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**PROTEST AT SEA:  
AN ANALYSIS OF THE CROWN MINERALS  
AMENDMENT ACT 2013**

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## ***Abstract***

*This paper examines the criminal offences introduced under the Crown Minerals Amendment Act 2013 in response to direct action protest at sea. These offences have proved controversial as they restrict fundamental protest rights and purport to apply in respect of foreign vessels beyond New Zealand's territory. This paper advances two central propositions in relation to these offences. First, the prescription and enforcement of the offences is permitted under the jurisdiction accorded to New Zealand at international law. Second, the limitations placed upon protest rights are justified in accordance with s 5 of the New Zealand Bill of Rights Act 1990.*

## ***Subjects and Topics***

*Crown Minerals Amendment Act 2013;*

*Offshore Resource Exploration and Exploitation;*

*Jurisdiction;*

*United Nations Convention on the Law of the Sea; Jurisdiction under International Law;*

*Freedom of Navigation;*

*Direct Action Protest;*

*New Zealand Bill of Rights Act 1990;*

*Freedom of Expression;*

*Freedom of Peaceful Assembly.*

*The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 14,965 words.*

## ***Table of Contents***

<b>I</b>	<b>INTRODUCTION</b> .....	<b>4</b>
<b>II</b>	<b>FUNDAMENTAL CONCEPTS AND CONTEXT</b> .....	<b>5</b>
	A MARITIME ZONES AND THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA .....	5
	B PETROLEUM, MINERALS AND THE NEW ZEALAND ECONOMY .....	6
	C POLICE V TEDDY, DIRECT ACTION PROTEST AND THE COST OF INTERFERENCE.....	7
	D THE PURPOSE OF THE NEW OFFENCES .....	9
<b>III</b>	<b>THE CROWN MINERALS AMENDMENT ACT 2013</b> .....	<b>10</b>
	A INTENTIONAL DAMAGE OR INTERFERENCE WITH STRUCTURES OR OPERATIONS .....	10
	B ENTRY INTO A SPECIFIED NON-INTERFERENCE ZONE.....	12
	C ENFORCEMENT MEASURES.....	13
<b>IV</b>	<b>DOES THE AMENDMENT ACT EXCEED NEW ZEALAND’S JURISDICTIONAL COMPETENCE AT INTERNATIONAL LAW?</b> .....	<b>14</b>
	A JURISDICTION AT INTERNATIONAL LAW .....	15
	B NEW ZEALAND’S JURISDICTION WITHIN THE TERRITORIAL SEA .....	16
	C NEW ZEALAND’S JURISDICTION BEYOND THE TERRITORIAL SEA .....	18
	1 <i>New Zealand Vessels and the Principle of Nationality</i> .....	18
	2 <i>Foreign Vessels and UNCLOS</i> .....	18
	D CONCLUSION IN RESPECT OF JURISDICTION UNDER INTERNATIONAL LAW .....	28
<b>V</b>	<b>IS THE AMENDMENT ACT CONSISTENT WITH THE NEW ZEALAND BILL OF RIGHTS ACT?</b> .....	<b>29</b>
	A THE OFFSHORE APPLICATION OF BORA.....	29
	1 <i>Law of the Sea and Human Rights</i> .....	31
	B ACCOMMODATING THE AQUATIC CONTEXT OF PROTEST AT SEA.....	32
	1 <i>Free Speech and the Public Forum Doctrine</i> .....	32
	2 <i>Categorisation versus Proportionality</i> .....	34
	C A PRIMA FACIE LIMITATION UPON PROTEST RIGHTS .....	34
	D A JUSTIFIED LIMITATION UPON PROTEST RIGHTS .....	39
	1 <i>Sufficiently Important Objective</i> .....	42
	2 <i>Proportionality</i> .....	43
<b>VI</b>	<b>CONCLUSION</b> .....	<b>49</b>
<b>VII</b>	<b>BIBLIOGRAPHY</b> .....	<b>50</b>

## *I Introduction*

Vast untapped oil, natural gas and mineral resources exist off the coast of New Zealand, the exploration and exploitation of which promises economic prosperity. However, deep-set environmentalist opposition to the exploitation of such resources has led to significant protest action both within New Zealand and across the world. Asserting the freedoms of expression and peaceful assembly, protest groups such as Greenpeace have taken to the seas in an effort to raise awareness and physically obstruct the exploitation of these resources.

In New Zealand, the conflict between offshore exploration and exploitation of natural resources and obstructive protest action has motivated the Hon Simon Bridges to introduce two new classes of criminal conduct. By virtue of Supplementary Order Paper 205, the Crown Minerals Amendment Act 2013 (Amendment Act) criminalises both interference with a structure or operation in an offshore area and the entry into a specified non-interference zone established around a structure or ship engaged in the exploration or exploitation of offshore oil, gas or mineral resources.<sup>1</sup> These offences have provoked controversy as they expressly apply extraterritorially, to both New Zealand and foreign vessels, and interfere with the fundamental rights to freedom of navigation and peaceful protest.<sup>2</sup>

This paper examines the controversial elements of the new offences in order to advance two central propositions. The first proposition is that the prescription and enforcement of the offences introduced by the Amendment Act are within the jurisdiction accorded to New Zealand under international law. The second proposition is that the offences are consistent with the New Zealand Bill of Rights Act 1990.

Part II of this paper will first explain the factual context of the Amendment Act and important foundational concepts in the law of the sea before moving to Part III which introduces the criminal offences established under the Amendment Act. Part IV will then advance the position that the Amendment Act does not exceed New Zealand's jurisdiction under international law. The governing principle is that jurisdiction is primarily territorial and therefore this part distinguishes between jurisdiction within the

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<sup>1</sup> Crown Minerals Amendment Act 2013, s 55.

<sup>2</sup> See for example Greenpeace "Defend the Right to Peaceful Protest at Sea: Reject the Anadarko Amendment" <[www.greenpeace.org](http://www.greenpeace.org)>; (16 April 2013) 689 NZPD 9358. The Process by which the offences became law has also been subject to critique: Green Party "Govt abuses urgency to extend Anadarko Amendment" (press release, 17 May 2013).

territorial sea and jurisdiction beyond the territorial sea. The most contentious issue in Part IV is whether the United Nations Convention on the Law of the Sea accords New Zealand the jurisdiction to enact the new offences, and enforce those offences, beyond the territorial sea with respect to foreign protest vessels. This paper argues that it does confer this jurisdiction because the offences introduced in the Amendment Act are a reasonable exercise of coastal state rights to explore and exploit the resources in the continental shelf and are a justified limitation upon freedom of navigation. Part V then turns to the tension between the offences and protest rights. The offences restrict protestors' freedom of expression, peaceful assembly, and – within the territorial sea – freedom of movement. However, this paper argues that these restrictions are justified in a free and democratic society, in accordance with s 5 of the New Zealand Bill of Rights Act.

## *II Fundamental Concepts and Context*

### *A Maritime Zones and the United Nations Convention on the Law of the Sea*

The 1982 United Nations Convention on the Law of the Sea (UNCLOS)<sup>3</sup> has been described as a “constitution” for the oceans<sup>4</sup> and governs contemporary law of the sea.<sup>5</sup> The provisions of UNCLOS will inform the assessment of New Zealand’s jurisdiction under international law. At this preliminary stage, however, it is important to introduce the concepts of coastal states, flag states and maritime zones, as these concepts are fundamental to the framework set out in UNCLOS.

The coastal state is the state whose territory is adjacent to the relevant area of the ocean. For present purposes, the coastal state is New Zealand. A flag state is the state which has granted a ship the right to sail under its flag.<sup>6</sup> Within New Zealand, a foreign ship is any ship that is not, and is not entitled to be, registered under the Ship Registration Act 1992.<sup>7</sup> The rights and obligations accorded to coastal state and flag states under UNCLOS differ between the various maritime zones.

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<sup>3</sup> United Nations Convention on the Law of the Sea 1833 UNTS 397 (opened for signature 10 December 1982, entered into force 16 November 1994) [UNCLOS].

<sup>4</sup> Tommy TB Koh, President of the Third United Nations Conference on the Law of the Sea “A Constitution for the Oceans” (6 and 11 December 1982) *Oceans and Law of the Sea: United Nations* <[www.un.org](http://www.un.org)>.

<sup>5</sup> Malcolm D Evans “The Law of the Sea” in Malcolm D Evans (ed) *International Law* (3rd ed, Oxford University Press, Oxford, 2010) 651 at 653.

<sup>6</sup> Robin R Churchill and Alan V Lowe *The Law of the Sea* (3rd ed, Manchester University Press, Manchester, 1999) at 211.

<sup>7</sup> Maritime Transport Act 1994, s 2(1).

The relevant zones for the purposes of this paper are the territorial sea, the exclusive economic zone (EEZ), and the continental shelf. The territorial sea is the area of sea directly adjacent to the land. It extends 12 nautical miles from the baseline, which is drawn at the intersection of the shore and the Lowest Astronomical Tide.<sup>8</sup> The EEZ is the area of water beyond and adjacent to the territorial sea that extends 200 nautical miles from the baseline.<sup>9</sup> The area of New Zealand's EEZ is four million square kilometres.<sup>10</sup> The continental shelf comprises the seabed and subsoil of the submerged prolongation of the land mass of the coastal state beyond the territorial sea to the outer edge of the continental margin.<sup>11</sup> The area of New Zealand's continental shelf that extends beyond the EEZ is 1.7 million square kilometres.<sup>12</sup>

### ***B Petroleum, Minerals and the New Zealand Economy***

As the Amendment Act restricts protest against the prospecting, exploration and mining of offshore resources, a brief introduction to such activities is now provided. There are three stages in the exploitation of offshore petroleum and mineral resources. First, prospecting activities are “undertaken for the purpose of identifying land likely to contain mineral deposits or occurrences” and may include seismic surveys.<sup>13</sup> Exploration activities are then “undertaken for the purpose of identifying mineral deposits or occurrences and evaluating the feasibility of mining particular deposits or occurrences” and may include drilling, dredging or excavation.<sup>14</sup> If feasible, mining activities follow. This may include the development of necessary production facilities and well drilling for the purposes of extraction.<sup>15</sup> In order to undertake these activities, a permit must be obtained from the Minister of Energy under s 25 of the Crown Minerals Act 1991.

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<sup>8</sup> UNCLOS, arts 3–6; Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977, ss 3, 5, 6 and 6A. Section 2 identifies that 1 nautical mile is equal to 1.852 kilometers.

<sup>9</sup> UNCLOS, art 57; Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act, s 9.

<sup>10</sup> Ministry for the Environment *Managing Our Oceans: A Discussion Document on the Regulations Imposed under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill* (ME 1090, May 2012) at vii.

<sup>11</sup> UNCLOS, art 76; Continental Shelf Act 1964, s 2(1). Note that if the outer edge of the continental margin does not extend 200 nautical miles from the baseline, then the coastal state is entitled to a continental shelf of 200 nautical miles.

<sup>12</sup> Helen Clark “UN recognises NZ’s extended seabed rights” (press release, 22 September 2008); *Recommendations of the Commission on the Limits of the Continental Shelf in regard to the Submission made by New Zealand 19 April 2006* (CLCS 54, 2008).

<sup>13</sup> Crown Minerals Act 1991, s 2(1).

<sup>14</sup> Crown Minerals Act, s 2(1).

<sup>15</sup> Crown Minerals Act, s 2(1); *New Zealand Petroleum and Minerals Guide to Government Management of Petroleum* (Ministry of Business, Innovation and Employment, 2013) at 2.

Additionally, marine consents are required from the Environmental Protection Authority for activities, such as exploratory drilling, that are not permitted in the Regulations under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.<sup>16</sup> The first application for a prospecting permit extending beyond New Zealand's EEZ to the limits of the outer continental shelf was submitted to the Minister for Energy on the 6 May 2013.<sup>17</sup>

Currently, New Zealand's only petroleum producing fields are within the Taranaki Basin. In particular, the Maari and Pohokura offshore oil fields dominate oil production and produced over 53 per cent of New Zealand's oil in 2012.<sup>18</sup> New Zealand's other deep water basins are underexplored, yet the Government considers there is significant potential for commercial hydrocarbon discoveries.<sup>19</sup> To this end, the Government's Business Growth Agenda seeks to "encourage a more positive environment for international investment" in order to realise the full economic potential of the resources.<sup>20</sup> As the Ministry of Business, Innovation and Employment (MBIE) reported on 4 September 2013, the petroleum and minerals sector is the most productive in New Zealand's economy.<sup>21</sup> Petroleum and minerals exports have tripled since 2002 and, with the exclusion of coal, were worth \$2,797 million in 2012.<sup>22</sup>

### ***C Police v Teddy, Direct Action Protest and the Cost of Interference***

Organisations such as Greenpeace have taken to the oceans to protest against the increasing exploration and exploitation of offshore minerals and resources. In New Zealand, the most significant recent offshore protest was carried out by Greenpeace and East Cape iwi in April 2011. During this protest, Mr Teddy sailed the fishing vessel *San Pietro* within 20 metres of the bow of the *Orient Explorer*. This occurred outside of New Zealand's territorial sea, but within the EEZ. The *Orient Explorer* was conducting a seismic survey of the Raukumara Basin off the East Coast, on behalf of Petrobras, a

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<sup>16</sup> *Guide to Government Management of Petroleum*, above n 15, at 2.

<sup>17</sup> "Recent Applications Received and Granted: Petroleum" (6 May 2013) NZ Petroleum and Minerals <[www.nzpam.govt.nz](http://www.nzpam.govt.nz)>; "Map of Active New Zealand Petroleum Permits" NZ Petroleum and Minerals <[www.nzpam.govt.nz](http://www.nzpam.govt.nz)>.

<sup>18</sup> Ministry of Business, Innovation and Employment *New Zealand Sectors Report 2013: Petroleum and Minerals* (4 September 2013) at 79 [*Sectors Report 2013*].

<sup>19</sup> *Sectors Report 2013*, above n 18, at 23.

<sup>20</sup> At 10–11, 20 and 79.

<sup>21</sup> At 10.

<sup>22</sup> At 10.

