

**ANTI-PIRACY PLANNING CHART – RED SEA  
GULF OF ADEN AND ARABIAN SEA**

**Australia's  
Response  
to Piracy:  
A Legal Perspective**

Edited by Andrew Forbes



SEA POWER CENTRE - AUSTRALIA



AUSTRALIA'S  
RESPONSE  
TO PIRACY:  
A LEGAL PERSPECTIVE

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# AUSTRALIA'S RESPONSE TO PIRACY: A LEGAL PERSPECTIVE

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Edited by  
Andrew Forbes

This volume has been peer reviewed.

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The Sea Power Centre - Australia was established to undertake activities to promote the study, discussion and awareness of maritime issues and strategy within the Royal Australian Navy, the Department of Defence and civil communities at large. Its mission is:

- to promote understanding of sea power and its application to the security of Australia's national interests
- to manage the development of RAN doctrine and facilitate its incorporation into ADF joint doctrine
- to contribute to regional engagement
- contribute to the development of maritime strategic concepts and strategic and operational level doctrine, and facilitate informed forces structure decisions
- to preserve, develop, and promote Australian naval history.

A listing of Centre publications may be found at the back of this volume.

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# Contents

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Contributors	v
Abbreviations	ix
<b>United Nations Convention on the Law of the Sea 1982</b>	<b>1</b>
<b>Should We Worry about Piracy?</b>	<b>5</b>
Andrew Forbes	
<b>Sea Piracy: Issues in the Indo-Pacific Region</b>	<b>17</b>
Sam Bateman	
<b>The International Legal Framework for Piracy</b>	<b>35</b>
Stuart Kaye	
<b>Scuppering Somali Piracy: Global Responses and Paths to Justice</b>	<b>45</b>
Clive Schofield and Robin Warner	
<b>Maritime Piracy: The Australian Jurisdiction</b>	<b>75</b>
Blair Ussher	
<b>Piracy and the use of Force in Australia</b>	<b>87</b>
Cameron Moore	
<b>Australian Counter-Piracy Operations: A Gulf of Aden Experience</b>	<b>103</b>
Peter Leavy	
<b>Postscript</b>	<b>111</b>
Andrew Forbes	
Sea Power Centre - Australia Publications	121





## Abbreviations

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AC	<i>Appeal Cases</i>
A Crim R	<i>Australian Criminal Reports</i>
ADF	Australian Defence Force
AFMA	Australian Fisheries Management Authority
AFP	Australian Federal Police
ATS	Australian Treaty Series
CLR	<i>Commonwealth Law Reports</i>
CMF	Combined Maritime Forces
CTF	Combined Task Force
EEZ	Exclusive Economic Zone
ER	<i>English Reports</i>
EU NAVFOR	European Union Naval Forces
FCA	Federal Court of Australia
FCR	<i>Federal Court Reports</i>
GFC	Global Financial Crisis
grt	gross registered tonnage
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IMB	International Maritime Bureau
IMO	International Maritime Organization
IRTC	Internationally Recommended Transit Corridor
ISPS Code	<i>International Ship and Port Facility Security Code</i>
KB	<i>King's Bench</i>
LNTS	League of Nations Treaty Series

LOSC	<i>United Nations Convention on the Law of the Sea 1982</i>
Moo	<i>Moore's Reports</i>
MSPA	Maritime Security Patrol Area
NATO	North Atlantic Treaty Organization
nm	nautical mile
NSWLR	<i>NSW Legal Reports</i>
PSC	Port State Control
QB	<i>Queen's Bench</i>
RAN	Royal Australian Navy
ReCAAP	<i>Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia</i>
ROE	Rules of Engagement
SC	Supreme Court
SUA Convention	<i>Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988</i>
TASSupC	Tasmanian Supreme Court
TFG	Transitional Federal Government
TG	Task Group
UIC	Union of Islamic Courts
UN	United Nations
UNTS	United Nations Treaty Series
US	United States
VHF	Vert High Frequency
VLCC	Very Large Crude Carrier

# THE LEGAL DEFINITION OF PIRACY

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# United Nations Convention on the Law of the Sea 1982

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## Article 100

### Duty to Co-operate in the Repression of Piracy

All States shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.

## Article 101

### Definition of Piracy

Piracy consists of any of the following acts:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

## Article 102

### Piracy by a Warship, Government Ship or Government Aircraft whose Crew has Mutinied

The acts of piracy, as defined in article 101, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft.

## Article 103

### Definition of a Pirate Ship or Aircraft

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

## Article 104

### Retention or Loss of the Nationality of a Pirate Ship or Aircraft

A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the State from which such nationality was derived.

## Article 105

### Seizure of a Pirate Ship or Aircraft

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

## Article 106

### Liability for Seizure without Adequate Grounds

Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure.

## Article 107

### Ships and Aircraft which are Entitled to Seize on Account of Piracy

A seizure on account of piracy may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

AUSTRALIA'S  
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# Should We Worry about Piracy?

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Andrew Forbes

The unprecedented international naval cooperation that began off the coast of Somalia in 2008 came as a surprise to many analysts. Not because of the actual cooperation - navies have been doing this for centuries - but because its focus on counter-piracy operations is something that has not been done for a long time. Generally it has been left to affected coastal states and/or their neighbours to respond to such incidents, with an apparent indifference from the international community to intervene militarily.<sup>1</sup>

The most visible example of piracy before Somalia is that in Southeast Asia waters, predominantly in the Malacca and Singapore straits. Normally such incidents is the responsibility of states within whose waters the attacks occur, but because these Southeast Asian waters contain many crucial sea lines of communication for global trade, there has been considerable scrutiny of incidents there and many calls for international action and for navies to intercede. But interestingly, for all the talk about naval intervention in the Malacca Strait, there has been no action due to resistance from the littoral states, as well as jurisdictional reasons. Moreover, the international shipping community has not rerouted its ships away from the strait, even at the height of the piracy scare, so the real nature of the 'threat' remains unclear.

