of that year and the subsequent passage by the Australian Parliament, on September 26, 2001, of omnibus border protection legislation that provided for a robust legal regime.² This new legislative scheme infused the Australian Defence Force (ADF) with significantly greater authority to intercept and remove suspected illegal entry vessels from Australia's maritime zones. There is no doubt that the reverberations of the attacks of September 11, 2001 (hereinafter referred to as 9/11), which were intensely felt within Australia at the time, also heavily influenced approaches to the

* Commander, Royal Australian Navy. The views expressed in this article are those of the author alone and do not necessarily represent the views of the Australian Government, the Australian Defence Force, or the Royal Australian Navy.

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issue of maritime border protection by both the Government and the Australian population. Such reverberations, in conjunction with the emotions generated by the Bali bombings of October 2002,³ continue to largely influence approaches to maritime border protection issues within the Australian body politic, though not without criticism by significant segments of the Australian public.

The unprecedented level of political debate relating to maritime border protection at the time of the election has been matched by an equally intense academic debate as to the lawfulness of actions taken by the ADF in intercepting incoming vessels carrying unlawful immigrants and denying them entry into Australia. The lawfulness of the actions undertaken by the ADF in implementing the Government's stringent border protection policies were also the subject of domestic litigation (which occurred while such operations were ongoing) within the Australian Federal Court, as well as a fulsome and comprehensive Senate Inquiry following the 2001 election.

The legal issues, which have been hotly debated with respect to these events, are possibly familiar to an American audience. They concern questions of constitutional capacity, especially the extent of executive power to direct military operations under the constitution in the face of potentially contrary legislative direction. They also touch on issues of international law relating to law of the sea rights and obligations and, of course, issues concerning the incorporation of international law within domestic law and the priority of either domestic or international law in operational decision making.

The Australian Defence Force and its Law Enforcement Role

The Australian Defence Force generally, and the Royal Australian Navy (RAN) in particular, have a solid tradition of exercising law enforcement powers on behalf of the Commonwealth Government. Unlike restraints imposed upon parts of the US military, there is no comparable Posse Comitatus Act⁴ limitation on the use of the ADF or RAN to enforce federal law. To the contrary, provisions of Australian Commonwealth law specifically authorize military members to exercise necessary law enforcement powers. Indeed, when the issue was peripherally raised in a constitutional context in the 1970s, a justice of the High Court of Australia noted in *dicta* that he could not conceive of any inherent limitation on the use of the ADF to enforce laws of the Commonwealth Government.⁵ Such a reflection is entirely consistent with Australian constitutional interpretive methodology dating to the 1920s, which has traditionally given full effect to the terms of Commonwealth laws provided they are based upon a requisite head of constitutional power. Concomitantly, the courts have been slow to impose any implied personal rights or

obligations arising from the Constitution which might act to restrict ADF law enforcement capacity. Indeed, there is no equivalent of the Fifth or Fourteenth Amendments to the US Constitution in the Australian Constitution nor is there the same historical experience that led to the passage of the Posse Comitatus Act in the United States, namely post-Civil War Reconstruction and the fear of martial excess.⁶

As a result of the broad constitutional capacity of the ADF to enforce Commonwealth laws, there has developed a relatively large, though disparate, corpus of law that guides RAN maritime law enforcement operations, particularly that of the patrol boat force operating off of northern Australia. In essence, the ADF has responsibility under Commonwealth legislation for such diverse areas as fisheries, customs, migration, and quarantine control, and more generally for issues such as anti-piracy. Notwithstanding this broad range of subject matter, the powers exercisable by the ADF differ according to the particular subject, thus the specific piece of legislation under which operations are being conducted will shape the powers and responsibilities of ADF officers. Importantly, there exist significant differences between various applicable pieces of legislation.

Fisheries enforcement has traditionally occupied the central focus of ADF law enforcement operations and has involved both major and minor RAN vessels. Thus, Australia routinely deploys a major fleet unit to its territories of Heard and McDonald Islands located in the Southern Indian Ocean (approximately 4100 kilometers southwest of Perth, Western Australia) to intercept major foreign fishing vessels engaged in wide-scale commercial fishing activities. Such deployments have led to some dramatic enforcement actions including one in particular, which is believed to be the longest hot pursuit in recorded history.⁷ More generally, fisheries enforcement largely occurs in the northern Australian Exclusive Economic Zone (EEZ) with respect to lower scale illegal fishing activity. For example, in the first four months of 2004, there were 48 interceptions of foreign illegal fishing in that region.⁸ With respect to customs enforcement, the ADF usually acts in conjunction with the Australian Federal Police, typically focusing on maritime drug interdiction operations. In 2003 for example, the RAN deployed a guided missile frigate with a contingent of Special Air Service (SAS) troops on board to successfully intercept a North Korean freighter that had landed 150 kilograms of heroin on the southern Australian mainland.

