

## **INTERNATIONAL LAW – HUMAN TRAFFICKING**

### **MISTREATMENT OF CREW ON FOREIGN FISHING VESSELS IN NZ**

**Peter Dawson - Presentation to MLAANZ – 11 September 2014**

#### **Setting the Scene**

On 31 July 2014, in its last act before rising for the elections, the NZ Parliament passed the *Fisheries (Foreign Charter Vessels and Other Matters) Amendment Act* which requires that from May 2016, Foreign Charter Fishing Vessels ("FCVs") will have to be registered in New Zealand and comply with New Zealand laws if they wish to access fish in the NZ EEZ.

In a statement after the bill was passed, Minister for Primary Industries, Nathan Guy said it would strengthen the regulation of foreign-owned commercial fishing vessels operating in New Zealand waters, and he is quoted as saying "*It shows that we are serious about the fair treatment of fishing crews, the safety of vessels and New Zealand's international reputation for ethical and sustainable fishing practices.*"

For the past 20 years FCVs have been licenced to operate in NZ's Exclusive Economic Zone ("EEZ"), but regrettably have featured frequently in our courts and media for all the wrong reasons.

When I look further afield beyond New Zealand, a string of international reports over the past decade have indicated that certain segments of the fishing industry are characterised by some of the worst forms of human rights abuse, forced labour and human trafficking.

Forced labour and human trafficking thrive on many of these vessels. The isolated environments within which these vessels operate, strong competition for diminishing fisheries resources and an abundant supply of vulnerable labour make crew easy victims of abuse.

What we hope to do is to give you an insight into how vulnerable to exploitation the crew on these vessels are, and how their plight has gone largely unnoticed in the international arena.

This is a two part presentation.

- I will provide an international context; and then using NZ as a case study, focus on some of the difficulties that have arisen for crew in the enforcement of their rights in NZ; and
- Craig will look more closely at human trafficking at sea how that is defined, and its interrelationship with transnational crime.

## **International**

William Wilberforce was a deeply religious English Member of Parliament who was very influential in the abolition of the slave trade and eventually slavery itself in the British Empire. For 18 years he regularly introduced anti-slavery motions into Parliament and in 1807 legislation was finally introduced to abolish the slave trade, but this did not free those who were already slaves. It was not until 1833 that an Act was passed giving freedom to all slaves in the British Empire. He died 3 days after the Act to free slaves in the British Empire passed through the British House of Commons.

Today, some 180 years later (according to the International Labour Organization ("ILO" statistics) some 20.9 million people continue to work under coercion, largely in the informal and illegal economy. Many of them are coerced by their recruiters or employers and are trapped in situations where it is all but impossible to escape. About 90% of today's forced labour is extracted by private agents in labour-intensive industries such as manufacturing, fisheries, agriculture and others.

Today's fisheries sector in its broadest expression, is one of the world's largest employers. According to 2010 FAO statistics, approximately 38 million people work in the wild capture and aquaculture sectors and fish farmers and those supplying services and goods to them, account for the livelihoods of between 660 and 820 million people or 10-12% of the world's population.<sup>1</sup>

Some 57 million tons of fish were exported or traded in 2010 and the total value of exported fish according to FAO statistics is around US\$125 billion. With increasing international population, the pressure on fish stocks has continued to increase, with an accompanying disproportionate increase in illegal fishing. The FAO estimates between

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<sup>1</sup> FAO 2012 pages 43, 46

11-26 million tons of fish, totalling between US\$10-23.5 billion are lost to illegal fishing every year.

Much of this fish is harvested by distant water fishing nations, who deploy a variety of vessels around the globe away from the home ports that fish both within the EEZ's of countries and on the High Seas. The most significant fleets being beneficially owned in Korea, China and Taiwan, and either flagged within those jurisdictions or in a variety of convenience registries, including Mongolia, Sao Tome and others. (Australia *Margaris* 9499 LOA 136m Recreational fishing groups and environmental groups that were usually at odds over Australia's new marine parks are allied in opposition to the super trawler.)

The vessels themselves are highly mobile, and labour intensive and rely principally on labour sourced from Malaysia, Indonesia, Thailand and other Asian states. More often than not, labour is sourced through crew agents in these jurisdictions who recruit the crew, with promises of wages that are significantly more than what they would earn at home. Once aboard the vessels and in foreign jurisdictions, many of them become victims of human rights abuses and human trafficking, which Craig will look at in more detail.

A number of developments in the international fishing environment have conspired to put pressure on the crew of these vessels.

