

**CIL RESEARCH PROJECT ON INTERNATIONAL MARITIME CRIMES  
NEW ZEALAND'S COUNTRY REPORT**

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Research Project on International Maritime Crimes

# **New Zealand's Country Report for CIL Research Project on International Maritime Crimes**

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## **Part I General Questions on Treaty Ratification and Implementation**

*1. Does your constitution have provisions on international treaties? Please describe.*

Unlike most countries, New Zealand does not have a written constitution. Instead, the constitution derives from a number of different written and unwritten sources. These sources include legislation, case law, constitutional conventions,<sup>3</sup> and other important legal principles. The New Zealand system of government has three separate branches, the legislative, executive and judiciary. The fundamental feature of the New Zealand system of government is parliamentary sovereignty. This is the notion that New Zealand's unicameral Parliament has supreme lawmaking powers that cannot be challenged.

That New Zealand does not have a written constitution means that there is no single document within which to find provisions on international treaties. Much of the practice relating to the ratification and implementation of international treaties has the status of constitutional conventions.

*2. Does your country have any regulations, manuals or other unofficial documents setting out the practices and procedures to be followed in the ratification and/or accession and/or implementation of international treaties? Please describe.*

The power to take binding treaty action (ratification, accession, acceptance, approval, withdrawal, denunciation, or signature) of international treaties rests with the Executive branch of the New Zealand Government. Cabinet (the group of Ministers, including the Prime Minister, which comprises the core of the executive) has decided that certain treaty actions must go through a specified parliamentary process before the Executive will taking binding action such as ratification. The Government (including Cabinet) must ask Parliament to change the law to make it consistent with treaty obligations. The practice in New Zealand is to make domestic law compatible with the treaty obligations before taking the binding action. It has been claimed that there is a constitutional convention regarding this practice

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<sup>3</sup> Constitutional conventions are non-legal rules and practices. Many are now written in a number of different documents, such as the Cabinet Manual 2008 and the House of Representative's Standing Orders. Although they are recorded in such documents, they emanate from custom and practice, rather than any formal rule making procedure.

of prior parliamentary consideration of treaties, which essentially requires the practice to be followed.<sup>4</sup>

Cabinet has an important role in this treaty making process. Cabinet is the principal policy and decision-making body of the executive branch of government. It is made up of Ministers of the Crown, though there are some Ministers who do not sit in Cabinet. Cabinet exists solely by constitutional convention but exercises considerable power within the New Zealand system of government.

The Cabinet Manual sets out the procedure for presenting international treaties to the House of Representatives (House). The relevant paragraphs are 5.83-5.91.<sup>5</sup> The Standing Orders of the House of Representatives 2008 (Standing Orders) also contains this process.<sup>6</sup> The inclusion of this process within these two documents indicates that the rules are important constitutional conventions. Although they are not included in legislation, they will be complied with.

#### Summary of Process

- *Negotiation*. New Zealand officials are involved in the negotiation of all bilateral and many multilateral treaties. Consultation with interested parties and stakeholders is performed in the course of treaty negotiations to ensure that New Zealand's wider interests are taken into account
- *Cabinet approval of text* (The Responsible Minister in consultation with Minister of Foreign Affairs and Trade leads this phase). Cabinet must approve formal steps involved in taking the proposed treaty action. Cabinet must also approve a National Interest Analysis. The National Interest Analysis is completed by the lead agency, in accordance with Standing Order requirements.
- *Signature*. The signing of a treaty signifies an intention to ratify and accept it as binding in the future. Of course, New Zealand is still bound by the obligation not to take actions that undermine the object and purpose of the treaty (VCLT Art 18)
- *Action on minor bilateral treaties*. There are specific criteria for determination of whether a bilateral treaty is minor or major. These guidelines are available on the MFAT Website. The CabGuide <sup>7</sup> provides a link to this page: <http://www.mfat.govt.nz/Treaties-and-International-Law/03-Treaty-making->

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<sup>4</sup> David McGee *Parliamentary Practice in New Zealand* (3<sup>rd</sup> Ed, Dunmore Publishing Ltd, Wellington, 2005) at 590 and 597.

<sup>5</sup> Cabinet Office *Cabinet Manual 2008* at [5.83-5.91]. The *Cabinet Manual* is available online: <http://cabinetmanual.cabinetoffice.govt.nz/>.

<sup>6</sup> Standing Orders of the House of Representatives 2008, SO 388-391. These are available online: <http://www.parliament.nz/en-NZ/PB/Rules/StOrders/>.

<sup>7</sup> *Guide to Cabinet and Cabinet Committee Processes*, online at: <http://cabguide.cabinetoffice.govt.nz/>.

<process/Treaty-Criteria.php>. If the treaty is not a major treaty of particular significance, it may be ratified without being presented to the House.

- *Presentation to the House* (all multilateral and major bilateral treaties). The Legal Division of MFAT is responsible for presentation of the treaty and its National Interest Analysis to the House of Representatives (Parliament). The treaty is then allocated to a Select Committee.<sup>8</sup>
- *Select Committee* (usually the Foreign Affairs, Defence and Trade Committee). The Government will usually refrain from taking treaty action until the Committee reports to the House, or until 15 days after presentation of the treaty to the house. The Committee is central to the treaty examination process and decides whether another Select Committee may appropriately consider the treaty. Due to the short time limit, most treaty examination is performed on the basis of National Interest Analyses and briefings from departmental officials and material from Committee advisors.
- *Government response*. The Minister of Foreign Affairs and Trade may discuss the content of a Select Committee report with Cabinet before the Executive takes the binding treaty action. If the report contains recommendations for Government, a Government response to such recommendations must be tabled within 90 days of the report. However, the Executive retains full discretion as to the final decision on the treaty. Parliament cannot veto a proposed treaty action.
- *Implementing legislation*. Where a treaty requires legislation before it can be accepted as binding, treaty examination by Select Committee becomes the first step in a process towards implementation of the treaty obligations. There is no standard form of legislation used to implement treaty obligations. In some cases, legislation may give direct effect to the treaty, with the text of the treaty included as a schedule to the Act. In other cases, wording from the treaty is used in legislation. This can include differences in wording or drafting changes so that it fits into the body of New Zealand law. In some further cases, the legislation relied on to implement a treaty obligation may not be drawn from the treaty and thus bears little textual resemblance. This is often the case where New Zealand law is perceived to be already compatible with a treaty obligation. Another legislative approach is implementation through delegated legislative powers.

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<sup>8</sup> A Select Committee is a committee of Members of Parliament who can examine legislation before it is passed, and also investigate other matters including proposed treaty action. The Select Committee generally reports its findings to the House of Representatives. Depending on the topic, the public may have an opportunity to make oral and written submissions to the Select Committee as part of its deliberations.

- *Binding treaty action* (ratification or accession). In every case, it is the practice to have implementing legislation in place, if necessary, before undertaking binding treaty action such as ratification.

Guidelines for other government agencies involved in international treaty action is provided by MFAT in “International Treaty Making: guidance for government agencies on practice and procedures for concluding international treaties and arrangements” (September 2009).<sup>9</sup> This information booklet was prepared in the interests of improving understanding within Government and its agencies of New Zealand’s practice with respect to international treaties.

The CabGuide provides information for government agencies on presenting treaties to the House. The CabGuide contains information on the processes and form of submitting international treaties to cabinet for consideration.