***MV Tampa* and Border Protection**

As previously mentioned, the *Tampa* incident generated considerable debate within Australian political and legal circles. The timing of that incident, coinciding as it did with 9/11, witnessed a subtle revision of approach regarding the question

of illegal entry—from one of mere migration control to one with greater national security overtones. This in turn has influenced the nature of legal analysis of the international and domestic legal rights that may be exercised in maritime border control actions and has influenced contemporary policy and legal choices.

The *MV Tampa* Case

On August 26, 2001, the Norwegian container ship *Tampa* rescued 433 people from a grossly overloaded and sinking Indonesian-flagged wooden-hulled vessel in the Indian Ocean. That vessel had been attempting to reach Australia from Indonesia as part of a people-smuggling operation and, accordingly, the persons on board did not possess lawful entry visas. Having rescued the crew and passengers, the *Tampa's* Norwegian master intended to return them to an Indonesian port to disembark them, when a decision was made to divert to Australian territory. The master then sought to drop them at Christmas Island, an Australian territory close to Indonesia. Representatives of the Australian Government contacted the ship and informed the master that the ship did not have permission to enter Australian waters and could not disembark the migrants. The master responded by claiming that some of the migrants on board were suffering from dire medical emergency and thus relied upon the right of “distress” to demand entry into the port facilities. Australian authorities countered by preparing medical teams to fly out to the vessel to address the alleged medical emergencies. During the course of planning the provision of medical assistance, the ship steamed into the Australian territorial sea surrounding Christmas Island and was then boarded by 45 SAS soldiers who traveled by fast boat to the vessel. Through a dramatic standoff during the next few days, the vessel was visited by the Norwegian Ambassador to Australia who received a note from the migrants outlining their assertions of refugee status. Proceedings were simultaneously filed in the Federal Court by public interest lawyers seeking an order of *habeas corpus* to compel the Australian Government to bring the migrants into Australian jurisdiction. The Government sought to prevent such access. The migrants appeared to be from a number of countries, including Afghanistan, Iraq, Kuwait, Sri Lanka and Pakistan.

After several days, the illegal migrants were voluntarily transferred to an Australian naval vessel and transported to the island nation of Nauru where representatives of Australia and the United Nations High Commissioner for Refugees (UNHCR) subsequently processed their applications. The Australian Government was aware that this was the commencement of a wave of vessels carrying persons seeking refugee status and ultimately implemented Operation Relex, which was designed to prevent entry into Australian internal waters by such craft.⁹ Approximately a dozen vessels attempted to transport illegal migrants to Australia

following the *Tampa* incident; the ADF/RAN successfully intercepted all of these vessels.¹⁰

Legal Issues Raised

The ability to intercept vessels carrying unlawful migrants is addressed within the 1982 United Nations Convention on the Law of the Sea (Law of the Sea Convention) in Article 33, which permits a coastal State the authority to exercise “the control necessary” within the contiguous zone to prevent infringement of immigration laws. Accordingly, as a matter of international law there can be no question of attracting state responsibility on the part of the coastal State for the interference with navigational rights of vessels infringing such laws. Additionally, such authority exists, *a fortiori*, in the territorial sea where Article 19(g) expressly notes that the loading/unloading of persons contrary to coastal State immigration laws “is prejudicial to the peace, good order or security” of that State and constitutes passage which, under Article 25, a coastal State may “take the necessary steps” to prevent.

