
Legal Constraints on Maritime Operations Affecting Merchant Shipping

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[I]t may safely be said that it is essential to the welfare of the whole country that the conditions of trade and commerce should remain, as far as possible, unaffected by an external war. In order to do this, the enemy must be kept not only out of our ports, but far away from our coasts.

Alfred Thayer Mahan, *The Influence of Sea Power Upon History 1660 – 1783*¹

In his recent book, *Seapower at the Millenium*, the eminent naval strategist Professor Geoffrey Till noted:²

Current developments are challenging traditional thinking about the strategic value of the ocean and the role of navies upon it. Nevertheless, all the traditional functions and tasks of navies so clearly enunciated by the likes of Mahan and Corbett appear alive and well. Sea control still confers tremendous benefits, since it enables the successful forces to use the ocean for their strategic advantage while denying it to others. With it, in varying degrees, military expeditions directed against the shore can be mounted or contested much more easily. With it, shipping conveying people, war supplies and trade across the ocean can be attacked or defended... Lastly, power at sea – traditionally based on the capacity to control it – is a potent means by which political influence can be exerted over other countries.

The primary mission of the New Zealand Defence Force (NZDF) is:³

...to secure New Zealand against external threat, to protect our sovereign interests, including in the EEZ, and to be able to take action to meet likely contingencies in our strategic area of interest.

In conducting operations at sea in support of this mission, the NZDF, or more particularly the Royal New Zealand Navy (RNZN) and maritime patrol aircraft of No 5 Squadron, Royal New Zealand Air Force, necessarily have an interface with commercial users of the oceans and airspace above them. Such contacts range from the boarding of merchant vessels in the Gulf of Oman to check for the presence of fugitive members of al-Qaeda or the Taliban to the verification of a fishing vessel's status in New Zealand's EEZ or Antarctic waters under the *Convention for the Conservation of Antarctic Marine Living Resources*.

The purpose of this article is to review some aspects of international and New Zealand domestic law of particular relevance to some of these meetings at sea. The topic is vast and accordingly this article attempts no more than to present a smorgasbord of some of the legal constraints on maritime operations affecting commercial shipping in order to stimulate thought, discussion and perhaps further study.

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¹ (12th ed), Boston: Little, Brown and Company, 1918, p. 87.

² Stroud: Sutton Publishing, 2001, p. 2.

³ *Foundations of New Zealand Military Doctrine*, Wellington: New Zealand Defence Force, 2004, pp. 2-3.

Armed Conflict at Sea

Modern context

It is apt to commence with a brief survey of the international law which constrains the actions of warships and military aircraft in relation to merchant shipping in an armed conflict situation. This is a topic which had been of little practical interest to New Zealand mariners since the Korean War. However, that was set to change in the aftermath of al-Qaeda's attacks on the United States on 11 September 2001. Following those attacks, the United States invoked its inherent right of self-defence against al-Qaeda and the *de facto* Taliban government of Afghanistan, which supported it. The United Nations Security Council expressly affirmed the right of the United States and other states acting in cooperation with the United States to exercise the right of individual and collective self-defence, as recognised by article 51 of the United Nations Charter.⁴

New Zealand was one of number of states which offered forces for what became known as Operation *Enduring Freedom*. This operation involved, *inter alia*, the use of force to hold accountable members of the *de facto* Taliban regime in Afghanistan for their support of the terrorist attacks on the United States and the capture of terrorists and other persons participating in hostilities against the coalition. Maritime forces were deployed to littoral areas in the vicinity of Afghanistan to apprehend terrorists and other enemy combatants attempting to evade capture by sea. New Zealand's contribution in the maritime environment to date has included three frigate deployments⁵ and the deployment of maritime patrol aircraft. There was ample authority for the Government to deploy those ships and aircraft under UN Security Council resolutions such as resolution 1373 (2001) and, in a domestic legal sense, section 5(d) of the *Defence Act 1990*. Once the ships and aircraft were in their area of operations in the Gulf of Oman and the vicinity, the law under which they were conducting operations was the law of armed conflict. The complex nature of the legal environment in which these ships were operating led the NZDF to deploy a legal officer with each ship for the first time.