On 29 June 2009, the Sea Power Centre - Australia, in conjunction with the Australian National Centre for Ocean Resources and Security at the University of Wollongong, conducted a closed door seminar for officials from a number of government departments on the legal implications associated with counter-piracy operations. The reason for conducting the seminar was the convergence of a number of issues:

- A decade-long concern within the academic maritime security community that piracy was not understood by journalists, many analysts, policy makers and governments.
- Announcements in early 2009 by the Australian government of an inquiry into piracy to be conducted by the Inspector of Transport Security and that the Australian Defence Force (ADF) would contribute to international efforts to combat piracy off the Horn of Africa.

## What Constitutes Piracy?

A major confusion regarding piracy comes from the often ill-informed debate over incidents in the Malacca Strait and Southeast Asian waters for the past 10-15 years. As this debate has impacted on subsequent responses to piracy off Somalia, it is useful to outline the relevant issues.

There have been a number attacks on shipping in Southeast Asia, not only in the Malacca Strait, but also the Singapore Strait and the Indonesian Archipelago. The primary source data, until recently, has been the annual report of the International Maritime Bureau (IMB) Piracy Reporting Centre based in Kuala Lumpur, Malaysia.<sup>2</sup> This report tallies all attempted and actual attacks around the world (as reported to it), listing them in a consolidated table, with subsequent pages providing some analysis, and the remainder of the report providing information on each attack. Unfortunately only the consolidated table is referred to by most media and analysts.

Referring to the consolidated table is problematic as it is misleading. First, it includes attempted and actual attacks, and these are subsequently reported by others as 'attacks'; there is also a tendency to overstate the number of attacks, where any 'incident' may be portrayed as an attempt. As an example, someone sneaking aboard a ship while it is in port and stealing rope or a tin of paint is classified as a pirate attack. These reporting practices tend to inflate the number of attacks. Confusingly, there is also a tendency to under-report actual attacks, as ship masters are often reluctant to make a report as it might involve a disruption to the voyage of a couple of days while the local police investigate the incident. Thus the number of reported attacks is suspect, as they include any attempt or incident, while actual attacks may not be recorded.

Also important are the types of ships attacked and where they are attacked. Any detailed analysis of the data relating to the Malacca Strait shows that it is cross-strait traffic that is being attacked, rarely, if ever, is international shipping transiting the strait attacked.<sup>3</sup> Thus international trade is not threatened, and the rationale for international naval intervention in the strait becomes questionable. More critically perhaps is when many of the attacks occur, which is while the ship is berthed or at anchor. If the ship is berthed, it is in a port, and thus both the ship but more critically the port owner are responsible for security, as required under the *International Ship and Port Facility Security (ISPS) Code*. If the ship is anchored, it might be outside a port, or in a holding pattern waiting for a spot cargo or an attempt to avoid port charges. Responsibility for ship security resides with the ship master in the first instance, but more particularly with the ship owner, and with the shipping industry more generally.

Herein lays a major problem, as the economics of the maritime transportation industry, particularly long-haul, requires continual cost minimisation to remain competitive, and this leads to minimum crewed ships. While automation of ship functions has enabled fewer crew onboard ships, there are now not enough crew to provide an adequate level of security for ships transiting areas prone to piracy. Thus the call by the IMB for increased naval patrols in the strait and for Indonesia, Malaysia and Singapore to improve general maritime security. But as has been outlined above, a fair measure of responsibility for security also falls upon the shipping industry, which appears reluctant to deal with the situation. Moreover, if most of the attacks are on local shipping, and occur when the ship is berthed or at anchor, it is not clear what naval patrols will achieve. As a reaction

to problem areas on the world's oceans where ships might be attacked, numerous ship advisories have been issued by the International Maritime Organization (IMO), various shipping associations and some flag states indicating these danger areas and appropriate measures for ships to take for their own protection.

Maritime jurisdictional issues add complexity to the problem. Within Southeast Asia, many maritime boundaries are in dispute. How this impacts upon piracy, is that the geographical location of an 'attack' determines the nature of the crime and who is empowered to respond. Under international law, piracy occurs on the high seas (but effectively also within the 200nm exclusive economic zone (EEZ)), and the *United Nations Convention on the Law of the Sea 1982* (LOSC) outlines the other parameters that constitute piracy. If these conditions are met, then any country or agency is able to intervene. But in the case of many incidents in Southeast Asia, not least areas of the Malacca and Singapore straits, and within Indonesian waters, such attacks usually occur within the 12nm territorial sea. The distinction is critical, as any attack in these waters is actually sea robbery, and only the state within whose waters the attacks occur has the legal jurisdiction to respond to the domestic crime.<sup>4</sup>

While the focus of this volume is Somali piracy, the information above outlines the prevailing mindset of the public, and perhaps governments, towards piracy. Why is this relevant to Australia?

## Inquiry into the Impact of Piracy on Australia

On 23 February 2009, the Australian government announced the Inspector of Transport Security would 'assess the current security arrangements covering Australian crews and ships' and 'investigate the impact, or potential impact, of piracy on Australian registered and international trading ships including their crews and passengers.' The effect of piracy on maritime trade would also be examined, with these reports to be submitted to government by the end of September 2009.<sup>5</sup>

As Australia relies heavily on foreign-flagged shipping for the majority of its seaborne trade, and there was no evidence that such trade has been affected, the need for an inquiry caused some confusion within the academic maritime security community. Part of the confusion arose due to the way the inquiry was conducted, as its detailed terms of reference were not publicly available and its operations were opaque to anyone not involved in the consultation process.

