

## THE INTERNATIONAL FORCE IN EAST TIMOR – LEGAL ASPECTS OF MARITIME OPERATIONS

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### I INTRODUCTION

On 20 September 1999, a multinational force, led by Australia, deployed to East Timor under the authority of the United Nations Security Council. United Nations Security Council Resolution 1264<sup>1</sup> authorised this Force to ‘take all necessary measures’ to ‘restore peace and security in East Timor’. The Force, which came to be known as the International Force in East Timor (‘INTERFET’), consisted of approximately 12 600 deployed personnel from 22 nations.<sup>2</sup> The deployment of INTERFET has been hailed as an outstanding success and laid the groundwork for the emergence of East Timor as an independent state. INTERFET was replaced, on 23 February 2000, with a peacekeeping force under UN command, forming part of the UN Transitional Authority in East Timor (‘UNTAET’). UNTAET was succeeded by the United Nations Mission of Support in East Timor (‘UNMISSET’).<sup>3</sup> UNMISSET completed its mandate on 20 May 2005.

The Australian Defence Force (‘ADF’) contribution to INTERFET represented the largest overseas deployment of Australian forces since the Vietnam War. A significant number of ADF lawyers were deployed as part of INTERFET, and Australia based lawyers were also instrumental in providing advice in relation to the operation.

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1 UN SCOR, 54<sup>th</sup> sess, 4054<sup>th</sup> mtg, UN Doc. S/RES/1264 (1999).

2 Australia provided the largest contingent of 5 521 personnel. Other contributing nations included Argentina, Canada, France, Germany, Italy, Jordan, New Zealand, Singapore, Thailand and the United Kingdom.

3 UNTAET was succeeded by UNMISSET on 20 May 2002. On the same day East Timor became an independent state known as Timor-Leste. UNMISSET was established by UN Security Council Resolution 1410 of 17 May 2002. Its mandate was to provide assistance to core administrative structures, provide interim law enforcement and maintain security in East Timor.

The unique history and geographical location of East Timor spawned a variety of novel and complex legal issues for which workable solutions were ultimately found. This was particularly so in relation to the maritime operations conducted by INTERFET, where the legal issues encountered were unprecedented.

## II BACKGROUND TO THE DEPLOYMENT

Prior to 1999, East Timor had a long history of foreign occupation. It was first colonised by Portugal in 1520. It was the subject of successive colonisation attempts by the Spanish, Dutch and British until the Treaty of Lisbon, concluded in 1859, affirmed Portuguese sovereignty.

During World War II, the entire island of Timor was occupied by Japanese troops. Because of the strategic significance of the island as a launching pad for attacks against Australia, approximately 230 Australian soldiers were also present on the island. In cooperation with the Timorese, they conducted a guerrilla campaign against the occupying Japanese forces. After the cessation of those hostilities, East Timor reverted to Portuguese sovereignty.<sup>4</sup>

In 1951, under Portuguese law, East Timor became an ‘overseas province’ and was regarded as an integral part of the Portuguese State. The Overseas Organic Law of 1972 formally designated East Timor as an ‘autonomous region of the Portuguese Republic’. In 1960, Timor was placed on the list of non-self-governing territories in UN General Assembly Resolution 1542.<sup>5</sup>

In July 1975, the Portuguese Government promulgated Constitutional Law 7/75, which provided for the formation of a Transitional Government in East Timor. The Transitional Government was to prepare for and oversee the election of a Popular Assembly in October 1976. The Popular Assembly was to be responsible for determining the future status of East Timor.

This change in policy on behalf of Portugal raised hopes within East Timor of possible future independence. Several pro-independence political parties emerged during this period. The two most significant were the Timorese Democratic Union, which favoured some form of continued association with Portugal; and *Frente Revolucionaria Timor Lest Independence* (‘FRETILIN’), which sought complete independence for East Timor.

An internal dispute between these two major parties resulted, on August 27 1975, in the Portuguese civil and military authorities withdrawing from the mainland of East Timor to the island of Atauro. On 7 December 1975, the armed forces of Indonesia invaded East Timor. Portuguese authorities departed Atauro on 8 December 1975. On 17 July 1976, Indonesia enacted a law incorporating East Timor as part of Indonesian territory.

4 West Timor reverted to Dutch sovereignty and, after the Dutch withdrawal, became part of the Republic of Indonesia.

5 UN GAOR, 15<sup>th</sup> Sess, Supp No 16, UN Doc A/4684 (1960). The Resolution explicitly states that Timor is a non-self-governing territory within the meaning of Chapter XI of the *Charter of the United Nations*, therefore Portugal has an obligation under Article 73(e) of the Charter to transmit information regarding the territory to the UN Secretary-General.