Brazilian oil and gas exploration company.<sup>23</sup> These protests form the factual matrix of the High Court decision *Police v Teddy*.<sup>24</sup>

Mr Teddy was charged and convicted under s 65(1)(a) of the Maritime Transport Act 1994 with the offence of operating a ship in a manner that causes unnecessary danger or risk to any other person. Although the High Court held that the presumption against the extraterritorial application of New Zealand law was rebutted, conviction rested upon the fact that *San Pietro* was a New Zealand vessel. The Court recognised that the same action could not have been taken against a person on board a foreign vessel. The protests from which *Police v Teddy* stemmed highlighted for Cabinet the “need for a clearer legal framework and policing and other enforcement powers” applicable with respect to both New Zealand and foreign vessels.<sup>25</sup>

Teddy’s protest was an example of non-violent direct action protest. The phrase ‘direct action’ describes protest that has the purpose of physically obstructing the activity protested against. It may be violent or non-violent.<sup>26</sup> Violent direct action tactics, such as severely damaging or ramming ships, have been used in the past by Sea Shepherd against ships engaged in whaling.<sup>27</sup> Non-violent direct action protests tend to employ passive human shield tactics.<sup>28</sup> This can include navigating high speed protest boats, or placing swimmers, directly in the path of danger.<sup>29</sup> A recent example of such tactics occurred on 22 September 2013 when 50 protestors jumped into the Giudecca Canal in Venice to obstruct the passage of cruise ships leaving port.<sup>30</sup>

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<sup>23</sup> Ministry of Economic Development *Petroleum Exploration Permit 52707* (1 June 2010); “Brazilian oil giant Petrobras dumps NZ exploration permits” New Zealand Herald (online ed, New Zealand, 4 December 2012).

<sup>24</sup> *Police v Teddy* [2013] NZHC 432, [2013] NZAR 299, at [1]–[2].

<sup>25</sup> Cabinet Business Committee “Protection of offshore petroleum and mineral activity from unlawful interference” at [8] and [24] (Obtained under Official Information Act 1982 Request to the Ministry of Business, Innovation and Employment).

<sup>26</sup> Helen Fenwick and Gavin Phillipson “Direct Action, Convention Values and the Human Rights Act” (2001) 21 LS 535 at 540–541.

<sup>27</sup> Glen Plant “International Law and Direct Action Protests at Sea: Twenty Years On” (2002) 33 NYIL 75 at 80.

<sup>28</sup> Plant, above n 27, at 97.

<sup>29</sup> See for example Plant, above n 27, at 97–98; Ron Smith “Terrorism, Protest and the Law: In a Maritime Context” (2008–2009) 11–12 YN NZ Juris 61 at 64.

<sup>30</sup> Tom Kington “Protestors dive into Venice canal to block cruise ships” (22 September 2013) The Telegraph <[www.telegraph.co.uk](http://www.telegraph.co.uk)>.

Non-violent direct action can be contrasted with communicative protest, which has only an incidental effect upon the activity protested against.<sup>31</sup> However, most protests at sea take the form of direct action because of the considerable costs and resources involved in orchestrating such protest.<sup>32</sup> If purely communicative protest does occur, it will normally occur in tandem with direct action. For example, in *Drieman and Others v Norway* a Greenpeace protest vessel shadowed the *Senet*, a Norwegian whaling ship, for a month before repeatedly positioning themselves in front of her bow and thereby forcing her to alter course.<sup>33</sup>

Non-violent direct action protest at sea can impose significant costs upon companies engaged in prospecting, exploration or mining activities if they are forced to veer off course or postpone their operations.<sup>34</sup> Vessels engaged in seismic surveying, for example, cannot stop immediately and, if faced with human shield protest tactics, would necessarily need to veer off course to avoid endangering life.<sup>35</sup> Non-violent direct action also gives rise to safety concerns for both the protestors and the workers on board the target vessel or structure.<sup>36</sup>

#### ***D The Purpose of the New Offences***

The impetus for the new offences was a combination of the recognition of the deleterious effects of direct action protest at sea and requests from the oil and gas industry for “a more robust government response to threats of, and actual, direct protest action”.<sup>37</sup> Cabinet was concerned that the status quo, limited in its application to New Zealand vessels, could damage “New Zealand’s reputation for having a predictable and stable investment environment” and may “discourage petroleum and mineral exploration companies” from investing in New Zealand.<sup>38</sup> Section 6 of the Amendment Act provides that its purpose is “to promote prospecting for, exploration for, and mining of, Crown-

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<sup>31</sup> Fenwick and Phillipson, above n 26, at 540–541.

<sup>32</sup> Plant, above n 27, at 99.

<sup>33</sup> *Drieman and Others v Norway* (33678/96) Third Section, ECHR 4 May 2000.

<sup>34</sup> Ministry of Business, Innovation and Employment *Regulatory Impact Statement: Protection of offshore petroleum and mineral activity from unlawful interference* (15 April 2013) at 15.

<sup>35</sup> Plant, above n 27, at 99.

<sup>36</sup> Cabinet Business Committee, above n 25, at [3] and [20].

<sup>37</sup> Cabinet Legislation Committee “Protection of offshore petroleum and mineral activity from unlawful interference – Supplementary Order Paper to Crown Minerals (Permitting and Crown Land) Bill” (18 March 2013) at [10] (Obtained under Official Information Act 1982 Request to the Ministry of Business, Innovation and Employment).

<sup>38</sup> “SOP – 205 Protection from Interference” at 1 (Obtained under Official Information Act 1982 Request to the Ministry of Business, Innovation and Employment); *Regulatory Impact Statement*, above n 34, at [12].

owned minerals for the benefit of New Zealand.” The new offences align with that purpose by providing “permit holders with assurance that they will be able to undertake lawful activities.”<sup>39</sup> Cabinet considered that such assurance was a necessary part of “establishing a predictable investment climate without avoidable risks.”<sup>40</sup> These risks were the costs discussed above: to companies, the environment and the safety of protestors and workers. In order to achieve this assurance, Cabinet introduced the offences to provide an “effective and clear deterrent” and “readily workable operation powers” in order to prohibit “unlawful interference with legitimate exploration and production activities in [the] EEZ from individuals and from vessels, whether New Zealand or foreign-flagged.”<sup>41</sup>

### *III The Crown Minerals Amendment Act 2013*

The factors canvassed above motivated the Hon Simon Bridges to introduce Supplementary Order Paper 205 to the Committee of the Whole House during their consideration of the Crown Minerals (Permitting and Crown Land) Bill.<sup>42</sup> The Supplementary Order Paper inserted cl 46A, which later became s 55A of the Amendment Act. Section 55A inserted ss 101A, 101B and 101C into the Crown Minerals Act 1991. These sections create two classes of criminal conduct, prescribe penalties for such conduct, and confer enforcement powers in respect of the offences. The detail of the two classes of criminal conduct will now be set out in order to ground the analysis of jurisdiction under international law and consistency with the New Zealand Bill of Rights Act.

#### *A Intentional Damage or Interference with Structures or Operations*

Section 101B(1) criminalises intentional conduct by any person that results in:

- (a) damage to, or interference with, any structure or ship that is in an offshore area and that is, or is to be, used in mining operations or for the processing, storing, preparing for transporting, or transporting of minerals; or
- (b) damage to, or interference with, any equipment on, or attached to, such a structure or ship; or

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<sup>39</sup> “SOP – 205 Protection from Interference”, above n 38, at 1.

<sup>40</sup> Cabinet Business Committee, above n 25, at [3].

<sup>41</sup> Cabinet Business Committee, above n 25, at [24]; *Regulatory Impact Statement*, above n 34, at [30].

<sup>42</sup> Supplementary Order Paper 2013 (205) Crown Minerals (Permitting and Crown Land) Bill (70–2).

- (c) interference with any operations or activities being carried out, or any works being executed, on, by means of, or in connection with such a structure or ship.

The offence requires that the accused person intended their conduct; they need not have intended the consequences of their conduct. Yet, it is the consequences of their conduct that determines whether the offence is committed. Thus, the offence is committed if the conduct results in “damage or interference”. The legislation does not define these terms. The damage or interference must be to a structure or ship “used in mining operations or for the processing, storing, preparing for transporting, or transporting of minerals.” This is very broad. “Mining operations” is defined to mean, among other things, “operations in connection with mining, exploring, or prospecting for any Crown owned mineral”.<sup>43</sup>

There is a further requirement that the ship or structure is in an “offshore area”. When the Amendment Bill was proposed, “offshore area” was defined to mean “any area within the territorial sea or EEZ that is on or above the continental shelf.”<sup>44</sup> In effect, this definition limited the application of these offences to the territorial sea and the EEZ. However, this definition was amended by s 14 of the Crown Minerals Amendment Act Amendment Act 2013 before the original Amendment Act came into force. “Offshore area” now means any area that is:<sup>45</sup>

- (a) within the territorial sea; or
- (b) within the EEZ; or
- (c) on or above the continental shelf.

By replacing the words “that is” with the word “or” this amendment extends the application of the offences to the area of the sea beyond the EEZ but above the continental shelf, an additional 1.7 million square kilometres.<sup>46</sup>

The penalty for offending against s 101B(1) is significant. In the case of an individual, the maximum penalty is “imprisonment for a term not exceeding 12 months” or “a fine not exceeding \$50,000.” In the case of a body corporate, such as Greenpeace, the maximum penalty is “a fine not exceeding \$100,000”.<sup>47</sup>

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<sup>43</sup> Crown Minerals Act, s 2(1).

<sup>44</sup> Crown Minerals Amendment Bill 2012 (70-3A), cl 46A.

<sup>45</sup> Crown Minerals Act, s 101A.

<sup>46</sup> Clark, above n 12.

<sup>47</sup> Section 101B(4).

## ***B Entry into a Specified Non-interference Zone***

The second class of conduct criminalised under the Amendment Act is that of entering into a specified non-interference zone. Thus, s 101B(2) stipulates that a person commits an offence if:

- (a) the person is the master of a ship that, without reasonable excuse, enters a specified non-interference zone for a permitted prospecting, exploration, or mining activity; or
- (b) the person leaves a ship and, without reasonable excuse, enters a specified non-interference zone for a permitted prospecting, exploration, or mining activity.

In contrast to the offences under s 101B(1), this is a strict liability offence.<sup>48</sup> It is not necessary that the offender intends to enter into the specified non-interference zone, provided that they do enter without a reasonable excuse.

The Chief Executive of MBIE may specify a non-interference zone by notice published in the fortnightly edition of the *New Zealand Notices to Mariners*.<sup>49</sup> The *New Zealand Notices to Mariners* is a globally recognised circular that informs “mariners of important matters affecting navigational safety” and is “the authority for correcting nautical charts.”<sup>50</sup> The published notice must specify:<sup>51</sup>

- (a) the permitted prospecting, mining, or exploration activity to which the non-interference zone relates; and
- (b) the locality of the activity; and
- (c) the area of the non-interference zone to which the activity relates (which may be up to 500 metres from any point on the outer edge of the structure or ship to which the activity relates or, if there is any equipment attached to the structure or ship, 500 metres from any point on the outer edge of the equipment); and
- (d) the period (which may be up to 3 months) for which the notice has effect.

Paragraph (c) provides that the maximum radius of the non-interference zone is 500 metres. In determining the radius, the Chief Executive must “take into account the nature

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<sup>48</sup> Supplementary Order Paper, above n 42, (explanatory note).

<sup>49</sup> Section 101B(6).

<sup>50</sup> Land Information New Zealand “Notices to Mariners” <[www.linz.co.nz](http://www.linz.co.nz)>; International Maritime Organisation *Safety Zones and Safety of Navigation Around Offshore Installations and Structures A/Res/671/16* (1989) at 289.

<sup>51</sup> Crown Minerals Act, s 101B(7).

of the activity, including the size of any structure or ship to which the activity relates and any equipment attached to the structure or ship necessary for the carrying out of the activity.”<sup>52</sup>

There are three important parallels between s 101B(1) and 101B(2). First, both provisions can be applied to protect either a ship or a structure. Second, both offences apply to conduct in an “offshore area” as defined above.<sup>53</sup> Third, both provisions apply in relation to permitted prospecting, exploration or mining activities. However, a person who commits an offence against subs 101B(2) is liable on summary conviction to a lesser fine “not exceeding \$10,000.”<sup>54</sup>

To date, notice of one specified non-interference zone has been given. It applies to the:<sup>55</sup>

- a) anchoring of the semi-submersible rig, the *Kan Tan IV*, to the seabed;
- b) drilling and well testing operations undertaken by *Kan Tan IV*; and
- c) the recovery of the anchors, on completion of the activities in (b).

These activities are to occur within an area 1.6 by 1.8 nautical miles (2.96 by 3.33 kilometres) within the EEZ off the Taranaki coast. The radius of the non-interference zone was set at 500 metres from the outer edge of the *Khan Tan IV*, a semi-submersible drilling rig, or any ship or equipment involved with the activities set out above. The *Notice to Mariners* identifies that two ships, the *Skandi Pacific* and the *Skandi Emerald*, will support the *Khan Tan IV*.<sup>56</sup>

### ***C Enforcement Measures***

The offences set out in s 101B may be enforced by every constable and every person acting under the command of, or commanding, a ship of the New Zealand Defence Force.<sup>57</sup> The powers accorded to enforcement officers are broad. Every enforcement

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<sup>52</sup> Section 101B(8).

<sup>53</sup> Ministry of Business, Innovation and Employment “16A: Non Interference Zones Around Petroleum and Mineral Exploration and Production Activities” in *Annual New Zealand Notices to Mariners – New Zealand Nautical Almanac* (2013–2014) at 256.

<sup>54</sup> Crown Minerals Act, s 101B(5).

<sup>55</sup> Ministry of Business, Innovation and Employment “NZ 179T/13” ed 17 *New Zealand Notices to Mariners* (16 August 2013) Land Information New Zealand <[www.linz.govt.nz](http://www.linz.govt.nz)> at 13.

<sup>56</sup> At 13. For vessel details see Marine Traffic “*Kan Tan IV*” (9 September 2013) <[www.marinetraffic.com](http://www.marinetraffic.com)>; Marine Traffic “*Skandi Pacific*” (9 September 2013) <[www.marinetraffic.com](http://www.marinetraffic.com)>; Marine Traffic “*Skandi Emerald*” (9 September 2013) <[www.marinetraffic.com](http://www.marinetraffic.com)>.