3. *Which agency or agencies in your government have legal experts to provide advice to your government on international law and treaties?*

The Legal Division of the Ministry of Foreign Affairs and Trade (MFAT) oversees the process by which the New Zealand Government enters into, withdraws, and denounces treaties. Any proposal to enter into an international treaty must be discussed with the Treaty Officer in the Legal Division of MFAT. This is required by the *CabGuide* and Cabinet Manual 7.115.

4. *Are there international law and treaty law experts in other ministries or government departments?*

Yes. Several other ministries employ lawyers and specialist international policy advisors. However, most significant international law questions will be referred to, or discussed with, MFAT.

5. *Which agency and/or agencies are responsible for studying an international treaty and making a recommendation on whether or not your country should ratify and/or accede to the treaty?*

The initiation of binding treaty action may be started by the Responsible Minister of an area, either in consultation or jointly with the Minister of Foreign Affairs. Therefore, while the individual ministries have a lead role in identifying potential treaty action, this is performed in conjunction with the Minister of Foreign Affairs and MFAT. In practice, there is a significant amount of inter-agency consultation when proposed treaty action is raised.

Therefore, the department with the main policy interest in the treaty, in consultation with the legal division at MFAT is responsible. For example, marine environmental treaties are

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<sup>9</sup> Online at: <http://www.mfat.govt.nz/downloads/treaties-and-international-law/treaty-making-booklet-2009.pdf>

considered by the Ministry of Transport and Maritime NZ (MNZ). The lead agency must also draft the National Interest Analysis in accordance with Standing Order Requirements (Cabinet Manual 7.117 and SO 389).

6. *If a treaty requires review, by more than one government department or agency, is an inter-agency committee established?*

Where more than one government agency is involved, the lead agency is responsible for ensuring that appropriate consultations are held with other interested agencies. There is not usually a committee formed, although in some instances informal committees of officials with overlapping interests may be created.

7. *What is the procedure/process for ratification of a treaty?*

Legislation necessary to implement a treaty in NZ law will not be introduced to the House until the treaty has been presented to the House and the relevant committee has reported back (or a period of 15 days has lapsed). The Government will not take any binding action, thus will not ratify, until provided for in NZ law. This is an invariable practice. This is due to the application of the doctrine of separation of powers. If a treaty will change legal obligations, then it must be implemented through domestic legislation.

Once domestic legislation aligns with the treaty obligations, the Government completes the treaty making process by depositing the appropriate formal instrument with the treaty depository.

### **Treaty Implementation Procedure**

8. *Which agency is responsible for studying and reporting on whether legislation must be enacted by Parliament or the national legislative body in order to implement the obligations in international treaties your country has ratified or decided to ratify?*

Whether a treaty requires legislation to be passed through Parliament will be identified by the National Interest Analysis or Regulatory Impact Analysis, prepared by the lead agency. The Regulatory Impact Analysis requirements apply at any point where a Cabinet paper is submitted for a decision. This includes the original approval for mandate to enter negotiations. Therefore the lead agency has responsibility for identifying the potential regulatory and legislative impacts of treaty action at a very early stage. A standalone Regulatory Impact Statement is not required where an extended National Interest Analysis will be performed. The National Interest Analysis is completed by the lead government agency and is a summary of why treaty action should be taken by the Government.

The CabGuide and Regulatory Impact Analysis Guidelines provide information about the requirements for identifying legislative implications. The Standing Orders (SO 389) contain requirements for National Interest Analyses. SO 389(g) is of specific relevance. It requires

the identification of the “measures that could or should be adopted to implement the treaty, and the intentions of the Government in relation to such measures, including legislation”.

9. *Which agency or agencies are responsible for drafting any implementing legislation?*

The Parliamentary Counsel Office (PCO) is responsible for drafting legislation in NZ. It is an executive agency and other agencies must follow the appropriate method for instructing the PCO to draft legislation. The lead agency and MFAT will also play a role in reviewing and providing comment on draft legislation.

10. *Which agency or agencies must approve any draft implementing legislation?*

Cabinet.

11. *How are particular treaty obligations implemented in national law? Once ratified, can a treaty be directly implemented or does it need to be followed with implementing laws and regulations, such as promulgation of new statutes or executive orders?*

New Zealand practices dualism in relation to treaties, which means a treaty has no domestic effect until implemented through legislation. The New Zealand government will not ratify a treaty unless it has been implemented in domestic legislation first.

12. *What is the procedure/process for the implementation of treaty into national law?*

The process for implementation of a treaty into national law is through the domestic legislative process. For a description of the process in New Zealand, see above n 2.

### **Criminal Jurisdiction given to national courts**

13. *Are there constitutional provisions or legislative provisions setting out the criminal jurisdiction of your Courts (e.g. offences within territory, on ships flying your flags, by your nationals, etc)?*

#### *General jurisdiction*

Criminal jurisdiction is primarily territorial, but there are express statutory provisions that will extend this jurisdiction in certain circumstances.<sup>10</sup> Section 6 of the Crimes Act maintains that, subject to s 7 of the same Act (discussed below), no act done or omitted outside of New Zealand is an offence, unless by virtue of any other provision of the Act or any other enactment.

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<sup>10</sup> *Laws of New Zealand Jurisdiction* (Online Ed) at [3]. Specific extra-territorial criminal jurisdiction for maritime matters is explained in *Laws of New Zealand Maritime Law and Admiralty* (Online Ed) at [9].

The court has jurisdiction over any act or omission committed beyond New Zealand by a person on board a Commonwealth ship,<sup>11</sup> New Zealand aircraft, or any ship or aircraft arriving in New Zealand after the act or omission has occurred (s 8(a), (b), and (c)). Section 8(d) grants jurisdiction over a British subject on board any foreign ship on the high seas or any such ship within the territorial waters of any Commonwealth country. Section 8(e) grants jurisdiction over a New Zealand citizen or a person ordinarily resident in New Zealand on board any aircraft. In the case where a person is charged in New Zealand for an offence committed on board a foreign vessel on the basis that he is in New Zealand as part of the voyage (s 8(c)), that person may defend the charge on the basis that the act would not have been an offence under the law of the country of which he is a national or citizen. (s 8(2)).

These provisions on jurisdiction must be read in conjunction with s 400 of the Crimes Act. Section 400 requires the Attorney-General's consent for prosecutions brought using s 8 jurisdiction. Where jurisdiction is based on article 8(c), the Attorney-General must only allow proceedings if he is satisfied that the government of the flag state has consented to the proceedings. Therefore, there are some limitations to the jurisdiction of the courts in relation to acts committed on board non-Commonwealth vessels.

New Zealand courts also have jurisdiction over an offence where any part of the offence occurs in New Zealand even if the person charged was not in New Zealand at the time of the act, omission or event (s 7).

#### *Extra-territoriality*

Extra-territorial jurisdiction is granted over some specified acts or omissions committed wholly outside of New Zealand (s 7). This applies if: the person is a New Zealand citizen; ordinarily resident in New Zealand; found in New Zealand and has not been extradited; or is a body corporate incorporated in New Zealand. Some of the specific statutory provisions to which extra-territorial jurisdiction applies include: money laundering (s 243), participation in an organized criminal group (s 98A), or terrorist acts (s 5 Terrorism Suppression Act 2002). Extra-territorial jurisdiction for each of these offences is subject to s 7B, which requires the Attorney-General's consent to bring a prosecution.