Two reports were issued as part of this inquiry. The first report, a set of advisory guidelines issued on 3 December 2009, drew heavily on the circulars published by the IMO maritime safety committee.<sup>6</sup> The report provided a general outline of the types of attacks that were occurring, making a distinction between piracy and armed robbery at sea, before providing detailed guidance for shipping in the Gulf of Aden and off the coast of Somalia, as well as

supplementary advice for fishing vessels and yachts in these waters. It also explained the group transit scheme in operation along the Internationally Recommended Transit Corridor.

The second report was released on 22 April 2010.<sup>7</sup> It provided a detailed overview of piracy at the global level and then by region, actions taken by the international community including the despatch of naval forces to counter piracy, and the impact of attacks on the global shipping industry and impacts on Australian shipping and trade. Importantly, on this last point the report noted that the impact on Australian-flagged shipping was low as the focus of Australian shipping was predominantly involved in coastal shipping. While foreign-flagged ships carrying Australian trade would be at higher risk, only 0.1 per cent of international shipping has been attacked.

## Committing the ADF to Counter-Piracy Operations

As early as January 2009 there was intermittent media reporting that Australia might be considering a military commitment to the Gulf of Aden. On 29 May 2009, the Australian government announced that the ADF would be deployed on counter-piracy activities.<sup>8</sup> This commitment would entail the flexible tasking of the frigate and P3-C maritime patrol aircraft already committed to operations in the Middle East under Operation SLIPPER, along with additional personnel sent to Bahrain to assist with the planning of such operations.<sup>9</sup>

There are currently three naval task forces operating in the Middle East as part of the Combined Maritime Forces:

- Combined Task Force (CTF) 150 is conducting maritime security operations in the Gulf of Aden, Gulf of Oman, Red Sea and Indian Ocean, with the aim of developing security and stability in the maritime environment.
- CTF 151 is conducting counter-piracy operations to suppress piracy in support of United Nations Security Council resolutions. It does this by operating in and around the Gulf of Aden, Indian Ocean, and Arabian and Red seas, aiming to deter and disrupt piracy through defensive measures, where pirates are released or handed over for prosecution, pirate vessels are confiscated or destroyed, and weapons, boarding equipment, global positioning systems and phones are confiscated.
- CTF 152 is conducting operations in the Arabian Gulf and is focused on theatre security cooperation and maritime security operations.

The flexible tasking of Australian forces means they can operate in any of these task forces, depending on the requirements of the force commander and Australian government guidance.<sup>10</sup>

The announcement of this commitment came as a surprise to some, as there is little Australian-flagged shipping in affected waters, the level of Australian trade is low compared to other sectors, and it was made before the Inspector of Transport Security had investigated and reported to the government on the piracy threat. This may have influenced the wording of the announcement which briefly mentioned protecting Australian merchant trade, but focused more on piracy as a threat to global security, as well as acting in accord with United Nations Security Council resolutions 1846 and 1851 which called on states to take an active role against piracy off the Somali coast.

While the decision to commit the ADF to such operations is a political decision made by the government, there would have been considerable preparatory work undertaken by the Department of Defence in developing options for government. What personnel and assets might be committed is relatively straightforward, but a major planning consideration would have been how the ADF would conduct counter-piracy operations, and this would be driven by jurisdictional issues.

Such departmental and governmental considerations are necessarily classified and thus not publicly available, but it is relatively simple to identify the key factors that would have been examined: what constitutes the national interest and legal jurisdiction/rules of engagement issues.

## The National Interest

As pirate attacks off the coast of Somalia affect international trade, what is Australia's dependency on trade and how much of it might be affected? There is a delay in the processing and publication of trade data, so decisions made in early 2009 would have been based on 2006-07 data. During this period seaborne trade data for Australia shows that total trade was valued at \$275.4 billion (733.7 million tonnes), with exports valued at \$142.4 billion (656.2 million tonnes) and imports valued at \$133 billion (77.5 million tonnes). If broken down by relevant geographical region:

- total trade with Europe was valued at \$40.5 billion (52.4 million tonnes), with exports valued at \$14.9 billion (48 million tonnes) and imports valued at \$25.6 billion (4.4 million tonnes)
- total trade with the Middle East was valued at \$9.8 billion (14.8 million tonnes), with exports valued at \$5.8 billion (8.2 million tonnes) and imports valued at \$4 billion (6.6 million tonnes)
- total trade with Africa was valued at \$5 billion (8 million tonnes), with exports valued at \$3.2 billion (6.9 million tonnes) and imports valued at \$1.8 billion (1.1 million tonnes).

Importantly, at this high level of reporting, it is not clear how much of the trade to Africa and Europe might have used the Cape of Good Hope route and thus bypassed the piracy threat off Somalia.

By way of comparison, Australia's total trade with Asia was valued at \$132.9 billion (584.1 million tonnes), with exports valued at \$60.6 billion (537.6 million tonnes) and imports valued at \$72.3 billion (46.5 million tonnes).<sup>11</sup> In purely financial terms, and ignoring criticality of specific cargoes, Australian trade with Asia far outstrips trade across the Indian Ocean to Africa, the Middle East and to Europe, and might therefore be considered far more important.

But as it is shipping that is being attacked, often with the ship being taken for ransom, what are the numbers of ships carrying Australian trade and more importantly (in a legal sense), how many are under the Australian flag? This is far more difficult to calculate and the only data source is a 2007 government report, which related the volume and value to Australian trade by shipping route, and number and types of ships used. Looking at the data for 2004-05, the routes that might be affected by Somali piracy are:

- The Red Sea route which includes the Gulf of Aden and the Suez Canal. Exports were valued at \$23 billion (4.1 million tonnes), and imports were valued at \$1.9 billion (5.4 million tonnes); using 264 ships for carrying exports and 98 ships used for importing goods.
- The Persian Gulf route which includes the Gulf of Oman and the Strait of Hormuz. Exports were valued at \$6.2 billion (2.1 million tonnes), and imports were valued at \$7.2 billion (2.8 million tonnes); using 113 ships for carrying exports and 110 ships used for importing goods.
- The Arabian Sea route, via Cape Comorin, India and Sri Lanka. Exports were valued at \$5.4 billion (0.9 million tonnes), and imports were valued at \$168 million (0.5 million tonnes); using 202 ships for carrying exports and 141 ships used for importing goods.<sup>12</sup>

However, as is generally acknowledged, most of this shipping is neither Australian owned nor Australian flagged. This is a critical issue, as the Australian government only has limited control over ships flying the Australian flag, and no control over other ships. So, what is the size of the Australian national fleet and how many ships are involved in trade in these waters?