<sup>57</sup> Section 101C(6).

officer who has reasonable cause to suspect a person has, is, or is attempting to commit an offence against 101B, may:<sup>58</sup>

- (a) stop a ship within a specified non-interference zone and detain the ship;
- (b) remove any person or ship from a specified non-interference zone;
- (c) prevent any person or ship from entering a specified non-interference zone;
- (d) board a ship (whether within a specified non-interference zone or otherwise), give directions to the person appearing to be in charge, and require the person to give his or her name and address;
- (e) without warrant, arrest a person.

There is, however, a restriction placed upon enforcement in respect of foreign ships. In accordance with subs 101B(9):

No proceedings for an offence against this section may be brought in a New Zealand court in respect of a contravention of this section on board, or by a person leaving, a foreign ship without the consent of the Attorney-General.

#### *IV Does the Amendment Act Exceed New Zealand's Jurisdictional Competence at International Law?*

Part IV will now advance the proposition that the offences in the Amendment Act are within New Zealand's jurisdictional competence. This issue arises because the Amendment Act expressly purports to apply to foreign vessels, and to "offshore areas" outside of New Zealand's territory. There is no question that the offences are consistent with New Zealand's jurisdiction as a matter of national law. By virtue of s 15(1) of the Constitution Act 1986, Parliament has "full power to make laws," including those with extraterritorial effect.<sup>59</sup> Although legislation is presumed to not apply extraterritorially,<sup>60</sup> the Amendment Act overcomes this by virtue of the definition of "offshore area" in s 101A. In order to argue that the Amendment Act is also consistent with New Zealand's jurisdiction under international law, this paper will now introduce the concept of jurisdiction at international law.

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<sup>58</sup> Section 101C(1).

<sup>59</sup> *Laws of New Zealand Human Rights* (online ed) at [39].

<sup>60</sup> *Poynter v Commerce Commission* [2010] NZSC 38; [2010] 3 NZLR 300 at [36].

## *A Jurisdiction at International Law*

Jurisdiction is an aspect of state sovereignty. It can be understood as “the power of the state under international law to regulate or otherwise impact upon people.”<sup>61</sup> International law determines the permissible extent of state jurisdiction.<sup>62</sup> A distinction is drawn between prescriptive and enforcement jurisdiction. Prescriptive jurisdiction relates to the capacity to make law whereas enforcement jurisdiction relates to the capacity to ensure compliance with that law, either via executive or judicial action.<sup>63</sup> Enforcement jurisdiction does not necessarily correspond with prescriptive jurisdiction.<sup>64</sup>

The question of state jurisdiction under international law came before the Permanent Court of International Justice in *S S Lotus*. With respect to enforcement jurisdiction, the Court ruled:<sup>65</sup>

the first and foremost restriction imposed by international law upon a State is that – failing the exercise of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another state. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.

In this statement the Court confirms the territorial principle of jurisdiction: that international law accords both enforcement and prescriptive jurisdiction to states within their territory.<sup>66</sup> The Court also endorses the corollary of this principle: in the absence of a permissive rule of international law, a state does not have extraterritorial jurisdiction. Although the Court’s statement related to enforcement jurisdiction, state practice confirms that a state asserting novel extraterritorial prescriptive jurisdiction must prove that it is entitled to do so.<sup>67</sup> Thus, extraterritorial prescriptive jurisdiction also depends upon some specific basis in international law.<sup>68</sup> The extraterritorial limitation upon

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<sup>61</sup> Malcolm N Shaw *International Law* (6th ed, Cambridge University Press, Cambridge, 2008) at 645; James Crawford *Brownlie’s Principles of Public International Law* (8th ed, Oxford University Press, Oxford, 2012) at 456.

<sup>62</sup> Robert Jennings and Arthur Watts *Oppenheim’s International Law* (9th ed, Longman, London, 1992) vol I at 456.

<sup>63</sup> Shaw, above n 61, at 645–646; Crawford, above n 61, at 456.

<sup>64</sup> Alan V Lowe and Christopher Staker “Jurisdiction” in Malcolm D Evans *International Law* (3rd ed, Oxford University Press, Oxford, 2010) 313 at 332.

<sup>65</sup> *S S Lotus (France v Turkey)* (1927) PCIJ (series A) No 10 at [45].

<sup>66</sup> Crawford, above n 61, at 458–459.

<sup>67</sup> Lowe and Staker, above n 64, at 319–320.

<sup>68</sup> Crawford, above n 61, at 458.

jurisdiction is conveyed by the Court in two slightly different terms. The first prohibits the exercise of jurisdiction in another state's territory. The second prohibits the exercise of jurisdiction outside of a state's own territory. Although these propositions reflect the same principle, they differ as there are areas outside the territory of a state that do not fall within the territory of another state.<sup>69</sup> It is these very areas, governed by the law of the sea, with which this paper is concerned.

The following analysis will be structured to reflect the centrality of the territorial principle of jurisdiction. This paper will first establish that, to the extent the offences apply over the territorial sea, they are within New Zealand's jurisdiction. It will then argue that the prescription and enforcement of the offences beyond the territorial sea also falls within New Zealand's jurisdiction at international law.

### ***B New Zealand's Jurisdiction within the Territorial Sea***

The territorial principle of jurisdiction provides that a sovereign state is entitled to complete prescriptive and enforcement jurisdiction within its territory.<sup>70</sup> A state's territory is the defined portion of the globe subject to that state's sovereignty.<sup>71</sup> Article 2 of UNCLOS confirms that coastal state sovereignty extends beyond its land territory to the territorial sea.<sup>72</sup> Thus, New Zealand has both prescriptive and enforcement jurisdiction over all vessels within its territorial sea. This includes both New Zealand and foreign vessels. However, this jurisdiction is qualified by the provisions in UNCLOS relating to the territorial sea.<sup>73</sup> This qualification does not undermine New Zealand's absolute prescriptive and enforcement jurisdiction in the territorial sea over New Zealand vessels. The effect of this qualification is that New Zealand's jurisdiction over foreign vessels is subject to the provisions within UNCLOS concerning the right of innocent passage.<sup>74</sup>

Article 17 of UNCLOS provides that "ships of all States ... enjoy the right of innocent passage through the territorial sea." A vessel is considered to be in passage if its

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<sup>69</sup> Lowe and Staker, above n 64, at 335.

<sup>70</sup> Antonio Cassese *International Law* (2nd ed, Oxford University Press, Oxford, 2005) at 49.

<sup>71</sup> Jennings and Watts, above n 62, at 563; Shaw, above n 61, at 489.

<sup>72</sup> UNCLOS, art 2(1); Daniel P O'Connell *The International Law of the Sea* (Clarendon Press, Oxford, 1982) vol 1 at 60–67; John H Currie, Craig Forcese and Valerie Oosterveld *International Law: Doctrine, Practice and Theory* (Irwin Law, Ontario, 2007) at 364; Shaw, above n 61, at 570.

<sup>73</sup> UNCLOS, art 2(3); Crawford, above n 61, at 256.

<sup>74</sup> Thomas Dux *Specially Protected Marine Areas in the Exclusive Economic Zone (EEZ)* (Lit Verlag, Berlin, 2011) at 124, n 825; Crawford, above n 61, at 256.

navigation through the territorial sea is “continuous and expeditious.”<sup>75</sup> Foreign protest vessels engaged in non-violent human shield direct action protest tactics are not in “passage” as their navigation through the territorial sea is neither continuous nor expeditious. Moreover, interference with any installation of the coastal state is deemed to be “prejudicial to the peace, good order and security of the coastal State” and, therefore, to be non-innocent.<sup>76</sup> Thus their passage would not be innocent if the subject of the direct action protest was a structure or installation. Due to its sovereignty over the territorial sea New Zealand has unqualified prescriptive and enforcement jurisdiction over vessels not exercising their right to innocent passage.<sup>77</sup> The right to exercise enforcement jurisdiction over foreign vessels in these circumstances is expressly recognised by art 25 of UNCLOS which permits coastal states to take “necessary steps” to “prevent passage which is not innocent.”<sup>78</sup>

Not all foreign vessels potentially affected by the Amendment Act will be conducting non-violent direct action protest. Foreign vessels conducting purely communicative protests may be in continuous and expeditious navigation and may thereby be exercising their right of innocent passage. Additionally, foreign vessels that are not protesting, but that nevertheless enter into the specified non-interference zones, would be exercising their right to innocent passage. New Zealand is not entitled to hamper innocent passage “except in accordance with [the] Convention”.<sup>79</sup> Relevantly, UNCLOS permits a coastal state to adopt, and requires foreign vessels to adhere to laws and regulations relating to:<sup>80</sup>

- (a) the safety of navigation and the regulation of maritime traffic;
- (b) the protection of navigational aids and facilities and other facilities or installations.

This provision confers upon New Zealand prescriptive and enforcement jurisdiction over innocent passage in the subject matters of navigational safety and the protection of facilities or installations. Although the primary objective of the offences in the Amendment Act is to deter interference with prospecting, exploration and mining activity, both offences do relate to the safety of navigation and the protection of structures and installations. Therefore, to the extent the offences hamper innocent passage, they do

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<sup>75</sup> Article 18(2). A vessel in passage may only stop for limited purposes, none of which are relevant to direct action protest.

<sup>76</sup> Articles 19(1) and 19(2)(k).

<sup>77</sup> See Churchill and Lowe, above n 6, at 75 and 86.

<sup>78</sup> Article 25(1).

<sup>79</sup> Article 24(1).

<sup>80</sup> Article 21.

so in accordance with UNCLOS. It follows that the prescription and enforcement of those provisions with respect to foreign vessels in the territorial sea is within New Zealand's jurisdictional competence under international law.

### *C New Zealand's Jurisdiction beyond the Territorial Sea*

As discussed, the exercise of prescriptive or enforcement jurisdiction over conduct occurring beyond the territorial sea will only comply with international law if it is based upon a permissive rule of international law. With respect to New Zealand vessels, the relevant permissive rule is the principle of nationality. With respect to foreign vessels, the permissive rules are to be found in the legal regime created by UNCLOS.

#### *1 New Zealand Vessels and the Principle of Nationality*

The nationality principle of jurisdiction provides that a state can exercise prescriptive jurisdiction over nationals of that state, regardless of where they are.<sup>81</sup> This is relevant because, by virtue of art 91(1) of UNCLOS, "ships have the nationality of the State whose flag they are entitled to fly." Consequently, New Zealand is entitled to extend the application of the Amendment Act to New Zealand vessels both within and beyond the territorial sea. New Zealand vessels are also subject to New Zealand's enforcement jurisdiction whilst on the high seas or within New Zealand's territorial sea or EEZ.<sup>82</sup>

#### *2 Foreign Vessels and UNCLOS*

The position with respect to foreign vessels beyond the territorial sea requires deeper analysis. This paper will argue that UNCLOS grants New Zealand the requisite prescriptive and enforcement jurisdiction under international law. However, before addressing the particular machinery of UNCLOS, it is important to understand that UNCLOS itself is the result of an extended nine year negotiation which proceeded by consensus.<sup>83</sup> Consequently, the provisions adopted strike a careful compromise between competing interests in an extremely sophisticated manner.<sup>84</sup> The two competing interests that give rise to the controversy surrounding the offences in the Amendment Act are the same two interests that have shaped the historical development of the law of the sea. This tension between the freedom of the high seas and coastal state control of the seas adjacent

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<sup>81</sup> Crawford, above n 61, at 460; Lowe and Staker, above n 64, at 323.

<sup>82</sup> See Evans, above n 5, at 665; Shaw, above n 61, at 673; UNCLOS, art 92(1).

<sup>83</sup> See Barry Buzan "Negotiating by Consensus: Developments in Technique at the United Nations Conference on the Law of the Sea" (1981) 75 AJIL 324.

<sup>84</sup> Evans, above n 5, at 659.

to their coasts has led to defining moments such as the publication of Hugo Grotius' *Mare Liberum* and the Truman Proclamations of jurisdiction and control over the natural resources in the seabed of the continental shelf.<sup>85</sup> As naval forces posed ever graver security threats and technology developed to enable the exploitation of ocean resources, coastal states sought to protect and advance their interests by claiming an extended right to control the waters adjacent to their coast. Such claims were strongly resisted by maritime powers intent upon protecting the freedom of the seas.<sup>86</sup> Bearing in mind the fine balance struck by UNCLOS, this paper will now proceed to argue that the Amendment Act is a reasonable exercise of coastal state rights in the exploitation of resources on the continental shelf.

(a) New Zealand's Prescriptive Jurisdiction over Foreign Vessels

The legal regime of the continental shelf, set out in Part VI of UNCLOS, mediates between coastal state sovereign rights in the exploitation of natural resources on the continental shelf and the freedom of the seas. This regime must guide the present analysis even though the offences in the Amendment Act purport to apply both within the EEZ and in the waters above the continental shelf beyond the EEZ. This is because art 56(3) of UNCLOS provides that coastal state rights with respect to the seabed in the EEZ, as set out in art 56, are to be exercised in accordance with the legal regime governing the continental shelf.

Article 56(1)(a) provides that, within the EEZ, coastal states have "sovereign rights for the purposes of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent<sup>87</sup> to the seabed and of the seabed and its subsoil." Similarly, art 77(1) in Part VI confirms that the coastal state exercises "over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural minerals". The concept of sovereign rights conveys a more limited form of authority than absolute sovereignty.<sup>88</sup> Yet the drafting history of UNCLOS indicates it was not intended that the nature of the coastal state's power be compromised, but that the

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<sup>85</sup> Donald R Rothwell and Tim Stephens *The International Law of the Sea* (Hart Publishing, Oxford, 2010) at 3; Hugo Grotius *The Freedom of the Seas or the Right which Belongs to the Dutch to Take Part in the East Indian Trade* (Oxford University Press, New York, 1633 trans, 1916 rep); Policy of the United States with Respect to the Natural Resources of the Subsoil of the Sea Bed and the Continental Shelf, as reproduced in Alan V Lowe and S Talmon (eds) *The Legal Order of the Oceans: Basic Documents on the Law of the Sea* (Hart Publishing, Oxford, 2009) at 19.

<sup>86</sup> Rothwell and Stephens, above n 85, at 3–14.

<sup>87</sup> The superjacent waters are those waters above the seabed of the continental shelf.