The purported annexation of East Timor by Indonesia was never recognised by the United Nations,<sup>6</sup> but was recognised by Australia in 1979.<sup>7</sup> The Indonesian military presence in East Timor was violently opposed by FRETILIN which, through its armed wing, *Falantil*, continued to conduct a campaign of insurgency. It is estimated that between 1975 and 1999, tens of thousands of East Timorese died in the internal conflict.<sup>8</sup>

Indonesian policy towards East Timor, however, altered dramatically after the fall of the Soeharto regime. Shortly after taking office in May 1998, Indonesian President B J Habibie announced that a referendum was to be held in East Timor, on the issue of integration with Indonesia. On 5 May 1999, the Governments of Indonesia and Portugal, together with the United Nations, signed a series of agreements regarding the future of East Timor.<sup>9</sup> The Agreements requested the Secretary-General to put to the East Timorese people a proposed constitutional framework of special autonomy for East Timor within the Republic of Indonesia. The Agreements provided that if the proposed constitutional framework was not acceptable to the East Timorese people, Indonesia would take the necessary steps to terminate its links with East Timor, restoring its status under Indonesian law to that held prior to annexation on 17 July 1976.

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6 In a series of resolutions following the 1975 invasion, both the Security Council and the General Assembly rejected Indonesian claims to sovereignty over East Timor and called upon Indonesia to withdraw from East Timor. See GA Res 3485 (XXX), UN GAOR, 30<sup>th</sup> sess, Supp No 34, UN Doc A/10034 (1975), GA Res 31/53, UNGAOR, 31<sup>st</sup> sess, Supp No 39, UN Doc A Res/31/39 (1976), GA Res 32/34, UN GAOR, 32<sup>nd</sup> sess, Supp No 45, UN Doc A Res/32/34 (1977) and SC Res 384, UN SCOR, 30<sup>th</sup> sess, 1869th mtg, UN Doc S/Res/384 (1975) and SC Res 389, SCOR, 31<sup>st</sup> sess, 1914th mtg, UN Doc S/Res/389 (1976). The United Nations continued to recognise Portugal as the administering power of East Timor as a non-self-governing territory under Chapter XI of the *Charter of the United Nations*.

7 Australia was the only state contributing to INTERFET which had recognised Indonesian sovereignty over East Timor. The Australian Minister for Foreign Affairs stated, on 20 January 1978, that Australia recognised the de facto annexation of East Timor by Indonesia. On 15 December 1978, the Minister declared that negotiations which were about to commence between Australia and Indonesia in relation to the delimitation of the continental shelf between Australia and East Timor would 'signify de jure recognition by Australia of the Indonesian incorporation of East Timor'. The Minister added: 'The acceptance of this situation does not alter the opposition which the Government has consistently expressed regarding the manner of incorporation.' The negotiations between Australia and Indonesia commenced in early 1979. See *Australian Yearbook of International Law* (1978-80) 8, 279-82.

8 An incident at Santa Cruz cemetery on 12 November 1991 drew international attention to the violent situation in East Timor. An official Portuguese delegation had been scheduled to visit East Timor on 4 November 1991. Pro-independence demonstrations had allegedly been planned to coincide with the visit of the delegation. On 28 October 1991, two pro-independence activists, who had been hiding in a church in Dili, were shot and killed. The delegation's visit was postponed and a memorial march to the Santa Cruz cemetery was arranged to honour the activists. Indonesian security forces opened fire on the marching crowd. According to official figures, 10 of the marchers were killed. Other reports suggest that the number of dead was close to 100.

9 On 5 May 1999, the Governments of Indonesia and Portugal signed an agreement which was witnessed by the Secretary-General of the United Nations (the Overall Agreement). On the same day, two other agreements were entered into by the Governments of Indonesia and Portugal and the Secretary-General of the United Nations. These supplementary agreements dealt with the popular consultation of the East Timorese people through a direct ballot and the necessary security arrangements for the balloting process. The Overall Agreement, together with the supplementary agreements, are referred to as the 'New York Agreements'.

On 11 June 1999, the UN Security Council established the United Nations Mission in East Timor to organise and conduct the referendum.<sup>10</sup> Over 451 000 East Timorese registered to vote and over 98 per cent of those registered voted in the referendum which took place on 30 August 1999.

The results of the referendum were announced by the UN on 4 September 1999. The majority of East Timorese (78.5 per cent) had voted against the proposed constitutional framework for special autonomy within the Republic of Indonesia. President Habibue announced that he accepted the result of the referendum, and called upon the Indonesian security forces in East Timor to maintain security. However, within hours of the announcement of the result, pro-integration militia rampaged throughout East Timor, rounding up pro-independence supporters, who were then either killed or removed from the region.

On 6 September 1999, Australia commenced evacuation of its own nationals from East Timor. The UN commenced evacuation of all but essential staff on 10 September 1999. On 12 September 1999, the Indonesian Government agreed to accept the assistance of the international community to restore peace and security in East Timor. UN Security Council Resolution 1264,<sup>11</sup> which determined that the situation in East Timor constituted a threat to peace and security and established INTERFET, was adopted on 15 September 1999.

The first elements of INTERFET arrived in East Timor on 20 September 1999. The situation they encountered was one of humanitarian crisis. The East Timorese infrastructure had been severely damaged during the period immediately following the announcement of the referendum result. There was no effective administration as officials had left East Timor after the announcement of the ballot results.<sup>12</sup> The judicial and law enforcement systems were non-existent. Many buildings and some entire towns had been destroyed. The UN estimated that of a total population of 890 000, over 500 000 East Timorese had been displaced by the post referendum violence. Many of these displaced persons were located across the border in West Timor.