The difficulty confronting the Australian action lay with the application of domestic law concerning ADF powers. The Australian Migration Act provided for a highly formalized procedure with which “Commanders” of duly commissioned ships were required to comply in order to exercise powers relating to the detention of illegal immigrants. Moreover, the Act seemed to generally contemplate that persons detained would be conveyed into Australian Migration Act jurisdiction (i.e., land territory) rather than removed from it. On the day SAS forces boarded the *Tampa*, the SAS were not acting in accordance with powers pursuant to the Migration Act. They were neither duly appointed “Commanders” for the purposes of the Act nor were they in command of a commissioned ship as required by the Act, but rather were acting pursuant to specific Government direction under the executive power of the Constitution. This executive power is exercisable in circumstances of, *inter alia*, national security and is identical to the type of power President Truman unsuccessfully sought to exercise in the *Youngstown* case.¹¹ The difficulty facing the Commonwealth in relying upon the executive power in the context of the *Tampa* interception was that it was squarely the type of situation described by Justice Jackson in the *Youngstown* case as being one where the Legislature had passed specific legislation, which essentially directed an incompatible regime. As with the result reached in the *Youngstown* case, it seemed to be a very precarious basis upon which to base military action. Indeed, a single Judge of the Australian Federal Court that decided the *Tampa* case in the first instance determined the matter against the Commonwealth.¹² Subsequently, however, the matter was decided in favor of the federal Commonwealth Government on appeal by a 2-1 majority.¹³ The opinion of

one the majority Justices on appeal expressly acknowledged that the Commonwealth possessed sufficient constitutional authority by use of the executive power to prohibit illegal entry in terms that seemed to correlate such denial with national security goals. It was a remarkably wide reading of prerogative powers and, significantly, was handed down on September 16, 2001. It seems very plausible that the events of 9/11 did influence judicial thinking, especially as the author of the opinion envisaging such a wide interpretation of prerogative powers was not expected to have decided the matter in the way he did.¹⁴

The decision has been criticized by some academic commentators for failing to properly have regard to implicit international obligations contained within the 1951 Refugee Convention¹⁵ to which Australia is party.¹⁶ Indeed, the issue seems to have been discussed in the literature as highlighting new and possibly intractable tensions between national security concerns arising from the “war on international terrorism” and humanitarian obligations to accord basic procedural rights to all unlawful migrants arriving by sea so as to properly determine who may have a *bona fide* claim to refugee status.

It is against this background that the border protection legislation that was passed in September 2001 may be better understood.¹⁷ Under the current domestic legal regime outlined in the Migration Act, the ADF is empowered to intercept all vessels suspected of containing unlawful migrants entering the contiguous maritime zone and may remove such vessels either to a nominated third country processing center or simply to a “place” seaward of the contiguous zone. This latter method of removal necessarily gives rise to potential objections under the Law of the Sea Convention with respect to the capacity to detain, and indeed tow, foreign-flagged vessels across international waters. There are a number of answers that might be offered to such objections. First, while Australia has ratified the Law of the Sea Convention, there exists no mechanism of self-executing treaty implementation within Australia such as exists within the United States. Accordingly, while some aspects of the Law of the Sea Convention have been incorporated into Australian domestic law, it is certainly not a comprehensive incorporation and there is no inconsistency with the amended Migration Act legislative powers to remove such vessels. This does not, of course, answer potential questions of state responsibility that might arise from interfering with freedom of navigation rights of the flag State of the vessel, yet notwithstanding ADF actions there has yet to be any kind of claim raised by any nation State that has alleged breach of such obligations. Second, and in partial answer to the first issue, the practice to date has been to tow only those vessels with Indonesian nationality under the terms of a “letter of notice” provided to Indonesia advising of such intent to return Indonesian flagged vessels carrying unlawful migrants. The return of such vessels to the 12nm edge of the

Indonesian coast under Operation Relex was observed by Indonesian authorities without protest and Australian international lawyers have characterized this forbearance as “constructive acquiescence.”