Legal framework with respect to merchant shipping

Considering the strategic importance of *guerre de course* or commerce raiding to belligerent powers and their naval forces throughout much of recorded history, it is perhaps unsurprising that the earliest attempts to codify the law of armed conflict at sea concerned themselves primarily with the belligerent interdiction of merchant shipping. Thus, one of the earliest attempts, the 1856 *Paris Declaration Respecting Maritime Law*, declared in its substantive articles:⁶

1. Privateering is, and remains, abolished;
2. The neutral flag covers the enemy's goods, with the exception of contraband of war.
3. Neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag;
4. Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient to actually prevent access to the coast of the enemy.

This simple form of rules, which has essentially stood the test of time despite the vast changes in naval and shipping technology over the past century and a half, was

⁴ UN Security Council Resolutions 1368 (2001) and 1373 (2001).

⁵ One deployment by HMNZS *Te Kaha* and two deployments by HMNZS *Te Mana*.

⁶ Opened for signature and entered into force for New Zealand on signature by the United Kingdom, 16 April 1856. The original French text is authentic; the version used here is a translation.

followed and developed upon by the conventions negotiated at the International Peace Conferences at The Hague in 1899 and 1907. With respect to the treatment of merchant ships in an armed conflict, as opposed to humanitarian aspects such as the collection and treatment of wounded and shipwrecked seamen, the modern treaty law remains largely based on the following conventions signed almost 100 years ago:

- The 1907 *Hague Convention VI Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities* ('Hague VI').⁷
- The 1907 *Hague Convention VII Relating to the Conversion of Merchant Ships into Warships* ('Hague VII').⁸
- The 1907 *Hague Convention XI Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War* ('Hague XI').⁹
- The 1907 *Hague Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War* ('Hague XIII').¹⁰

The Final Act at the end of the Second International Peace Conference which prepared these conventions expressed:¹¹

the wish that the elaboration of rules relative to the laws and customs of maritime war may figure in the programme of the next Conference and that, in all cases, the Powers will, wherever possible, apply the principles of the Convention relative to the laws and customs of land warfare to the war at sea.

In the following 80 years, two major international efforts were made in this vein. The first was a declaration adopted by the London Naval Conference on 26 February 1909 and titled the 1909 *London Declaration Concerning the Laws of Naval War* ('the London Declaration'). This Declaration expanded upon the rules for blockade laid down in the 1856 Paris Declaration; defined what is meant by contraband, the circumstances in which it may be captured, and the condemnation of contraband and vessels carrying contraband; and laid down rules in respect of neutral vessels. Regrettably, the conditions for the entry into force of the London Declaration were never fulfilled. Its terms were nevertheless observed either explicitly or implicitly, and to a greater or lesser degree, in a number of subsequent naval conflicts, notably the Italian-Turkish War of 1911 to 1912 and World War I.¹² However, Kalshoven observes that:¹³

...it seems safe to affirm that State practice subsequent to the adoption of the Declaration has not had the effect of lending binding force to those rules which had not previously acquired such force as customary rules of the international law of prize.

The second international effort was the *Oxford Manual of the laws of naval war* ('the Oxford Manual'), which was adopted by the Institute of International Humanitarian Law on 9 August 1913.

⁷ Opened for signature 18 October 1907 (entered into force 26 January 1910).

⁸ Opened for signature 18 October 1907 (entered into force 26 January 1910).

⁹ Opened for signature 18 October 1907 (entered into force 26 January 1910).

¹⁰ Opened for signature 18 October 1907 (not yet in force for New Zealand).

¹¹ Translation of the authentic French text: 'le voeu que l'élaboration d'un règlement relatif aux lois et coutumes de la guerre maritime figure au programme de la prochaine Conférence et que, dans tous les cas, les Puissances appliquent, autant que possible, à la guerre sur mer les principes de la Convention relative aux lois et coutumes de la guerre sur terre. N Ronzitti (ed), *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries*, Dordrecht: Martinus Nijhoff, 1988, p. 329.

¹² Ronzitti (ed.), note 12 above, p. 329.

¹³ Ronzitti (ed.), note 12 above, p. 272.