The establishment of INTERFET was always intended to be a temporary measure and, on 25 October 1999, in Security Council Resolution 1272,<sup>13</sup> the United Nations Transitional Authority in East Timor (UNTAET) was established as an interim authority to oversee the progression of East Timor to statehood. INTERFET formally transferred its responsibilities under UN Security Council Resolution 1264 to UNTAET on 23 February 2000.<sup>14</sup>

10 See UNSCOR, 54<sup>th</sup> sess, 4013<sup>th</sup> mtg, UN Doc S/Res/1246 (1999).

11 Above n 1.

12 This had a particular impact upon maritime activity as there was no port authority or harbour master to control access to Dili port. As a result, control of the port was initially assumed by the Naval Component Command INTERFET Headquarters, who were responsible for controlling access to Dili port by INTERFET units as well as the numerous vessels chartered by non-government organisations and foreign governments to provide humanitarian supplies to East Timor.

13 UN SCOR, 54<sup>th</sup> sess, 4057<sup>th</sup> mtg, UN Doc S/Res/1272 (1999).

14 The transition in fact took place progressively from East to West with Sector East handing over on 1 February 2000, Sector Central on 14 February 2000, the Oecussi enclave on 15 February 2000 and Sector West on 21 February 2000.

### A Headquarters INTERFET

INTERFET was established under unified rather than UN Command. Major General Peter Cosgrove,<sup>15</sup> then Commander of the ADF's Deployable Joint Force Headquarters ('DJFHQ'), was appointed as Commander INTERFET. Headquarters for INTERFET were established in Dili, staffed mainly by personnel from DJFHQ. In the interests of a collocated and integrated command, an Air Component Command and Naval Component Command were established within INTERFET Headquarters. The Naval Component Command was staffed by the recently established Deployable Joint Force Headquarters - Maritime ('DJFHQ-M'), based at Maritime Headquarters, Sydney. Other contributing countries also provided staff to the Headquarters, particularly in the form of liaison officers and planning staff.

### B Legal Support to the Deployment

From the outset it was recognised by the ADF that the INTERFET operation would involve a myriad of legal issues not previously encountered in an operational environment. As a result, Government lawyers were involved in the planning of the operation from the outset. It was also accepted that, when INTERFET deployed to East Timor, a number of ADF lawyers would deploy with the Force to provide in-theatre legal advice. In total there were 11 Australian legal positions within INTERFET.<sup>16</sup> Significant legal support was also provided to INTERFET by Australian-based lawyers, particularly at the environmental, operational and strategic command level, and in the training of deploying forces.

### C The Legal Context of the Operation

The legal environment into which INTERFET deployed was by no means straight forward. Australia was the only contributing state to have formally recognised the Indonesian annexation of East Timor. All other contributing states, and the UN, continued to recognise East Timor as a non-self-governing territory.<sup>17</sup> This dichotomy affected the position of the contributing nations, both in relation to the negotiation of the international agreements relating to the Force and the domestic law which was considered to apply in East Timor.

As lead nation, Australia assumed primary responsibility for the negotiation of international agreements in relation to the Force. These agreements included a Status of Forces Agreement ('the SOFA'), an Exchange of Diplomatic Notes and a Participation Agreement. The SOFA was an agreement between Australia and Indonesia, and dealt with issues such as the exercise of jurisdiction over members of the Force, freedom of entry and exit, and the right to carry arms. The Exchange of Diplomatic Notes was an arrangement between Australia and

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<sup>15</sup> Now General Peter Cosgrove, former Chief of Defence Force.

<sup>16</sup> These positions were; Senior Legal Adviser INTERFET Command Legal Office ('ICLO') and two additional officers; two legal officers at HQWESTFOR; one legal officer at HQ Force Logistics Support Group, one legal officer Naval Component Command and four legal officers in the Detainee Management Unit. In addition a number of lawyers from contributing states were attached to the ICLO on occasion.

<sup>17</sup> See above n 7.

UNTAET which regulated the relationship between INTERFET and UNTAET. The Participation Agreement set out the arrangements between the states contributing to INTERFET. The Agreement dealt with the settlement of claims, command and control, and the waiver of immunity.

While negotiated by Australia, the SOFA was worded so as to apply to ‘the Force’ and provided for Indonesia to confirm its application, on request, to each participating state. The effect of the SOFA was, however, ambiguous for those states who had never recognised Indonesian sovereignty over East Timor. New Zealand, for example, argued that the SOFA had effect between Indonesia and Australia only by virtue of Australia’s recognition of Indonesian sovereignty over East Timor.<sup>18</sup> The New Zealand position was that UNSC Resolution 1264 alone was the legal basis for the Force and that New Zealand Defence Force personnel deployed as part of INTERFET were immune from local jurisdiction on the basis of customary international law.<sup>19</sup>

The situation was further complicated when, on 20 October 1999, Indonesia withdrew its claim to sovereignty over East Timor.<sup>20</sup> At this point it was questioned whether the SOFA had any continuing effect, given that Indonesia no longer exercised either de jure or de facto control over East Timor. In concluding that the SOFA continued to apply, the Australian Government emphasised the SOFA provisions which stated that the Agreement would cease to be in effect ‘on the departure of the last member of the Force from East Timor or as the Government of Australia and the Government of the Republic of Indonesia mutually determine’.