The issue of unlawful immigration and border control mechanisms has necessarily been brought into sharper relief in the context of the war against terrorism. Notwithstanding the navigational regime contemplated in the Law of the Sea Convention pertaining to the application of immigration laws in the contiguous zone and territorial sea only, the general jurisdictional rules of international law concerning both territorial and prescriptive jurisdiction relating to national security controls does admit to an extended reach of application beyond these maritime zones. Under these principles it is entirely arguable to admit to the extra territorial application of migration controls that might be exercised within international waters where this is deemed to be a necessary incident of preserving national security interests. Indeed, the skein of authority emanating from a US Court of Appeals and the US Supreme Court, respectively, in the *Nippon Paper*¹⁸ and *Hartford Fire*¹⁹ cases would seem to lend support for such reach, at least in circumstances where the intent of foreign actors is to unlawfully interfere with domestic activities and their conduct in fact produced or is likely to produce a substantial effect. More trenchantly, the adoption of United Nations Security Council Resolution 1373²⁰ on September 28, 2001 would seem to provide ample Chapter VII authority to override objections of navigational interference reflected in the Law of the Sea Convention. Resolution 1373 deals with international terrorism in the context of the post-9/11 environment. Article 2(g) thereof calls upon States, acting under Chapter VII authority, to “prevent the movement of terrorists or terrorist groups by effective border controls.” Pursuant to Articles 25 and 103 of the Charter, which demand compliance with such decisions and provide for the overriding of inconsistent provisions contained in any international agreement, such a stipulation could readily displace navigational rights of vessels carrying unlawful migrants in circumstances where there is a suspicion of terrorist connection. The requisite level of suspicion of terrorist connection required to authorize action need not necessarily be high. The academic Derek Jinks has persuasively argued that in the context of international terrorism the rules of state responsibility have been applied by virtue of both Resolution 1373 and international consensus to significantly lower the threshold of attribution between private actors and the State in circumstances where the State merely harbors or supports such actors.²¹ Such a development further dilutes the original tests promulgated by the International Court of Justice (ICJ) in the *Nicaragua* case²² and the International Criminal Court for the Former Yugoslavia in the *Tadic* appeal²³ regarding attribution criteria. While such an approach may be critiqued for being both under and over inclusive,²⁴ it nonetheless

grounded offensive military action in Afghanistan in 2002 and thus opens the door for consideration of lesser forms of control mechanisms. If such action is acceptable in the context of offensive military operations then surely it permits a State to tighten maritime border controls beyond the traditional limits of the contiguous zone and thus authorize preventative action within international waters where this is deemed necessary to preserve both national and international security. That such a proposition relies upon the authority of Resolution 1373, as it does, is hardly revolutionary. As far back as 1949 in the ICJ's *Corfu Channel* decision, the highly respected Judge Alvarez pointedly acknowledged the capacity of the Security Council to vary maritime navigational rights where this was necessary to preserve international peace and security and fully accepted the consequential diminution of sovereign rights that such actions might entail.²⁵ Indeed, as evidenced by the *Certain Expenses*²⁶ and *Namibia*²⁷ decisions of the ICJ, the challenge of international lawyers today seems not so much as deciding what the Security Council can do, but rather determining the limits of what it may not do.²⁸

The clash between national security measures as applied in the context of border control actions and humanitarian aspirations of those seeking asylum and human rights obligations of the coastal State does raise uncomfortable conundrums. In the current environment of the war on terrorism, States such as Australia are choosing to accord national security and the orderly processing and screening of asylum seekers within countries of origin (rather than on the shores of Australia) a higher priority. While such a choice might be criticized on both legal and policy grounds,²⁹ it is not altogether unique within the domestic jurisprudence of a number of countries who have faced similar issues. The US Supreme Court in *Sale v. Haitian Centers Council*,³⁰ for example, in an 8-1 majority decision determined that high seas interdiction of Haitian asylum seekers did not attract obligations under the Refugee Convention³¹ as the Court construed neither the Convention nor supporting US domestic law as applying beyond territorial boundaries of the United States.³² Similarly, the UK Court of Appeal in the recent 2002 decision of *A v. Secretary of State for the Home Department*³³ determined that measures adopted by the UK Government following 9/11 to detain and expel non-nationals derogated from a host of international human rights guarantees (detention policies and rights to a fair trial) but were nonetheless acceptable as derogations which could be justified in times of public emergency. What is intriguing in that instance was that the UK Government's detention of non-nationals was directed more at the threat such non-nationals posed to the United States than the United Kingdom, but nonetheless such actions were unanimously upheld by the Court.

Multilateral Cooperation

While invocation of national security measures to inform approaches to maritime border control suggest a theme of arrogant unilateralism, this is not necessarily the case. The experience of maritime law enforcement by Australia within the region has been one of exceptionally constructive co-operation. This has been particularly pronounced with Australia's near neighbors such as Papua New Guinea and Indonesia and more generally with countries situated in the South West Pacific under the Nuie Treaty,³⁴ but has also extended more broadly to countries situated within the Indian Ocean which was amply demonstrated by the *South Tomi* incident of early 2001.³⁵