Ronzitti notes that:¹⁴

The Institute of International Law's intention was that the Manual be a parallel to the 'Manual relative to the laws and customs of land warfare', adopted in the Oxford session of 9 September 1880 – over thirty years earlier – which, with the Brussels 'Declaration concerning the laws and customs of war' of 27 August 1874 (not subsequently ratified by the signatory States), had represented the premises for the Hague Conventions of 1899 and 1907 relative to land warfare.

In 1987, the Institute of International Humanitarian Law began a series of meetings of international lawyers and naval experts on the subject of the need for a modernisation of the law applicable to armed conflicts at sea.¹⁵ At the second meeting, the experts suggested to the Institute that they work on the development of a manual. The product of this work, which took place between 1988 and 1994, is the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* ('the San Remo Manual').¹⁶ The San Remo Manual is intended 'to provide a contemporary restatement of the international law applicable to armed conflicts at sea'.¹⁷ This manual was unreservedly endorsed by the International Committee of the Red Cross ('ICRC') at its 26th International Conference and is now widely accepted by major naval powers. For the most part it represents a useful guide to the rights and obligations of mariners in a zone of conflict. The basic rules which underpin it are available from the website of the ICRC.

Merchant vessels generally exempt from attack

The rights and obligations of a merchant ship in an armed conflict are determined by the flag that ship wears and the type of service it is engaged in.¹⁸ However, the practical distinction between the actions which are permitted in respect of an enemy merchant ship and a neutral merchant ship is surprisingly narrow.¹⁹

Even if a merchant ship sailing independently wears the flag of a belligerent state, a warship or military aircraft of the opposing belligerent may not attack it unless the warship or aircraft has intelligence which indicates that the merchant ship is a military objective.²⁰ Applying article 52(2) of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* ('Additional Protocol I'),²¹ this means that intelligence must indicate that the ship is one:

...which by [its] nature, location, purpose or use make[s] an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.

¹⁴ Ronzitti (ed.), note 12 above, p. 330.

¹⁵ 150 naval officers, academics, military lawyers and other practitioners from 65 states participated in their personal capacities. The participants were drawn from all regions of the world. New Zealand was not represented.

¹⁶ International Institute of Humanitarian Law, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, (1995), Cambridge: University Press.

¹⁷ *San Remo Manual*, note 17 above, p. 5.

¹⁸ See, for example, article 57 of the London Declaration and Hague XI.

¹⁹ One group of participants at Institute of International Humanitarian Law's meetings to settle the text of the San Remo Manual suggested that the distinction should be abandoned: see *San Remo Manual*, note 17 above, p. 157.

²⁰ It may however capture such a ship: see text below.

²¹ Opened for signature on 12 December 1977, 1125 UNTS 3 (entered into force on 7 December 1978).

Where a ship is normally used for civilian purposes, there is a rebuttable presumption in a case of doubt that it is not a military objective.²² The San Remo Manual indicates that the following activities may render an enemy merchant vessel a military objective:²³

- Engaging in belligerent acts on behalf of the enemy, such as minelaying.
- Acting as a naval auxiliary, such as transporting troops or military materiel.
- Acting as an intelligence collection platform.
- Sailing under convoy of enemy warships or military aircraft.²⁴
- Resisting visit, search or capture by a naval commander.
- Being armed to an extent that it could inflict damage on a warship.

All but the last of these activities equally render a neutral merchant ship a legitimate military objective. A neutral merchant ship is entitled to be armed to any extent, provided that it does not use those weapons for un-neutral service. In addition to the general restriction on such attacks, all merchant vessels are exempt from attack if they are:

- Hospital ships.²⁵
- Small craft used for coastal rescue operations²⁶ and other medical transports.²⁷
- Vessels granted safe conduct by agreement between the belligerent parties, including:²⁸
 - o Cartel vessels, that is, vessels designated for and engaged in the transport of prisoners of war.
 - o Vessels engaged in humanitarian missions, including vessels carrying supplies indispensable to the survival of the civilian population, and vessels engaged in relief actions and rescue operations.
- Vessels engaged in transporting cultural property under special protection.²⁹
- Passenger vessels when engaged only in carrying civilian passengers.³⁰
- Vessels charged with religious, non-military scientific or philanthropic missions.³¹
- Small coastal fishing vessels and small boats engaged in local coastal trade.³²
- Vessels designed or adapted exclusively for responding to pollution incidents in the marine environment.³³

²² Article 52(3) of Additional Protocol I.