From the perspective of maritime operations, the most important aspect of the SOFA was that it provided that INTERFET vessels and aircraft would enjoy freedom of movement throughout East Timor, including Atauro Island and the Ambino (Oecussi) enclave.<sup>21</sup> The SOFA, however, provided that access to the Atauro Island and the enclave was to be ‘by air and sea through designated corridors’. It was envisioned that these air and sea corridors would be negotiated informally between INTERFET and the Indonesian authorities. While an air corridor was informally agreed,<sup>22</sup> the coordinates of a sea corridor were never agreed and, as a consequence, INTERFET units were forced to rely upon normal

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18 Interestingly, despite the fact that the UN also declined to recognise Indonesian sovereignty over East Timor, the UN concluded a Status of Mission Agreement with Indonesia regarding the United Nations Mission in East Timor on 23 August 1999.

19 The New Zealand position is discussed in a paper presented by Lieutenant Colonel L P Maybee, Command Legal Officer, HQ Land Command, New Zealand Defence Force (at Australian Defence Force ‘INTERFET Lessons Learnt Conference’, Australian Defence Force Academy, Canberra, 17 March 2000).

20 Declaration of the People’s Consultative Assembly of Indonesia on 20 October 1999.

21 The Ambino enclave is known by the East Timorese as the Oecussi enclave. The enclave has traditionally been considered as part of the sovereign territory of East Timor but is located on the North coast of West Timor.

22 An air route to the enclave was agreed with the Indonesian Government early in the operation and was used extensively. However, in early November 1999, INTERFET Headquarters was notified by an Indonesian authority that the air corridor was closed. The rights of passage guaranteed under the law of the sea provided no assistance in relation to the passage of aircraft over land to the enclave. The question whether UNSC Resolution 1264 alone provided authority to overfly Indonesian territory without Indonesian consent therefore arose. INTERFET was never forced to rely upon this authority, however, as later that same day INTERFET Headquarters was notified that the air route had been ‘re-opened’.

rights of navigation when transiting through Indonesian archipelagic waters en route to the enclave. The rights of navigation guaranteed by the *United Nations Convention on the Law of the Sea*<sup>23</sup> ('UNCLOS'), were arguably less generous than would appear to be contemplated by the use of the phrase 'freedom of movement' in the SOFA. In addition, the delimitation of maritime zones in the area immediately adjacent to East Timor was far from clear in the early stages of the INTERFET operation.<sup>24</sup> Hence, the inclusion of a designated sea corridor in the SOFA would have greatly assisted the conduct of maritime operations by INTERFET.

It was also envisaged that a Military Technical Agreement would be concluded between INTERFET and Indonesia. This agreement was to have established a Joint Security Consultative Group involving Indonesian and INTERFET officers, provided agreement in relation to detainee handling and delineated an INTERFET Area of Operations (particularly in relation to maritime operations). Unfortunately, a consensus was never achieved in relation to this document. Consequently, the delimitation of an area adjacent to East Timor in which 'freedom of navigation' applied was one of the most immediate concerns of the Maritime Component Command in the early stages of the operation.

The negotiation of the agreements relating to the Force was a protracted process. The SOFA was not finally agreed until 24 September 1999, some four days after the arrival of the first INTERFET elements. Some of the Participation Agreements were not concluded at all during the operation.<sup>25</sup>

Differing views on the status of Indonesia's claim to East Timor also affected the positions of the contributing nations in relation to the domestic law applicable in East Timor. In the early stages of the INTERFET operation this issue was of most relevance in relation to the treatment of civilians suspected of committing criminal offences.<sup>26</sup>

Prior to 20 October 1999 it was arguable, at least from an Australian perspective, that Indonesian law continued to apply in East Timor. This argument became more difficult to sustain, however, after Indonesia withdrew its claim to sovereignty on 20 October 1999.

The application of Indonesian law also raised some difficulties for those contributing countries who had never recognised Indonesian sovereignty in East Timor. Some of these countries argued that Portuguese law, which had applied prior to the Indonesian annexation, should again be applied in East Timor. From a practical viewpoint this would have raised considerable difficulty as, in reality, Indonesian law had been enforced in East Timor since 1976. Portuguese law was virtually unknown to the East Timorese. It was also foreseeable that as East

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23 Opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

24 This issue is discussed in greater detail below.

25 In these circumstances the only alternative was to proceed on the basis that the model participation agreement was effective in relation to those states where a bilateral agreement had not been formally concluded.

26 In relation to criminal offences committed by members of INTERFET, the SOFA provided exclusive jurisdiction to the contributing state for offences related to official duties. As members of the military of the contributing states, members of INTERFET were bound at all times by the military discipline legislation of their own state (members of the ADF were bound by the *Defence Force Discipline Act 1982* (Cth)).