In that instance, a Togolese registered vessel had engaged in illegal fishing activity at Heard and Macdonald Islands and was pursued from the EEZ of those islands by an Australian Fisheries Authority vessel in a two-week hot pursuit that extended along the entire southern length of the Western Indian Ocean to the coast of South Africa. During the course of the pursuit offers of warship assistance were received from French authorities who occupied the French possession of Kerguelen Island and, similarly, South African authorities who were exceptionally helpful when assistance was requested. In the event, an Australian military boarding team was dispatched to South Africa and transited through that country for deployment upon a South African warship that met *South Tomi* as it rounded the Cape of Good Hope. With hastily prepared complementary rules of engagement and mutually agreed understandings of the legal issues involved, Australian military members (who were also authorized fisheries officers under the relevant legislation) successfully apprehended *South Tomi* from the flotilla of South African warships that had steamed out into international waters to intercept the vessel. An Australian steaming party was placed onboard *South Tomi* and the vessel returned back to Western Australia where the ship and catch were forfeited and the master prosecuted. From a Law of the Sea Convention perspective, the incident raised a number of interesting legal issues which included, in particular, the capacity of one nation to hand over hot pursuit to another nation while still maintaining law enforcement jurisdiction upon apprehension. In that regard, the Convention merely makes reference to "government ships" without mentioning the nationality of such ships as an integral criteria for hot pursuit. Similarly, the question of whether the skirting of *South Tomi* through the territorial sea of Kerguelen Island would have rendered the hot pursuit otiose even when the coastal State, in this case France, did not object to the continued pursuit. In any event, this latter issue was not in issue, for while *South Tomi* seemed intent on entering the French territorial sea at Kerguelen Island it eventually diverted its track and did not do so.

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The international legal issues thrown up by the *South Tomi* incident were never tested within international legal or diplomatic fora as Togo made no representations on behalf of the vessel upon its arrest or subsequent prosecution. The issues nonetheless demonstrated the unilateral nature of many of the rights contained within the Law of the Sea Convention. It seemed a very odd outcome that notwithstanding the co-operation of so many nations in seeking to apprehend this vessel, that the terms of the Convention had, in theory at least, the capacity to defeat this intent.

Conclusion

The tightening of its maritime border control laws by the Australian Government has generated considerable academic criticism by those who validly rue the subordination of humanitarian priorities. Such measures have nonetheless been supportable under a sheath of domestic and international legal authority and, moreover, have proven to be extremely effective in stemming the tide of seaborne unlawful migrants. Australian embassies in countries of origin apply the very same tests for refugee status in those countries as would apply to the hapless asylum seeker washing up on Australian shores.

The events of 9/11 and the associated war on terrorism continue to resonate in approaches to maritime security issues and have permitted the ascendancy of national and international security measures which have the potential to override long standing navigational rights. The key in confronting international terrorism and ensuring adequate maritime border security is striving for multilateral cooperation rather than resolute reliance upon unilateral rights. The experiences of the ADF/RAN in undertaking law enforcement measures within our region in concert with countries such as South Africa, France and Papua New Guinea have amply demonstrated the magnificent ability to “force multiply” military means so as to secure common ends. Such co-operation is of course key to ensuring effective maritime border security and more broadly to ensuring a durable victory in this war we are fighting against the scourge of international terrorism.

Notes

1. See *infra* note 9 and accompanying text.
2. Border Protection (Validation and Enforcement Powers) Act 2001, available at http://www.australianpolitics.com/parliament/legislation/01-08-29_border-protection-bill.shtml.
3. The terrorist bombing occurred in Kuta, Indonesia on the Island of Bali on October 12, 2002. Among the 202 people killed in the attack were 88 Australian nationals. A description of the events of that tragic event is available at <http://www.answers.com/topic/2002-bali-bombing>.