Piracy is one of the offences to which extra-territorial jurisdiction applies, although the extra-territoriality is incorporated into the wording of the offence itself (See below). This reflects the UNCLOS articles which provide for the right of states to intervene on the high

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<sup>11</sup> Section 2 defines a Commonwealth ship as: "a ship registered or required to be registered in any Commonwealth country, or recognised by the law of any Commonwealth country as a ship belonging to that country; and includes any ship for the time being used as a ship of any of the armed forces of any Commonwealth country". Section 8 applies to Irish vessels and citizens as if they are members of the Commonwealth.



seas where acts of piracy are suspected.<sup>12</sup> There are also specific extra-territorial criminal offences contained in the separate Maritime Crimes Act 1999.

## **PART II: IMPLEMENTATION OF GLOBAL CONVENTIONS TO WHICH NEW ZEALAND IS A PARTY**

### **1982 United Nations Convention on the Law of the Sea (UNCLOS)**

14. *Which government agency is the lead agency with responsibility for (a) implementing UNCLOS into your national law, (b) for drafting the implementing legislation [if not the same as (a)] and (c) for ensuring that your country complies with its obligations under UNCLOS (there may be more than one agency)?*

There is no single government agency with sole responsibility for oceans issues, so responsibility is often divided. Implementing UNCLOS is the main responsibility of MFAT. MFAT actively participates in the bodies established for the effective implementation of UNCLOS, including at the General Assembly.<sup>13</sup> PCO is responsible for drafting legislation. A number of ministries, including MFAT are involved in ensuring compliance with UNCLOS obligations. These include the Ministry for the Environment, Ministry of Fisheries, and the Ministry of Transport.

15. *Does your country have national legislation implementing UNCLOS provisions on piracy (Articles 100 – 110 of UNCLOS)? Please elaborate, particularly on:*

- a. *The definition of piracy in your implementing legislation;*
- b. *How it differs from the UNCLOS definition of piracy in Article 101;*
- c. *The penalties prescribed.*

New Zealand's Crimes Act 1961 establishes two, separate, types of piracy, one defined by international law, the other based on the common law.

First, the Crimes Act ss 92-97 criminalises acts of piracy as set out in UNCLOS. Anyone who does "any act amounting to piracy by the law of nations" will constitute a crime under s 92. Section 92 applies whether the act was committed in or outside of New Zealand. The phrase 'piracy by the law of nations' incorporates international conventions concerning piracy, therefore the New Zealand courts will look to the definition of piracy in UNCLOS.<sup>14</sup>

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<sup>12</sup> Ibid, at 4.

<sup>13</sup> New Zealand Ministry of Foreign Affairs and Trade *Treaties and International Law - Law of the Sea and Fisheries UNCLOS* 23 November 2010 <http://www.mfat.govt.nz/Treaties-and-International-Law/04-Law-of-the-Sea-and-Fisheries/index.php>

<sup>14</sup> *Laws of New Zealand Piracy* (Online Ed) at [306].

The penalties prescribed are different according to the quality of act is committed. If the act includes murder, attempted murder, or any other act that is likely to endanger life, then the offender will be subject to a compulsory sentence of life imprisonment (s 92(1)(a)). For any other act, the offender is liable to imprisonment not exceeding 14 years (s 92(1)(b)).

Sections 95, 96, and 97 are also relevant to piracy under international law. Section 95 criminalises attempts to commit any act amounting to piracy by the law of nations, s 96 criminalises the conspiracy to do any act amounting to piracy by the law of nations, and s 97 criminalises everyone who is an accessory after the fact to any act amounting to piracy by the law of nations. The penalties for these offences are less than general piracy according to the law of nations. An attempt engages a maximum 14 years imprisonment, conspiracy engages a maximum of 10 years imprisonment, and an accessory after the fact is liable to a maximum of 7 years imprisonment.

Second, s 93 then outlines a different form of piracy, “piratical acts” which may be: done by a NZ citizen; done within NZ; or done in relation to a NZ ship or aircraft. Section 93 criminalises certain piratical acts that do not necessarily amount to piracy under international law.<sup>15</sup> The s 93 definition of piratical act is different to the UNCLOS provision. It is not limited to acts for private gain. It details different acts to be piracy depending on location. An act of hostility or robbery will constitute a piratical act when committed by anyone within NZ, or by a NZ citizen or by someone ordinarily resident in NZ when outside NZ (s 93(a)). Anyone who enters a NZ ship and throws overboard or destroys any goods on board whether within or outside NZ will commit a piratical act (s 93(b)). Anyone on board a NZ ship, in or outside NZ, will commit a piratical act if he or she:

- i. turns enemy or rebel and piratically runs away with the ship or any boat, weapons, ammunition, or goods; or
- ii. voluntarily yields up the ship or any boat, weapons, ammunition, or goods to any pirate; or
- iii. counsels or procures any person to yield up or run away with any ship, goods, or merchandise, or to turn pirate or go over to pirates; or
- iv. assaults the master or commander of any ship in order to prevent him from fighting in defence of his ship and goods; or
- v. imprisons or restrains the master or commander of any ship; or
- vi. makes or endeavours to make a revolt in the ship

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<sup>15</sup> *Laws of New Zealand* Legislative Provisions relating to the Armed Forces in the Provision of Public Services (online ed) at [152].

The penalties for piratical acts are outlined in s 94. The same distinction between murder, attempted murder, or endangering life, and other lesser acts is applied. The first category carries a life sentence, any other case is liable for a maximum of 14 years imprisonment.

The fact that both the 'law of nations' definition and the further piratical acts definition engage criminal liability under the Crimes Act means that New Zealand's legislation goes beyond UNCLOS.

*16. Does your country's national legislation (implementing or other) provide universal jurisdiction to your national courts to prosecute pirates of any nationality for acts which take place outside of your country's territorial sovereignty (i.e. high seas or exclusive economic zones) and which otherwise do not have any connection to your country (i.e. neither the pirates, victim crew members or ships are from your country). Please elaborate.*

S 92 outlines that any act amounting to piracy according to the law of nations, whether in or outside of New Zealand is liable for conviction in NZ. Therefore there is universal jurisdiction when the act falls within the law of nations definition of piracy.<sup>16</sup>

S 93 has more specific definitions of piratical acts, and these differ according to the location of occurrence.

*17. Are you are aware of any prosecutions in your national courts for acts of piracy that occur outside the territorial sovereignty of your country (i.e. exclusive economic zone or high seas)? Please elaborate.*

As far as we are aware, no such prosecutions have occurred in NZ.

## **1979 International Convention against the Taking of Hostages (Hostage Taking Convention)**

*18. Which government agency is the lead agency with responsibility for (a) implementing the Hostage Taking Convention into your national law, (b) for drafting the implementing legislation (if not the same as (a)) and (c) for ensuring that your country complies with its obligations under the Hostage Taking Convention (there may be more than one agency)?*

MFAT

*19. Does your country have national legislation implementing the Hostage Taking Convention? If it does, please answer the following questions:*

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<sup>16</sup> *Laws of New Zealand Piracy (Online Ed) at [305].*

- a. *Does your country have specific legislation making the offences exactly as set out in Article 1 of the Hostage Taking Convention offences under your national law? Please elaborate.*
- b. *What are the corresponding penalties? Do the penalties take into account the grave nature of the offence as required in Article 2?*
- c. *Does your implementing legislation also create offences for attempts and abetment as provided in Article 1?*
- d. *What are the corresponding penalties? Do the penalties take into account the grave nature of the offence as required in Article 2?*

The Crimes (Internationally Protected Persons, United Nations and Associated Personnel, and Hostages) Act 1980 implements the Hostage Taking Convention.