Timor progressed towards independence, it would enact its own legislation, thus applying a third set of law within a period of only a few years.

This issue was eventually resolved by the passing of UNTAET Regulation 1999/1 on 27 November 1999. The Regulation provided that, with certain exceptions, Indonesian law applied in East Timor until further UNTAET regulation or subsequent legislation of the democratically established institutions of East Timor. In addition, the Regulation provided that all persons undertaking public duties were to observe internationally recognised human rights standards.

One of the preliminary considerations in regard to the legal context of the operation was the possible application of the law of armed conflict. The Australian Government position was that the law of armed conflict did not, as a matter of law, apply in East Timor.<sup>27</sup> This conclusion was based on a determination that the activities of the militia were not, at the time of the INTERFET operation, attributable to Indonesia such as to constitute an international armed conflict. The possible application of *Additional Protocol II to the Geneva Conventions*, or common Article 3 of the *Geneva Conventions 1949*, was also considered and it was determined that neither applied as a matter of law. Factors influencing this determination were the limited number of engagements between INTERFET forces and militia,<sup>28</sup> that the militia did not control a defined area of territory and that they did not operate under a defined command structure.<sup>29</sup> Despite the Australian Government's position that the law of armed conflict did not apply as a matter of law, the underlying principles were applied as a matter of policy where relevant.

Another of the novel legal issues encountered by the Force was the management of East Timorese civilians suspected of criminal offences where there was no effective civil administration or judicial system. It was clear from the outset that the establishment of an East Timorese judicial system would be a long-term project conducted over many years. There was concern that it was both impractical, and a breach of human rights norms, to detain persons for protracted periods awaiting the establishment of a permanent judicial system. However, there was also a desire, particularly amongst the East Timorese people, to see those implicated in the post-referendum violence brought to justice. A Detainee Management Unit, staffed by ADF lawyers, was established as an interim measure. From October 1999 to January 2000, the Detainee Management Unit reviewed all cases where civilians had been detained on suspicion of a serious criminal offence, and determined whether the detainee should be released or held pending the re-establishment of a civil judiciary. On 12 January 2000 a civil

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27 The Australian Government position in this regard differed from that of the International Committee of the Red Cross who argued that militia members detained by INTERFET were entitled to prisoner of war status. The argument put forward by the International Committee of the Red Cross was based on a belief that the militia continued to be controlled by the Indonesian armed forces.

28 INTERFET forces did receive fire early in the operation near the village of Motaain on the border between East and West Timor. The incident arose from a dispute over where the border between East and West Timor was located.

29 For a comprehensive discussion of the possible application of the law of armed conflict in East Timor see Dale Stephens, 'The Use of Force in Peacekeeping Operations – The East Timor Experience' (2005) *Australia Pacific Centre for Military Law Monograph 79*.



judiciary, under the auspices of UNTAET, assumed responsibility for all persons detained in East Timor in relation to criminal offences.<sup>30</sup>

From a maritime perspective, the most challenging legal issues encountered during the INTERFET operation arose from the emerging independence of a state which had formerly been incorporated within an archipelagic state. This unique circumstance gave rise to many complex questions, particularly in relation to rights of navigation, which required swift and pragmatic resolution.

### III INDONESIAN BASELINES

The unique experience of archipelagic states has been on the international agenda for some decades.<sup>31</sup> Indonesia, as one of the largest such states, was a driving force in bringing to international attention the unique security problems encountered by archipelagic states. It was largely as a result of Indonesian efforts that *UNCLOS* incorporated Part IV, which provides a unique regime in relation to archipelagic states.<sup>32</sup>

Part IV provides an exception to the general rule that a state's territorial sea baselines must follow the low water line of the coast.<sup>33</sup> Article 47 provides that an archipelagic state may draw straight baselines joining its outermost islands and drying reefs, provided that those baselines enclose the main islands and an area in which the ratio of the area of water to the area of land is between 1 to 1 and 9 to 1.<sup>34</sup> An archipelagic state is entitled to establish a territorial sea and other maritime zones measured from those archipelagic baselines.<sup>35</sup> The waters enclosed within the archipelagic baselines are referred to as archipelagic waters. The archipelagic state may exercise sovereignty over its archipelagic waters and territorial sea in the same manner in which a coastal state is entitled within its territorial sea.

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30 For a comprehensive discussion of the activities of the Detainee Management Unit and of the general legal issues faced by INTERFET see Michael J Kelly, Timothy L H McCormack and Paul Muggleton, 'Legal Aspects of Australia's Involvement in the International Force for East Timor' (2001) 841 *International Review of the Red Cross* 101–39. For a discussion of the re-building of the East Timorese judicial system see Hansjorg Strohmeyer, 'Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor' (2001) 95 *American Journal of International Law* 46.