Returning to 2006-07 data, the numbers of Australian ships involved in overseas trade was 39, of which 9 were registered under the Australian flag and 30 under foreign flags, and of the 11 ships that conducted trade with Africa, the Middle East and Europe (all of which might be affected by Somali piracy), 9 sailed under foreign flags. The relevant ships (flag/cargo/destinations) are:

- *Goodwill* (Panama/ iron ore and coal/ Belgium, Netherlands and Turkey)
- *Goonyella Trader* (Liberia/ iron ore and coal/ France, Netherlands and Germany)
- *Pioneer* (Australia/ sugar/ South Africa)
- *Pos Ambition*, (Panama/ iron ore and coal/ the Netherlands)
- *Botany Tradition* (Panama/ chemicals/ Benin, Guinea, Togo and South Africa)
- *Juniper* (Bahamas/ chemicals/ Saudi Arabia, and United Arab Emirates (UAE))
- *Priam* (Singapore/ general cargo/ United Kingdom, Netherlands and Germany)
- *Deneb Prima* (Italy/ livestock/ Oman, Saudi Arabia, UAE and Kuwait)
- *Maysora* (Bahamas/ livestock/ Saudi Arabia, Oman, Egypt, Israel, Jordan, Kuwait, and UAE)
- *Torrens* (Tonga/ livestock/ UAE, Jordan and Saudi Arabia)
- *Nivosa* (Australia/ crude oil/ Saudi Arabia).<sup>13</sup>

The majority of Australian trade is with Asia; not Europe, the Middle East or Africa. Moreover, notwithstanding the number of ships used for that trade, only 11 ships of the national fleet are 'Australian' and only 2 flew the Australian flag. Of these, *Pioneer* was trading with South Africa and would not appear to be at risk of Somali piracy, while *Nivosa* trading with Saudi Arabia might potentially be at risk. Thus the likelihood and consequences of an attack on 'Australian' shipping appears very low, as was confirmed by the aforementioned Australian government piracy report.

Thus the rationale for a military commitment does not appear to have been based on either economic grounds or legal responsibility for the safety and security of Australian shipping. However, piracy is a global problem and while Australian trade and shipping might not be directly affected, our trading partners might be. Moreover, Australia has always been proud of its role as an international good citizen. As a country heavily reliant on trade, it would be incongruous for Australia not to be involved in the 'defence of trade'.

## Jurisdiction/Rules of Engagement

Part of government deliberations over whether to make a commitment to counter-piracy activities off Somalia would revolve around jurisdictional issues. An academic consideration of these issues makes up the majority of this volume, and so they will be only briefly outlined here.



LOSC as well as United Nations Security Council resolutions 8116, 8138, 1846 and 1851 allows states to act against piracy off Somalia, including in the territorial sea as agreed by the Somali Transitional Federal Government.<sup>14</sup> What Australian forces might do with any suspected pirates needs to be determined: can they be charged under Australian legislation? Might they be handed over to an international tribunal? Might they be handled over to a third party country for prosecution? Or might they be released? Decisions on these factors are opaque, but papers in this volume explore the technical issues. But at their core, these considerations drive the most important planning/operational consideration – what will be the rules of engagement (ROE) for forces operating in the Gulf of Aden?

ROE are prepared by the ADF and endorsed by the Australian government. They constitute a direction from commanders to subordinates on how they will undertake an operation, specifying what actions may, and what may not, be used to achieve the objectives of the mission. Importantly, they are framed within the parameters of international and domestic law, to meet the end-state required by the government. Factors such as where the operations will take place, the legal regime that applies to that area, duties and rights of flag and coastal states, as well as the rights and duties all need to be considered. A specific issue for counter-piracy operations off Somalia is reconciling the broad remit provided by United Nations Security Council resolutions which mentions ‘all necessary means’ with other international laws which actually restrict how widely the resolution can be interpreted, as well as any restrictions that flow from national legislation. Obviously these rules are highly classified, as their inadvertent release would allow adversaries to either develop counter strategies or more critically, deliberately provoke an excessive response. They would, however, be released to coalition partners to enable effecting operational planning and tasking. While the ROE that apply to Australian counter-piracy operations are not known, the various rules that would have been considered can be easily identified. Apart from the basic right to self defence, counter-piracy operations would be constrained by whether or not force can be used, and if so, what level of force (up to and including deadly force) can be exerted, and what limitation might be placed on the use of force.

The initial rules that would have been considered include whether the mission task is related to the suppression of piracy, whether there is a maritime law enforcement role, does it involve the protection of others and preventing interference with shipping:

- suppression of piracy (what level of force can be used, whether continued pursuit of a pirate into the territorial sea of another state is allowed, and whether the destruction of pirate equipment is allowed)
- maritime law enforcement (what level of force may be used in various maritime zones to enforce what types of laws)

- the protection of others (what level of force, up to and including deadly force, can be used either for the protection of others, or to prevent a serious crime being committed against others)
- the prevention of interference with ships (what level of force, up to and including deadly force, can be used to prevent the unauthorised boarding or seizure of ships).

Geographical issues would then come into play - where are forces allowed to operate and how close should they get to an adversary:

- geographic positioning of forces (where are forces allowed to operate and what areas are they prohibited from entering)
- relative positioning of forces (how close, and under what circumstances, may other vessels be approached).