²³ *San Remo Manual*, note 17 above, pp. 146-47.

²⁴ This is the downside of the convoy system for the master and owner of a merchant vessel. However, the experiences of merchant vessels in the Battle of the Atlantic and the Arctic convoys of World War II demonstrate that, on balance, the advantages of sailing in convoy with friendly warships and military aircraft far outweigh the risks in an era of unrestricted submarine warfare.

²⁵ Article 22 of the *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature on 12 August 1949, 75 UNTS 85 (entered into force on 21 October 1950) ('Geneva Convention II').

²⁶ Article 27 of Geneva Convention II.

²⁷ Article 23 of Additional Protocol I.

²⁸ *San Remo Manual*, note 17 above, pp. 129-31.

²⁹ Article 12(3) of the 1954 *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, opened for signature on 14 May 1954 (not yet in force for New Zealand).

³⁰ *San Remo Manual*, note 17 above, p. 132.

³¹ Article 4 of Hague XI exempts these vessels from capture. The International Institute of Humanitarian Law considers that this extends to a prohibition on attack as well: *San Remo Manual*, note 17 above, pp. 132-33.

³² Article 3 of Hague XI. Under customary international law, such vessels are subject to the regulation of the local belligerent naval commander and must submit themselves to inspection on demand: *San Remo Manual*, note 17 above, p. 134.

³³ *San Remo Manual*, note 17 above, p. 135. This restriction is not reflected in treaty law; *quaere* whether it has yet been incorporated into customary international law.

- Vessels which have surrendered.³⁴
- Life rafts and life boats.³⁵

Vessels which would otherwise enjoy these exemptions lose their protected status if they engage in one of the activities mentioned above, which render merchant vessels military objectives.

Visit, search and capture

Customary international law has long recognised that all merchant vessels at sea are subject to belligerent visit and search outside neutral waters,³⁶ provided that there are reasonable grounds for suspecting that they are subject to capture.³⁷ All enemy merchant ships other than those exempt from attack (*supra*) are subject to capture,³⁸ however, neutral merchant ships are only subject to capture if there are reasonable grounds for suspecting that they:

- (a) Are carrying contraband;³⁹
- (b) Are breaching a blockade;⁴⁰ or
- (c) Have engaged in un-neutral service.⁴¹

Customary international law also provides an exemption from the right of belligerent visit and search in the case of neutral merchant ships under the convoy of a neutral warship, although the scope of this exemption is unsettled. Article 33 of the Oxford Manual states that:

Vessels convoyed by a neutral warship are not subject to visit except in so far as permitted by the rules relating to convoys.

The San Remo Manual places four conditions on the exemption:

- (a) The vessel must be bound for a neutral port;
- (b) The escort must be of the same neutral flag or of a neutral flag with which the merchant vessel's flag State has concluded an agreement providing for such convoy;
- (c) The flag State of the neutral warship must warrant that the merchant vessel is not carrying contraband or rendering un-neutral service; and
- (d) If requested, the escort commander must provide all information regarding the character of the vessel and its cargo as could otherwise be obtained by visit and search.

The United States, as the world's preeminent naval power, appears to recognise condition (d), but not conditions (a) or (c). It recognises that the exemption will arise if the neutral convoy is escorted by a warship of the same flag, but simply notes the San Remo Manual's view in respect of bilateral convoy agreements without commenting on

³⁴ Article 41 of Additional Protocol I.

³⁵ Article 12 of Geneva Convention II.

³⁶ As to the prohibition on belligerent visit and search in the territorial sea of a neutral State, see article 2 of Hague XIII.

³⁷ As to the requirement for reasonable grounds, see Wolf Heintschell von Heinegg, "Visit, Search, Diversion, and Capture in Naval Warfare: Part I, The Traditional Law" (1991) XXIX *Canadian Yearbook of International Law* 297.

³⁸ Article 33 of the Oxford Manual; *San Remo Manual*, note 17 above, p. 157.

³⁹ Article 37 of the London Declaration.

⁴⁰ Article 20 of the London Declaration.