<sup>88</sup> Maria Gavouneli *Functional Jurisdiction in the Law of the Sea* (Martinus Nijhoff Publishers, Leiden, 2007) at 64.

legal separation between the continental shelf and the superjacent waters be emphasised.<sup>89</sup> The effect of arts 56 and 77 is that, with respect to the specific purpose of exploring and exploiting the natural resources in the seabed of the continental shelf, New Zealand is sovereign. UNCLOS also accords particular jurisdiction to coastal states over structures engaged in the exploitation of resources in the EEZ by virtue of arts 56 and 60.<sup>90</sup> The provisions in art 60 are imported *mutatis mutandis*<sup>91</sup> to artificial islands, installations and structures on the continental shelf.<sup>92</sup> The jurisdiction conferred includes jurisdiction with regard to “customs, fiscal, health, safety and immigration laws and regulations.”<sup>93</sup> Discussion during the Third United Nations Conference on the Law of the Sea indicated that jurisdiction was intended to “include criminal jurisdiction with regards to offences committed on or against such installations and structures.”<sup>94</sup>

As the Amendment Act offences serve the purpose of protecting and enhancing the exploration and exploitation of the natural resources in the continental shelf, they are, *prima facie*, within New Zealand’s prescriptive jurisdiction under international law. To the extent that the offences protect installations and structures, as opposed to ships, the prescriptive jurisdiction is also expressly conferred by art 60.<sup>95</sup> However, the jurisdiction conferred upon coastal states is not absolute and is subject, in particular, to two restrictions. Coastal states must, in the exercise of their jurisdiction, have due regard to the freedom of navigation. Moreover, the exercise of their jurisdiction may not unjustifiably interfere with freedom of navigation. This paper will now proceed to argue that the Amendment Act is consistent with these qualifications. This is critical because if the Amendment Act contravenes these restrictions then it exceeds the jurisdiction permitted to New Zealand under international law.

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<sup>89</sup> O’Connell, above n 72, at 477.

<sup>90</sup> Article 56(1)(b)(i) and 60(1)(b).

<sup>91</sup> *Mutatis mutandis* means “with the necessary changes”. There are no relevant changes in relation to the tension between art 60 and the freedom of navigation because that freedom applies within the EEZ as well as in the high seas above the outer continental shelf. See Bryan A Garner (ed) *Black’s Law Dictionary* (9th ed, Thomson Reuters, United States of America, 2009) at 1115.

<sup>92</sup> Article 80.

<sup>93</sup> Article 60(3).

<sup>94</sup> Myron H Nordquist *United Nations Convention on the Law of the Sea 1982: A Commentary* (Martinus Nijhoff Publishers, Boston, 1985) vol 2 at [60.15(d)].

<sup>95</sup> Article 60 concerns structures but not ships: the reference in art 60(3) to the “construction of installations and structures” suggests something permanent and at least semi-fixed, as opposed to mobile. This understanding is supported by state practice. See Oceans Act 1996 SC 1996 c 31, s 20(1); International Maritime Organisation, above n 50, at 288; Tullio Treves “Italy and the Law of the Sea” in Tullio Treves and Laura Pineschi (eds) *The Law of the Sea: The European Union and its Member States* (Martinus Nijhoff Publishers, The Hague, 1997) 327 at 341.

First, the obligation on coastal states to “have due regard to the rights and duties of other States” will be discussed.<sup>96</sup> The right at issue is the freedom of navigation, as this right is exercised by protestors at sea and restricted by non-interference zones specified under the Amendment Act. By virtue of arts 58(1) and 87(1), all states have freedom of navigation within the EEZ and in the waters over the outer continental shelf. Yet vessels exercising their freedom of navigation must also pay due regard to coastal states’ rights over the continental shelf.<sup>97</sup> Such vessels must “comply with all laws and regulations adopted by the coastal State in accordance with” UNCLOS “in so far as they are not incompatible with this Part.”<sup>98</sup> In this sense, freedom of navigation is not to be given a rigid construction nor considered “impervious to reasonable requirements of economic life and scientific progress”.<sup>99</sup>

The standard of “due regard” is not clarified within UNCLOS, however, the drafting history of the due regard obligation in art 87(2) is informative. Article 87(2) was preceded by art 2 of the 1958 Convention on the High Seas. This provision referred to an obligation of “reasonable regard”.<sup>100</sup> The adoption of the term “due” in place of “reasonable” was merely semantic and not intended to change the legal substance of the obligation.<sup>101</sup> The principle of “reasonable regard” was applied by the International Court of Justice in *Fisheries Jurisdiction (United Kingdom v Iceland)*. The Court held that the parties were under mutual obligations to negotiate in good faith towards an equitable solution of their differences, and during that process pay due regard to the interests of other states.”<sup>102</sup> Iceland’s unilateral action disregarded the fishing rights of the United Kingdom, and thus breached the principle. Reasonable regard was considered “an element of the principle of good faith: rights must be exercised reasonably”.<sup>103</sup>

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<sup>96</sup> UNCLOS, art 56(2).

<sup>97</sup> Churchill and Lowe, above n 6, at 206, n 3; O’Connell, above n 72, at 504; UNCLOS, art 87(2).

<sup>98</sup> Article 58(3).

<sup>99</sup> Hersch Lauterpacht “Sovereignty Over Submarine Areas” (1950) 27 BYIL 376 at 403.

<sup>100</sup> Convention on the High Seas 450 UNTS 82 (opened for signature 29 April 1958, entered into force 30 September 1962), art 2.

<sup>101</sup> David Anderson *Modern Law of the Sea: Selected Essays* (Martinus Nijhoff Publishers, Leiden, 2008) at 234; Bernard H Oxman “An Analysis of the Exclusive Economic Zone as Formulated in the Informal Composite Negotiating Text” in Thomas A Clingan (ed) *Law of the Sea: State Practice in Zones of Special Jurisdiction – Proceedings of the Thirteenth Annual Conference of the Law of the Sea Institute 1979* (The Law of the Sea Institute, Hawaii, 1982) 57 at 70; Edward D Brown “The exclusive economic zone: criteria and machinery for the resolution of international conflicts between different users of the EEZ” (1977) 4 *Marit Pol Mgmt* 325 at 339.

<sup>102</sup> *Fisheries Jurisdiction (United Kingdom v Iceland) (Merits)* [1974] ICJ Rep 3 at 23–24 and 34.

<sup>103</sup> Anderson, above n 101, at 234–235.

The standard underlying the reciprocal due regard obligation is therefore one of reasonableness. The exercise of coastal state jurisdiction must be consistent with the reasonable use of the high seas freedoms.<sup>104</sup> The standard of reasonableness is also central to the second limitation upon a coastal state's rights over the resources in the continental shelf. Article 78(2) stipulates that the exercise of a coastal state's sovereign rights over the continental shelf for the purposes of exploring and exploiting its natural resources must not result in "unjustifiable interference with navigation".

An analysis of the compliance of the Amendment Act with these two restrictions may be informed by reference to the considerable safeguards for navigation established in the context of coastal state jurisdiction under art 60.<sup>105</sup> These safeguards are "specific elaborations of the due regard obligation of the coastal state".<sup>106</sup> Violations of these provisions would unjustifiably interfere with the freedom of navigation.<sup>107</sup> Article 60(4) provides that coastal states may establish reasonable safety zones around structures and installations. The safety zones shall be reasonably related to the nature and function of the structures and installations and shall not exceed a distance of 500 metres around them.<sup>108</sup> Moreover, installations and structures and safety zones "may not be established where interference may be caused to the use of recognised sea lanes essential to international navigation".<sup>109</sup>

Insofar as the Amendment Act protects offshore structures and installations, it aligns with the safeguards in art 60. In determining the area of a non-interference zone the Chief Executive of MBIE must take into account the nature of the activity to which it will apply.<sup>110</sup> The maximum area of these zones corresponds to the maximum area permissible under UNCLOS. Moreover, the legislative provisions require due notification of the safety zones established and specification of the locality of the activity in the *New Zealand Notices to Mariners*, which would be accessible to foreign vessels. Taken together with the mental element of the offence of interference, and the defence of reasonable excuse to a charge under subs 101B(2), this illustrates that due regard has been given to navigation rights in the prescription of these offences. Moreover, as the measures accord with the jurisdiction conferred under art 60, the "resulting infringement

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<sup>104</sup> Jennings and Watts, above n 62, 802–803.

<sup>105</sup> See Brown, above n 101, at 334.

<sup>106</sup> Oxman, above n 101, at 75.

<sup>107</sup> At 75.

<sup>108</sup> UNCLOS, art 60(5).

<sup>109</sup> Article 60(7).

<sup>110</sup> Crown Minerals Act, s 101B(8).

upon freedom of navigation may be considered justified.”<sup>111</sup> Therefore the offences, at least insofar as they protect structures and installations, are within New Zealand’s prescriptive jurisdiction.

This paper will now proceed to argue that criminalising conduct carried out against, or in the specified non-interference zone surrounding ships, as compared with structures and installations, also has due regard for, and does not unjustifiably interfere with, freedom of navigation. This argument will be framed by the guidance provided by Joanna Mossop on the various factors to be considered when balancing coastal state rights over the outer continental shelf with the rights of the users of the superjacent waters.<sup>112</sup> Two of the factors identified by Mossop are of particular relevance in these circumstances. The first is the relative importance of the interests affected. The second is the question of whether the interference with freedom of navigation is as minimal as possible in order to achieve the coastal state’s objectives.<sup>113</sup> Another important factor, to be subsumed within Mossop’s first proposed inquiry, is the extent of the interference with the right and the corresponding interest. As recommended, guidelines from relevant international organisation, the International Maritime Organisation, will also be taken into account.<sup>114</sup>

1. Relative importance of the interests affected and the extent of the intrusion on the rights

This factor reflects the opinion of the International Law Commission that the question of whether any particular interference is justified is “one of assessment of the relative importance of the interests involved.”<sup>115</sup> Churchill and Lowe also argue that the due regard obligation necessitates a case by case weighing of the competing interests in all

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<sup>111</sup> Rüdiger Wolfrum “Freedom of Navigation: New Challenges” in Myron H Nordquist, Tommy TB Koh and John N Moore (eds) *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention* (Martinus Nijhoff Publishers, Leiden, 2009) 79 at 85.

<sup>112</sup> Joanna Mossop “Regulating the Uses of Marine Biodiversity on the Outer Continental Shelf” in David Vidas (ed) *Law, Technology and Science for Oceans in Globalisation: IUU Fishing, Oil Pollution, Bioprospecting, Outer Continental Shelf* (Martinus Nijhoff Publishers, Leiden, 2010) 319 at 327.

<sup>113</sup> At 328.

<sup>114</sup> At 328.

<sup>115</sup> Arthur Watts (ed) *The International Law Commission 1949–1998: Volume 1 – The Treaties* (Oxford University Press, Oxford, 1999) at 104.

the circumstances.<sup>116</sup> David Attard agrees that the interests of states must be considered.<sup>117</sup>

It will be recalled that the tension that underlies the offences is the conflict between the coastal state's interests in the exploration and exploitation of the resources in the continental shelf, and protestors' freedom of navigation. Freedom of navigation is a sacrosanct principle of critical importance within the law of the sea. As noted by the Court of Appeal in *Sellers v Maritime Safety Inspector*, it is "one of the longest and best established principles in international law."<sup>118</sup> Yet a coastal state's interest in the exploitation and exploration of the resources on the seabed of the continental shelf has also been a critical driving force behind the evolution of the law of the sea. The growing importance and accessibility of offshore resources ultimately led to the phenomenon of the EEZ and caused significant disagreement during UNCLOS negotiations.<sup>119</sup> At the level of principle, neither of these conflicting interests can be said to be relatively more important than the other as they are both fundamental and inform the delicate balance achieved by UNCLOS.

In this case however, a discussion of the extent of the intrusion into the respective interests is informative. Attard recognised the value of an analysis of the nature of the particular interference caused to navigation.<sup>120</sup> The Amendment Act only restricts navigation within a maximum distance of 500 metres around specified structures or ships. Provided the requisite due notice is given as to the existence and location of the specified non-interference zones, vessels can alter course and avoid the zones without significant financial cost.<sup>121</sup> There would be a significant non-financial cost imposed upon foreign protest vessels as they would be prevented from achieving the objective of their navigation. However, as the navigation of protest vessels does not align with the economic and security concerns that have driven the development of the principle of freedom of navigation throughout history, the deleterious impact of the spatial restriction on freedom of navigation ought not to be overemphasised.<sup>122</sup> Thus, a moderate interference must be balanced against the significant costs of direct action protest for

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<sup>116</sup> Churchill and Lowe, above n 6, at 207.

<sup>117</sup> David Attard *The Exclusive Economic Zone in International Law* (Clarendon Press, Oxford, 1987) at 144.

<sup>118</sup> *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (CA) at 46.

<sup>119</sup> Attard, above n 117, at 1–30.

<sup>120</sup> At 144.

<sup>121</sup> See Attard, above n 117, at 144.

<sup>122</sup> See Philipp Wendel *State Responsibility for Interferences with the Freedom of Navigation in Public International Law* (Springer, Berlin, 2007) at 6.

prospecting, exploration and mining activities. Moreover, the freedom of navigation of the prospecting and exploration vessels could be impaired by protest action within the specified non-interference zone. Another factor in the balancing exercise is the sovereign nature of New Zealand's rights in relation to resource exploitation. Edward D Brown has argued that these rights "raise strong presumptions in favour of priority being accorded to the rights of the coastal state" when they conflict with freedom of navigation.<sup>123</sup> On balance, and in light of these considerations, this factor supports prioritising New Zealand's interest in the exploration and exploitation of the resources of the continental shelf over the moderate infringement caused to freedom of navigation.

## 2. Minimal Impairment

The second relevant factor can be labelled "minimal impairment". As proposed by Mossop, the question is whether the proposed interference with navigation rights is as minimal as possible in order to achieve the coastal state's objectives, or whether a less restrictive option is available to the coastal state.<sup>124</sup> This question ought to be applied in a more nuanced way that does not focus on extremes but incorporates a standard of reasonableness. This approach is appropriate as the standard of reasonableness, illustrated in the reciprocal obligations of due regard, pervades the delicate balance struck between competing interests by UNCLOS. Moreover, it is supported by the reference in art 79(2) to the right of coastal states to "take reasonable measures for the exploration of the continental shelf." The reformulated question would ask whether the measures impose more than a reasonably necessary infringement upon freedom of navigation.