Section 8 establishes the crime of hostage taking. "Subject to subsection (2) of this section, every one commits the crime of hostage-taking who, whether in or outside New Zealand, unlawfully seizes or detains any person (in this section called the hostage) without his consent, or with his consent obtained by fraud or duress, with intent to compel the government of any country or any international intergovernmental organization or any other person to do or abstain from doing any act as a condition, whether express or implied, for the release of the hostage". Subsection (2) excludes conviction if the act of hostage-taking takes place in NZ, the alleged offender and hostage are NZ citizens, or the alleged offender is in NZ. There is no crime of attempt or abatement in the NZ statute.

This is different to the Hostage Taking Convention crime of Art 1. There is no requirement of threatening to kill, injure, or continue to detain another person as outlined in Article 1.1 Hostage Taking Convention.

The Crimes Act 1961 criminalises an attempt to commit an offence where an attempt is not defined in the enactment. (s 72). An offence is defined by the Crimes Act s 2 as any offence against the Crimes Act or any other enactment. Therefore, provided the actus reus and mens rea for a general attempt are satisfied, an attempt to commit the acts criminalised by s 8 would be an offence. If there is no specific penalty, the penalty for an attempt is half the maximum sentence for the full offence (thus 7 years). (s 331(1) Crimes Act 1961). The Crimes Act also criminalises those who aid, incites, procures the commission of any act outside New Zealand if it would be a crime in the place where it takes place. (s 69).

The maximum penalty is 14 years imprisonment. The penalty is prescribed in s 8(3).

20. *Compulsory Jurisdiction: Does your national legislation (either implementing or other legislation) give your country jurisdiction over an offence:*

- a. *Committed by a foreign national in your territory (territoriality principle, Article 5 (1) (a));*

Section 8 states that every one commits the crime of hostage-taking when the relevant acts are carried out, whether in or outside New Zealand. This provides very wide jurisdiction. Furthermore, s 16 maintains that nothing in the Crimes Act s 8 (which relates to jurisdiction in respect of crimes on ships or aircraft beyond NZ) or s 400 (Attorney-General consent) applies with respect to proceedings under s 8 of this Act. However, there is a restriction on jurisdiction provided in s 8(2). Subsection 2 excludes jurisdiction when the act of hostage taking takes place in NZ, the offender and victim are NZ citizens, and the offender is in NZ. A foreign national committing an offence NZ would not meet s 8(2)(b), thus jurisdiction would not exist. Other criminal provisions in the Crimes Act would apply, however.

- b. *Committed by a foreign national or your own national outside your territory on board a ship or aircraft registered in your country (flag state principle, Article 5 (1) (a));*

A foreign national or NZ citizen on a NZ registered ship, but outside of NZ territory would not be subject to jurisdiction under s 8. This is due to the exclusion of applicability of Crimes Act 1961 s 8 from this act (s 16). However, other criminal provisions in the Crimes Act would apply.

- c. *Committed by a national of your country outside your territory (nationality principle, Article 5 (1) (b));*

A NZ citizen who commits the act of hostage-taking outside of NZ would be subject to s 8. They would not meet the limitation of s 8(2)(a).

- d. *Committed by a foreign national or your own national in order to compel the government of your country to do or abstain from doing any act, whether the act constituting the offence is committed in or outside your country (protective principle, Article 5 (1) c));*

If the act done with intent to compel the NZ government to do or abstain from an act was committed by a NZ citizen in NZ (and the alleged offender is in NZ) there would be no jurisdiction under s 8 (s 8(2)(a) and (b)). If the act was done with intent to compel the NZ government to do or abstain from an act in or outside NZ by a foreign national the subsection 2 limitation on jurisdiction would not apply.

- e. *Committed by a foreign national outside your territory when the foreign national who committed the offence is present in your territory after the commission of the offence (presence of offender, Article 5 (2)).*

There is nothing in the Act to prevent prosecution in such a case.

21. **Permissive jurisdiction:** Does your national legislation (either implementing or other legislation) give your country jurisdiction over an offence:

a. Committed outside your territory by a stateless person who has his or her habitual residence in your country (nationality principle, Article 5 (1) (b));

A stateless person who commits the relevant act outside of New Zealand would be subject to s 8 jurisdiction. The limitation of s 8(2)(a) is not met.

b. Committed by a foreign national outside your territory with respect to a hostage who is a national of your country (Passive personality principle, Article 5 (1) (d)).

A foreign national outside NZ who commits the relevant act of hostage taking in relation to a NZ citizen would be subject to jurisdiction under s 8. Subsection 2 of s 8 is not relevant.

22. Please consider whether there is anything in your national legislation (either implementing or other legislation) that prohibits the legislation from applying to the taking of crew-members hostage on board a ship.

The only problem would be if the hostage taking occurred on board a Commonwealth ship, in which case the Crimes (Internationally Protected Persons, UN and Associated Personnel, and Hostages) Act would not apply (s 16). However, the provisions of the Crimes Act would apply in that situation.

23. Are you aware of any cases of prosecutions in your courts of persons who committed the act of hostage taking against crew members on board a ship? If so, please elaborate.

We are not aware of any such prosecutions in NZ.

## **1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988 SUA)**

24. Which government agency is the lead agency with responsibility for (a) implementing 1988 SUA into your national law, (b) for drafting the implementing legislation [if not the same as (a)] and (c) for ensuring that your country complies with its obligations under 1988 SUA (there may be more than one agency).

The Ministry of Transport is the lead agency with regards to SUA.

a. Does your country have national legislation implementing 1988 SUA? Does your country have specific legislation making the offences exactly as set out in Article 3 (1) of 1988 offences under your national law?

The Maritime Crimes Act 1999 is an act to give effect to the 1988 SUA. It does not contain the text of the convention as a schedule to the Act. Therefore, the treaty is implemented primarily through the wording of the legislative provisions. Section 4 sets out *Crimes relating to ships* giving effect to Article 3(1) 1988 SUA. The wording of s 4(1) is not exactly the same as Article 3(1). There are small differences in word order and some of the offences are broken into separate sub paragraphs by the statute.

- S 4(1)(a) has the same effect as Art 3(1)(a).
  - S 4(1)(b) gives effect to Art 3(1)(b). The 1988 SUA Convention requires the act of violence be taken against a person. Although the New Zealand statute does not clearly state this, it does define<sup>17</sup> an act of violence (the words used in the statute) to be an act, that if committed in New Zealand would constitute a) assault as defined in any of sections 192, 193, 194, 196, or 202C of the Crimes Act 1961; or b) any of the crimes specified in sections 188, 189, 190, 191, 197, 198, 198A, 199, 200, 202, 203, or 209 of the Crimes Act 1961. These constitute the majority of the offences relating to assault, injuring or kidnapping. Therefore, the essence of s 4(1)(b) is the same as art 3(1)(b).
  - Ss 4(1)(c) and (d) have the same effect as Art 3(1)(c). It does not make a difference that the crime is separated into two sub paragraphs. Note that the Act assumes that anything likely to destroy a ship is likely to endanger the safe navigation of the ship.
  - Ss 4(1)(e) and (f) give effect to Art 3(1)(d). It is broader in scope because “anything” is not limited to a device or substance. This avoids potential definitional issues.
  - S 4(1)(g) has the same effect as Art 3(1)(e).
  - S 4(h) has the same effect as Art 3(1)(f).
  - There is a separate subsection dedicated to Art (3)(1)(g). S 4(2)(a) covers the killing of any person. It requires the act to fall within the homicide provisions of the Crimes Act 1961 (ss 158, 160, 167, 168, and 171). S 4(2)(b) implements the ‘injure’ aspect of Art 3(1)(7).
- b. *What are the corresponding penalties? Do the penalties take into account the grave nature of the offence as required in Article 5?*

The penalties for s 4 offences are prescribed by s 7. A person who commits a crime against s 4(2)(a) must be sentenced to life imprisonment where the conduct is the same conduct described as murder. When the conduct is described as manslaughter, the offender is liable for life imprisonment. A sentence of imprisonment not exceeding 14 years is applicable for a person who commits a crime against s 4(1), or s 4(2)(b), or s 4(3).