31 The issue of archipelagic states was discussed without conclusion at the 1888, 1927 and 1928 sessions of the *Institut de Droit International*, the 1924 and 1926 meetings of the International Law Association and the 1930 Hague Codification Conference. The baseline rules applicable to coastal archipelagos were also considered by the International Court of Justice in the *Anglo-Norwegian Fisheries Case (United Kingdom v Norway)* [1951] ICJ Rep 116. The question of the special status of mid-ocean archipelagic states was not however fully discussed at an international codification conference until the 3rd United Nations Conference on the Law of the Sea (commencing in December 1973 and concluding in 1982).

32 For detail of the history of Part IV see *The Law of the Sea: Archipelagic States: Legislative History of Part IV of the United Nations Convention on the Law of the Sea* (New York, United Nations, 1990).

33 Part IV applies only to 'archipelagic states'. Article 46 defines the terms 'archipelagic state' and 'archipelago' and it is arguable that not all states constituted of a large number of small islands fall within these definitions.

34 Article 47 also provides further rules which apply to the drawing of archipelagic baselines (particularly in relation to their length).

35 See Article 48.

Far in advance of international recognition of the archipelagic concept, Indonesia's *Law No 4 of 1960* declared baselines around the Indonesian archipelago in a manner similar to that ultimately recognised as permissible under Part IV. In recognition of Portuguese sovereignty over East Timor at that time, the declared baselines did not extend to East Timor and a gap was left in this area.

After the entry into force of *UNCLOS*, the *Act on Indonesian Waters* (No 6 of 8 August 1996) was passed, explicitly referring to the archipelagic concept contained in *UNCLOS*, and revoking *Act No 4 of 1960*. Unlike its predecessor, the *Act on Indonesian Waters* did not provide a list of coordinates for the baselines and included only an illustrative map. Most of the baselines defined in *Law No 4 of 1960* appear to remain unchanged, with the exception of those in the Natuna Sea.<sup>36</sup> Despite Indonesia's 1975 annexation of East Timor, no baselines were ever extended to include East Timor within the Indonesian archipelagic claim.

Mindful of Australia's *de jure* recognition of Indonesian sovereignty, until September 1999, the ADF operated in the waters adjacent to East Timor as if there were declared Indonesian baselines following the low water line on the South coast. The Indonesian territorial sea was recognised as extending 12 nautical miles seaward from those baselines. The waters to the North of East Timor were recognised as Indonesian archipelagic waters. With the withdrawal of Indonesian forces however, the legal status of the waters adjacent to East Timor became a pressing concern for INTERFET.

#### IV STATUS OF WATERS

The maritime operations conducted by INTERFET involved launch and recovery of aircraft, replenishment at sea and other activities which would not normally be consistent with 'innocent passage' through the territorial sea of a foreign state. Whilst the SOFA guaranteed freedom of movement for the Force 'into throughout and out of East Timor', no agreement had been reached in relation to the maritime area in which freedom of movement applied.<sup>37</sup> After the withdrawal of Indonesian forces, it was also questionable whether Indonesia had any authority to grant freedom of movement in the waters adjacent to East Timor.

It is clear that, in accordance with *UNCLOS*, a newly independent state is entitled to declare various maritime zones adjacent to its coastline. What is unclear is the status of the waters adjacent to the new state whilst it makes the transition to independence. It has been suggested that, in the absence of a fully functioning government, but during mature transitional administration, the UN

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36 The Natuna Sea, located North-West of the coast of Borneo, includes the seas around Bintan Island, the Anambas Islands, the Natuna Utara Islands and the Natuna Selatan Islands. The coordinates in this area were also altered by Government Regulation No 61 of 1998. One of the archipelagic sea lanes included in Indonesia's partial designation (discussed below) passes through the Natuna Sea and for this reason new coordinates were declared in this region.

37 As previously discussed, it was intended that an INTERFET Area of Operations would be contained in the Technical Agreement however such an Agreement was never concluded.

should exercise de facto control over the adjacent maritime zones.<sup>38</sup> In the early stages of the INTERFET operation, East Timor had neither a functioning government nor a mature transitional administration. Whilst there was reluctance to place any fetter upon the self-determination of East Timor, it was clear that a pragmatic approach was required in relation to this issue.

In the circumstances, and based upon Australian Government advice, INTERFET adopted a policy whereby the waters immediately adjacent to East Timor were regarded as international waters. This approach was consistent with the fact that Indonesia no longer exercised any control over East Timor and, whilst recognising that East Timor had a right to declare maritime zones, did not commit the emerging nation to any particular claim.

In international waters, ships and aircraft of all nations may exercise freedom of navigation and over flight, guided by the principle of due regard. Prima facie the area of international waters was said to extend 12 nautical miles seaward of the low water line around East Timor. Whilst this was relatively unproblematic to the South, to the North there were many Indonesian islands that were within 24 nautical miles of the coastline of East Timor. In these circumstances the equidistant line formula (as contemplated in Article 15 of *UNCLOS*) was applied to delimit Indonesian archipelagic waters from the area of international waters.