In order to deter direct protest action against offshore prospecting, exploration and mining activities it was necessary for Parliament to criminalise both actual interference with the relevant ships and structures and the entry into specified non-interference zones. In contrast, it was not strictly necessary to set the maximum radius of non-interference zones at 500 metres. This is because the preventative effect of criminalising entry into a specified non-interference is achieved by the *fact* of a non-interference zone, and does not depend upon the particular maximum radius of that zone. However, setting the maximum radius at 500 metres is reasonable as it conforms to the maximum radius permitted by art 60 for safety zones around structures and installations on the continental shelf.<sup>125</sup> The International Maritime Organisation has confirmed that protestors must respect safety

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<sup>123</sup> Brown, above n 101, at 344.

<sup>124</sup> Mossop, above n 112, at 328.

<sup>125</sup> UNCLOS, art 60(5).

zones not exceeding 500 metres in radius.<sup>126</sup> For these reasons, the offences are a reasonably necessary impairment upon freedom of navigation.

This paper therefore concludes that criminalising conduct carried out against, or entry into the specified non-interference zone surrounding ships, as compared with structures and installations, has due regard for, and does not unjustifiably interfere with, freedom of navigation. In light of this conclusion, the Amendment Act is to be understood as consistent with the prescriptive jurisdiction accorded to New Zealand by UNCLOS. It will be recalled, however, that prescriptive jurisdiction does not necessarily entail enforcement jurisdiction.<sup>127</sup> Thus, this paper will now argue that UNCLOS also accords New Zealand the necessary enforcement jurisdiction to enforce the offences against foreign vessels beyond the territorial sea.

#### (b) New Zealand's Enforcement Jurisdiction over Foreign Vessels

Douglas Guilfoyle has argued that a coastal state “clearly” has enforcement jurisdiction in the EEZ with respect to the subject matters over which it has sovereign rights.<sup>128</sup> If this claim is true, then New Zealand has jurisdiction within the EEZ over measures, such as the Amendment Act, undertaken for the purpose of exploring and exploiting the resources on the continental shelf. Yet Guilfoyle’s argument is untenable in light of a close reading of UNCLOS. It is true that art 73 confers enforcement jurisdiction over the laws adopted by a coastal state with respect to the exploration and exploitation of the *living* resources of the EEZ.<sup>129</sup> However, this jurisdiction does not expressly extend to non-living resources.<sup>130</sup>

Nevertheless, there are three reasons why New Zealand does have enforcement jurisdiction with respect to the offences in the Amendment Act. First, insofar as the Amendment Act protects structures, enforcement jurisdiction is conferred under art 60. This provides that the coastal state may exercise control within the safety zones established around installations and structures on the continental shelf for the purpose of

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<sup>126</sup> International Maritime Organisation *Assuring Safety During Demonstrations, Protests Or Confrontations On The High Seas* MSC.303(87) (17 May 2010).

<sup>127</sup> Lowe and Staker, above n 64, at 332.

<sup>128</sup> Douglas Guilfoyle *Shipping Interdiction and the Law of the Sea* (Cambridge University Press, New York, 2009) at 14.

<sup>129</sup> Article 73(1).

<sup>130</sup> See Mossop, above n 112, at 329; Ivan A Shearer “Problems of Jurisdiction and Law Enforcement against Delinquent Vessels” (1986) 35 ICLQ 320 at 335.

ensuring the safety of both navigation and the installation.<sup>131</sup> Second, the right of hot pursuit extends to violations of coastal state law committed in the EEZ or “on the continental shelf, including safety zones around continental shelf installations.”<sup>132</sup> Hot pursuit is the legitimate pursuit of a foreign vessel following the violation of a coastal state’s law by that vessel.<sup>133</sup> Its extension cements the case for enforcement jurisdiction with respect to structures and installations. Hot pursuit may also be undertaken against a foreign ship for violation of other “laws of the coastal state applicable in accordance with this Convention to the EEZ or the continental shelf”.<sup>134</sup> As argued above, the provisions of the Amendment Act relating to vessels are enacted in accordance with the prescriptive jurisdiction conferred upon New Zealand by UNCLOS. Therefore, hot pursuit of foreign vessels may also be undertaken with respect to the offences committed against vessels. Third, the commentary of the International Law Commission on the draft of art 2 of the Convention on the Continental Shelf indicates that coastal state sovereign rights were intended to include “all rights necessary for and connected with the exploitation of the continental shelf [including] jurisdiction in connexion with the prevention and punishment of violations of law.”<sup>135</sup>

State practice also supports the argument for enforcement jurisdiction. Both the United Kingdom and the United States assert authority under national law to enforce safety zone regulations in the waters above the continental shelf.<sup>136</sup> A very recent example of the exercise of enforcement jurisdiction occurred in Russia. In September 2013 the crew of the *Artic Sunrise*, a Norwegian vessel operated by Greenpeace, protested against oil drilling in the Pechora Sea in Russia’s EEZ by scaling an offshore oil rig. They have been arrested and detained by Russian authorities.<sup>137</sup> Although these examples relate to enforcement jurisdiction over structures and installations, they support the more general proposition that coastal states have the jurisdiction to enforce measures related to the exploration and exploitation of natural non-living resources in the continental shelf.

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<sup>131</sup> UNCLOS, art 60(2); Mossop, above n 112, at 330.

<sup>132</sup> UNCLOS, art 111(2).

<sup>133</sup> Yoshifumi Tanaka *The International Law of the Sea* (Cambridge University Press, Cambridge, 2012) at 163–164.

<sup>134</sup> UNCLOS, art 111(2).

<sup>135</sup> *Documents of the eighth session including the report of the Commission to the General Assembly* [1956] vol 2, YILC 253 at 297.

<sup>136</sup> Continental Shelf Act 1964 (UK), s 2; Navigation and Navigable Waters 33 CFR § 147.5 and 147.10. See also James Kraska and Paul Pedrozo *International Maritime Security Law* (Martinus Nijhoff Publishers, Leiden, 2013) at 83.

<sup>137</sup> Human Rights Watch “Russia: Drop Piracy Charges Against Greenpeace” (30 September 2013) <[www.hrw.org](http://www.hrw.org)>.

It ought to be noted that this conclusion is in tension with the principle that ships on the high seas are subject to the exclusive jurisdiction of the flag state.<sup>138</sup> Although coastal state jurisdiction under UNCLOS is a legitimate caveat upon that exclusive jurisdiction,<sup>139</sup> Parliament included s 101B(9) in the Amendment Act to ensure consistency with international law. Section 101B(9) provides that:

No proceedings for an offence against this section may be brought in a New Zealand court in respect of a contravention of this section on board, or by a person leaving, a foreign ship without the consent of the Attorney-General.

This provision reflects similar requirements in other legislation through which New Zealand seeks to exert jurisdiction extraterritorially, or over foreign nationals.<sup>140</sup> It is intended to ensure that any proceedings brought in relation to foreign ships are consistent with international law.<sup>141</sup> To ensure such consistency, the consent of the Attorney General ought to only be given when the flag state has waived their prioritised jurisdiction and granted consent to the Attorney General to bring proceedings.<sup>142</sup> Whether this occurs in practice remains to be seen. Nevertheless, s 101B(9) strengthens the argument advanced above that New Zealand does have enforcement jurisdiction under international law to enforce the Amendment Act.

#### ***D Conclusion in respect of Jurisdiction under International Law***

This part of the paper has grappled with the tension between the freedom of navigation of foreign vessels and New Zealand's interests in exploring and exploiting the oil and gas resources in the continental shelf. It has argued that the Amendment Act is consistent with New Zealand's prescriptive and enforcement jurisdiction at international law. It will

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<sup>138</sup> UNCLOS, art 92(1).

<sup>139</sup> Evans, above n 5, at 671. Exclusive flag state jurisdiction is also displaced in the event of piracy, as defined in art 101 of UNCLOS. However, it is unlikely that even violent direct action protest constitutes an act of piracy as it is not committed "for private ends". See Atsuko Kanehara "So-Called 'Eco-Piracy' and Interventions by NGOs to Protest against Scientific Research Whaling on the High Seas: An Evaluation of the Japanese Position" in Clive R Symmons (ed) *Selected Contemporary Issues in the Law of the Sea* (Martinus Nijhoff Publishers, Leiden, 2011) at 207–213; But see *Castle John v NV Mabeco* [1986] 77 ILR 537 (Belgium, Court of Cassation) and *Institute of Cetacean Research v Sea Shepherd Conservation Soc* 708 F 3d 1099 (9th Cir 2013) at 1101–1102.

<sup>140</sup> See for example Nuclear-Test-Ban Act 1999, s 6(1); Antarctica (Environmental Protection) Act 1994, s 6(1).

<sup>141</sup> *Regulatory Impact Statement*, above n 34, at [64].

<sup>142</sup> Evans, above n 5, at 666. It has been argued that reliance on coastal state jurisdiction dispenses with the need for flag state authorisation altogether: Guilfoyle, above n 128, at 94.

be recalled that this jurisdiction is relatively uncontroversial when asserted with respect to New Zealand vessels, and within New Zealand's territorial sea. Beyond the territorial sea, jurisdiction over foreign vessels arises by virtue of UNCLOS. The critical issue is whether the offences in the Amendment Act are within the scope of the rights attributed to coastal state rights for the purpose of exploring and exploiting the resources on the continental shelf. As argued above, the offences do fit within the scope of these rights as they have due regard to, and do not unjustifiably interfere with, freedom of navigation. Enforcement jurisdiction is also permitted by UNCLOS, albeit not expressly. Having argued that the Amendment Act is consistent with New Zealand's jurisdiction under international law, this paper will now turn to consider whether the offences are consistent with the New Zealand Bill of Rights Act.

### *V Is the Amendment Act Consistent With the New Zealand Bill of Rights Act?*

This part will focus on the tension between New Zealand's interests in resource exploitation and the fundamental rights of freedom of expression, peaceful assembly and movement exercised by protesters at sea. In order to do so, it will first justify the application of the New Zealand Bill of Rights Act (BORA) to the Amendment Act. It will also defend the use of the proportionality inquiry required under s 5 of BORA as the most appropriate means of taking into account the fact that these protests occur at sea. The paper will then proceed to argue that although the Amendment Act limits the rights of freedom of expression, peaceful assembly and – to the extent applicable – movement, that limitation is justified under s 5 of BORA. Due to space constraints, this paper will focus solely on these fundamental rights of protest. Other rights, such as freedom for unreasonable search and seizure, may also be implicated by the Amendment Act but will not be analysed in this paper.

#### *A The Offshore Application of BORA*

The offences in the Amendment Act purport to apply both within and beyond the territorial sea. It will be recalled that the territorial sea is considered part of New Zealand's territory and therefore, within this area, there is no issue of the extraterritorial application of BORA to consider. However, as the offences apply beyond the territorial sea, it is important to establish the scope of the extraterritorial application of BORA. The extraterritorial application of human rights instruments poses the question of whether the rights in those instruments apply notwithstanding that "at the moment of the alleged

violation of his or her human rights the individual concerned is not physically located in the territory of the state.”<sup>143</sup>

New Zealand legislation is presumed to not apply extraterritorially unless it contains an express provision to the contrary or such application is a necessary implication.<sup>144</sup> The application of BORA is determined under s 3, which states that the Act applies only to acts done:

- (a) by the legislative, executive, or judicial branches of the Government of New Zealand; or
- (b) by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

Section 3 neither asserts nor denies the application of BORA extraterritorially and therefore does not rebut the presumption against extraterritorial application.<sup>145</sup> However, as contended by Ella Watt, the extraterritorial application of BORA is a necessary implication of the relationship between BORA and the International Covenant on Civil and Political Rights (the ICCPR).<sup>146</sup> The Long Title of BORA confirms that it is an Act “to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights”.<sup>147</sup> The ICCPR requires each state party to it “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant.”<sup>148</sup> The Human Rights Committee and the International Court of Justice agree that the ‘and’ in art 2(1) is disjunctive, and that the ICCPR applies when states exercise jurisdiction outside their territory.<sup>149</sup> The extraterritorial application of BORA is a necessary implication because New Zealand must comply with BORA in its

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<sup>143</sup> Marko Milanovic *Extraterritorial Application of Human Rights Treaties* (Oxford University Press, Oxford, 2011) at 7.

<sup>144</sup> *Poynter v Commerce Commission*, above n 60, at [36].

<sup>145</sup> Ella Watt “The Extraterritorial Application of the New Zealand Bill of Rights Act 1990” (LLB (Hons) Dissertation, Victoria University of Wellington, 2012) at 13–17.

<sup>146</sup> At 17–19.

<sup>147</sup> New Zealand Bill of Rights Act 1990, Long Title (b).

<sup>148</sup> International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 2(1).

<sup>149</sup> Human Rights Committee *General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* CCPR/C/21/Rev1/Add 13 (2004) at [10]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 at 179.

exercise of jurisdiction extraterritorially to meet its international obligations under the ICCPR.<sup>150</sup>

### *1 Law of the Sea and Human Rights*

The sovereign rights and jurisdiction accorded to states under UNCLOS are sufficient to meet the requirement for the application of human rights instruments that a state has jurisdiction over the relevant matter. For this reason, those jurisdictional rights have “consecrate[ed] the applicability of human rights at sea.”<sup>151</sup> This position has developed most clearly in the jurisprudence concerning the interpretation of art 1 of the European Convention on Human Rights (the ECHR). Article 1 of the ECHR requires that “High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms” guaranteed by the Convention.<sup>152</sup>

An illustrative example can be found in *Drieman and Others v Norway* which concerned a protest conducted by Greenpeace against Norwegian whaling vessels within Norway’s EEZ. Greenpeace engaged in non-violent direct action tactics, including navigating dinghies in a zigzag across the bow of a whaling vessel at a distance of five to 20 metres. The protestors were arrested and detained. They argued that this amounted to a violation of their rights to freedom of expression, peaceful assembly and association guaranteed under arts 10 and 11 of the ECHR. In holding that Norway’s obligations under the ECHR were engaged, the European Court of Human Rights (the ECtHR) referred to the rights of the coastal state to regulate the exploitation of living resources in its EEZ and found that enforcement activities undertaken on this basis constituted an exercise of jurisdiction for the purposes of art 1 of the ECHR.<sup>153</sup> The case of *Salemink* also supports this position. *Salemink* concerned the applicability of European social security schemes to a worker employed on a gas drilling platform in the Netherland’s EEZ. The European Court of Justice held that the functional sovereign and jurisdictional rights conferred on the coastal state by UNCLOS entailed the application of European law with respect to work carried

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<sup>150</sup> Watt, above n 145, at 18.