4. Act of June 18, 1878, § 15 (codified in 18 U.S.Code § 1385 (1994)).
5. Gibbs J. in *Li Chia Hsing v Rankin* (1978), 141 COMMONWEALTH LAW REPORTS 182, 195.
6. See generally Nathan Canestaro, *Homeland Defense: Another Nail in the Coffin for Posse Comitatus*, 12 WASHINGTON UNIVERSITY JOURNAL OF LAW & POLICY 99 (2003).
7. The Uruguayan long-liner fishing vessel *Viarsa I* was sighted on August 7, 2003 fishing in the Australian Exclusive Economic Zone. A 6300 kilometer pursuit followed, which ended with the *Viarsa I*'s capture on August 28. See *Illegal Boat Set to Dock*, THE ADVERTISER (Adelaide, Australia), Sept. 30, 2003, at 24. An earlier second extended pursuit involved the *South Tomi*, a South African-registered, Spanish-owned trawler. On March 29, 2001 the *South Tomi* was observed by an Australian Fisheries Management Authority vessel to be engaged in unlawful fishing in the Australian Exclusive Economic Zone near Heard and McDonald Islands. Ignoring an order to proceed to Fremantle, a 4100 kilometer pursuit ensued, with the *South Tomi* finally being captured on April 12. See *8000 KM Sea Chase – Pirate Trawler Caught After Hot Pursuit*, THE DAILY TELEGRAPH (Sydney, Australia), Apr. 14, 2001, at 11; *Fish Pirates Chased Across Ocean SAS Troops Pounce Out of Africa*, COURIER MAIL (Queensland, Australia), Apr. 14, 2001, at 3. For a complete discussion of both events, see Erik Jaap Molenaar, *Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean: The Pursuits of the Viarsa I and the South Tomi*, 19 INTERNATIONAL JOURNAL OF MARINE & COASTAL LAW 19 (2004).
8. See generally *Blitz On Illegal Fishing Boats Catches Nine Indonesian Vessel*, Vol. 6, Issue No. 22, WEEKLY DIAR.COM E-NEWSLETTER, available at <http://www.diar.com/data/news04.htm#Anchor-May-59504>.
9. For a description of the *MV Tampa* incident and of Operation Relex, see Parliament of Australia: Select Committee Inquiry on a Certain Maritime Incident, Ch. 2, Operation Relex, available at http://www.aph.gov.au/senate/committee/mar.time_incident_ctte/report.htm.
10. See Operation Relex, in Wikipedia, available at http://.wikipedia.org/wiki/Operation_Relex.
11. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).
12. *Victorian Council for Civil Liberties Inc. v. Minister for Immigration & Multicultural Affairs* (2001) 110 FCR 452.
13. *Ruddock v. Vardarlis* (2001) 110 FCR 491.
14. See Penelope Mathew, *Current Development: Australian Refugee Protection in the Wake of the Tampa*, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 661, 662 (2002).
15. Convention Relating to the Status of Refugees, July 25, 1951, 189 U.N.T.S. 150.
16. See generally Penelope Mathew, *International Association of Refugee Law Judges Conference: Address – Legal Issues Concerning Interception*, 17 GEORGETOWN IMMIGRATION LAW JOURNAL 221 (2003).
17. The border protection legislation of September 2001 is a package of three separate acts pertaining to border protection issues that were enacted by the Australian Parliament in the wake of the terrorist attacks of 9/11. That package includes the Migration Legislation (Excision from Migration Zone) Act 2001, the Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001, and the Border Protection (Validation and Enforcement Powers) Act 2001. See also *supra* note 2.
18. *United States v. Nippon Paper Industries Co., Ltd.*, 109 F.3d 1 (1st Cir. 1997), cert. denied 522 U.S. 1044.
19. *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993).
20. SC Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement>.

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21. Derek Jinks, *State Responsibility for Sponsorship of Terrorist and Insurgent Groups: State Responsibility for the Acts of Private Armed Groups*, 4 CHICAGO JOURNAL OF INTERNATIONAL LAW 83 (2003).
22. Military and Paramilitary Activities (Nicar. v. US), 1986 ICJ 14 (June 27).
23. Prosecutor v. Tadic, Case No. IT-94-1-A (ICTY 1999), available at <http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf>.
24. Jinks, *supra* note 19, at 92-4.
25. Corfu Channel (Merits) (U.K. v. Alb.), 1949 I.C.J. 4, 41 (Dec. 15).
26. Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, 1962 I.C.J. 157 (July 20).
27. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16 (June 21).
28. Jose E. Alvarez, *Judging the Security Council*, 90 AMERICAN JOURNAL OF INTERNATIONAL LAW 1 (1996).
29. Mathew, *supra* note 14.
30. Sale v. Haitian Centers Council, Inc., 509 U.S. 155 (1993).
31. Convention Relating to the Status of Refugees, *supra* note 13.
32. See Mathew, *supra* note 14, at 667-8, where the author criticizes the reasoning adopted by the majority in that instance.
33. [2002] EWCA Civ 1502 Case No: C/2002/1710 of Oct. 25, 2002.
34. Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region, July 9, 1992, 32 INTERNATIONAL LEGAL MATERIALS 136 (1993), available at <http://fletcher.tufts.edu/multi/texts/niue.txt>.
35. *Supra* note 7.