Then tactical issues are considered as they guide any operational response:

- warnings (is the use of warnings allowed; if so: what types of warnings against what type of target)
- warning shots (can warning shots be used; if so: are they fired in the vicinity of a vessel, or to compel compliance)
- disabling fire (can disabling fire be used; if so: is it limited to compelling compliance, or is it permitted in any circumstances)
- boardings (what level of force may be used for compliant, non-compliant and opposed boardings)
- search and detention of persons (what level of force may be used to search, disarm, detain and prevent escape)
- inspection, seizure and destruction of property (what level of force may be used to inspect, seize, secure the release of, and destroy).<sup>15</sup>

Within these operating parameters, the boarding of vessels is clearly the most dangerous. The Royal Australian Navy is very experienced in boarding operations in a variety of conditions, ranging from the usually benign boarding of vessels carrying asylum seekers to illegal fishing vessels (which might be an opposed boarding) in Australia's EEZ, and more dangerous boarding of vessels in the Arabian Gulf as part of Middle East operations (extending back to 1990-91).

As Australia has had naval forces committed in the Arabian Gulf for about 20 years, the decision to flexibly task the frigate assigned to Middle East operations across the three naval task forces operating is the best use of scarce resources.

## Structure of this Volume

The purpose of the seminar was to discuss various aspects related to piracy as well as associated legal issues.

The first two papers provide the necessary background to the issues, examining piracy and relevant international law issues respectively. In the first paper, Sam Bateman compares and contrasts the differing types of piracy occurring in Southeast Asia and off Somalia; and in the second paper Stuart Kaye outlines the international law perspectives as they impact on the ability of a country to respond to piracy outside its own waters. Clive Schofield and Robin Warner then examine Somali piracy, relevant legal issues, as well as naval responses. In a paper published elsewhere but revised for this volume, Blair Ussher examines piracy law in Australia while Cameron Moore examines legal issues impacting the ADF when undertaking law enforcement operations. In a paper not given to the seminar, Pete Leavy provides details of the best known counter-piracy task by HMA Ships *Sydney* and *Ballarat*, which occurred before the formal commitment of Australian forces, highlighting what is involved in such an activity, the uncertainties involved and the delays in being able to respond to ships in distress given the vast areas of ocean involved. A postscript outlines ongoing jurisdictional issues, international naval cooperation and the Australian commitment thus far.

## Endnotes

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1. An extreme example of international indifference occurred during what is called the 'Tanker War', when a strategy during the Iran-Iraq war of 1980-88 saw merchant shipping in the Strait of Hormuz attacked with no response from the international community until 1987 when the United States agreed to flag Kuwaiti oil tankers and offer them naval protection.
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3. Sam Bateman, Catherine Zara Raymond and Joshua Ho, *Safety and Security in the Malacca and Singapore Straits: An Agenda for Action*, Institute of Defence and Strategic Studies, Nanyang Technological University, Singapore, 2006, <[www.rsis.edu.sg/publications/policy\\_papers](http://www.rsis.edu.sg/publications/policy_papers)> (1 December 2010).
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7. Office of the Inspector of Transport Security, *International Piracy and Armed Robbery at Sea Security Inquiry Report*, Department of Infrastructure, Transport, Regional Development and Local Government, Canberra, 2010 <[www.infrastructure.gov.au/transport/security/oits/files/IPARS\\_SecurityInquiryReport.pdf](http://www.infrastructure.gov.au/transport/security/oits/files/IPARS_SecurityInquiryReport.pdf)> (1 December 2010); interestingly, there was no accompanying press release announcing the publication of the report.
8. Jonathan Pearlman, 'Australia to Take on Somali Pirates', *Sydney Morning Herald*, <[www.smh.com.au/articles/2009/01/08/12310041991160.html](http://www.smh.com.au/articles/2009/01/08/12310041991160.html)> (15 April 2010); 'Australia may Contribute Ship to Piracy Fight', *ABC News*, <[www.abc.net.au/news/stories/2009/05/19/2574456.htm](http://www.abc.net.au/news/stories/2009/05/19/2574456.htm)> (15 April 2010).
9. The Hon Joel Fitzgibbon MP, *Minister for Defence announces Australian Contribution to International Anti-piracy Efforts*, Defence Media Release 095/2009, <[www.minister.defence.gov.au/Fitzgibbontpl.cfm?CurrentId=9148](http://www.minister.defence.gov.au/Fitzgibbontpl.cfm?CurrentId=9148)> (15 April 2010).
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14. Resolution 1816 empowers states to enter the Somali 12nm territorial sea, 1818 encourages states to undertake a counter-piracy roles, 1846 suggests the SUA Convention might be used to provide a legal framework for action, and 1851 encourages states to work together to prosecute pirates.
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# Sea Piracy: Issues in the Indo-Pacific Region

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Sam Bateman

Sea piracy continues to be regarded as a major maritime security issue in the Indo-Pacific region. It receives a lot of press mainly because of the significant upsurge in attacks off the Horn of Africa by Somali pirates.<sup>1</sup> However, the situation in Southeast and South Asia has improved overall despite a worrying increase in the number of attacks in the southern part of the South China Sea.<sup>2</sup>

Media reports about piracy must be kept in perspective. A successful piracy attack makes a good story that often dramatises the original event and its implications. For example, a press report of a tanker attacked in the Malacca Strait will usually include information about the vital energy traffic through the strait between the Middle East and Northeast Asia. This gives a misleading impression. What is not reported is that the tanker involved was a small product tanker in local trade with a cargo perhaps of kerosene or palm oil. It was not a large crude oil carrier on transit through the strait. The latter ships are not at risk in those waters unless they stop or anchor.<sup>3</sup>

Apart from the pirates themselves, many organisations actually gain from piracy. Marine insurance companies increase their premiums even though the insured vessel might be at low risk of attack.<sup>4</sup> Lloyds of London currently lists extensive areas of the Indo-Pacific region as war risk areas, including Djibouti, Somalia and adjacent areas of the Indian Ocean, Gulf of Aden, Yemen, Pakistan, Sri Lanka, the ports of Balikpapan and Jakarta in Indonesia, the Sulu archipelago and the northeast coast of Sumatra.<sup>5</sup> With the exception of Georgia, Israel, Lebanon, Venezuela and some parts of West Africa, all current war risk areas are in the Indo-Pacific region.