<sup>151</sup> Irini Papanicolopulu “International Judges and the Protection of Human Rights at Sea” in Nerina Boschiero and others (eds) *International Courts and the Development of International Law* (T M C Asser Press, The Hague, 2013) 535 at 539–540.

<sup>152</sup> Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953), art 1 [ECHR].

<sup>153</sup> *Drieman and Others v Norway*, above n 33.

out on installations over the continental shelf for the purposes of prospecting and exploiting natural resources.<sup>154</sup>

These decisions support the proposition that legislation and enforcement relating to the exercise of New Zealand's sovereign rights and jurisdiction over the continental shelf constitutes an exercise of jurisdiction for the purposes of the ICCPR. Therefore the provisions and enforcement of the Amendment Act must comply with BORA. However, although BORA has the potential to apply beyond the territorial sea, particular rights are limited in their application to New Zealand territory. For instance, the right to freedom of movement may only be asserted by offshore protestors within the territorial sea. This limitation is expressly stipulated in s 18, which provides that "everyone lawfully in New Zealand has the right to freedom of movement and residence *in New Zealand*".<sup>155</sup> For this reason, the right to freedom of movement under s 18 will not form a central focus of the following analysis of protest rights at sea.

### ***B Accommodating the Aquatic Context of Protest at Sea***

The protection of protest rights at sea also raises the question of how the location within which the rights are exercised, that is, at sea, relates to the rights analysis required by BORA. Although BORA does not distinguish between the protection of protest rights at sea and on land, the aquatic context of protest does give rise to particular countervailing interests that may justify a limitation on those rights under the s 5 proportionality inquiry. The balancing inquiry required by s 5 will now be juxtaposed with the methodology developed in the United States in relation to the First Amendment protection of free speech.

#### *1 Free Speech and the Public Forum Doctrine*

In United States rights jurisprudence, the significance of the geographic location of speech manifests in the public forum doctrine. This doctrine varies the scope of speech rights afforded to the speaker according to the category of forum that the person occupies.<sup>156</sup> The public forum doctrine was recently employed in the resolution of a dispute between Greenpeace and Shell concerning protest action within specified restricted zones around vessels engaged in oil exploration.

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<sup>154</sup> Case C-347/10 *A. Salemink v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen* [2012] ECR 00000 at [32]–[35].

<sup>155</sup> Watt, above n 145, at 29.

<sup>156</sup> Timothy Zick *Speech out of Doors: Preserving First Amendment Liberties in Public Places* (Cambridge University Press, Cambridge, 2009) at 53.

In 2012, the District Court of Alaska granted a preliminary injunction prohibiting Greenpeace USA from coming within a specified distance, ranging between 500 and 1000 metres, of vessels contracted by Shell for oil exploration.<sup>157</sup> At first instance, and on appeal, Greenpeace argued that restricting their ship's navigation in such zones would unduly limit their First Amendment right to free speech.<sup>158</sup> In support of this submission, Greenpeace referred to the Supreme Court's finding in *Schenck v Pro-Choice Network* that floating "bubble" zones prohibiting protest within 15 feet of patients entering or leaving an abortion clinic were unconstitutional.<sup>159</sup>

This submission was rejected. The District Court emphasised that the Court in *Schenck* was guided, among other things, by the fact that public sidewalks are a "prototypical example of a public forum". The sea was no such forum.<sup>160</sup> The Court of Appeal affirmed this reasoning, stating:<sup>161</sup>

[S]peech is, of course, most protected in such quintessential public fora as the public sidewalks surrounding abortion clinics. But the high seas are not a public forum, and the lessons of *Schenck* have little applicability here.

These decisions affirm the prominence of the public forum doctrine in the regulation of protest within the United States. Under this doctrine, expressive liberties are broadest in "quintessential" or "traditional" public forums such as public streets, parks and sidewalks.<sup>162</sup> The public forum doctrine, and other definitional tools like it, have developed in response to the unqualified language of the First Amendment, which stipulates that "Congress shall make no law ... abridging the freedom of speech".<sup>163</sup> As there is no express internal or external qualification on that prohibition, the judiciary has developed categorisation methods to restrict the scope of the right.<sup>164</sup>

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<sup>157</sup> *Shell Offshore Inc v Greenpeace Inc* 2012 WL 1931537 (D Alaska) at 852.

<sup>158</sup> *Shell Offshore Inc v Greenpeace Inc* 709 F 3d 1281 (9th Cir 2013) at 1291; *Shell Offshore Inc v Greenpeace Inc*, above n 157, at 852.

<sup>159</sup> *Schenck v Pro-Choice Network* 519 US 357 (1997).

<sup>160</sup> *Shell Offshore Inc v Greenpeace Inc*, above n 157, at 852 citing *Schenck v Pro Choice Network*, above n 159, at 377.

<sup>161</sup> *Shell Offshore Inc v Greenpeace Inc*, above n 158, at 1291.

<sup>162</sup> Zick, above n 156, at 53.

<sup>163</sup> United States Constitution, Amendment I.

<sup>164</sup> Kathleen M Sullivan and Gerald Gunther *First Amendment Law* (3rd ed, Foundation Press, New York, 2007) at 8–13.

## 2 *Categorisation versus Proportionality*

The categorisation of the protest forum gives unique importance to location and can foreclose balancing of fundamental principles in certain cases.<sup>165</sup> As it is a preliminary inquiry, categorisation would likely detract from a proper analysis of the particular value of the speech act in the circumstances. The place at which protests occur should not be decisive in and of itself. Instead, the importance of place should be understood to reside in the relationship between that place and the values served by both the regulation and protection of protest rights. It is certainly conceivable that protest in places such as the grounds of Parliament advance the democratic and truth rationales of protest rights to a greater extent than protest in a residential street.<sup>166</sup> However, the public forum doctrine does not allow for flexibility in analysis and “distracts attention from the first amendment values at stake”.<sup>167</sup>

There is no public forum doctrine in New Zealand. Yet the place of protest is incorporated into the human rights analysis within the proportionality inquiry mandated by s 5 of BORA.<sup>168</sup> This inquiry ensures that place is treated as one of the contextual features of the particular case.<sup>169</sup> As McGrath J stated in *Brooker v Police*, the question of whether a restriction of freedom of expression is justified must depend “on the relevant time, place and circumstances”.<sup>170</sup> This approach is preferable because place should not itself determine the protection accorded to protest rights.<sup>171</sup>

### ***C A Prima Facie Limitation upon Protest Rights***

Having justified the application of BORA, and in particular of s 5, to the Amendment Act, this paper now argues that the offences set out in s 101B(1) and 101B(2) are a prima facie limitation on the right to protest. The right to protest is not expressly confirmed in

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<sup>165</sup> Sullivan and Gunthner, above n 164, at 12.

<sup>166</sup> The rationales of protecting protest are examined further below.

<sup>167</sup> Daniel A Farber and John E Nowak “The Misleading Nature of Public Forum Analysis: Context and Content in First Amendment Adjudication” (1984) 70 Va L Rev 1219 at 1224.

<sup>168</sup> Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) at [15.8.10].

<sup>169</sup> Eric Barendt *Freedom of Speech* (2nd ed, Oxford University Press, Oxford, 2005) at 290.

<sup>170</sup> *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [133].

<sup>171</sup> Timothy Zick “Speech and Spatial Tactics” (2006) 84 Tex L Rev 581 at 581.

BORA, however, it is protected in the freedoms of expression, peaceful assembly, and movement.<sup>172</sup>

Freedom of expression is protected by s 14 of BORA, which provides:<sup>173</sup>

Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

Protest has traditionally been addressed solely within the framework of freedom of expression.<sup>174</sup> However protest action, particularly at sea, is generally collective in nature.<sup>175</sup> In this way, freedom of expression is fundamentally linked to the freedom of peaceful assembly, guaranteed in s 16 of BORA.<sup>176</sup> Additionally, everyone has the right to freedom of movement under s 18 of BORA although, as discussed, this right is not applicable beyond the territorial sea. Each of these rights is integral to effective protest action.<sup>177</sup>

It is important to understand the rationales and purposes of the protest rights because those rationales illustrate the importance of the rights and inform the determination of the nature and extent of any infringement upon them.<sup>178</sup> The freedoms of expression, peaceful assembly and - to the extent applicable - movement share common rationales in the context of protest.<sup>179</sup> These rationales are traditionally associated with the protection of freedom of expression. They are democracy, truth, and self-fulfillment.<sup>180</sup>

The argument from democracy asserts that a pluralistic and democratic society requires its members to be free to enter into forceful, rigorous and informed debate with each

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<sup>172</sup> Butler and Butler, above n 168, at [13.5.1] and [16.4.5]; *Brooker v Police*, above n 170, at [115]; *Stanton v Police* [2012] NZHC 3223, [2013] NZAR 24 at [15]; John Ip “What a Difference a Bill of Rights Makes? The Case of the Right to Protest in New Zealand” (2010) 24 NZULR 239 at 239.

<sup>173</sup> New Zealand Bill of Rights Act, s 14.

<sup>174</sup> Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 348; Ip, above n 172, at 239.

<sup>175</sup> See *Morse v Police* [2011] NZSC 45, [2012] 2 NZLR 1 at [110] per McGrath J.

<sup>176</sup> Barendt, above n 169, at 273; Butler and Butler, above n 168, at [15.1.1].

<sup>177</sup> Sebastian Bisley “Protests and the Chinese President – An Index of Freedom” (2001) 32 VUWLR 1027 at 1036.

<sup>178</sup> This is consistent with the purposive interpretation required of BORA rights. See *Minister of Transport v Noort* [1992] 3 NZLR 260 (CA) 271 per Richardson J.

<sup>179</sup> Barendt, above n 169, at 272.

<sup>180</sup> *Brooker v Police*, above n 170, at [114] per McGrath J; Claudia Geiringer and Steven Price “Moving from Self-Justification to Demonstrable Justification – the Bill of Rights and the Broadcasting Standards Authority” in Jeremy Finn and Steven Todd (eds) *Law, Liberty and Legislation* (LexisNexis, Wellington, 2008) at 320; Butler and Butler, above n 168, at [13.6.2]–[13.6.13].

other.<sup>181</sup> The dissemination of political ideas, facilitated by the formation of groups and assemblies, will result in an informed citizenry equipped to influence government action and participate in the democratic process.<sup>182</sup> Political protest directly engages this rationale,<sup>183</sup> and courts consistently confirm that political expression “lie[s] at the very heart of freedom of expression.”<sup>184</sup> Protest can be considered political if it conveys a message “relevant to the development of public opinion on a whole range of issues which an intelligent citizen should think about”.<sup>185</sup>

The argument from truth is that unrestricted public debate is critical for the discovery of truth.<sup>186</sup> Such debate creates a “marketplace of ideas” that will lead to the truth.<sup>187</sup> According to this theory, truthful speech defeats falsity through rational discourse,<sup>188</sup> and the “best test of truth is the power of the thought to get itself accepted in the competition of the market”.<sup>189</sup>

The argument from self-fulfillment posits that expression and assembly are intrinsically valuable. Protest facilitates self-development, self-fulfillment and the formation of personal identity.<sup>190</sup> This rationale conceives of limitations to speech as an affront to human dignity.<sup>191</sup> The Human Rights Committee has emphasised that this rationale also underlies freedom of movement as “liberty of movement is an indispensable condition for the free development of a person.”<sup>192</sup>

In light of these rationales, it will now be argued that criminalising *non-violent* direct action protest against ships and structures engaged in prospecting, exploration and mining

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<sup>181</sup> Butler and Butler, above n 168, at [13.6.11] and [15.1.1].

<sup>182</sup> Eric Barendt “Freedom of Assembly” in Jack Beatson and Yvonne Cripps (eds) *Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams* (Oxford University Press, Oxford, 2002) 161 at 166; Barendt, above n 169, at 21, 155 and 272.

<sup>183</sup> Geiringer and Price, above n 180, at 321.

<sup>184</sup> See for example *Morse v Police*, above n 175, at [108] per McGrath; and *Wadsworth v Auckland City Council* [2013] NZHC 413, [2013] NZAR 430 at [57] citing *Vancouver (Cil) v Zhang* 2010 BCCA 450, (2010) 325 DLR (4th) 313 at [68].

<sup>185</sup> Barendt, above n 169, at 162.

<sup>186</sup> Barendt, above n 169, at 7; Butler and Butler, above n 168, at [13.6.3].

<sup>187</sup> *Thompson v Police* [2012] NZHC 2234, [2103] 1 NZLR 848 at [70]–[72].

<sup>188</sup> David Mead *The New Law of Peaceful Protest: Rights and Regulation in the Human Rights Act Era* (Hart Publishing, Oxford, 2010) at 7; Barendt, above n 169, at 11; Peter W Hogg *Constitutional Law in Canada* (looseleaf ed 5, Carswell Company) at 43–8.

<sup>189</sup> *Abrams v United States* 250 US 616 (1919) at 630 per Holmes J.

<sup>190</sup> Butler and Butler, above n 168, at [13.6.13].

<sup>191</sup> Barendt, above n 169, at 13–15; Mead, above n 188, at 7.

<sup>192</sup> Human Rights Committee *General Comment 27: Freedom of Movement (Art 12)* UN Doc CCPR/C/21/Rev1/Add9 (1999) at [1].

of resources limits the right to protest. Direct action protest may be violent or non-violent. Violent direct action protest is not a protected exercise of the right to freedom of expression or peaceful assembly. Freedom of expression is “as wide as human thought and imagination”,<sup>193</sup> yet it does not protect violent conduct.<sup>194</sup> Similarly, freedom of assembly is internally qualified by the requirement that the assembly be peaceful. In *Barret v Tipperary*, the Court held that an assembly is peaceful unless it is violent in and of itself or has a serious and aggressive effect on people or property.<sup>195</sup> Violent direct action would meet this threshold. However, non-violent direct action and traditional communicative protest are both protected by freedom of expression and peaceful assembly.