- Steadily increasing vessel costs are cut by hiring low-cost labour. In a typical long distance fishing operation, which are generally very labour intensive, crew costs account for between 30-50% of operating costs.
- Increasing international regulation of high seas fisheries through Regional Fisheries Management Organisations (RFMO's) has increased the cost of operation of these vessels, through trade sanctions (ICATT and CCAMLR) and spatial restrictions (creation of MPA's).
- Increased competition for scarce resources affects the crew's safety.
- Increased pressure on fish stocks means these vessels have to stay at sea longer, and work harder to maintain supply (FNI article).

Globalisation has meant that many long distance fishing operators are structured as trans-national corporations. Many of these operators make use of multiple flags of convenience together with opaque company structures to avoid law enforcement

measures and will typically register their vessels in jurisdictions that are unable or unwilling to meet their international obligations or exercise their criminal law enforcement jurisdiction. More recent studies have shown a close nexus between trans-national fishing operators and trans-national crime, and this aspect will be addressed in more detail by Craig Tuck.

In the past decade the public conscience has slowly been stirred with a number of high profile articles that have been published internationally on the plight of crew on fishing vessels. Most of these reports focus on the plight of crew in particular regions, and many of them reveal common abuses which include:

- Physical and sexual abuse;
- Long working hours;
- unsafe and unmaintained vessels and poor or no safety practises;
- Abandonment of seafarers in port;
- Use of corrupt manning agents and touts;
- Blacklisting of crew that protest abuse;
- Lack of access to justice;
- Withholding of travel documents/Seamen's books.

If you have ten minutes to spare, I would encourage you to look at a recent Guardian newspaper expose on modern day slavery in the Thai Prawn fishery. There is a 10 minute video clip on their website that makes for startling viewing as to the treatment of crew on these vessels.

*Guardian article link: <http://www.theguardian.com/global-development/2014/jun/10/supermarket-prawns-thailand-produced-slave-labour>*

I will now narrow the focus and look at the operation of foreign flagged fishing vessels in NZ. These vessels typically operate under time charter/joint venture arrangements with NZ companies, and hire is normally calculated by reference to a percentage of the profits from the catch.

## **New Zealand**

**A few statistics:** In 1996/1997 there were approximately 160 FCV's operating in NZ. The numbers of both FCVs and domestic vessels has declined steadily. In the 2010/2011 fishing year, 27 FCV's operated in NZ. Of these the majority were flagged in Korea (13)

and the rest, Japan, and Ukraine. In the past 5 years there has been a steady exodus of vessels, and currently there are 14 FCV's operating under charter arrangements.

These vessels typically catch 51% of the major fish species in our EEZ by volume which accounts to 44% of our export value of fish. The total value of product caught and exported annually is around \$666.7 million dollars. The vessels range in size from 30m to in excess of 100m.

To my knowledge, there are no new FCV's operating in NZ with many of the current vessels being 20 to 30 years old.

Some of these vessels have been operating in NZ for more than 20 years, as was the case with the ill-fated *Oyang 70* (23 years) vessel which was 36 years old. A limited number come into NZ for a three month tuna or squid season, but most operate permanently in NZ on fishing plans that cover their operation for the whole year.

The replacement cost of a new factory freezer trawler is around NZ\$ 60 million.

In 2005 in NZ, 10 Indonesian workers walked off a Korean-flagged longliner named the *Sky 75* claiming that they had not been paid their wages of US\$200 per month and had to endure appalling living and working conditions. This prompted public outrage in NZ and resulted in the implementation of a Code of Practice that sought to put in place measures to ensure the protection and payment of workers aboard these vessels in NZ. The Fisheries Act 1996 was amended to extend the application of the NZ MW Act and Wages Protection Act to the operation of these vessels.

On 18 August 2010, the 92 metre Korean flagged fishing vessel *Oyang 70* sunk some 700 kilometres East of Dunedin, New Zealand, with 51 crew on board. Six crewmen died; three were found dead in the water in their life-jackets and a further three remain missing, including the Captain. The surviving crew were rescued (together with the three dead men) by the crew of the New Zealand flagged fishing vessel *Amaltal Atlantis*.

This prompted the crews of several FCV's operating in the EEZ to walk off their vessels and complain of poor pay (USD 300pm) long hours (up to 30 hours in the hoki season) and physical and sexual abuse.

I will let some crew from an *Oyang* vessel that operated in NZ tell their own story. Video clip link: <http://www.walkfree.org/nz-end-slavery-at-sea/>. The Walk Free Foundation is an international NGO, focussed on fighting slavery conditions on land or water.