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<sup>17</sup> Section 2, Maritime Crimes Act 1999.

The graduated sentence structure where the conduct is equivalent to murder or manslaughter indicates that the NZ statute has taken account of the grave nature of offending as required by the 1988 SUA Convention Art 5.

- c. *Does your implementing legislation also create offences for attempts, abetment and threatening to commit offences as provided for in Article 3 (2)?*

Section 4(3) states that “any person commits a crime who threatens to do, in relation to a ship, any act that is a crime against any of paragraphs (b) to (d) or paragraph (g) of subsection (1) if the threat – (a) is in order to compel any other person to do or abstain from doing any act; and (b) is likely to endanger the safe navigation of the ship”. This relates to Art (3)(2)(c) of 1988 SUA. The SUA Convention and implementing statute refer to the same acts. There is no difference between the SUA Convention and Maritime Crimes Act.

Section 6 states that for the purposes of s 4(2) and s 5(2) an act or omission occurs in connection with the commission or attempted commission of any of the crimes against s 4(1) or s 5(1) if it was done or omitted with intent:

- a. To commit or facilitate the commission or attempted commission of any of those crimes; or
- b. To avoid the detection of himself or herself or of any other person in the commission or attempted commission of any of those crimes; or
- c. To avoid the arrest or facilitate the flight of himself or herself or of any other person on the commission or attempted commission of any of those crimes.

This section goes further than Art 3(2) of the 1988 SUA Convention. It criminalises the evasion of detection.

- d. *What are the corresponding penalties? Do the penalties take into account the grave nature of the offence as required in Article 5?*

An offender under s 4(3) is liable to imprisonment not exceeding 14 years. No penalty is expressly stated for the offences in s 6, and these would be governed by the provisions of the Crimes Act. For example, the maximum penalty for being an accessory after the fact is 7 years if the offence was murder, or 5 years if the offence was liable to more than 10 years imprisonment,<sup>18</sup> which is arguably a significant penalty.

- 25. Compulsory jurisdiction:** *Does your national legislation (either implementing or other legislation) give your country jurisdiction over an offence:*

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<sup>18</sup> Section 312, Crimes Act 1961.



- a. *Committed by a foreign national or your own national outside your territory against or on board a ship flying your country's flag at the time of the offence (flag state principle, Article 6 (1) (a));*

The flag state principle is implemented through s 8. Section 4 applies to a New Zealand ship scheduled to navigate beyond the territorial sea of a country (s 8(1)(a) and (b)). Section 4 also applies to New Zealand ships within the territorial waters of another country when the offender is found in a country that is party to the 1988 SUA Convention but is not the country where the act or omission occurred (s 8(2)).

- b. *Committed by a foreign national in your territory, including your territorial sea (territoriality principle, Article 6 (1) (b));*

The Act does not specify its application to within New Zealand. Section 8 determines its extra-territorial application only. However, the offences in s 4 are broadly defined and do not exclude acts taking place within New Zealand's territory. New Zealand is defined in the Act to include "all waters within the outer limits of the territorial sea of New Zealand, as defined by section 3 of the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977".<sup>19</sup> In addition, the provisions of the Crimes Act would also potentially apply to acts committed in the NZ territorial sea.

- c. *Committed by one of your nationals outside your territory (nationality principle, Article 6 (1) (c));*

Section 8(1)(b)(ii) and s 8(2)(c)(ii) states that the New Zealand statute applies to acts committed outside of New Zealand if the alleged offender is a New Zealand citizen or ordinarily resident in New Zealand.

- d. *Committed by a foreign national outside your territory when the foreign national who committed the offence is present in your territory after the commission of the offence (presence of offender, Article 6 (4)).*

Section 8(3) states that s 4 applies in respect of acts committed within the territory of another country if the offender is present in NZ.

**26. *Permissive Jurisdiction:*** *Does your national legislation (either implementing or other legislation) give your country jurisdiction over an offence:*

- a. *Committed by a stateless person whose habitual residence is in its territory (nationality principle, Article 6 (2) (a));*

When the Maritime Crimes Act grants extra-territorial jurisdiction over New Zealand citizens it also grants jurisdiction over those ordinarily resident in New Zealand (s 8(1)(b)(ii) and s 8(2)(c)(ii)).

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<sup>19</sup> Section 2, Maritime Crimes Act 1999.

- b. *Committed by a foreign national and during which, a national of your country is seized, threatened, injured or killed (passive personality principle, Article 6 (2) (b));*

The legislation does not provide for jurisdiction in this case unless the offender is present in New Zealand.

- c. *Committed by a foreign national in an attempt to compel your country to do or abstain from doing any act (protective personality principle, Article 6 (2) (c)).*

Similarly, this is not expressly provided for in the legislation.

27. *Does your national legislation (either implementing or other legislation) provide for the Master to arrest a person who has committed a SUA offence and deliver that person to appropriate authorities in another State Party, as set out in Article 8 of 1988 SUA?*

Sections 11 and 12 of the Maritime Crimes Act state the powers of masters. Under s 11(1), a master of a NZ ship may deliver to the appropriate authorities of a country that is party to the 1988 SUA Convention any person whom the master has reasonable grounds to believe has committed a crime against s 4. There are conditions on this delivery set out in ss 11(2) to (4), including giving notification to the receiving county. It is a minor offence for a master not to comply with subsection 2 or subsection 3 relating to notification of intention to deliver a person to another state.

The Maritime Crimes Act also grants masters power to search persons and baggage on ships (s 12). This applies if, because of distance from land or other reasons, it is impractical to obtain assistance from a law enforcement officer. This power is not specifically outlined in Art 8 of SUA.

28. *Are you aware of any cases of prosecutions for SUA offences or equivalent to SUA offences in your courts? If so, please elaborate.*

As far as we are aware, no such prosecutions have occurred in NZ.

### **1999 International Convention for the Suppression of the Financing of Terrorism (1999 Terrorism Financing Convention)**

29. *Which government agency is the lead agency with responsibility for (a) implementing the 1999 Terrorism Financing Convention into your national law, (b) for drafting the implementing legislation (if not the same as (a)) and (c) for ensuring that your country complies with its obligations under the 1999 Terrorism Financing Convention (there may be more than one agency).*

Ministry of Justice

- a. *Does your country have national legislation implementing the 1999 Terrorism Financing Convention? Does your country have specific implementing legislation making the offences exactly as set out in Article 2 of the 1999 Terrorism Financing Convention offences under your national law?*

The Terrorism Suppression Act 2002 specifically implements the 1999 Terrorism Financing Convention. The Convention is included in the statute as a Schedule (Sch 2). This indicates the intention of the legislation to give direct effect to the Convention. The text of the treaty becomes part of NZ statute law. It is accepted that no amendment can be made to the schedule containing the treaty. However, sections of the legislation are open for amendment even if it changes the legislative effect of the treaty (McGee, 596).