Ship hijackings off Somalia have created a new business for private security companies to arrange the payment of ransom monies for a large fee that is recoverable from insurance. These companies win from all aspects of piracy. They conduct risk assessments, offer security protection for ships and crews, and handle the payment of ransoms. Their activities are supported by the United States (US) with the admiral in command of US naval forces in the Middle East, Vice Admiral Bill Gortney, USN, praising the actions of private security guards who thwarted a second attack on the US-flagged container ship *Maersk Alabama*.<sup>6</sup>

Navies also benefit from piracy. At a time when the budgets of most Western navies are under pressure, piracy allows navies to demonstrate their utility in peacetime while providing a scenario to show the benefits of naval cooperation. As the executive overview to the latest *Jane's Fighting Ships* observes:

The pirates of Somalia have performed at least one useful purpose over the last year: they have provided a much needed reminder of the importance of the sea and of potential threats to global security.<sup>7</sup>

The counter-piracy operations off the Horn of Africa are a practical demonstration of the current US maritime strategy which emphasises cooperation between the navies and coastguards of the world. Deploying warships to counter-piracy operations off the Horn of Africa also serves the purpose of governments wishing to establish a strategic presence and influence in a region that is politically unstable but vitally important as a source of energy.

Lastly, academics have gained from piracy. Judging by the spate of books and articles in learned journals on the subject, it has become a topic of considerable academic interest. Unfortunately some of these academic papers are ill-informed with a heavy reliance on unsubstantiated media reports gleaned from the internet, and a lack of understanding of both the law of the sea and the international shipping industry.

## What is Piracy?

Other authors in this volume will address legal aspects of piracy in more detail. Suffice to note that piracy is a technical legal term referring to particular acts of violence committed on the high seas or in an exclusive economic zone (EEZ). There are some misunderstandings with appreciating what constitutes piracy at sea. It can have a narrow legal meaning for the purpose of establishing jurisdiction over particular illegal activities, or it can be used broadly to cover all forms of sea robbery and violence at sea. The media invariably takes the latter approach.

The strict legal definition of piracy is provided in Article 101 of the *United Nations Convention on the Law of the Sea 1982*. Key words in this definition are 'high seas' and 'for private ends'. An incident that does not occur on the high seas (and in the EEZ) is not piracy. Piracy under international law cannot occur within the territorial sea, archipelagic waters or internal waters of a state, that is, waters under the full sovereignty of that state. The significance of 'for private ends' is that it distinguishes acts of terrorism from piracy, as terrorism is not normally conducted for private ends. The third prerequisite of piracy is that two ships (or aircraft) need be present. Under international law it is not piracy if the crew, passengers, or even stowaways already onboard seize a ship. Such an act remains under the jurisdiction of the vessel's flag state.

To overcome the limitation of the narrow definition of piracy under international law, and to facilitate the collection of data, the International Maritime Organization (IMO) and the International Maritime Bureau (IMB) introduced a separate definition for 'armed robbery against ships'.<sup>8</sup> The IMB defines armed robbery against ships as:

Any unlawful act of violence or detention, or any act of depredation, or threat thereof, other than act of 'piracy', directed against a ship or against persons or property onboard such a ship, within a State's jurisdiction over such offences.<sup>9</sup>

This definition covers not only acts against vessels during passage, but also acts against vessels in port or at anchor, regardless of whether they are inside or outside territorial waters when attacked. Importantly, it has no weight in international law. The basic point is that the strict definition of piracy exists only to establish piracy as a universal crime against which all states are entitled to take action.

Piracy and armed robbery against ships are just two forms of 'maritime crime' defined as a criminal offence connected to the sea or to ships. In many cases, the perpetrators of piratical acts also regularly engage in other forms of maritime crime, particularly smuggling. While not engaged in piracy or smuggling, they might pursue legal fishing activities.

All these problems have been evident with recent high profile operations to counter piracy off Somalia and in the Gulf of Aden. Western navies, in particular, engaged in these operations have been criticised from time to time for not being more robust in their efforts to arrest pirates and bring them to trial.<sup>10</sup> Reasons for this apparent reticence lie in the national rules of engagement (ROE) under which these navies operate, and uncertainty as to the relevant legal regimes and national jurisdiction.

## Causes of Piracy

Prime causes of piracy lie in the lack of economic opportunity and good governance onshore. Contemporary pirates and sea robbers, certainly the foot soldiers involved, typically come from coastal fishing communities which have suffered from the decline in fish stocks due to overfishing, particularly by commercial fishing interests. The 'other pirates' in Somali waters have been illegal foreign fishing vessels.<sup>11</sup> The piracy situation in these waters has its origins in local fishermen taking the law into their own hands, seizing foreign fishing vessels and holding them for ransom. Having found this activity financially rewarding, it was a small step then to move on to other commercial vessels passing through their waters.

