

## FRANK STUART DETHRIDGE MEMORIAL ADDRESS

### INTERNATIONAL LAW AND NATIONAL LAW ENFORCEMENT – A REGIONAL EXAMPLE. SENTENCING FOR FISHERIES OFFENDING IN THE NEW ZEALAND DISTRICT COURT.

Judge T J Broadmore\*

#### Preliminary Comments

It is an honour and a privilege to have been invited to present this address.

Unlike many who have spoken on this occasion in honour of Frank Dethridge, I did not have the good fortune to know him. But I know how highly he was regarded both as a lawyer – he was for most of his professional life a partner in the Melbourne office of Mallesons – and as a man; and how much he was mourned after his untimely death in 1976.

In the interests of reinforcing the institutional memory of our founder, I take this opportunity of repeating the tribute to Frank of Sir Ninian Stephen when he presented the first of these addresses in 1977:<sup>1</sup>

He was a man learned in the law and with a great interest in and much experience of shipping law. Those members of the Victorian Bar fortunate enough to be briefed by him in shipping matters were the wiser for his counsel. His wisdom, kindness and moderation will long be remembered in the profession. He had developed to an exquisite degree that high art of the instructing solicitor, how to teach counsel what he does not know but needs to learn for the case in hand, while conveying the impression all the while that it is he, the instructing solicitor, who is collecting pearls of wisdom as they fall from counsel's lips.

It is a matter of record that Frank first conceived the idea of a maritime law association in Australia, brought it to life, and was elected its President at its inaugural meeting in 1974 and presided over its first conference in Melbourne in 1975. There were twelve attendees at that conference, amongst whom were my good friends Ron Salter of Phillips Fox DLA and Paul Willee QC of the Victorian bar, so I suppose I can claim a mere one degree of separation from Frank. From the original twelve, the Association now has more than 200 members and about 90 delegates here today, including Ron. If you would wish to learn of but one of Frank's accomplishments, look around you.

I was an inaugural member of the New Zealand Branch of the Association, formed in 1977. Rather terrifyingly, that was more than 30 years ago. From my membership of the Association have sprung long friendships, cordial professional relationships, and opportunities for learning about maritime law, all of which I have valued and enjoyed enormously. I therefore have personal reason to acknowledge Frank's accomplishment in establishing this Association.

When I became a District Court judge about four years ago, I displayed on the shelves of my chambers the books of my maritime law library – Scrutton, Carver, Gilmore & Black and the rest. Since then, I have not opened one of them. So it would be dangerous of me to attempt any kind of learned discussion of some current topic in maritime law.

Most of what we do in the District Court is deal with criminal cases. And a large part of that involves sentencing offenders. Wave after wave of them. Not just for criminal offending of all but the highest degrees of gravity, but

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\* Judge of the District Court in Wellington, New Zealand. This address was presented to the 2009 Annual Conference of the Maritime Law Association of Australia & New Zealand in September 2009. The views expressed in this paper do not represent the views of the District Court bench, the Ministry of Justice, the Ministry of Fisheries, or any government-related organisation. They are my own. I gratefully acknowledge the assistance of Alana Long, research counsel, District Court, Wellington, and others with professional involvements in the topic who have made helpful suggestions but who would probably prefer not to be publicly identified.

<sup>1</sup> Sir Ninian Stephen, 'Frank Stuart Dethridge Memorial Address' Inaugural Annual MLAANZ Conference 1977.

for regulatory offending which can involve deaths in the work place, or heavy financial losses involving breaches of the *Commerce Act* (NZ) or the *Fair Trading Act* (NZ).

So it is about sentencing that I wish to speak this morning. Sentencing with a maritime flavour, however. I have set out to examine the approach my colleagues take to sentencing offenders against our fisheries laws, to consider the legal and factual context in which such sentencing takes place, and to consider whether we have in fact been taking into account all relevant matters. As will appear, I consider that this topic has implications for the enforcement of environmental legislation generally where the context of such legislation includes international conventions and agreements.

## Introduction

Most fisheries prosecutions in New Zealand are determined by a District Court judge at a summary trial.<sup>2</sup>

The District Court judge hearing fisheries charges has a challenging role. On the one hand, whether recognised or not, the issues before the Court have as their context a centuries-long evolution of national law moving steadily from freedom to control, moderated in recent times by international law, refined through years of international conferences and debated by some of the most eminent legal thinkers on the planet. On the other hand, the Judge must determine the generally prosaic issues that arise as in any other criminal case: has the prosecution established the elements of the offence charged to the standard of beyond reasonable doubt; and if so, what are the consequences?

I do not know to what extent those international jurists, arguing over a semicolon, give thought to those who must apply the national laws mandated by their work. But what I have increasingly become aware of is that the work of law enforcement in this area is highly significant in both legal and environmental terms. And that its significance extends far beyond New Zealand. There seems to me to be a case to be made for the explicit recognition of this context by the courts in sentencing offenders.