Section 8 sets out the offence of Financing of Terrorism. The wording is slightly different to Terrorism Financing Convention, however, the same act and mental element is required. The key point of difference is that the NZ statute creates its own term; 'terrorist act'. Terrorist act is defined in the Terrorism Suppression Act 2002 s 5. This section includes reference to offences established in specified terrorism conventions (s 5(1)(b)) (Schedule 3) and, also includes more general acts (ss 5(2) and (3)). Schedule 3 is the same as the Terrorism Financing Convention Annex, with the addition of the Convention for the Suppression of Acts of Nuclear Terrorism, adopted by the General Assembly of the United Nations at New York on 13 April 2005. This was inserted in 2007.

The general definition of terrorist act, outside of existing conventions, is wider in the New Zealand statute than the Terrorism Financing Convention. Specifically, there are more intended outcomes. The Terrorism Financing Convention has one outcome, the intention to cause death or serious bodily injury (Art 2(1)(b)). The Terrorism Suppression Act contains 5 different outcomes. The first is causing death or injury (s 5(3)(a)). However, it also includes serious risk to health and safety of population; destruction of property of great value or importance, or major economic loss, or major environmental damage if likely to result in 1 or more outcomes (a), (b), and (d); serious disruption or interference with infrastructure likely to endanger life; and introduction or release of a disease-bearing organism, if likely to devastate the national economy of the country.

The New Zealand statute is specific in stating that it will be an offence to provide or collect funds knowing that they will benefit an entity that the person knows carries out or participates in terrorist acts.

- b. *Does such legislation provide that persons who finance the commission of SUA offences or hostage taking offences would be guilty of an offence under your national law on terrorist financing (See Article 2 (1) (a))?*

Whether the financing of SUA or hostage-taking offences would be an offence under s 8 depends on the definition of terrorist act. Both the 1988 SUA Convention and the Hostage-Taking Convention are included in schedule 3. Therefore, offences under each convention are included in the definition of terrorist act, and the financing of such offences would suffice for the offence of financing of terrorism.

*c. What are the corresponding penalties? Do the penalties take into account the grave nature of the offence as required in Article 4 (b)?*

The penalty for the financing of terrorism is imprisonment not exceeding 14 years. (s 8(4)).

*d. Does your implementing legislation also create offences for attempts, participation as an accomplice, organization or contribution to the commission of an offence as provided for in Article 2 (4) and (5)?*

The legislation does not explicitly provide for these offences. However, the Crimes Act 1961 has provisions generally relating to attempts, parties to offences, conspiracy to commit an offence and being an accessory after the fact.

*e. What are the corresponding penalties? Do the penalties take into account the grave nature of the offence as required in Article 4 (b)?*

The Crimes Act 1961 contains these penalties. As they are the same penalties as apply to all crimes in New Zealand, they can be seen to be considered equally grave as other offences.

**30. Compulsory Jurisdiction:** *Does your national legislation (either implementing or other legislation) give your country jurisdiction over an offence:*

*a. Committed by a foreign national in the territory of your country (territoriality principle, Article 7 (1) (a));*

Yes, criminal law in NZ is based on the concept of territoriality.

*b. Committed by a foreign national or national of your country on board a vessel flying the flag of that State or an aircraft registered in your country (flag state principle, Article 7 (1) (b))*

S 15 grants jurisdiction over acts done outside NZ by NZ citizens or on NZ aircrafts and ships. According to s 15(c), proceedings may be brought if the act was not done in NZ, but was done by any person on board any aircraft that is either registered to NZ or being used by the NZ defence force (s 15(c)(i) and (ii)). Section 15(d) grants jurisdiction over any person who commits the offence on board any ship that is registered, or required to be registered under the Ship Registration Act 1992 (s 15(d)(i) and (ii)), or being used by the NZ defence force.

- c. *Committed by a national of your country outside your territory (nationality principle, Article 7 (1) (c));*

Section 15 states that offences apply to acts outside New Zealand by New Zealand citizens (s 15(a)).

- d. *Committed by a foreign national outside your territory when the foreign national who committed the offence is present in your territory after the commission of the offence (presence of offender, Article 7 (4)).*

The presence of the offender is recognised by s 18. Section 18 states that even if the acts alleged to constitute the offence occurred wholly outside NZ, proceedings may be brought for financing of terrorism if the person to be charged has been found in NZ and has not been extradited.

**31. *Permissive Jurisdiction:*** *Does your national legislation (either implementing or other legislation) give your country jurisdiction over an offence:*

- a. *Committed by a foreign national directed towards or which resulted in the carrying out of any of the offences in Article 2 (1) of the Terrorism Financing Convention in the territory of or against the national of that country (Article 7 (2) (a));*

Yes. Proceedings may be brought against a foreign national, even when the acts are done wholly outside when NZ, if they are directed towards or resulted in one or more terrorist acts being done in NZ (s 17(a)) or against a NZ citizen (s 17(b)).

- b. *Committed by a foreign national directed towards or which resulted in the carrying out of any of the offences in Article 2 (1) (a) and (b) against a State or government facility of that country abroad, including diplomatic or consular premises of that country (Article 7 (2) (b));*

Yes. Section 17(c) grants jurisdiction over acts done wholly outside of NZ that are directed towards or result in one or more terrorist acts being done against a state or government facility abroad (for example, NZ diplomatic or consular premises).

- c. *Committed by a foreign national directed towards or which resulted in the carrying out of any of the offences in Article 2 (1) (a) and (b) committed in an attempt to compel that country to do or abstain from any act (Article 7 (2) (c));*

Yes. S 17(d) grants jurisdiction over acts done wholly outside of NZ that are directed towards or result in one or more terrorist acts being done in an attempt to compel the Government of NZ to do or abstain from doing any act.

- d. *Committed by a stateless person who has his or her habitual residence in the territory of that country (Article 7 (2) (d));*

The offences apply to acts outside New Zealand by a person who is ordinarily resident in New Zealand but not a citizen of any state (s 15(b)).

- e. *Committed on board an aircraft which is operated by your government (Article 7 (2) (e))*

Offences apply to acts committed on NZ aircraft. Specifically, any aircraft registered or required to be registered in NZ under the Civil Aviation Act or being used by the NZ Defence Force (s 15).

- 32. *Are you aware of any cases of prosecutions in your courts of persons who financed the commission of SUA offences and/or hostage taking offences such as the hijacking of ships or the taking of crewmembers hostage for ransom? If so, please elaborate.*

As far as we are aware, no such prosecutions have occurred in NZ.

## **2000 United Nations Convention on Transnational Organized Crime (2000 UNTOC)**

- 33. *Which government agency is the lead agency with responsibility for (a) implementing the 2000 UNTOC into your national law, (b) for drafting the implementing legislation (if not the same as (a)) and (c) for ensuring that your country complies with its obligations under the 2000 UNTOC (there may be more than one agency).*

Ministry of Justice

- 34. *With regards to Article 5 on participating in an organized criminal group:*

- a. *Does your country have specific implementing legislation making the offence set out in Article 5 of participating in an organized criminal group an offence under national law? Does your implementing legislation also create offences for attempts and abetment as provided for in Article 5 (1) (b) of UNTOC? What penalties does your legislation prescribe?*

The Crimes Act 1961 contains a provision for an offence of participating in an organized criminal group akin to Art 5 UNTOC. The relevant provision is s 98A.