Poverty, lack of economic opportunity and unemployment lead to piracy being seen as an alternative source of income. Economic problems also cause political insecurity and a resurgence of internal security problems leading to a higher risk of illegal activity, including at sea. If there is not good governance onshore, then there will not be effective law enforcement at sea. As one naval historian noted, 'the proximity of politically unstable nations or territories has regularly emerged as both cause of and permission for armed robbery or piracy at sea'.<sup>12</sup>



Corruption among police, maritime officials and shipping companies may also be a factor. Pirates sometimes appear well informed about shipping movements and cargoes, and may even enjoy some protection from law enforcement authorities. Marine police and naval personnel have been accused of being complicit in piratical activities in Indonesian waters. A possible reason for the recent marked fall in the number of attacks in Indonesian waters may well be because the word has gone out from Jakarta that this form of corruption is unacceptable and firmer action against pirates is required.<sup>13</sup>

## Current Situation

Table 1 shows trends with the incidence of piracy and armed robbery against ships (actual and attempted) worldwide between 2004 and 30 June 2010. Pirate attacks worldwide were down nearly 20 per cent in the first half of 2010 in comparison with the corresponding period of the previous year.<sup>14</sup>

The number of acts in 2009 was 406, a marked increase of 113 from 2008 with a further 196 incidents in the first half of 2010.<sup>15</sup> By far the greatest concentration of these incidents was in Somalia and the Gulf of Aden with 217 incidents in 2009 and 100 in the first half of 2010. The increase in the number of attacks globally is entirely due to this situation off the Horn of Africa. The number of crew kidnappings and ship hijacking also increased markedly in 2009 from 2008, but again almost all these incidents were off Africa.

The situation off the Horn of Africa deteriorated in 2009 with 217 attacks attributed to Somali pirates, as compared with 11 in 2008.<sup>16</sup> However, there are some indications that the situation is being better contained - the 100 attacks (actual and attempted) carried out by Somali-based pirates in the first half of 2010 may be compared with 148 incidents over the same period of 2009. This decrease in the number of attacks is significant because the first six months of the year cover a weather period more favourable to the pirates before the onset of the southwest monsoon in June.

Elsewhere in the world, the situation has steadily improved over recent years. Even off Nigeria, which has been another high risk area, there has been some improvement with 28 incidents in 2009 as compared with 40 in 2008. This trend continued into 2010 with only six incidents in the first half of 2010.

Southeast Asian waters were a major area of concern in the early 2000s, but steady improvement continued until 2009 when there has been some deterioration. The situation in 2009 showed little change from 2008 (67 attacks as compared with 65), but 52 incidents have already occurred in the first half of 2010. However, these total figures hide major changes within the region itself with a marked fall in the number of attacks in Indonesian waters (15 attacks in 2009 as compared with 28 in 2008), and a big increase in attacks in Malaysian waters, the South China Sea and the Singapore Strait (38 as against 16). The situation in Indonesian waters has deteriorated recently with 16 incidents in the first half of 2010 and the pattern of increased attacks in Malaysian waters and the South China Sea has also continued during 2010.

Location	2004	2005	2006	2007	2008	2009	Jan to Jun 2010
Southeast Asia	170	118	87	78	65	67	52
South Pacific	1	-	-	2	-	-	-
Indian Subcontinent	32	36	53	30	23	29	12
Americas	45	25	29	21	14	37	15
Somalia/Gulf of Aden	10	45	20	44	111	217	100
Nigeria	28	16	12	42	40	28	6
Other Africa	35	19	29	34	38	25	10
Rest of World	8	17	9	12	2	3	1
<b>Total</b>	<b>329</b>	<b>276</b>	<b>239</b>	<b>263</b>	<b>293</b>	<b>406</b>	<b>196</b>

*Table 1: Global Piracy - Actual and Attempted Attacks (2004-10)<sup>17</sup>*

A significant number of acts of armed robbery against ships occurred off the Indian subcontinent in 2006, but these were generally in ports and anchorages in Bangladesh. The downward trend in the number of attacks since then may be attributed to increased port security and harbour patrolling.

There could be some under-reporting of incidents. Both the IMB and the IMO have noted the reluctance by ship masters and shipowners to report incidents due to concern that any investigation will disrupt the ship's schedule, the adverse publicity possibly involved and the possibility that insurance premiums may increase. Under-reporting may also occur because attacks on local craft, such as fishing boats, barges and small barter vessels, are not reported.

Over-reporting of incidents is also possible, and contemporary figures may not be comparable with data, say from the 1990s or early 2000s. Many incidents reported to the IMB are very minor, such as unsuccessful attempts to board or petty theft (usually small items such as paint, mooring ropes or outboard motors). Some inflation of the number of incidents may occur through increased awareness of the problem and the reporting channels available. This can be seen in the ease of reporting via email as it is now just a matter of sending off an email report to the IMB without any substantiation or follow-up. In earlier years, many of the incidents, particularly the relatively minor ones and the attempted attacks, may have gone unreported. The IMB statistics may also be inflated by the propensity of ships to report any close approach by a small craft as an 'attempted attack', and by the lack of follow-up by the IMB to determine whether the incident was in fact an actual attack.<sup>18</sup>

## Types of Piracy

There are marked differences in the types of piratical attacks that occur in the three main current hot spots for global piracy: Somalia/Gulf of Aden, Southeast Asia and Nigeria. These regions represented over three-quarters of the total global attacks during 2009 with 217, 67 and 28 attacks respectively. Several different types of piracy and armed robbery against ships might be identified, each varying according to the region in which the practice is found.

In the Somalia/Gulf of Aden area, the attackers are well organised and their 'business plan' involves hijacking ships and crews for ransom. The ransom paid for a large vessel and her crew typically exceeds US\$1 million. In November 2009, \$3.3 million was reportedly paid to secure the release of the large and sophisticated Spanish fishing vessel *Alakrana* and 36 crew members.<sup>19</sup> The attackers have come to appreciate that shipowners and insurance companies will pay the ransom and that once a ship has been successfully hijacked, patrolling navies will not use force to recover it due to the risk of casualties among the warship's crew and hostages. So far there have been few casualties among the crews of hijacked ships who are normally relatively well looked after by the pirates.