Non-violent direct action protest fits within the scope of freedom of expression provided the conduct has an expressive component.<sup>196</sup> Non-violent direct protest against vessels and structures engaged in prospecting, exploring or mining has an expressive component as it attempts to convey opposition to such activities. Additionally, the passive use of human shield tactics in non-violent direct action protest meets the requirement that assembly is peaceful. Thus, both traditional communicative protests and non-violent direct action fall within the guarantee of peaceful assembly.

The rationales of protest rights identified earlier also support the inclusion of non-violent direct action protest within the scope of freedom of expression and peaceful assembly. Protest at sea enables the insertion of ideas and opinions regarding prospecting, exploration or mining activities into the “marketplace of ideas” within which, the theory maintains, truth will be revealed. The argument from self-fulfillment is also triggered if participating in such a protest is of value to an individual.<sup>197</sup>

The consistency of non-violent direct action with the democratic rationale is more contentious. David Mead argues that although direct action protests may relate to political matters, they “do not seek citizen reflection on state policy” and are therefore not aligned with the democratic rationale.<sup>198</sup> To the same end, Helen Fenwick and Gavin Phillipson

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<sup>193</sup> *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at 15.

<sup>194</sup> *Thompson v Police*, above n 187, at [73] citing *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48 (HC).

<sup>195</sup> *Barret v Tipperary (NR) Co Council* [1964] IR 22; See Butler and Butler, above n 168, at [15.6.11] and Rishworth, above n 174, at 349.

<sup>196</sup> This test was set out by the Supreme Court of Canada in *Irwin Toy Ltd v Attorney General (Quebec)* [1989] 1 SCR 927 and adopted in New Zealand in *Thompson v Police*, above n 187, at [76].

<sup>197</sup> See Fenwick and Phillipson, above n 26, at 542.

<sup>198</sup> Mead, above n 188, at 9 and 235.

contend that in seeking to bring about change directly, non-violent direct action has an anti-democratic aim and therefore subverts rather than strengthens democracy.<sup>199</sup> Such concerns motivated the Third Section of the ECtHR in *Drieman and Others v Norway* to hold that the non-violent direct action tactics of Greenpeace could not receive “the same privileged protection as political speech or peaceful demonstration of opinion on such matters.”<sup>200</sup>

However, there is a strong argument that non-violent direct action at sea does engage the democratic rationale as the protests are political in nature and do disseminate political ideas.<sup>201</sup> To assert that direct action protestors do not engage with the citizenry is to oversimplify both the purpose and the effect of direct action protest. While the immediate purpose is to physically impede the activity, the ultimate aim may be to bring about change by generating a reflective and informed electorate. This was true of the protest at issue in *Police v Teddy* by which Teddy “attempted to disrupt mining and exploration activities with the aim of generating publicity through protest”.<sup>202</sup> The decision to engage in controversial human shield tactics can be understood as a calculated attempt to facilitate the conveyance of a message. In a world driven by a need for immediate sensationalism and controlled by media, “controversy tends to attract airtime and coverage.”<sup>203</sup> The uploading of video recordings of direct action protest at sea onto the websites of prominent environment non-governmental organisations such as Greenpeace supports this understanding.<sup>204</sup> Additionally, direct action protests may “play an important supporting and catalyzing role within the democratic process.”<sup>205</sup> Therefore non-violent direct action protest does engage the democratic rationale for the protection of protest.

Moreover, non-violent direct action protest has been held to fall within the scope of freedom of expression in *Police v Geiringer*<sup>206</sup> and *Steel and Others v United Kingdom*.<sup>207</sup> The protest in *Police v Geiringer* was the act of lying down in front of a vehicle with the intention of preventing that vehicle from moving.<sup>208</sup> In *Steel and Others*

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<sup>199</sup> Fenwick and Phillipson, above n 26, at 543.

<sup>200</sup> *Drieman and Others v Norway*, above n 33.

<sup>201</sup> Mead, above n 188, at 8.

<sup>202</sup> *Regulatory Impact Statement*, above n 34, at [7].

<sup>203</sup> Zick, above n 156, at 116.

<sup>204</sup> See for example Greenpeace New Zealand “Highlights from the 2011 Stop Deep Sea Oil Flotilla” <[www.greenpeace.org](http://www.greenpeace.org)>.

<sup>205</sup> Mead, above n 188, at 308.

<sup>206</sup> *Police v Geiringer* [1990–92] 1 NZBORR 331 (DC).

<sup>207</sup> *Steel and Others v United Kingdom* (1998) 28 EHRR 603 (ECHR).

<sup>208</sup> *Police v Geiringer*, above n 206, at 337.

*v United Kingdom* the ECtHR held that two non-violent direct action protests constituted expression protected by art 10 of the ECHR. The first protestor attempted to obstruct a grouse-shoot by walking in front of one member of the shoot as he lifted his gun. The second protestor stood under a digger in an attempt to disrupt building works on a motorway extension.<sup>209</sup>

Penalising entry into a specified non-interference zone is also a prima facie spatial limitation on the guaranteed freedoms.<sup>210</sup> Freedom of expression encompasses the right to impart information and includes the freedom to choose the place at which the opinion is expressed in order that it might have the greatest impact.<sup>211</sup> Regulating where protest can occur therefore limits freedom of expression.<sup>212</sup> As Lamer J said in the Canadian Supreme Court, “freedom of expression cannot be exercised in a vacuum ... it necessarily implies the use of a physical space in order to meet its underlying objectives.”<sup>213</sup> Similarly, freedom of peaceful assembly protects the right to assemble “at a place of one’s choosing.”<sup>214</sup> The fundamental importance of the “right to protest in an effective way” led the Supreme Court to affirm in *Morse v Police* that it “is legitimate for those wishing to protest to make choices based on time, place and circumstance as to the most effective manner of doing so.”<sup>215</sup> Criminalising entry into specified non-interference zones restricts this legitimate choice and is therefore an infringement of the right to freedom of expression and peaceful assembly. The limitation on freedom of movement, although only relevant within the territorial sea, is self-evident.

#### ***D A Justified Limitation upon Protest Rights***

Having established the prima facie limitation upon protest rights, this paper will now argue that the Amendment Act is nevertheless consistent with BORA as the limitation is justified in accordance with s 5. Section 5 provides that:

the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

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<sup>209</sup> *Steel and Others v United Kingdom*, above n 207, at [92]; See also *Hashman and Harrup v United Kingdom* (2000) 30 EHRR 241 (Grand Chamber, ECHR) and *Drieman and Others v Norway*, above n 33.

<sup>210</sup> Hogg, above n 188, at 43–20.2.

<sup>211</sup> Butler and Butler, above n 168, at [13.7.37].

<sup>212</sup> Hogg, above n 188, at 43–20.2.

<sup>213</sup> *Committee for the Commonwealth of Canada v Canada* 1991 1 SCR 139 at 148.

<sup>214</sup> Mead, above n 188, at 67; Barendt, above n 169, at 272.

<sup>215</sup> *Morse v Police*, above n 175, at [108].

The methodology developed in New Zealand in applying s 5 has drawn upon the *Oakes* test set out by the Canadian Supreme Court. The following questions are pertinent.<sup>216</sup>

- (a) Does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?
- (b) Proportionality:
  - (i) Is the limiting measure rationally connected with its purpose?
  - (ii) Does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?
  - (iii) Is the limit in due proportion to the importance of the objective?

As these questions are considered, recourse will be made to the concept of deference. Deference refers to the degree of latitude accorded to Parliament’s judgment and can inform every aspect of the s 5 inquiry.<sup>217</sup> Judicial deference to Parliament is appropriate in New Zealand because of the reference in s 5 to our “free and democratic society” and the consequent need to give “appropriate weight to the fact that a limit has been democratically enacted.”<sup>218</sup>

The prevalence of deference within proportionality jurisprudence has led to scholarly debate concerning the approach that courts should take in affording deference to primary decision makers. For instance, Murray Hunt calls for a culture of justification, in which decision makers are explicit about the contextual factors that are relevant to the intensity of review, and about how those factors influence the “degree of deference appropriate in the particular context.”<sup>219</sup> It is of critical importance, in Hunt’s view, that the concept of deference is distinguished from submission. Deference ought to be understood as respectful attention to the justifications offered by the decision maker. In this sense, due deference still requires a review of the issue at dispute, yet refrains from reviewing that decision for correctness.<sup>220</sup>

Tipping J opined that the deference given to Parliament’s appreciation of the matter could be primarily determined by the subject matter. Matters involving “major political, social or economic decisions” demand significant deference in contrast to matters having

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<sup>216</sup> *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [103] per Tipping J, [203]–[205] per McGrath J, [269]–[272] per Anderson J and [64]–[81] per Blanchard J; *R v Oakes* 1986 1 SCR 103.

<sup>217</sup> *Hansen v R*, at [112] per Tipping J.

<sup>218</sup> At [111] per Tipping J.

<sup>219</sup> Murray Hunt “Sovereignty’s Blight: Why Contemporary Public Law Needs the Concept of ‘Due Deference’” in Nicholas Bamforth and Peter Leyland (eds) *Public Law in a Multi-Layered Constitution* (Hart Publishing, Oxford, 2003) at 343 and 351.

<sup>220</sup> At 351–352.

“substantial legal content”.<sup>221</sup> In *Hansen*, Tipping J reasoned that Parliament was to be accorded only a small degree of latitude because the presumption of innocence was “at the heart of criminal justice” and was not an area within which “Parliament’s institutional competence or expertise might justify substantial judicial restraint”.<sup>222</sup> However, the subject matter and the relative institutional competence do not exhaust the factors that influence the deference due. The importance of the right impinged will also inform this decision. Hunt also identifies other relevant factors including the “degree of democratic accountability of the primary decision maker, and the extent to which the affected interests have already had the opportunity of genuinely participating in a democratic process directed at balancing the competing interests.”<sup>223</sup>

With respect to the Amendment Act, a moderate degree of deference is due to Parliament. Although regular national elections affirm the democratic accountability of Parliament, affected interests have not had the opportunity of genuinely participating in a democratic process directed at balancing competing interests in this case. It will be recalled that the relevant offences were introduced in a Supplementary Order Paper. The amendments were therefore not heard by a Select Committee and the opportunity for genuine participation in the democratic process was negated.<sup>224</sup> Moreover, the Attorney General did not vet the Supplementary Order Paper for compliance with BORA, as could otherwise have been required under s 7. These factors, taken in light of the fundamental nature of the rights of freedom of expression and peaceful assembly, argue against according deference.<sup>225</sup>

However, the relative institutional competence on this matter favours deference. The executive, acting through the legislature, has relative expertise in assessing the measures necessary to achieve their objectives due to their experience in managing protest activity. Moreover, the subject matter of the impugned provisions is the protection of permitted prospecting, exploration and mining activities. This falls at the policy, social and economic end of Tipping J’s proposed spectrum and it is not a purely legal matter. On balance, these concerns justify a moderate degree of latitude towards the legislature’s

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<sup>221</sup> *Hansen v R*, at [116] per Tipping J.

<sup>222</sup> At [131] per Tipping J.

<sup>223</sup> At 351.

<sup>224</sup> Nikki Pender and Pam McMillan “SOP sinks mining protesters” (26 April 2013) LawTalk - New Zealand Law Society <[www.lawsociety.org.nz](http://www.lawsociety.org.nz)>.

<sup>225</sup> On the fundamental nature of these rights see *Morse v Police*, above n 175, at [108] per McGrath J; *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [112] per Gault J and [178] per Keith J; *Brooker v Police*, above n 170, at [114] per McGrath J.

assessment of the balance to be struck between protest rights and government objectives. The s 5 inquiry will be conducted with this degree of deference in mind.

### *1 Sufficiently Important Objective*

The first question is whether the limiting measure serves a purpose sufficiently important to justify curtailment of the rights and freedoms. In *Oakes*, Dickson CJ opined that the objective “must relate to concerns which are pressing and substantial rather than merely trivial”,<sup>226</sup> and must be directed to the “realisation of collective goals of fundamental importance.”<sup>227</sup> Although these observations suggest that a court would engage in a strict scrutiny of the legislative objective, the practical experience in Canada demonstrates that this requirement is met without difficulty.<sup>228</sup> McGrath J’s statement in *Hansen* that “it would be rare in New Zealand for the courts to decide that the objective of the legislature in criminalising certain behaviour was in pursuit of a policy goal that was not a legitimate aim” supports a similar understanding in the New Zealand context.<sup>229</sup>

The primary objective of s 101B, as discussed above, is to deter interference with the prospecting, exploration and mining of Crown resources in order to promote investment. Subsidiary objectives included ensuring the safety of both protestors and exploration vessels, and ensuring the navigation of vessels was not impeded. Failure to achieve these objectives would increase the risk faced by investors and thereby undermine the promotion of the prospecting, exploring and mining of Crown resources.

The objectives of securing economic investment, safety and navigation free from interference are substantial, not trivial, concerns. The sea is an “unpredictable and dangerous environment”<sup>230</sup> within which protest action involving the close navigation of ships, or ships with structures, raises legitimate safety concerns.<sup>231</sup> Freedom of navigation is a sacrosanct principle in the law of the sea which has developed to address the need to protect the economic interests of states. The objective of attracting foreign investment is also of substantial importance as it has flow-on consequences for the economic development of New Zealand. These objectives could also be described as collective goals of fundamental importance.

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<sup>226</sup> At 138–139.

<sup>227</sup> At 136.

<sup>228</sup> Hogg, above n 188, at 38–23.

<sup>229</sup> At [207].

<sup>230</sup> (16 April 2013) 689 NZPD 9358.

<sup>231</sup> Greenpeace International *Code Of Conduct During Demonstrations/Campaigns Against Ships On High Seas: Comments On Document Nav 54/25, Annex 11* International Maritime Organisation Subcommittee on Safety of Navigation 55/9 (20 May 2009) at 4.