⁴¹ Articles 45 and 46 of the London Declaration.

whether such agreements can confer the customary exemption.⁴² The United States cites 'the experience of the convoying by several nations in the Persian Gulf during the tanker war between Iran and Iraq (1984-1988)' as supporting its view of customary international law in this area.⁴³

Law Enforcement

At 4,053,000 square kilometres, New Zealand has the fourth largest Exclusive Economic Zone ('EEZ') in the world. 72 per cent of the water column in the New Zealand EEZ has a depth greater than 1,000 metres and, at the same time, our littoral seas are exposed to the full force of the Roaring Forties. New Zealand also has an extremely long shoreline, which provides the coastal boundary of a territorial sea occupying 169,000 square kilometres. Policing such vast areas would be a challenge for any nation, and yet New Zealand has a relatively small population and economic base from which to fund such law enforcement efforts. In the absence of a full-time professional coastguard of the type in service in the United States or any other significant civilian deepwater patrol assets, much of this law enforcement effort must inevitably take place from ships of the RNZN and the Orion maritime patrol aircraft of the RNZAF. The Government has indicated that the Navy's focus on support to civilian law enforcement in New Zealand's ocean areas is to increase substantially through its agreement to purchase two new offshore patrol vessels ('OPV') and four new inshore patrol vessels ('IPV'). The project to purchase these vessels, which will add substantial capability to the RNZN, is known as Project Protector.

As a consequence of the Government's decision to purchase the OPVs and IPVs, over the next decade it can reasonably be expected that mariners operating commercial vessels in New Zealand's territorial sea and EEZ will encounter the Navy on a far more regular basis than they do at present. In performing this law enforcement role, the Navy acts in support of other agencies such as the New Zealand Customs Service and the Ministry of Fisheries, pursuant to section 9(1)(a) of the *Defence Act 1990*. The purpose of this part of the article is to examine the legal framework which applies to contacts between HMNZ ships and merchant vessels under the auspices of:

- (a) The *Customs and Excise Act 1996* ('the C&E Act'); and
- (b) The *Fisheries Act 1996*.

Customs and excise

Article 17 of the *United Nations Convention on the Law of the Sea* ('UNCLOS')⁴⁴ provides that '[s]ubject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea'. The territorial sea comprises that area of ocean which is subjected to national jurisdiction by the coastal State and which extends no more than 12 nautical miles to seaward of the baselines which are generally drawn along the low water mark.⁴⁵ Beyond the territorial sea, ships of all States enjoy the right to freedom of navigation.⁴⁶ However, in its

⁴² United States Navy, *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations, NWPI-14M*, (1997) Newport, RI: US Naval War College, pp. 7-24. This edition was published after the San Remo Manual.

⁴³ *Annotated Supplement to the Commander's Handbook*, note 43 above, note 120.

⁴⁴ Opened for signature on 10 December 1982 (entered into force for New Zealand on 18 August 1996).

⁴⁵ Article 5 UNCLOS, but see articles 6 to 16 in respect of other lawful methods of drawing baselines.

⁴⁶ Articles 58 and 87 UNCLOS.

territorial sea and contiguous zone,⁴⁷ every coastal State may exercise the control necessary to enforce its customs, fiscal, immigration and sanitary laws.⁴⁸

Section 139(1) C&E Act provides that:

Any Customs officer and any authorised person assisting the officer may at any time board a craft that is within New Zealand if—

- (a) The craft has arrived in New Zealand from a point outside New Zealand; or
- (b) The craft is departing from New Zealand to a point outside New Zealand, including while the craft is travelling within New Zealand en route to a point outside New Zealand; or
- (c) The craft (not being a craft to which paragraph (a) or paragraph (b) of this subsection applies) is carrying any domestic cargo or international cargo while the craft remains within New Zealand; or
- (d) The Customs officer has reasonable cause to suspect that the craft (not being a craft to which paragraph (a) or paragraph (b) or paragraph (c) of this subsection applies)—
 - (i) Is carrying any dutiable, uncustomed, prohibited, or forfeited goods; or
 - (ii) Has been, is being, or is about to be, involved in the commission of an offence against this Act—

for the purpose of performing any function or exercising any power that the officer may be required, authorised, or empowered to perform or exercise under this Act.