To take up the narrative, in 2011 the University of Auckland published a working paper entitled "*Not in NZ Waters Surely? Labour and Human Rights abuses aboard foreign fishing vessels*". This paper examined the role of institutions governing labour conditions in the NZ fishing industry, and contains an overview of labour and human rights abuses revealed during interviews with some 144 fishers, industry representatives and foreign crew.

The abuse of crew on Korean flagged vessels was again highlighted in an expose in November 2011 in the US based Bloomberg Business week, citing Sanford Limited and United Fisheries as being part of having "dirty supply chains" in that their products are caught, using crew in near slave conditions. This caused a furore in the US market and further investigations into the way in which crew were treated on these vessels operating in NZ.

Three legal papers have been published in recent years in the MLAANZ journal dealing with aspects of the operation of FCVs. One very scholarly article by Jennifer Devlin suggestively entitled "*Modern Day Slavery*" in 2008, looking at employment aspects, and one less scholarly article by me in 2011 and a further article in 2014 entitled "*Confronting the Challenge of Human Trafficking for Forced Labour in the Pacific: Some thoughts from New Zealand*", by Thomas Harré, published in the New Zealand Yearbook of International Law.

The plight of the crews has spawned a range of litigation. Around 500 crew have brought actions for unpaid wages totalling some NZ\$21 million both in the High Court (in the exercise of its admiralty jurisdiction to prevent departure of the vessels and obtain security) and the Employment Relations Authority ('ERA'). The ERA is the tribunal clothed by the Fisheries Act 1996 with the jurisdiction to address failures by the vessel owners to comply with NZ's Minimum Wages legislation. Some of these claims have been settled but most are currently in various stages of progression through the ERA and the High Court.

The general theme that has come through the academic and legal writings on the subject, is that the owners of these vessels lacked accountability and have consistently demonstrated that they are poor stewards of New Zealand's natural resources, and the crew that man these vessels and the vessels themselves.

Several captains and factory managers of the vessels have successfully been prosecuted under the NZ Fisheries Act 1996 for offending under the fisheries Act, including dumping, trucking and filing false returns. Two vessels have been forfeited to the Crown through the operation of that Act, the most recent one occurring this Monday, in respect of the

*Oyang 77*, according to Marine Traffic.com is currently operating off Falkland Islands in the squid fishery. The question is, will MPI take action against this vessel?

The captain and chief engineer of one vessel has been prosecuted by Maritime New Zealand ("MNZ") for the dumping of oily water, through a bypass arrangement videoed by a disgruntled oiler, a practice that crew have advised us was commonplace for the past 20 years.

The public pressure culminated in the then Ministers of Fisheries, and Labour convening a joint ministerial Inquiry into the use and operation of FCV's in November 2011, which provided a 113 page report the Ministers in February last year. The Inquiry made 15 recommendations regarding the future regulation of these vessels. The centre piece of the change is the requirement for the vessels to reflag into NZ by April 2016, in order to clarify a bunch of jurisdictional grey areas in NZ law that allowed these abuses to exist and flourish.

### **Confused Legal Regime**

The legal regime under which these vessels operate is a jurisdictional muddle.

Over the past 20 years, NZ law has been progressively extended to have some jurisdictional hooks over these vessels, but the hold that NZ institutions have over the management and operation of them are tenuous, and unscrupulous operators have used this jurisdictional uncertainty to their advantage.

*So how are they regulated?*

Let's start at the international instruments and then focus on local regulation:

1. The rights and duties of flag states and coastal states within whose waters a vessel operates are set out in UNCLOS, which seeks to strike a balance between the rights of coastal states and the rights of vessels to operate in their territorial seas and EEZ's.
2. Inherent in this balance is that a coastal state's rights over a vessel are limited and that the flag state has primary jurisdiction over the technical, administrative and crewing matters of its vessel.
3. A coastal state has sovereign rights with respect to the living resources on the seabed and supra-adjacent water column.
4. By virtue of UNCLOS, New Zealand has sovereign rights for the purpose of exploring and exploiting, conserving and managing the living resources of its EEZ

(article 56), however it must develop proper conservation and management measures to ensure the resource is not endangered by over-fishing (article 61). Article 62 further obliges New Zealand to promote the objective of optimum utilisation of the living resources.