In discussing these ideas, I will need to outline the international instruments influencing our fisheries law, the response of that law, particularly in respect of sentencing, to assess the extent to which that response is appropriate, and to offer a view on directions the Courts might properly take.

It will also be necessary to cover briefly New Zealand law relating to sentencing generally.

## International Drivers

### *The Environmental Context*

There is no need for me to rehearse the doleful advice from fisheries scientists world-wide that global fisheries are under stress, in a state of decline, or are at imminent risk of total collapse. It is worth noting that this situation has become apparent only since the adoption of the *United Nations Convention on the Law of the Sea (UNCLOS)* in 1982, a mere 28 years ago.

These world-wide declines in capture fisheries 'have focussed attention on the need for new paradigms for the conservation and management of marine living resources both within and beyond national jurisdiction'.<sup>3</sup>

However, the latest news is not altogether bad. There has recently been a positive assessment of New Zealand's fisheries management performance in the research paper *Rebuilding Global Fisheries* published in the latest issue of the international journal, *Science*. New Zealand was one of only two marine areas to receive a 'Green' rating, the highest allocated. Along with Alaska, New Zealand has led the world in terms of management success by our efforts to put management interventions in place, before drastic measures are needed, to conserve, restore

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<sup>2</sup> Offenders generally who face charges punishable by more than six months imprisonment may elect trial by jury; but, because foreign offenders in fisheries cases are not subject to a sentence of imprisonment (for reasons to be discussed later), they have no right of election. The charges against them are therefore determined at summary trials. New Zealand nationals in fisheries cases may elect trial on the same basis as in other cases.

<sup>3</sup> David Freestone, Richard Barnes and David Ong (eds), *The Law of the Sea: Progress and Prospects* (2006) 1.

and rebuild marine resources. Both technical and anecdotal reports indicate recovering stocks in a number of important fisheries, notably hoki.

The paper reports success elsewhere as well. It seems that fisheries management success stories are becoming increasingly common. The US, Iceland and the EU have been making concerted attempts to reduce fishing pressure over the last decade or so and this has resulted in increases in fish biomass in a number of cases. As a result, recoveries of some stocks off the US west coast, New England and northwest Australia have been spectacular. Reduced fishing pressure means there are many other stocks poised for recovery. But it is clear that these successes have resulted from determined management efforts, in which quota management systems on the New Zealand model are a highly-regarded component.<sup>4</sup>

It comes as no surprise to learn that environmental groups challenge the conclusions of the paper. Much of the claimed success is apparent only, they maintain; and, for every apparent success, failure looms elsewhere, even in New Zealand. But no-one doubts that the price of success in achieving the rebuilding of fish stocks and long term sustainability is continuing vigilance. Our Ministry of Fisheries itself warns that there is no room for complacency.

### ***The International Legal Context***

In 1982, in *UNCLOS* the world community at last confirmed the fundamental concepts of coastal State sovereignty over a territorial sea of 12 nautical miles; and sovereign rights, subject to the provisions of the Convention, of exploring, exploiting, conserving and managing the natural resources of the adjacent Exclusive Economic Zone (EEZ). These concepts having been established, the rights of coastal States in their EEZs, including the ongoing management of fisheries, appear to prevail subject only to the duties and obligations owed to other States as specified in *UNCLOS*.<sup>5</sup>

But the problems of fisheries management by coastal States did not go away with the adoption of the convention. Richard Barnes has pointed out the entirely foreseeable consequence of empowering coastal States to exclude foreign fishers from their EEZs:<sup>6</sup> the international tragedy of the commons has merely been replaced by the potential for a national one in which national fleets, protected from foreign competition, continue to over-exploit the resource; and the exhortations in Art 61 of the Convention are sufficiently non-specific to allow coastal States so minded to avoid being called to account. Moreover, conservation and fisheries management issues are excluded from *UNCLOS*' compulsory dispute resolution procedures.

Protection of fisheries on the high seas is, by contrast, addressed explicitly. The Convention, in Art 117, is forthright in requiring States to take measures for their respective nationals for the conservation of the living resources of the high seas. This requirement, together with the requirements in Articles 63 and 64 to co-operate in the specific situations envisaged in those Articles, has provided the legal underpinning for two important international agreements: the *Fish Stocks Agreement* of 1995,<sup>7</sup> concerning the regulation of the exploitation of *straddling* stocks – those which straddle the boundary between the high seas and a coastal State's EEZ – and highly migratory species such as tuna; and further a voluntary instrument adopted by the Food and Agriculture Organisation of the United Nations (FAO) – the *International Plan of Action to Prevent, Deter and Eliminate Illegal Unreported and Unregulated Fishing (Plan of Action)*. Both of these agreements are important for the control and management of fishing on the high seas; and both are reflected in NZ legislation. But, as my purpose is to focus on the regime governing fishing in our EEZ, I do not propose to examine them except incidentally.