For the purposes of this provision and the other provisions of the C&E Act which will be discussed in this article, ‘New Zealand’ is defined as the land and the waters enclosed by the outer limits of the territorial sea of New Zealand, and also includes the contiguous zone of New Zealand, as defined by sections 3 and 8A of the *Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977*.

In most cases it would be preferable for HMNZ ships performing tasks on behalf of the New Zealand Customs Service to have a Customs officer on board, however the C&E Act does permit officers or members of the ship’s company of a warship to be appointed ‘authorised persons’ by the Comptroller of Customs.⁴⁹ In such a case, the ship’s company could assist a Customs officer, who could be ashore, by boarding a vessel on the instructions of that officer. Once the boarding party is on board the suspect craft, it may search that craft ‘using such force as in the circumstances is reasonable, [to] enter every part of the craft and open any package, locker, or other place, and may examine all goods found on the craft’.⁵⁰ The boarding party may then remove any goods which contravene the C&E Act.⁵¹

HMNZ ships operating at the request of the Comptroller of Customs have all necessary powers to compel a suspect vessel to bring to for boarding and detention, including the power to open fire as a last resort. Section 142 C&E Act provides:

The officer commanding or in charge of any craft in Her Majesty’s service having hoisted and carrying or displaying the proper ensign or the Customs flag shall, at the request of the Chief Executive, within New Zealand, chase any ship where—

- (a) The ship does not immediately bring-to when signalled or required to do so; or
- (b) The master refuses to permit the ship to be boarded,—

⁴⁷ This is an area of the EEZ adjacent to the seaward boundary of the territorial sea, which may extend no further seaward than 24 nautical miles from the baselines: article 33(2) UNCLOS.

⁴⁸ Articles 19, 21, 25(1) and 33(1) UNCLOS.

⁴⁹ Section 6, C&E Act.

⁵⁰ Section 140 C&E Act.

⁵¹ Section 141 C&E Act.

and may, as a last resort after having fired a warning, fire at or onto the ship to compel it to bring-to.

In addition to the OPVs and IPVs, the term ‘craft’ in section 142 will also apply to the SH-2G Seasprite helicopters in service with the RNZN, which will be able to operate from the flight deck of an OPV.

Under international law, if a foreign-flagged merchant vessel in New Zealand’s contiguous zone, having been ordered to bring to by one of HMNZ ships acting on the instructions of the Comptroller of Customs, attempts to evade interception by proceeding seaward beyond the limits of the contiguous zone, New Zealand is permitted to undertake the ‘hot pursuit’ of that vessel.⁵² Hot pursuit may be conducted by one or more consecutive warships or military aircraft, provided that the pursuit is uninterrupted.⁵³ Hot pursuit must cease if the suspect vessel enters the territorial sea of its flag State or a third State.⁵⁴

Under New Zealand law, however, having compelled a merchant vessel to bring to by hot pursuit following its departure from New Zealand’s contiguous zone, the Customs officer or authorised persons on board the pursuing warship would not be permitted to board the vessel. The reason for this limitation is that boardings for the purposes of the C&E Act may only be lawfully conducted ‘within New Zealand’.⁵⁵ However, pursuant to section 143 of the C&E Act, the Customs officer (but not an authorised person) would have the power to direct the suspect vessel to any place within New Zealand, where of course the boarding, search and seizure powers could be exercised. This legal framework only serves to emphasise the desirability for HMNZ ships of embarking a Customs officer when proceeding on Customs duties.

Fisheries

Article 56(1)(a) UNCLOS provides that ‘[i]n the exclusive economic zone, the coastal State has... sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed...’. Articles 61 to 73 UNCLOS provide an international legal framework for the conservation, exploitation and regulation of marine living resources by coastal States in their EEZs. Of particular relevance to this article, article 73(1) provides that:

The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.

In 2001, the Government’s Maritime Patrol Review identified that:⁵⁶

The fishing industry, our fourth largest export earner, makes a major contribution to the economy:

- harvest value of \$1.2 – 1.5 billion
- estimated contribution to the economy \$4.5 billion
- employs 10,250 people directly and 16,100 indirectly
- recreational fishing value estimated at \$220 million

⁵² Article 111(1) UNCLOS.

⁵³ Article 111(1) and (6)(b) UNCLOS.