5. What is less clear under UNCLOS is the extent to which the coastal state has jurisdiction over safety standards for the vessels, health and safety of the crew and labour conditions both within the territorial sea and the EEZ and I will come back to this later.
6. The legislative framework for managing NZ fisheries is the Fisheries Act 1996 and its attendant regulations, which incorporates the principles of UNCLOS and seeks to put in place a regulatory regime for the sustainable utilisation of fisheries resources.
7. There are two discreet access mechanisms in the Fisheries act 1996 for foreign fishing vessels wishing to operate in NZ:
  - a. The **first** is Part 5 of the Fisheries Act 1996, which provides the Minister of Fisheries with a mechanism to apportion part of the Total Allowable Commercial Catch, described as "foreign allowable catch", to foreign vessels. This Part directly addresses New Zealand's obligations under Part 5 of UNCLOS so that if there is surplus allowable catch, New Zealand is obliged to allow other states access to that surplus through bilateral access arrangements. Whilst historically, New Zealand has had a number of access agreements in place (including with Japan, Korea and the USSR) currently New Zealand's only state-to-state access agreement in force is between United States of America and Pacific Island nations.
  - b. The **second** is through section 103 of the Fisheries Act that permits access by FCVs on the basis of a charter arrangements with a local quota holder, thus avoiding the flat state to flag state access arrangements contemplated by UNCLOS.

This section (prior to the amendment Act) allowed the vessel to remain foreign flagged, and the crew are employed by the foreign vessel owner, and in most (**not all**) respects subject to the laws of the flag state.



However a 2006 extension (after the *Sky 75*) of s103(5) of the Fisheries Act 1996 made the NZ Minimum Wage Act and the Wages Protection Act of application to the any crew contracts, however, the employment relationship itself, remains subject to the law of the flag or the agreed law and jurisdiction of the employment contract.

So the built-in protections, that are a feature of the Employment Relations Act, have no application to these contracts which leaves employees with few remedies (outside the recovery of wages) other than those set out in s103(5) of the Fisheries Act 1996. How does S103(5) grab jurisdiction?

Section 103(5) of the Fisheries Act 1996 deems each person engaged or employed on FCVs to be an employee for the purposes of the Minimum Wage Act and the Wages Protection Act and also gives the ERA and the Employment Court jurisdiction in any dispute relating to the application of these acts.

Unfortunately, this section, on its own, is difficult to enforce for a subjugated crew who do not speak English, are not well resourced and cannot afford long, drawn out litigation, but who find themselves up against an unscrupulous employer with deep pockets (refer to turn around at night and on weekends).

Because of these failures, the 2006 Code of Practice governing crew on FCV's was developed. The Code of Practice, to which the Department of Labour, the New Zealand Seafood Industry Council (on behalf of New Zealand fishing companies) and the New Zealand Fishing Industry Guild were parties, is a set of policy guidelines of Immigration New Zealand (under the umbrella of the Department of Labour) that applies to the charter arrangements between the FCP and the NZCP.

The Code set out a package of measures designed to regulate work conditions on FCVs and set minimum remuneration requirements. The Code also introduced a so-called "accountability framework" in respect of crew. Under the Code, the Charterer must be a signatory to the Code to be able to allow the owner to employ foreign crew members

It is clear from reports of conditions on board FCVs (as detailed in media reports and in the University of Auckland's paper) that the Code of Practice ("COP") is not being complied with. In fact, it is evident on many vessels that conditions on board the vessels had not improved since the Code was introduced. While its ambitions were commendable, in terms of the day-to-day operation of FCVs, the Code failed in its goal of effectively regulating working conditions on board FCVs. The COP was replaced by an amendment to NZ's immigration rules in December 2013, which sought to address some

of the deficiencies in the COP such as the requirement to pay the crew's wages into an NZ bank account.

Whilst the increased international and domestic scrutiny has resulted in an improvement in the wages paid to the crew (US\$300 to NZ\$2500) however through the time chartering arrangements, the FCV owners have been paying lip service to the COP, NZ immigration requirements and have been paying the crew substantially less than the Minimum Wage.

We have found:

- Multiple contracts in Indonesian/NZ;
- Required to record hours worked daily - falsified;
- Amounts that are paid are paid to Indonesian Agents appointed by vessel owners (one recently prosecuted in Korea);
- Wash-up payment at airport after check-in with no chance to audit.

### **Another Jurisdictional Tension**

The requirements for the safe operation of vessels in New Zealand are set out in the MTA. The detailed technical standards and procedures that put these requirements into effect are set out in the Maritime Rules.

Historically, however, FCVs operating in New Zealand fisheries waters were not required to meet New Zealand maritime safety standards but were assessed by a classification society or governed by the maritime legislator of the relevant flag state. However, there is significant variety in the rules and standards of inspection between classification societies and amongst flag states.

As a result of concerns relating to the condition and safety of FCVs, the NZ Maritime Rules were amended in 2006 so that the Safe Ship Management regime set out in Rule 21 was to apply to all foreign fishing vessels registered under section 103 of the Fisheries Act after they had been operating in New Zealand for a period of two years. This required the vessels to enter into the NZ Safe Ship Management System.