As is apparent from the agreements I have just referred to, *UNCLOS* does not purport to legislate in detail for every matter that it covers. It operates as a framework convention which may be supplemented by specialised

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<sup>4</sup> Ministry of Fisheries, *Annual Report 2009: Fisheries Policy and Management Achievements During the Year* (2009) [7] <[http://www.fish.govt.nz/NR/rdonlyres/90A15522-2543-43E6-9660-0778B7780F9B/0/AnnualReport\\_2009.pdf](http://www.fish.govt.nz/NR/rdonlyres/90A15522-2543-43E6-9660-0778B7780F9B/0/AnnualReport_2009.pdf)> This and the preceding paragraph paraphrase part of a press release from the Ministry of Fisheries, available on its website, [www.fish.govt.nz](http://www.fish.govt.nz).

<sup>5</sup> *United Nations Convention on the Law of the Sea (UNCLOS)*, 1994, 1833 UNTS 3, arts 56(2) (general duty to exercise rights with regard to the interests of other States); 61(2) (not to over-exploit living resources; 62(2) (access by other States to surplus); 63 and 64 (straddling and highly migratory stocks); and 192-3 (protection and preservation of the marine environment).

<sup>6</sup> Richard Barnes, "The LOSC: An Effective Framework for Domestic Fisheries Conservation?" in David Freestone, Richard Barnes and David Ong (eds), *The Law of the Sea: Progress and Prospects* (2006) 241.

<sup>7</sup> *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (Fish Stocks Agreement)*, 2001, 2167 UNTS 3.

agreements to put flesh on the bones of the general obligations it has created. In the context of regulating fishing by foreign States in the EEZ of a coastal State, Art 61(2) prescribes a high-level obligation as follows:

The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation. As appropriate, the coastal State and competent international organisations, whether subregional, regional or global, shall co-operate to this end.

Further, in relation to conservation measures within the EEZ of a coastal State, UNCLOS provides in Arts 192 and 193 that:

192. States have the obligation to protect and preserve the marine environment.

193. States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.

Although the reference to sovereign rights hardly implies that coastal States are answerable to the international community for their environmental stewardship of EEZs, Art 194(5) goes on to provide that:

The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.

Seeking jurisdiction primarily from these sources, the international community under the auspices of the FAO has developed a further voluntary instrument to accompany the *Fish Stocks Agreement* – the *Code of Conduct for Responsible Fisheries*. The justification for the *Code of Conduct* is well set out in its Preface, from which the following is taken:<sup>8</sup>

From ancient times, fishing has been a major source of food for humanity and a provider of employment and economic benefits to those engaged in this activity. The wealth of aquatic resources was assumed to be an unlimited gift of nature. However, with increased knowledge and the dynamic development of fisheries after the Second World War, this myth has faded in face of the realization that aquatic resources, although renewable, are not infinite and need to be properly managed, if their contribution to the nutritional, economic and social well-being of the growing world's population is to be sustained.

The widespread introduction in the mid-seventies of EEZs and the adoption in 1982, after long deliberations, of UNCLOS provided a new framework for the better management of marine resources. The new legal regime of the ocean gave coastal States rights and responsibilities for the management and use of fishery resources within their EEZs which embrace some 90 percent of the world's marine fisheries. *Such extended national jurisdiction was a necessary but insufficient step toward the efficient management and sustainable development of fisheries. Many coastal States continued to face serious challenges as, lacking experience and financial and physical resources, they sought to extract greater benefits from the fisheries within their EEZs.* (emphasis added)

In recent years, world fisheries have become a market-driven, dynamically developing sector of the food industry and coastal States have striven to take advantage of their new opportunities by investing in modern fishing fleets and processing factories in response to growing international demand for fish and fishery products. By the late 1980s it became clear, however, that fisheries resources could no longer sustain such rapid and often uncontrolled exploitation and development, and that new approaches to fisheries management embracing conservation and environmental considerations were urgently needed.

The *Code of Conduct* sets out in Article 6 detailed principles directly applicable to domestic fisheries management, of which a summary is as follows:

1. The right to fish carries with it the duty to conserve and manage living marine resources.
2. Fisheries management should promote the maintenance of the quality, diversity and availability of fishery resources in sufficient quantities for present and future generations in the context of food security, poverty alleviation and sustainable development. Management

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<sup>8</sup> Food and Agriculture Organisation of the United Nations, *Code of Conduct for Responsible Fisheries (Code of Conduct)*, 1995. Preface (emphasis added).

measures should not only ensure the conservation of target species but also of species belonging to the same ecosystem or associated with or dependent upon the target species.

3. States should prevent over-fishing and excess fishing capacity and should implement management measures to ensure that fishing effort is commensurate with the productive capacity of the fishery resources and their sustainable utilisation.
4. States should take measures to rehabilitate populations as far as possible and when appropriate.
5. Conservation and management decisions for fisheries should be based on the best scientific evidence available.
6. The precautionary approach should be widely applied to conservation, management, and exploitation of living aquatic resources.
7. Selective and environmentally safe fishing gear and practices should be further developed and applied, to the extent practicable, in order to maintain biodiversity and to conserve the population structure and aquatic ecosystems and protect fish quality.
8. Critical fisheries habitats should be protected.
9. States authorising fishing and fishing support vessels to fly their flags should exercise effective control over those vessels so as to ensure the proper application of this *Code of Conduct*.
10. States should co-operate to prevent disputes.