⁵⁴ Article 111(3) UNCLOS.

⁵⁵ Section 139(1) C&E Act.

⁵⁶ *Maritime Patrol Review*, (2001) Wellington: Department of Prime Minister and Cabinet, p. 8.

With such a significant resource at stake, it is hardly surprising that the new OPVs and IPVs might be expected to devote a fair percentage of their efforts to protecting it. However, similarly to the situation in respect of customs and excise, the New Zealand Defence Force is not the lead agency for fisheries enforcement. Any fisheries patrols carried out by Defence Force assets are therefore conducted at the request of the Ministry of Fisheries as a public service pursuant to section 9(1)(a) *Defence Act 1990*. In many cases, it will be desirable that naval vessels deployed on such duties carry a specialist fishery officer employed by that Ministry.

That having been said, pursuant to section 196(2)(a) *Fisheries Act 1996*, every officer in command of a vessel or aircraft of the NZDF is a fishery officer at all times and may, without warrant, exercise the powers conferred on fishery officers under that Act. If the officer in command directs a Service member under his or her command to perform any of the duties of a fishery officer, that subordinate also has all the powers of a fishery officer.⁵⁷

The powers available to an officer in command in the course of enforcing the Fisheries Act include the powers to, at any reasonable time:

- Stop (order to bring to) a vessel.⁵⁸
- Enter (board) the vessel.⁵⁹
- Examine the vessel's papers, equipment and cargo.⁶⁰
- Detain the vessel for such period as is reasonably necessary to carry out the inspection.⁶¹

In addition, if the officer in command believes that a fishing vessel is being or has been used in contravention of the provisions of the *Fisheries Act* or of the conditions of any written authority issued under the Act, he or she may require the master of that vessel to take it to the nearest available port, or such other port as is agreed between the master and the officer in command.⁶² An officer in command may do all things, give such directives and use such force as is reasonably necessary to exercise the abovementioned powers.⁶³

In contrast to the more limited statutory scheme under the C&E Act, the *Fisheries Act* expressly contemplates the apprehension and boarding of fishing vessels outside New Zealand's EEZ following a hot pursuit. Pursuant to section 215(2) of the Act, an officer in command can exercise his or her powers as a fishery officer in any waters (or land) within the boundary of the New Zealand EEZ. Furthermore, an officer in command may exercise those powers outside the New Zealand EEZ in respect of a vessel which is or should be wearing the New Zealand flag under the *Ship Registration Act 1992*.⁶⁴ Finally, the officer may exercise his or her powers as a fishery officer in respect of a foreign vessel if he or she:

- (a) Believes on reasonable grounds that any person on board the vessel has committed an offence within New Zealand's territorial sea or EEZ;
- (b) Is in fresh pursuit of, or has freshly pursued, the vessel; and

⁵⁷ Section 196(3) *Fisheries Act 1996*.

⁵⁸ Section 199(1)(a) *Fisheries Act 1996*.

⁵⁹ Note 59 above.

⁶⁰ Note 59 above.

⁶¹ Section 199(3) *Fisheries Act 1996*.

⁶² Section 204(1) *Fisheries Act 1996*.

⁶³ Sections 205 and 215(1) *Fisheries Act 1996*.

⁶⁴ Section 215(2)(c) and (3) *Fisheries Act 1996*.

(c) Commenced that pursuit in New Zealand's territorial sea or EEZ.

Conclusion

The modern legal environment for a naval officer serving at sea or an air force officer flying above it is as complex as the maritime environment itself. In any one deployment, any one of HMNZ ships or military aircraft may find itself applying a myriad of international and domestic legal rules. Occasionally, such as on operations in troubled parts of the world with conflicting claims to maritime zones, there is absolutely no room for error. In all cases, as is typical of all endeavours in the maritime sphere, the margin for error is at best slim. When an operation requires a naval vessel to intercept a merchant vessel, naval commanders are cognisant of the economic pressure on the master of the merchant ship to minimise any delay in her proceeding about her lawful business. Despite this, in the author's experience such meetings are generally conducted in the traditional spirit of friendly cooperation and camaraderie between mariners. It is hoped that this article has at least provided some insight into a few of the legal constraints which apply when those contacts occur.