Notwithstanding the provisions of Rule 21 (read with Rule 46), the foreign vessel is still subject to the requirements of the relevant flag state and extent of MNZ's jurisdiction over the safety requirements remained uncertain.

As a result, two parallel safety regimes applied to the condition and operation of FCVs in New Zealand waters. This created uncertainty as it is not clear, where the maritime regulation of the vessel's flag state has a more permissive requirement in regard to a particular aspect of maritime safety than the Rules, which regime should apply. The new

Act will do away with this distinction through the requirement that the vessel must be flagged in NZ, and be subject to the MTA. Recently MR 21 has been replaced by MR 19.

A further tension was highlighted in the sinking of the *Oyang 77* where MNZ was unable to use its investigative powers under the MTA to investigate the sinking of the vessel due to the fact that it occurred beyond 12nm and the vessel was foreign flagged. After initial uncertainty as to which entity had jurisdiction to look into the sinking, New Zealand's Transport Accident Investigation Commission ("TAIC") was appointed to investigate on behalf of the Korean flag state. The Korean Maritime Safety Tribunal agreed to TAIC's assistance on the basis that any report prepared for it would remain confidential.

However by virtue of the fact that three bodies were recovered from the site of the sinking, and returned to shore by the *Amaltal Atlantis* the Coroner was able to convene and inquest into the cause of the sinking. The public outrage that was sparked by the sinking of the *Oyang 70* and the subsequent findings of the Coroners Inquiry into the sinking, prompted MNZ to take vigorous port state action against many of these vessels, with the result that many were detained and forced to upgrade their vessels (ref: Lyttleton Engineering and engineer).

This also led to the Minister convening an inquiry into the operation of these vessels in NZ.

### **The Ministerial Inquiry**

This inquiry found:

- FCV's brought significant economic benefit to NZ fishing companies, through operational flexibility, and preferential access to markets such as Korea. This put operators who had NZ owned and crewed vessels at a significant competitive disadvantage;
- Many quota owners were able to collectivise and sell their quota through using FCV's, however this artificially increased the cost of quota and reduced employment opportunities in NZ;
- That there were serious breaches of NZ's employment rules and workplace standards; together with non-compliance with NZ's safety standards;
- It caused significant damage to NZ's international reputation for failures by NZ operators to ensure that their obligations under the Code of Practice were complied with;

- There were significant weaknesses in the government's monitoring and enforcement regimes of these vessels.

This caused them to recommend a package of reforms which included:

- Improvement of monitoring and enforcement of the rules established for FCV's;
- The amendment of the existing regulations and legislation and the extension of the application of the HSEA to these vessels;
- For NZ to ratify 2 international conventions including STCW-F and the ILO C188 work in fishing convention;
- That all FCV's be demise chartered to NZ operators and be required to reflag to NZ by April 2016.

With the Amendment bill being passed into law, the jurisdictional drainpipes that these operators were running up have now been all but closed. In particular, the NZ operator is required to employ the crew, so we will no longer have the complex jurisdictional issues that arise where crew are on working on foreign flagged vessels but subject in part to NZ law.

The recent legislative reform in NZ, which will come into effect in April 2016 will resolve most of the jurisdictional confusion in NZ, and will provide regulatory authorities with certainty as to what legal regime applied to the employment conditions aboard these vessels.

## **Conclusion**

Distant water fishing vessels have many reasons to wish to avoid regulatory scrutiny and the activities of vessels at sea can be reclusive and very hard to monitor. We have found that three ugly sisters tend to conspire together on these vessels:

- The operators are poor stewards of the vessels themselves with many of them in appalling condition and unsafe;
- The operators are poor stewards of the marine environment, and have a track record of illegal fishing, dumping and high grading;

- The operators are poor stewards of the crew and regard them as a commodity to be used and disposed of.

Through our involvement with the crew of these vessels in NZ, we have been contacted by a variety of international organisations that have recognised the plight of these crew.

I would encourage you to read a 2013 report by Eve De Koenig entitled "*Forced Labour and Trafficking in Fisheries*" [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_214472.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_214472.pdf) and view some of the video material on the Human Rights at Sea website [www.humanrightsatsea.com](http://www.humanrightsatsea.com).

The ITF and Seafarers Rights International has been actively involved in highlighting the plight of fishing and other crew, and the recent ratification of the Maritime Labour Convention will go some way to addressing working conditions on non-fishing vessels. Several of these bodies are looking at supply chain legislation to regulate the markets, to force operators to be better stewards of the crew and the resource.

We have collected a library of resources on this topic that can be accessed from our website <http://www.maritimelaw.co.nz/articles/10/24/>.

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