The *Code of Conduct* is purely voluntary. As noted by Barnes,<sup>9</sup> its significance is that it provides a set of principles that can be drawn on by States in designing domestic fisheries regimes, and it may contribute to the formation of State practice and the development of customary international law on fisheries regulation. As stated in Art 3, it is to be interpreted and applied in conformity with the relevant rules of international law, as reflected in *UNCLOS* and other specified international instruments.

For present purposes, in my view, its significance for New Zealand is that it provides an assurance that our regime, established under the *Fisheries Act 1996* (NZ) and to be described shortly, reflects best international practice, and is consistent with and responsive to international legal paradigms.

## **NZ Fisheries Environment – some background**

Because New Zealand is so remote, outright piracy of our fisheries by foreign vessels is virtually unknown. So far as I am aware, there has been only one prosecution of the master of a foreign fishing vessel which had no right at all to be in our waters.<sup>10</sup> One of the defences advanced in that case was that the master thought he was in the EEZ of Tonga.

But there has for many years been a considerable legitimate presence in New Zealand of foreign owned and crewed vessels. That presence was initially accepted in recognition of the inevitability of what became Art 62(2) of *UNCLOS*: if a coastal State was unable to exploit the sustainable catch levels of particular fisheries, it should make the difference available to foreign vessels. Thus s 28 of the *Territorial Sea and Exclusive Economic Zone Act 1977* (NZ) allowed the grant of licences to foreign owners.

However, through the 1980s, the government advanced a policy of developing New Zealand's own deep-sea fishing capacity. The practice developed of New Zealand companies chartering foreign vessels, crewed by foreign nationals, on a basis whereby the New Zealand charterer owned the catch. The consequence has been that it is now rare, if not unknown, for any part of the sustainable harvest to remain available to be fished under licence by foreign operators. The theoretical right of access by licensed foreign fishing vessels is now covered by Part 5 of the *Fisheries Act 1996* (NZ).

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<sup>9</sup> Barnes, above n 6, 253.

<sup>10</sup> *Kim v McDonald* (Unreported, High Court, Auckland, Speight J, 18 February 1980) (on appeal).

The other major development since the 1980s has been the development of the Quota Management System (QMS). The broad outline of the QMS system will be known to many in this audience, but I will summarise it here.<sup>11</sup> The Ministry of Fisheries establishes quota management areas and sets total allowable commercial catches (TACC) of specific species for those areas. The TACC is divided into 100 million shares. Individual transferable quota (ITQ), expressed as a number of shares in the TACC, is allocated to fishing companies based on their catch history and other considerations. The ITQ represents a property right in the fishery and gives access to it.

In order to catch fish against the quota held, fishers also require annual catch entitlement (ACE). This entitlement represents a catching right, and is allocated to quota holders according to the number of shares that they hold in the species concerned. The Ministry adjusts the TACC from time to time on the basis of statistical data of various kinds; and quota and ACE is adjusted appropriately. All fish covered by quotas and caught by a quota holder must be covered by an annual catch entitlement.

Both ITQ and ACE are separately tradable, so that a quota holder may sell, lease or mortgage quota and may sell the ACE generated by the ITQ.

Theoretically, therefore, provided that the research undertaken by the Ministry and the catch entitlement decisions made periodically on the basis of that research are accurate, the fishery can be maintained sustainably in the long term. Granted that there is constant wrangling between fishing companies, other interest groups and the Ministry over the allocation of quota and catch entitlements, but the overall concept has general support.

*The Economist* magazine is a forthright supporter of QMS systems. It recently praised them in the following terms:<sup>12</sup>

By giving fishermen a long term interest in the health of the fishery, ITQs have transformed fishermen from rapacious predators into stewards and policemen of the resource. The tragedy of the commons is resolved when individuals owned a defined (under guarantee) share of a resource, a share that they can trade. This means that they can increase the amount of fish they catch not by using brute strength and fishing effort, but by buying additional shares or improving the fishery's health and hence increasing its overall size.

In the interests of New Zealand, it is necessary to ensure that the QMS system operates fairly and efficiently. Offending of the kind evident in many prosecutions over the last few years must be strictly policed in order to ensure continued progress towards those goals.

## The Fisheries Act 1996

The purpose of the Act as stated in s 8 is 'to provide for the utilisation of fisheries resources while ensuring sustainability'.

Further, s 9 requires the maintenance of biodiversity of the aquatic environment. The Act explicitly provides, in s 5, for its interpretation in a manner consistent with New Zealand's international obligations relating to fishing. With that in mind, it is clear that ss 8 and 9 imply reference both to *UNCLOS* and to the *Convention on Biological Diversity*.<sup>13</sup> It would normally follow that the Act should be read in the context of the international law of the sea and, if possible, consistently with that law.<sup>14</sup>

But it seems that the express language of s 5 implies a requirement for more than mere consistency. In *Greenpeace NZ Inc v Minister of Fisheries*,<sup>15</sup> Gallen J (referring to the 1983 Act) observed that *UNCLOS* established a background to the New Zealand legislation which made it appropriate to *place an emphasis* on the conservation of harvested species.