S 98A criminalises participation in an organised crime group. This means that the second of the two possible offences of Art 5 is adopted in NZ (Art 5(1)(a)(ii)).

The NZ offence provisions relating to participation in an organized crime group allow the alleged offender to have been reckless as to whether their conduct would contribute to criminal activity or the objectives of the group (s 98A(1)(b) and (c)). This is wider than Art 5 which states that there must be intention to carry out the activities of the group. A further

difference is greater specification given as to what an organised crime group is. Section 98A(3) specifies that notwithstanding certain factors, such as subordinates, employment, and changes in membership, an organized crime group still exists.

Article 5(3) requires that where a domestic offence requires participation in an organized criminal group, that state shall ensure that all serious crimes covered by such offence. This is achieved by the NZ statute through s 98A(2) which criminalises participation an organized group where the objective is an offence punishable by 4 years imprisonment or a serious violent crime.

The penalty for participation in an organized crime group is imprisonment of up to 10 years. (s 98A(1)).

The provisions of the Crimes Act 1961 in relation to attempts, parties to offences etc, are applicable to this offence.

*35. With regards to Article 6 on laundering of the proceeds of crime:*

- a. Does your country have specific implementing legislation making the offence set out in Article 6 on laundering proceeds of crime an offence under national law? What are the penalties prescribed under your national legislation?*

The current provisions relating to money laundering were implemented by a 2003 amendment act, presumably to fulfil the requirements of the Convention.

- b. If your country does have specific implementing legislation on Article 6 of UNTOC:
  - i. What are the predicate offences under your domestic legislation to the offence of laundering proceeds of crime?*
  - ii. Does your legislation require that the predicate offences be committed in your country or include also offences committed outside your country?*
  - iii. If your legislation includes as predicate offences also offences committed outside your country, please explain whether your national legislation incorporates the requirement in Article 6 (2) (c) of UNTOC.*
  - iv. Does your national legislation permit the prosecution and punishment of an offender for both the predicate offence and the laundering of proceeds from the offence (See Article 6 (2) (e) of UNTOC)?**
- c. If your country does not have implementing legislation, does it have other legislation which is equivalent to the offence of laundering of proceeds of crime as set out in Article 6 of UNTOC? What are the differences in elements of the offence under your legislation and the elements set out in Article 6? What penalties does your legislation prescribe?*

The offence of laundering proceeds of crime is contained in s 243 Crimes Act 1961. It is an offence to engage in a money laundering transaction in respect of any property that is the proceeds of a serious offence if the person engaging in the transaction knows or believes

that all or part of the property is the proceeds of such an offence, or is reckless as to whether this is the case. The offence is very similar to Art 6 UNTOC.

The predicate offences are thus 'serious offences'. Serious offence is defined (s 243(1)) to mean an offence punishable by a maximum term of imprisonment of 5 years or more. An act, wherever committed, that if committed in NZ would be liable for imprisonment of up to 5 years, will suffice for a serious offence. See s 243(1)(definition of serious offence)

The New Zealand statute incorporates the requirement of Art 6(2)(c). This article requires that acts outside of New Zealand shall only constitute a predicate offence for money laundering where the conduct is a criminal offence in the state where the act was committed. This is achieved through s 245(1) Crimes Act. However, according to s 245(2) Crimes Act, if the act would constitute a serious offence had it been committed in New Zealand, it will be presumed to be an offence in the state where it was carried out. It is up to the alleged offender to raise the possibility that it was an offence, in which case this must be proved by the prosecution.

A difference between the domestic offence and Art 6 UNTOC is the defence of s 244. It is a defence to the offence of money laundering in NZ if the acts to which the charge relates was done by that person in good faith in accordance with a number of different statutes.

The penalties prescribed by the Crimes Act 1961 are different according to the stage of the money laundering transaction. A person who engages in the money laundering transaction is liable for imprisonment of up to 7 years (s 241(2)). A person who obtains, or has in their possession, any property with the intent to engage in money laundering and knows, believes, or is reckless as to whether the property is proceeds from a serious crime, is liable for up to 5 years imprisonment (s 241(2)).

**36. Compulsory Jurisdiction:** *Does your national legislation (existing or implementing) give your country jurisdiction over an offence:*

- a. *Committed by a foreign national when the offence is committed in the territory of your State (Article 15 (1) (a));*
- b. *Committed on board a vessel flying its flag or an aircraft registered under its laws (Article 15 (1) (b));*
- c. *Committed by your own national outside of your territory where that national is in your territory and your country does not extradite him or her on grounds that he or she is a national of your country (Article 15 (1) (c)).*

Please refer to answers at n 13 above.

**37. Permissive Jurisdiction:** *Does your national legislation (existing or implementing) give your country jurisdiction over an offence:*



*a. Committed against one of your nationals (Article 15 (2) (a));*

Section 7A grants extra-territorial jurisdiction over acts that constitute an offence under s 98A or s 243 (s 7A(1)). S 7A(1)(c) states that jurisdiction applies if the person in respect of whom the offence is committed is a New Zealand citizen or ordinarily resident in New Zealand.

*b. Committed by one of your nationals or a stateless or habitual resident in your territory (Article 15 (2) (b));*

See above n 13.

*c. Relating to participation in an organized criminal group committed outside its territory with a view to the commission of a serious crime (as defined in Article 2 (b) of UNTOC) within its territory (Article 15 (2) (c) (i));*

Section 7A(1)(d) grants jurisdiction if the group of people with or in which the person to be charged is alleged to have participated are alleged to have as their objective or one of their objectives the obtaining of material benefits by the commission in New Zealand of offences or conduct referred to in paragraph (a) or paragraph (b) of section 98A(2). These two subparagraphs relate to deriving material benefit from acts that if committed in New Zealand, would be punishable by 4 or more years imprisonment.

*d. Relating to participation in money-laundering outside your territory aimed at the laundering of proceeds of crime in your territory (Article 15 (2) (c) (ii));*

Section 7A also applies to offences of money-laundering under s 243. Also to be noted is s 245, which states that s 243 (money-laundering) is not to apply to certain acts committed outside New Zealand. It will not apply if any property is alleged to be the proceeds of a serious offence; the act that is alleged to constitute that serious offence was committed outside New Zealand; and the act was not, at the time of its commission, an offence under the law of the place where the act was done (s 245(1)). Section 245(2) states that where the act alleged to constitute the serious offence was committed outside New Zealand, it is to be presumed that the act was an offence under the law where it was done. This will be presumed unless the person charged puts the matter at issue (s 245(2)).

*e. Committed outside your territory where the offender is present in your territory after the commission of the offence (Article 15 (4)).*

If the offender is found in New Zealand, and has not been extradited, then jurisdiction extends according to s 7A(1)(a)(iii).

Where jurisdiction is granted under s 7A, the Attorney-General must give consent to proceedings (s 7B Crimes Act).

*38. Please consider whether there is anything in your national legislation on Articles 5 and 6 (either implementing or other legislation) that prohibits that legislation from applying to the persons who organize or launder proceeds from maritime related crimes such as piracy, ship-hijacking and hostage taking of crew for ransom.*

There is nothing that we are aware of that would prevent legislation applying to proceeds of maritime related crimes. Such crimes are all subject to penalties of more than 5 years.

*39. Are you aware of any cases of prosecutions in your courts of persons who organized or laundered proceeds from maritime related crimes such as piracy, ship-hijacking and hostage taking of crew for ransom. If so, please elaborate.*

As far as we are aware, no such prosecutions have occurred in NZ.