There was also some debate in relation to the line delimiting the area of international waters from the territorial sea adjacent to West Timor. The angle at which this line protruded from the coast significantly impacted the delimitation of Indonesian archipelagic waters from the international waters and there was no clear authority as to how it should be drawn. The issue was referred to cartographers in Australia who settled upon a line which, in their view, was an equitable delimitation of the area, bearing in mind it was only an interim solution. Despite these difficulties, an area of international waters was eventually delimited with sufficient precision to facilitate maritime operations.

There remained, however, some practical and legal issues regarding rights of navigation in the area. The large number of units involved and the type of operations being conducted resulted on many occasions in units operating outside of the area of international waters. This raised the controversial question of the rights of navigation exercisable within the Indonesian archipelago. This was an issue which, even prior to the 1999 developments in East Timor, had been contentious at international law.

## V RIGHTS OF NAVIGATION IN INDONESIAN WATERS

The effect of the archipelagic baseline rules contained in Part IV of *UNCLOS* is to allow an archipelagic state to exercise sovereignty over a greater area of water than would have been the case under the general 'low water line baseline' rule. This increase in the area over which archipelagic states may potentially

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38 See Rob McLoughlin, 'East Timor, Transitional Administration and the Status of the Territorial Sea' (2003) 4 *Melbourne Journal of International Law* 323.

exercise sovereignty obviously impacts upon freedom of navigation in the area of archipelagic states. Part IV recognises that impact by guaranteeing certain rights of navigation, both to vessels and aircraft, through the archipelagic waters and territorial sea of an archipelagic state.

Article 17 of *UNCLOS* guarantees to all ships the right of innocent passage through the territorial sea of all states. Article 52 extends this right to all ships passing through archipelagic waters. Article 53 guarantees the more generous right of archipelagic sea lanes passage to both ships and aircraft transiting the archipelagic waters and territorial sea of an archipelagic state. The right of archipelagic sea lanes passage is more expansive than that of innocent passage. It may be exercised by aircraft as well as ships. Archipelagic sea lanes passage may be conducted in the ‘normal mode’. In contrast to the right of innocent passage, there is no recognition in *UNCLOS* of a right to suspend archipelagic sea lanes passage in the interests of the security of the archipelagic state.<sup>39</sup>

Article 53(1) provides that an archipelagic state may designate archipelagic sea lanes in which archipelagic sea lanes passage may be exercised. While a number of archipelagic states are considering undertaking such a designation,<sup>40</sup> only Indonesia has formally submitted a proposed designation to the International Maritime Organization (‘IMO’).<sup>41</sup> The Indonesian proposal, submitted in 1998, was described as a ‘partial system’ and designated three sea lanes, centred on the Sunda, Lombok and Ombai Straits.<sup>42</sup> The Indonesian proposal was approved by the Maritime Safety Committee of the IMO, as a partial designation, in May 1998. The approved scheme was incorporated into Indonesian domestic law by *Indonesian Government Regulation No 37 of 2002*.

Article 53(12) provides that if an archipelagic state does not designate sea lanes or air routes,<sup>43</sup> the right of archipelagic sea lanes passage may be exercised through ‘the routes normally used for international navigation’. The Australian Government position, at the time of the INTERFET operation, was that while archipelagic sea lanes passage could clearly be exercised in those sea lanes which had been approved by the IMO, the exercise of the right through the Indonesian archipelago was not limited to those lanes and could be exercised ‘through the routes normally used for international navigation’.

During the operation there was a need on many occasions for INTERFET units to navigate in Indonesian archipelagic waters and territorial sea. In particular, it was necessary for units to transit from the area of international waters to the Oecussi enclave, both to undertake the initial insertion of forces in the enclave,

39 Article 25(3) does allow a coastal state to temporarily suspend the right of innocent passage if such suspension is essential for the protection of the coastal state’s security.

40 Most notably the Philippines.

41 Article 53(9) provides that ‘an archipelagic State shall refer proposals to the competent international organization’. It is now accepted that the International Maritime Organization is ‘the competent international organization’.

42 The proposal was described as a ‘partial system’ as there was strong opposition, particularly on behalf of Australia and the United States, to the suggestion that the exercise of archipelagic sea lanes passage through the Indonesian archipelago would be limited to the three designated sea lanes.

43 There remains some debate as to whether the designated sea lanes must be identical to the air routes or whether one may exist without the other.

and to provide logistical support for those forces once they were established. While the SOFA provided for the designation of a corridor through which passage to the enclave could be conducted, such a corridor was never agreed. Hence it was necessary to either conduct transit consistent with the right of innocent passage through Indonesian archipelagic waters to the enclave, or to conduct passage in the 'normal mode' in a normal route.<sup>44</sup>

Some national policies also restricted INTERFET units from undertaking operations such as replenishment at sea within 12 nautical miles of land (for environmental reasons). Many INTERFET units were therefore unable to undertake certain operations within the area of international waters. These operations are also not generally considered to be consistent with innocent passage but are considered to constitute 'normal mode' such that they are consistent with archipelagic sea lanes passage. It was therefore necessary on occasion to identify a convenient 'route normally used for international navigation' in which such operations could be conducted.