<sup>11</sup> A full and helpful description of the system is contained in *Ministry of Fisheries v Yoshimura & Urata* (Unreported, District Court, Dunedin, O'Driscoll DCJ, 17 January 2005).

<sup>12</sup> 'Economies of Scales' *The Economist* 20 September 2008, 18.

<sup>13</sup> *Convention on Biological Diversity*, 1993, 1760 UNTS 79. And to other relevant international agreements to which New Zealand is a party such as the *Fish Stocks Agreement* and also the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 1993, 993 UNTS 243.

<sup>14</sup> *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 (Court of Appeal).

<sup>15</sup> (Unreported, High Court, Gallen J, 27 November 1995).

Later provisions in the early part of the Act explain and amplify the references to utilisation and sustainability.

### **Offence Provisions of the Fisheries Act**

I do not intend to review the offences created by the Act. Obviously there are offences relating to catch limits, fish size, types of nets and other gear, areas closed to fishing, and matters of that kind. And there is a range of offending relating to the management and control of fishing under quota.

Section 252 of the Act establishes a hierarchy of three tiers of offending. The most serious offences attract a maximum penalty of a fine of \$250,000; less serious offences attract a maximum penalty of a fine of \$100,000; and lesser offending still attracts a maximum penalty of a fine of \$5,000. In addition, for some offences attracting fines at the two higher levels, imprisonment for terms not exceeding 5 years and 1 year respectively may also be imposed. At all levels of offending, the court also has the option of imposing a 'community-based' sentence – an electronically monitored sentence of home detention or community detention, or a sentence of community work.

Section 253 gives effect to the prohibition on imprisonment of foreign nationals contained in Article 73 of *UNCLOS*. In cases where s 253 applies, the maximum fine is increased to \$500,000. Reflecting the Convention, the section also contains the qualification that sentences of imprisonment may nevertheless be imposed on foreign nationals pursuant to an agreement with a foreign government.

### **Sentencing**

Section 254 is fundamentally important in sentencing under the Act. It provides as follows:

If any person is convicted of an offence against this Act, the Court *shall*, in imposing sentence, *take into account the purpose of this Act* and shall have regard to:

- (a) The difficulties inherent in detecting fisheries offences; and
- (b) The need to maintain adequate deterrents against the commission of such offences. (emphasis added)

It is necessary to mention that the Act also contains provisions for minor offences, administrative penalties and the like.

### **The Sentencing Act**

Section 254 operates within the context of the law relating to sentencing generally, as set out in the *Sentencing Act 2002* (NZ). That Act sets out the purposes and principles of sentencing; and also prescribes the types of sentence that are available and the rules governing their imposition.

I am sure that the general approach of the *Sentencing Act* would come as no surprise to lawyers outside New Zealand. The stated purposes of sentencing, at least those relevant to fisheries offences, include holding offenders accountable for the harm done to the community; denouncing the offender's conduct, and deterring the offender and others from similar offending. The principles of sentencing call for consideration of a range of factors of which the most relevant one for present purposes is the gravity of the offending, including the culpability of the offender.

The Act goes on to specify the aggravating and mitigating factors to be taken into account in reaching a final sentence. The list of factors specified is non-exclusive. Most are relevant primarily to traditional criminal offending. But the specified factors of premeditation, a guilty plea, and remorse are relevant in the fisheries context.

The current approach of the New Zealand courts to the calculation of an appropriate sentence in any criminal case calls for a two-stage process. First, determine the culpability of the offending, including in that exercise

aggravating and mitigating factors relevant to the offending, so as to identify a ‘starting point’ sentence. And then take into account aggravating and mitigating factors personal to the offender in order to reach a final sentence. Proceeding in this way assists the sentencing judge in observing the important principle of maintaining consistency of sentencing levels.<sup>16</sup> At the same time, justice can be done to individual offenders by adjusting the ‘starting point’ sentence to reflect their personal circumstances.

## Summary to Date

I have now touched on the international context, relevant provisions of the *Fisheries Act*, and the generally applicable purposes and principles of sentencing. This review identifies the following propositions:

1. The global capture fisheries resource is in crisis; but New Zealand is in the forefront in restoring and maintaining sustainability.
2. International instruments, adding to the broad framework of *UNCLOS*, recognise that situation, call on coastal States to take action in response, and set out, in some detail, the measures regarded internationally as required in order to restore and sustainably maintain the resource.
3. The *Fisheries Act* reflects current international norms and expressly provides for its interpretation in a manner consistent with New Zealand’s international obligations relating to fishing.
4. Section 254 of the Act expressly requires the court to take into account the purposes of the Act in sentencing.