### **Protocol of 2005 to 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (2005 SUA Protocol)**

*40. Which government agency is the lead agency with responsibility for (a) implementing the 2005 SUA Protocol into your national law; (b) for drafting the implementing legislation (if not the same as (a)); and (c) for ensuring that your country complies with its obligations under the 2005 SUA Protocol (there may be more than one agency).*

MFAT is the lead agency responsible for implementing the 2005 SUA Protocols, and is working closely with the Ministry of Transport. Legislation is required to implement the 2005 SUA Protocols. New Zealand is thus a signatory, but not yet a party to the treaty. This raises complications for the final section of questions. As a signatory, New Zealand does incur some obligations not to undermine the purposes of the treaty, as set out in Art 18 VCLT.

New Zealand in general has a position of ratifying counter-terrorism treaties where it is possible, and it intends to ratify the 2005 Protocols as soon as New Zealand legislation is compliant with the Conventions.

To date, New Zealand has completed a National Interest Analysis, appended to this report, which indicates that New Zealand intends to implement the Protocol. Our understanding is that instructions have been sent to Parliamentary Counsels Office to draft the necessary implementation. However the current Government's legislative agenda is ambitious, and this legislation is not flagged as a high priority. It was initially expected that the legislation would have been tabled by now, but recent estimates suggest it may be 2012 at the earliest before the legislation is tabled for consideration by Parliament.

Although the form of the legislation has not been confirmed, it is likely to take the form of an amendment to the Maritime Crimes Act.

## **Extradition and Mutual Legal Assistance Under the Conventions**

41. *In your country, is extradition granted:*

- a. *By Statute; and/or*
- b. *By Treaty or other agreement or arrangement (bilateral or multilateral); and/or*
- c. *By virtue of reciprocity or comity?*

Extradition is governed in NZ by the Extradition Act 1999.<sup>20</sup> The Extradition Act does not require a foreign country to have a treaty to request extradition from New Zealand. Where there is no existing extradition relationship (e.g. treaty, Commonwealth nation, or Order in Council) the decision to extradite will be on the basis of a number of factors, including reciprocity, the seriousness of the offence, the object of the Act, and any other matters the Minister considers relevant (Part 5 Extradition Act 1999).

42. *Is your country able to carry out the obligations in the Conventions which you are party to with respect to the extradition of offenders? Was it necessary to amend your laws to enable you to carry out these obligations?*

Where an international treaty is implemented through specific legislation, this legislation contains provisions as to whether the crimes proscribed are extradition crimes.

### *Hostage Taking Convention*

New Zealand is able to carry out extradition of offenders. The Crimes (Internationally Protected Persons, United Nations and Associated Personnel, and Hostages) Act 1980 specifically prescribes the crime of hostage taking as an extraditable offence (s 10). This means hostage-taking is included in any extradition treaty concluded between NZ and a state party to the Hostage Taking Convention that was concluded before 12 December 1985.

### *1988 SUA*

Section 14(1) of the Maritime Crimes Act 1999 prescribes s 4 offences to be extradition offences. This means that crimes relating to ships (s 4) are applicable under any extradition treaty concluded before 1 September 1999 between NZ and any country that is party to 1988 SUA.

### *1999 Terrorism Financing Convention*

Section 69 of the Terrorism Suppression Act 2009 deems financing of terrorism to be extraditable. This means that any extradition treaty concluded before 5 December 2002

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<sup>20</sup> *Laws of New Zealand* Extradition (Online Ed) at [6].

between New Zealand and a state party to the 1999 Financing of Terrorism Convention will include the financing of terrorism offence.

The Crimes Act itself does not contain extradition provisions. Therefore, whether the crimes of piracy (UNCLOS), participation in an organized criminal group and money laundering (UNTOC) are extraditable depends on the statutory definition within the Extradition Act 1999. The meaning of extradition offence is in the Extradition Act s 4. The offence must be punishable under the law of the extradition country for not less than 12 months as the maximum penalty and would be punishable by not less than 12 months in New Zealand (s 4(1)(a) and s 4(2)).

The Extradition Act 1999 provides that certain crimes with transnational aspects are deemed to be offences under any extradition treaty between New Zealand and a state party to UNTOC. This provision includes participation in an organized criminal group and money laundering.

*43. If in your country, extradition is granted by statute, does that statute include all offences covered by each of the Convention as extraditable offences? ((See Article 10 (3) of the Hostages Convention, Article 11 (3) of 1988 SUA, Article 11 (3) of the 1999 Terrorism Financing Convention, Article 16 (6) of UNTOC and Article 10 (3) of 2005 SUA Protocol)*

An extraditable offence is defined by s 4 Extradition Act 1999. It covers an act that is punishable by not less than 12 months imprisonment in the extradition country, if that act is punishable by imprisonment of not less than 12 months in NZ.

The penalties of each of the offences under the relevant conventions are more than 12 months. Therefore each is an extraditable offence

*44. Are there any conditions in your country for granting extradition?*

If there is an extradition treaty between New Zealand and the extradition country, the treaty will provide conditions for extradition.

*45. In your country, is mutual legal assistance granted:*

- a. By Statute; and/or*
- b. By Treaty or other agreement or arrangement (bilateral or multilateral); and/or*
- c. By virtue of reciprocity or comity?*

Mutual legal assistance may be granted by statute, treaty, or other formal or informal agreement.

*46. Does your country have national legislation on mutual legal assistance? Please elaborate.*

The Mutual Assistance in Criminal Matters Act 1992 is the legislation concerning mutual legal assistance in New Zealand.<sup>21</sup> The object of the Act is to facilitate the provision and obtaining, by New Zealand, in international criminal matters (s 4). However, nothing in the Act prevents the operation of existing forms of cooperation (whether formal or informal) in respect of mutual assistance in criminal matters, nor does the Act prevent the development of any new forms of cooperation (s 5).

A request for assistance in a criminal matter may be made by any foreign country by the Attorney-General. Requests of New Zealand may be made to the Attorney-General by prescribed foreign country, convention countries, or any other countries (s 24).

*47. Is your country able to apply the provisions in each of the Conventions on mutual legal assistance to other State Parties in connection with criminal proceedings brought in respect of offences under the Conventions? (See Article 11 of the Hostages Convention, Article 12 (3) of 1988 SUA, Article 12 of the 1999 Terrorism Financing Convention, Article 18 of UNTOC and Article 11 of 2005 SUA Protocol)*

Subject to s 24A and s 24B, a convention country may make a request for mutual legal assistance of New Zealand. A request can be made by New Zealand to any country (s 7). If a convention country requests assistance in accordance with a convention, the request must relate to criminal matters arising from the commission or suspected commission of an offence that, if committed within the jurisdiction of New Zealand, would correspond to an offence in New Zealand, specifically listed or described in the Schedule to the Mutual Assistance in Criminal Matters Act 1992.

The Schedule lists;

- Hostage Taking Convention – Section 8 Crimes (Internationally Protected Persons, United Nations and Associated Personnel, and Hostages) Act 1980.
- 1988 SUA – Section 4 Maritime Crimes Act
- UNTOC – Section 98A Crimes Act.

*48. Are there any conditions in your country for granting mutual legal assistance?*

Requests made to New Zealand for legal assistance are dealt with by Part III of the Mutual Assistance in Criminal Matters Amendment Act 1988. The Attorney-General must refuse requests for assistance in certain circumstances. These are set out in s 27 of the Act.

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<sup>21</sup> *Laws of New Zealand Criminal Procedure* (Online Ed) at [375].