Further complicating the navigational regime was the possibility that the independence of East Timor gave rise to the formation of a strait such as that contemplated by Article 45 of *UNCLOS*. Article 45 provides that a non-suspendable right of innocent passage applies in straits used for international navigation between a part of the high seas or an exclusive economic zone and the territorial sea. Arguably, however, such a strait would also constitute a 'route normally used for international navigation' and, in the absence of a full designation of archipelagic sea lanes on behalf of Indonesia, the more generous right of archipelagic sea lanes passage could be said to apply.

The complexity of the navigational regime in operation required comprehensive guidance from INTERFET Headquarters to INTERFET units. INTERFET Headquarters released a Navigation Policy which discussed the legal status of the surrounding waters and the navigational rights which could be exercised. While this policy was binding upon Australian units, it was issued as guidance for other contributing countries in the hope that they would adopt consistent policies. Many of the participating countries, whose operations were generally conducted in other geographical areas, had little experience of navigating through archipelagos. The INTERFET Navigation Policy therefore served as useful guidance in formulating national policies.

## VI RIGHT OF APPROACH AND VISIT

In the early stages of the INTERFET operation, a report was passed to INTERFET Headquarters from a Non-Government Organisation alleging that civilians were being forcibly removed from the territory of East Timor via boat. This raised the possibility that INTERFET units may be called upon to approach

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<sup>44</sup> For example, passage which involved the use of aircraft is inconsistent with innocent passage but is consistent with archipelagic sea lanes passage and therefore, under Australian policy, could be conducted in a 'normal route' through the archipelago.

and visit vessels departing East Timor. It was contemplated that it may be necessary to approach and visit suspected vessels both in the area of international waters and in Indonesian archipelagic waters.

Article 110 of *UNCLOS* sets out the circumstances in which a warship is justified in boarding a foreign ship that it encounters on the high seas. The forcible removal of persons from a geographic area does not fall neatly within any of these prescribed circumstances. Any legal authority for such a boarding would therefore need to derive from UN Security Council Resolution 1264. In authorising the use of ‘all necessary means’ to ‘restore peace and security in East Timor’ the Resolution was arguably broad enough to encompass a right of approach and visit if required. However, in other instances where naval forces have undertaken naval interdiction under the authority of a UN Resolution, that Resolution has more specifically conferred the authority to do so.<sup>45</sup> In most instances, boardings conducted under the authority of a UN Security Council Resolution have been conducted either beyond regional territorial sea claims or with the consent of the coastal state.<sup>46</sup> The conduct of boardings within the Indonesian archipelago, without Indonesian consent, would have been a controversial undertaking. Ultimately, the allegations of forcible removal appeared to be unfounded and no such boardings were undertaken.

## VII CONCLUSION

INTERFET deployed to East Timor at a time of dramatic and rapid change in the country’s history. The withdrawal of Indonesian claims to sovereignty, and the subsequent transition to independence of East Timor, brought into question all of the legal regimes which had previously applied in the country. Even after the operation had commenced, the question of what – if any – law applied in the country was unsettled. For a Force which was tasked to disarm the militia and restore peace, this was an issue requiring efficient and practical resolution. Balanced against the need for an instant solution was the concern that the East Timorese people, who had fought so long and hard for their own independence, should not be saddled with a legal legacy that was not of their own choosing.

The emergence as a separate legal entity of a state which had previously been incorporated within an archipelagic state was unprecedented. The archipelagic concept had only recently been explicitly acknowledged by the international community. The rights of navigation applicable within an archipelago were still the subject of debate. While it was universally accepted that an independent East

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45 See, eg, SC Res 665, UN SCOR, 45<sup>th</sup> sess, 2938<sup>th</sup> mtg, UN Doc S/Res/665 (1990) in relation to the Persian Gulf, SC Res 787, UN SCOR, 47<sup>th</sup> sess, 3137<sup>th</sup> mtg, UN Doc S/Res/787 (1992) and SC Res 820, UNSCOR, 48<sup>th</sup> sess, 3200 mtg, UN Doc S/Res/820 (1993) in relation to the Former Republic of Yugoslavia and SC Res 917, UNSCOR, 49<sup>th</sup> sess, 3376<sup>th</sup> mtg, UN Doc S/Res/917 (1994) in relation to Haiti.

46 See Rob McLaughlin, ‘United Nations Mandated Naval Interdiction Operations in the Territorial Sea?’ (2002) 51 *International and Comparative Law Quarterly* 249.

Timor was entitled to proclaim its own maritime zones, the status of the adjacent waters in the period preceding any declaration of such zones was uncertain.

In order to fulfil its mandate INTERFET required the ability to conduct effective maritime operations. That ability in turn required an urgent and effective resolution of the legal status of the surrounding waters. In the circumstances, it is suggested that the recognition of an area of 'international waters' was an appropriate and legally sustainable solution. This policy also ensured that East Timor retained the opportunity to establish its own maritime jurisdiction unhampered by any inheritance from the transitional phase of its history. After independence, the democratically elected parliament eagerly seized this opportunity. On 23 July 2002, in *Law No 7 of 2002*, a territorial sea, exclusive economic zone, contiguous zone and continental shelf were proclaimed on behalf of the newly independent state of Timor-Leste.