The question now to be addressed is whether these propositions are adequately reflected in sentencing offenders.

## District Court Sentencing Decisions

To address that question, I have reviewed a number of District Court sentencing decisions in fisheries matters. I have selected five of such decisions,<sup>17</sup> because the judges concerned in those cases have taken the opportunity to express specific views about sentencing in the fisheries context.

The cases I have reviewed follow, expressly or implicitly, the judgment of Fisher J in the High Court in *Ministry of Agriculture and Fisheries v Lima*,<sup>18</sup> an appeal against a sentence imposed in the District Court. Fisher J’s approach was approved by a full bench of the High Court in *Ministry of Agriculture and Fisheries v Equal Enterprise Ltd.*<sup>19</sup>

What is also clear from each decision is that the overall approach to sentencing must be governed by the provisions of the *Sentencing Act* to which I have already referred. This means that fisheries-specific considerations must relate to the purposes and principles of sentencing set out in the *Sentencing Act*; and that aggravating and mitigating circumstances including the personal circumstances of the offender must be taken into account in reaching a final sentence.

It would be tedious to set out the circumstances of *Lima* or the individual District Court cases. Their significance is that the judges identified particular aspects of the offending which have general application and which are relevant to determining sentence. These are as follows:

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<sup>16</sup> *R v Taueki* [2005] 3 NZLR 372 (Court of Appeal).

<sup>17</sup> *Ministry of Agriculture and Fisheries v Imlach* (Unreported, Wellington, Jaine DCJ, 8 October 1993); *Ministry of Agriculture and Fisheries v Dubchak* (Unreported, Wellington, Keane DCJ, 17 August 1994); *Ministry of Fisheries v Choe and others* (Unreported, Wellington, Ongley DCJ, 10 October 2001); *Ministry of Fisheries v Yoshimura* (Unreported, Dunedin, O’Driscoll DCJ, 17 January 2005); *Ministry of Fisheries v Pierzchlinski and others* (Unreported, Christchurch, Crosbie DCJ, 12 March 2009). All judgments are those of the District Court at the venues mentioned.

<sup>18</sup> (Unreported, Auckland, Fisher J, 26 August 1993).

<sup>19</sup> [1994] 2 NZLR 473.



1. The high level of fine, and the significant increase in 1990, signalled a clear parliamentary indication that the Courts must regard these matters as serious because of the threat that offending of this kind poses to New Zealand's valuable fisheries resources.
2. The need for conservation of the resource.
3. The need for deterrence, particularly in circumstances where undetected offending can result in significant gain.
4. The fact that those who cheat the system place fishermen who operate lawfully at a commercial disadvantage.
5. Where the offending vessel is a foreign vessel, it is fishing within New Zealand waters as a privilege.
6. Where the offending involves fishing in an area prohibited to that vessel, the purpose of the prohibition is relevant. Purposes may include protecting spawning grounds or limiting access to smaller local vessels.
7. The cost and difficulty of surveillance operations and documentary investigations.
8. Trucking offending results in over-fishing and distortion of scientific information derived from catch reports.  
Trucking is the practice of catching fish in one management area but reporting it as caught in another.

Additionally, throughout these cases and others, there is reference to more general sentencing themes – premeditation and sophistication in concealment; whether the offending continued for some time until discovery or was a one-off event; the pursuit of commercial gain; whether the offending represented a joint enterprise by a number of offenders.

Earlier, I referred to the need for sentencing judges to consider the personal circumstances of the offender. That includes the means of the offender and his or her ability to pay. It is frequently the case that offenders, particularly officers and crew members on foreign vessels, are paid poorly and have few assets. No doubt for their own strategic reasons, their employers often maintain that the offenders were acting on their own and that they will not indemnify them in respect of fines. In those circumstances, the sentencing judge is in a quandary.

As to that, it is worth noting the approach of the judge in one of the cases reviewed. He considered that it would be wrong in principle to sentence the defendants on the basis that their employer might indemnify them. However, he considered that in cases where there was a need for a deterrent sentence, the means of the offender and the interests of the public must be placed in the balance. That might mean, and did mean in the particular case, that it would be appropriate to impose a fine which was beyond the immediate means of a defendant to pay.

The statutory prohibition on imposing sentences of imprisonment on foreign offenders has recently received attention. In the last of the cases reviewed, Judge Crosbie thought he could see a means whereby such offenders could nevertheless be exposed to imprisonment by using the procedures of the *Summary Proceedings Act* (NZ) for the enforcement of fines. He opined that:<sup>20</sup>

the Court would possibly order immediate payment of fines to be levied and that, in default, the Court might invoke the warrant of commitment provisions under the *Summary Proceedings Act*. These provisions, in the Court's view, do not infringe and are separate to the provisions relating to imprisonment under the Fisheries Act and the International Conventions.

It is not hard to conclude that a tactic of that kind would likely force the hand of an employer and ensure payment of fines beyond the true ability of the offender to pay. But whether it would withstand scrutiny on appeal is an open question.