In light of the required purposive interpretation of BORA,<sup>232</sup> it is also appropriate to refer to New Zealand's obligations under the International Covenant on Civil and Political Rights (the ICCPR).<sup>233</sup> Articles 19 and 21 of the ICCPR guarantee the freedoms of expression and assembly and provide a list of purposes that may legitimately justify limitations on those rights. One of these is "the respect of the rights ... of others".<sup>234</sup> The European Convention on Human Rights (ECHR) also permits limitations necessary for that purpose.<sup>235</sup> Jurisprudence under BORA closely follows the grounds provided for in the ICCPR and ECHR.<sup>236</sup> It is certainly arguable that the provisions of s 101B serve the purpose of respecting the rights of others as the term "rights" is not limited to rights protected in BORA.<sup>237</sup> The rights respected in this instance are the rights of companies who have a permit under the Crown Minerals Act 1991 to engage in prospecting, exploration or mining activities. These arguments lead to the conclusion that the objectives that motivated Supplementary Order Paper 205 were sufficiently important to justify some infringement upon freedom of expression and assembly.

## 2 Proportionality

### (a) Rational Connection

The first step of the proportionality inquiry is to determine whether there is a rational connection between the offences and the objectives pursued. The Court in *Oakes* stated that the law must be "carefully designed to achieve the objective in question" and should not be "arbitrary, unfair, or based on irrational considerations".<sup>238</sup> This formulation of the test was applied in *Hansen* by Blanchard J and McGrath J,<sup>239</sup> whereas Anderson J expressed the view that these qualifications were subsumed within the proportionality inquiry and therefore did not require individual consideration.<sup>240</sup> Tipping J conceived of the "rational connection" test as a threshold question, satisfied by a mere logical relationship between the limitation and the objective pursued.<sup>241</sup> Each offence will now be considered against the question of rational connection.

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<sup>232</sup> *Minister of Transport v Noort*, above n 178, at 278.

<sup>233</sup> New Zealand Bill of Rights Act, Long Title (b).

<sup>234</sup> International Covenant on Civil and Political Rights, above n 148, arts 19(3)(a) and 21.

<sup>235</sup> ECHR, above n 152, art 10(2) and 11(2).

<sup>236</sup> *Butler and Butler*, above n 168, at [13.8.2].

<sup>237</sup> At [13.8.1].

<sup>238</sup> *R v Oakes*, above n 216, at 139.

<sup>239</sup> At [78] per Blanchard J, at [204]–[205] per McGrath J.

<sup>240</sup> At [271].

<sup>241</sup> At [121] and [125].

(i) Section 101B(1) – Damage or Interference

Under both the substantial and threshold approach, there is a rational connection between criminalising conduct that damages or interferes with shipping or structures involved in mining operations and the objectives of deterrence, safety, and procuring unimpeded navigation. Criminalising intentional damage or interference with these vessels or structures does not take into account irrelevant considerations, nor is it unfair. The provision is tailored to its objective as penalising conduct that intentionally damages or interferes with vessels or structures has a strong likelihood of deterring such conduct, thereby reducing the risk posed by direct action protest to safety and navigation.

(ii) Section 101B(2) – Entry into Specified Non-interference Zones

Criminalising entry into a specified non-interference zone will deter entry into that zone by protest vessels. For this reason, there is a logical relationship between criminalisation and a reduction in risk to safety, navigation and the promotion of prospecting, exploration and mining activities. Section 101B(2) therefore satisfies the threshold conception of the rational connection test. Additionally, it is not arbitrary, unfair, nor does it take into account irrelevant matters. It is also specifically tailored to meet its objectives as it further prevents non-violent direct action protest. Any non-violent direct action protest is likely to risk the safety of both parties as it necessarily involves navigation in close quarters. This will also impinge upon the navigation of the exploration vessel. Such protest is less likely to occur where clear locational restrictions are created and enforced upon the navigation of protest vessels. Although criminalising entry into the specified non-interference zone would also prevent protest action that was purely communicative, and therefore unlikely to endanger safety or navigation, it advances the deterrence of direct action protest. For these reasons, both offences under s 101B are rationally connected to their objective.

***(b) Minimal Impairment***

The second step in the proportionality inquiry involves an assessment of whether the means chosen impair the rights no more “than reasonably necessary to achieve Parliament’s purpose”.<sup>242</sup> Although this was described in *Oakes* as a requirement that the means impair the rights “as little as possible”, the Canadian Supreme Courts has also adopted a reasonableness gloss for this standard.<sup>243</sup> This was adopted because it “builds

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<sup>242</sup> At [126] per Tipping J, [279] per Anderson J and [79] per Blanchard J.

<sup>243</sup> *R v Edwards Books and Art* [1986] 2 SCR 713 at 772 per Dickinson CJ.

in appropriate latitude to Parliament”.<sup>244</sup> Bearing in mind the moderate degree of deference due to Parliament’s assessment of the matter, the question is whether “there was an alternative but less intrusive means of addressing the legislature’s objective which would have had a similar level of effectiveness.”<sup>245</sup>

In order to achieve Parliament’s objectives, it was necessary to criminalise intentional conduct that interferes with structures or ships. It is possible to argue that the offence of entering a specified non-interference zone was not necessary as it restricts the expression and assembly rights of all protestors, not merely those engaged in direct action protest. This argument would assert that safety, navigation and ultimately the investment market would be sufficiently protected if only protest action that interferes with mining operations at sea were restricted. However, the stronger position is that this offence is reasonably necessary to achieve the objectives, especially considering the deference due to Parliament. The specified non-interference zones serve the purpose of achieving clarity with respect to the conduct required to trigger the offence, a clarity that is not imparted by the undefined standard of “interference” in s 101B(1). This certainty assists the deterrence of direct action protest because it establishes that all such conduct, relying as it does upon close proximity to the protested action, is illegal. As it is a strict liability offence, subject only to a defence of reasonable excuse, there is no ambiguity upon which direct action protest could be defended. Thus s 101B(1) has a preventative as opposed to a reactive effect. Combined with the practical costs and difficulties of enforcement of these laws on the oceans, this is reasonably necessary to achieve the objective of protecting safety and ensuring investor confidence in the offshore gas and oil market.

The next question must be whether it was reasonably necessary for Parliament to set the maximum radius of the specified non-interference zone to 500 metres, or whether a lower maximum could have sufficiently achieved the objectives pursued. The reasons advanced above in relation to the necessity of the offence itself do not depend on the particular distance adopted. Thus the offences could have achieved their intended purpose even with a maximum area of less than 500 metres. However, the moderate degree of deference due to Parliament strongly advocates the acceptance of 500 metres as reasonably necessary, especially given the provisions in art 60 of UNCLOS relating to safety zones around structures on the continental shelf.

The safety zones permitted by art 60 of UNCLOS shall not exceed 500 metres in radius, “except as authorized by generally accepted international standards or as recommended

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<sup>244</sup> *Hansen v R*, at [124] per Tipping J.

<sup>245</sup> At [217] per McGrath J.

by the competent international organization.”<sup>246</sup> In recent years, the International Maritime Organisation has fielded requests from Brazil to extend the breadth of safety zones to one nautical mile around fixed structures and two nautical miles around floating structures.<sup>247</sup> The Sub-Committee on Safety of Navigation denied there was a “demonstrated need” to “establish safety zones larger than 500 metres”.<sup>248</sup> The discussion by the Committee indicates that, if anything, there is an emerging movement among states to extend the maximum radius beyond 500 metres. The purpose of safety zones illustrates that the 500 metre radius is also reasonable with respect to ships. Safety zones were permitted under UNCLOS to enhance the safety of navigation.<sup>249</sup> As the close navigation of two ships poses a greater risk to safety than the close navigation of a ship to a structure, it is reasonable that the 500 metre maximum radius transfers to non-interference zones around ships. This analogous international standard, in tandem with the moderate deference due to Parliament, means that the minimal impairment test is satisfied.

**(c) Due Proportion**

The final step in the s 5 inquiry asks whether the limit placed on rights is proportionate to the importance of the objectives.<sup>250</sup> This requires the importance of freedom of expression and assembly and the nature and extent of the limitation imposed on those rights to be weighed against the objectives pursued by the limitation.<sup>251</sup>

**(i) The Value of Protest at Sea**

As discussed, the rights of freedom of expression and assembly are of fundamental importance within New Zealand’s democratic society. The value to be attributed to the particular exercise of these rights depends upon the connection between the protest activity and the underlying rationales explored above. The stronger this connection, the more value ought to be attributed to that protest.<sup>252</sup> This paper discussed the strength of this connection when it considered the question of whether the Amendment Act

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<sup>246</sup> UNCLOS, art 60(5).

<sup>247</sup> *Brazil Proposal for the establishment of an Area to be Avoided and modifications to the breadth of the Safety Zones around Oil Rigs located off the Brazilian Coast – Campos Basin Safety Zones* IMO Doc NAV 53/3 (26 February 2007).

<sup>248</sup> Sub-Committee on Safety of Navigation *Report to the Maritime Safety Committee* IMO Doc Nav 56/20 (31 August 2010) at [4.15].

<sup>249</sup> Kraska and Pedrozo, above n 136, at 79; O’Connell, above n 72, at 504.

<sup>250</sup> *Hansen v R*, at [104] per Tipping J and [225] per McGrath J.

<sup>251</sup> At [199] per McGrath J.

<sup>252</sup> Geiringer and Price, above n 180, at 320; *Hansen v R*, at [199] per McGrath J.

constitutes a prima facie limitation upon protest rights. It has argued that political protests against the prospecting, exploration and mining of resources on the continental shelf strongly engage the democratic rationale, contribute to the marketplace of ideas, and advance the self-fulfillment of individual protestors. The protest action restricted by s 101B should therefore be considered high-value speech of significant importance.<sup>253</sup>

(ii) The Extent and Significance of the Intrusion

Section 101B(1) completely prohibits non-violent direct action protest as such protest, by definition, fulfills the requirements of being intentional and having the consequence of interfering with the activities being carried out. In doing so, it undermines the contribution that non-violent direct action protest makes to the market-place of ideas, the promotion of an informed citizenry and the self-fulfillment of individuals.

Criminalising entry into a specified non-interference zone also prohibits non-violent direct action. Moreover, to the extent that the inability to access a particular place restricts the ability of protestors to convey their message effectively, the rationales of protecting purely communicative protest are also undermined.<sup>254</sup> Even where the intended audience of purely communicative protest at sea is the general public, close proximity to the vessels and structures may be necessary as the successful dissemination of the message may rely upon striking video footage that can only be obtained in that location.<sup>255</sup> If that message is not conveyed, the value of the protest, grounded in its contribution to an informed citizenry and the marketplace of ideas, is lost. The inability to access a particular place also undermines the rationale of self-development by restricting autonomous choice as to the place of protest and indirectly restricting autonomous choice as to the means of protest.<sup>256</sup> Spatial restrictions that render protest ineffectual therefore constitute severe infringements on the values underlying protest activity.<sup>257</sup> The prohibition of entry into specified non-interference zones is a substantial interference with the freedom of expression and assembly of purely communicative protestors.

(iii) Balancing the Competing Interests – Overall Proportionality

The proportionality inquiry requires that the importance of the rights infringed and the extent of the infringement be weighed against competing objectives. The considerable

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<sup>253</sup> See Geiringer and Price above n 180, at 322 for a discussion of the hierarchy of speech.

<sup>254</sup> Zick, above n 171, at 618; Zick, above n 156, at 111; Barendt, above n 169, at 87.

<sup>255</sup> Zick, above n 156, at 115.

<sup>256</sup> Fenwick and Phillipson, above n 26, at 545; Mead, above n 188, at 8.

<sup>257</sup> Philip Joseph “The Illusion of Civil Rights” (2000) NZLJ 151 at 152.

restrictions upon high-value speech are to be weighed, in this instance, against the competing objectives of securing economic investment, protecting the safety of vessels and structures at sea, and reducing interference with navigation. These objectives are important concerns that must not be undervalued.

Section 101B(1) is a proportionate limitation on protest rights. It restricts high-value political protest, and the extent of the intrusion upon the underlying rationales is significant as non-violent direct action is prohibited. However, the danger posed by non-violent direct action protest to the legitimate and important objectives justifies the conclusion that the interference with the rights of freedom of expression and assembly is proportionate to the objectives pursued. Section 101B(1) is, therefore, consistent with BORA as it imposes no more than a justifiable limitation on rights.

Section 101B(2) requires a more complex analysis because criminalising entry into a specified non-interference zone undermines both non-violent direct action and purely communicative protests. Yet the competing interests of safety, navigation, and investment security are not significantly implicated by purely communicative protest. Nevertheless, for interrelated reasons, this paper concludes that the balance struck is proportionate. First, and from a pragmatic perspective, the costs and risks of protesting at sea are such that protest at sea almost inevitably employs direct action tactics. Although this does not detract from the extent of the infringement upon protest rights in cases of purely communicative protest, it does support the conclusion that the “the infringement is too high a price to pay for the benefit of the law.”<sup>258</sup> Combined with the appropriate latitude due to Parliament, and the argument advanced earlier that non-interference zones are a reasonable measure by which to advance Parliament’s objectives, this factor justifies the conclusion that s 101B(2) is also a proportionate limitation upon protest rights.

It follows that the offences constitute a justified and reasonable limitation upon the rights to freedom of expression, peaceful assembly, and – to the extent applicable – movement. For this reason, s 5 is satisfied and the Amendment Act is consistent with the New Zealand Bill of Rights Act.

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<sup>258</sup> See Hogg, above n 188, at 38–43.

## *VI Conclusion*

The offences in the Amendment Act were introduced to deter offshore direct action protests. They criminalise conduct by New Zealand and foreign vessels within and beyond the territorial sea in such a way that limits the freedoms of navigation and protest. Nevertheless, this paper has argued that the offences are consistent with both New Zealand's jurisdiction under international law and the New Zealand Bill of Rights Act. The jurisdiction to enact and enforce these offences arises, in respect of New Zealand vessels and vessels within the territorial sea, by virtue of the principles of nationality and territoriality. In respect of foreign vessels beyond the territorial sea, New Zealand has jurisdiction because the offences are a reasonable exercise of the sovereign rights provided in UNCLOS for the purpose of exploring and exploiting the natural resources on the continental shelf. The offences in the Amendment act are also consistent with BORA. They limit high-value speech and infringe the rights to freedom of expression, peaceful assembly and – within the territorial sea – movement. However, in light of the moderate degree of deference due to Parliament and the costs imposed by direct action protest against the important objectives of safety, navigation and facilitating the economic exploitation of natural resources, the offences constitute no more than a reasonable and justified limitation upon the right to protest.

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