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<sup>20</sup> *Ministry of Fisheries v Pierzchlinski and others* (Unreported, District Court, Christchurch, Crosbie DCJ, 12 March 2009) [37].

With great respect, this review demonstrates that my colleagues on the District Court bench are conscientiously applying the purposes and principles of sentencing in a principled way, giving full weight to factors traditionally regarded as enhancing the gravity of the offending or as aggravating. But there is no evidence that they (or, for that matter, the High Court) have considered the four propositions outlined in the summary above. With respect to Fisher J, *Lima* was decided before the *Fisheries Act 1996* was enacted.

## **New Zealand Offenders**

The prohibition on imprisonment does not apply to New Zealand offenders. That sentence is nowadays frequently imposed for repeat and serious offending.

A particular example is offending relating to paua, the shellfish known elsewhere as abalone. The paua fishery is included in the quota management system. But poaching is rife: paua is a delicacy highly prized in Asian cuisine; it fetches good prices in Asia; it is taken by divers operating off the shoreline and offenders therefore require little in the way of equipment; and it is comparatively easy to process, package, and smuggle out of the country. Organised criminal gangs such as the Mongrel Mob are extensively involved in the trade.

Paua poaching is more serious than quota offending because the poacher has no right whatsoever to take paua and offenders typically pay no regard to niceties such as size or catch limitations. Deterrent sentences are therefore called for.

In April 2009, my colleague Judge Davidson sentenced an intermediary in the black market paua trade to imprisonment for a term of three years. That sentence evolved from a starting point of 4½ years. Over a period of four months, he had participated in 16 transactions involving some 2,500 kg of paua meat with a retail value of about NZ\$325,000.<sup>21</sup>

Although the judge did not refer to any of the considerations I have been discussing, I think it can reasonably be accepted that a sentence of that kind is one which would capture attention anywhere.

## **Forfeiture**

A consequence of the conviction of offenders is that, in a wide range of cases, property associated with the offending is forfeited to the Crown. Forfeiture may cover a vessel, fishing gear, the catch, and quota. The Court has jurisdiction to order that property not be forfeited if special reasons are found; and further has jurisdiction to grant relief against forfeiture, particularly where innocent third parties are adversely affected. The forfeiture provisions of the Act have given rise to much legal argument, fortunately beyond the scope of this address.

The significance of forfeiture in the sentencing context is that, in cases where offenders also face forfeiture of their own assets, the sentencing judge is entitled to have regard to that in settling the final penalty.<sup>22</sup> Following the logic of *Taueki*,<sup>23</sup> it seems to me that the prospect of forfeiture is not relevant in fixing the starting point sentence. It is a personal circumstance particular to the offender, and is therefore to be taken into account as a potentially mitigating factor in calculating the final sentence. And, of course, forfeiture is not relevant in those many cases where the offenders are employees whose personal assets are not at risk of forfeiture.

## **Discussion**

It is undeniable that the District Court treats fisheries offending seriously. But none of the judges in the cases that I have reviewed has referred to, much less taken account of, the four environmental and legal issues identified earlier. It appears that the current approach to sentencing does not take into account the international context inherent in the purposes of the Act, despite the express requirement of s 254 to take that context into account.

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<sup>21</sup> *Ministry of Fisheries v Mao* (Unreported, District Court, Wellington, Davidson DCJ, 9 April 2009).

<sup>22</sup> *Ministry of Agriculture and Fisheries v Equal Enterprise Ltd* [1994] 2 NZLR 473, 479.

<sup>23</sup> *R v Taueki* [2005] 3 NZLR 372 (Court of Appeal).

There seems to me to be a number of reasons why we should modify our approach.

First, New Zealand has achieved comparative success in creating a framework for sustainably managing its capture fisheries resource in accordance with international norms. It is logical that the philosophy which has led to that success should extend to the approach taken to the sentencing of offenders. Sentencing offenders is, after all, the ultimate sanction for maintaining the resource and for maintaining the credibility of the management system. There is no point in enacting the laws, even in apprehending offenders, if the offenders are not then dealt with in a manner which reflects all relevant concerns.

Secondly, New Zealand is an often-cited example to the world of how fish stocks can be sustainably managed. All offending is serious to the extent that it threatens the sustainability of the resource. Trucking, in particular, goes to the heart of the QMS. Dumping (an offence of which there were no examples in the cases I reviewed) is arguably worse, because the catch is not reported at all. And, at a practical level, no-one gets to eat the fish. Offending of that kind damages not only the particular fishery involved, but also world-wide efforts to introduce effective models of fishery management.

Thirdly, there is a deterrent effect on the foreign owners of vessels implicated in offending. Some of these owners are major corporations; others have wide international connections. Holding them to account in New Zealand is likely to encourage lawful conduct elsewhere. And where such owners nevertheless become involved in offending elsewhere, the fact that significant penalties have been imposed in New Zealand, if drawn to the court's attention, is likely to be treated as an aggravating factor in sentencing.

Fourthly, if our courts do not recognise the full gravity of offending of this kind then a world-wide audience of timid policy-makers, doubters and cheats will be encouraged to make decisions, or fail to make them, on the basis that not even in New Zealand do the courts pay proper regard to the international implications of offending, or ensure that serious offending is appropriately punished.

I have recently been made aware that this consideration is not fanciful. The *Plan of Action* as to illegal, unreported and unregulated fishing requires flag States to take action against their own nationals involved in offending against the fisheries laws of foreign States.<sup>25</sup> Within the Pacific region, regulatory bodies have been considering the level of penalty for such offending with a view to ensuring that penalties imposed by flag states are of adequate severity. It has apparently been proposed that penalties imposed by coastal States in analogous cases should be treated as a benchmark for that consideration.

John Donne said that no man was an island, alone unto himself. Although New Zealand is an island nation, the fact is that on this issue we are all in it together; because our comparative success in fisheries management is well known what we do has an effect on the behaviour of others; and judges cannot disregard that in making sentencing decisions.

The legal justification in domestic law for these propositions is that s 254 of the Act explicitly requires the sentencing judge to *take into account* the purposes of the Act – much more compelling words than *have regard to*. And the purposes of the Act, reading ss 8 and 9 as informed by s 5, include recognition of, acting consistently with, and indeed, as Gallen J concluded in *Greenpeace*, placing emphasis on, New Zealand's international obligations relating to fishing. Those obligations include the provisions of *UNCLOS* and customary international law as it evolves – in particular, the *Code of Conduct* to which I have already referred.

I therefore consider that judges, in determining the gravity of the offending for the purposes of identifying a starting point for sentencing offenders in this class of case, should expressly articulate these considerations in their sentencing decisions. I do not believe that this would require the sentencing judge to say a lot. Simply that the culpability of the offending was aggravated by the fact that it infringed not just the *Fisheries Act* but also requirements recognised by the international community under *UNCLOS*. And that the international community had recognised the harm done to the global fisheries resource by offending which had the potential to affect the sustainability of the particular fishery. Finally that it was necessary to deter the offenders and others from similar offending not just in New Zealand but elsewhere. A judge with more time than most might also refer to Article 6 of the *Code of Conduct*, with its detailed principles directly applicable to domestic fisheries management.

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<sup>25</sup> New Zealand has given effect to this requirement in the *Fisheries Act 1966* (NZ) s 113A. For an example of a prosecution under the section see my judgment in *Ministry of Fisheries v Tukunga and Boyes* (Unreported, Wellington District Court, 30 March 2007).

The likely effect of doing so would be to increase the perceived gravity of the offending in determining the starting point for sentencing offenders.

It is arguable that the effect on the ultimate sentence imposed might be minimal in individual cases. But it is the overall impact that matters. It is the articulated approach which gets reported in news media, law reports and legal publications, and fisheries literature; and which is cited in future cases when judges come to assess the gravity of the offending.

## **Conclusion**

There is no question that District Court judges have conscientiously approached their task of sentencing fisheries offenders. They have taken a strict approach both to offending and offenders. They have provided reasons for their sentences which are carefully articulated and soundly based in the general law applicable to sentencing. But what I propose is that they look beyond our local concerns, and recognise that those local concerns reflect a global problem. That global problem is more powerfully addressed if those called on to enforce the law at a local level articulate an intention to do so, and reflect that intention in the sentences they impose. As I have tried to argue, New Zealand law gives them the tools to do that.

Put more simply, I maintain that New Zealand fisheries law now requires our judges to think globally as well as to act locally.

That last observation leads me, by way of conclusion and summary, to refer back to the wider themes I identified at the start of this address.

Criminal sanctions have always been regarded as a necessary tool to control anti-social activities. For some 150 years, since the early Factories Acts of the United Kingdom, activities regarded as anti-social have included acts or omissions threatening the health and safety of individuals or communities. More recently, national governments have addressed environmental issues as well. Now the global community has itself become involved in such issues. In conventions and agreements such as *UNCLOS* and the FAO agreements discussed earlier, the global community is imposing on states parties obligations (or allows for them) to regulate the conduct of their nationals in respects relevant to the environment by measures including criminal sanctions. That process can be expected to accelerate in response to an increasing range of environmental challenges. The Stockholm Convention on Persistent Organic Pollutants, which authorises states parties to prohibit the production, importation and export of such pollutants, is an example of this.

There is therefore a direct connection between the language of international conventions and agreements and the process of enforcement of criminal sanctions at the national level: those responsible for drafting the international instruments intend and expect that their purport will be reflected in national criminal law and the practice of national courts. But that direct connection is necessarily mediated by national law.

The New Zealand experience in fisheries law enforcement demonstrates, I suggest, a need for clarity of expression of relevant legislative purpose at both international and national level. If that need is met effectively, then first instance judges, in giving effect to what are effectively international sanctions, will be the better equipped to reflect the concerns which gave rise to their national legislation. It may be a novel experience for first instance judges to find themselves at the cutting edge of global environmental law enforcement; but that is where, increasingly, they will find themselves.