The situation is rather different off Nigeria where the attacks are usually much more violent with frequent loss of life. Vessels, particularly ones associated with the offshore oil and gas industry, are attacked in coastal waters, anchorages and rivers, with crews held for ransom.

In Southeast Asia, there are three distinct strains of piracy. The first type, occurring in Indonesia, Vietnam and the Philippines, is mainly opportunistic petty theft from ships at anchor or in port. Such instances clearly fall under the jurisdiction of the port state and can only be controlled by efficient and effective measures for port security, as well as onboard security on the ships themselves.

A second type of piracy occurs when ships are underway in the confined waters typical of Southeast Asia, such as the Malacca and Singapore straits and the Indonesian and Philippine archipelagos. Ships in these waters may be vulnerable due to their proximity to shore and numerous surface contacts such as other shipping and fishing vessels in their vicinity which can hide the approach of pirate craft. Also, bridge crews may be preoccupied with navigating and avoiding collision, meaning ships may be proceeding slowly. The pirates board vessels to steal cash and valuables. Notable features of this type of piracy are the degree of skill demonstrated by the pirates in making their attack and that violence is not normally used unless resistance is offered.

The third type of piracy is when an entire ship is stolen or hijacked. During the 1990s in Southeast Asia, some ships were hijacked with the objective of giving them a false identity and turning it into a 'phantom ship' with fraudulent registration documents. The hijacking off the product tanker *Petro Ranger* east of Singapore in 1998 was an

example of this type of piracy.<sup>20</sup> After being hijacked, the ship was taken to a Chinese port under a false name and the cargo discharged. The master of *Petro Ranger* suspected that his vessel had been attacked to order as the pirates had prepared new registration papers for the ship and prior information about his family. He also suspected the complicity of the ships' owners, but this was adamantly denied:

Creating a phantom ship has become difficult due to the introduction of the *International Ship and Port Facility Security (ISPS) Code* with the IMO requirement for ships to have a ship identification number and a continuous synoptic record that provides a record of a ship's movement, changes of name and owner. These requirements have made it much harder to falsify registration documents for a ship. Nevertheless, smaller ships, such as tugs, barges and small product tankers, which do not have to meet these requirements, are occasionally hijacked and may be recycled for service under another name.

The ship hijackings by Somali pirates are not about creating a phantom ship. The pirates are not interested in a ship's cargo or in using the ship for further service. Their only interest is in holding the ship, her crew and her cargo until such time as a ransom is paid for their release.

## The Horn of Africa

As shown in Table 1, the number of incidents around the Horn of Africa has increased markedly in recent years. The reasons for this include the breakdown in governance onshore in Somalia, the development of an effective business plan by the pirates, and some initial delays in the international community getting its act together to deal with the situation. The problem may have been misunderstood initially with international authorities not fully appreciating the necessity of dealing with problem's political dimensions.<sup>21</sup>

However, it should be noted that many of these attacks are only attempted attacks. For example, in 2009, 169 of the 217 incidents off Somalia and in the Gulf of Aden were attempted attacks. Table 2 shows the current breakdown of types of attack around the Horn of Africa attributed to Somali pirates. Smaller and slower vessels are more vulnerable. There has been no successful hijacking so far of the large and fast container ships carrying the more valuable cargoes through the area.

As Table 2 shows, ships were fired upon in some incidents, but where ships were not fired upon, there is a possibility that ships may have been mistaken in thinking they were under attack. There is much fishing activity in the area and Somali pirates use similar types of fishing dories. It is also apparently a recognised fishing technique to follow closely in the wake of a merchant ship which is believed to attract fish.

Area	Actual Attacks		Attempted Attacks	
	Boarded	Hijacked	Fired Upon	Attempted
Gulf of Aden	-	20	64	32
Somalia	1	26	45	8
Red Sea	-	-	3	12
Arabian Sea	-	-	-	1
Indian Ocean	-	-	-	1
Oman	-	1	2	1
<b>Total</b>	<b>1</b>	<b>47</b>	<b>114</b>	<b>55</b>

*Table 2: Attacks attributed to Somali pirates 2009<sup>22</sup>*

Originally attacks were occurring mostly off Somalia itself, but then the pirates came to appreciate that there were richer pickings in the Gulf of Aden where many attacks occurred in 2009. However, the number of attacks in the Gulf of Aden dropped markedly in the latter part of the year. Yet more effective security arrangements there pushed pirates towards Bab el-Mandab Strait and the Red Sea, and hundreds of kilometres into the Indian Ocean, as far out as the Seychelles using motherships. This was also the case in 2010 with attacks occurring over a wider geographical area than previously - from the southern part of the Red Sea in the west to beyond 70° E, and from the Arabian Sea and coast of Oman south to the vicinity of the Comoros islands.<sup>23</sup> The need for pirates to seek their targets further afield may also help explain the decreased attacks in the first half of 2010 mentioned earlier. The improved situation in the Gulf of Aden is particularly noticeable with 33 incidents in the first half of 2010 as compared with 100 in the corresponding period of 2009.

The 47 vessels successfully hijacked in 2009 consisted of:

- 25 vessels under 5000 gross register tonnage (grt) (including ten fishing vessels, four yachts, two dhows and one tug)
- 3 vessels were between 5000 and 10,000grt
- 8 between 10,000 and 20,000grt
- 11 over 20,000grt.

Of the eleven largest vessels, all were bulk carriers with the exception of one very large crude carrier (VLCC) and one listed as a general cargo ship, but possibly also employed in a bulk trade.

There is evidence to suggest that substandard ships are more likely to be successfully hijacked than quality vessels. As older ships are regarded by Port State Control (PSC) regimes as having higher risk factors, age may be taken as an indication of a possible substandard ship. While there will be exceptions with some older ships being operated safely and efficiently, an older ship is more likely to be substandard and operated by a less well trained and motivated crew. A ship may start her life with a reputable company, but over the years, she may change her name and flag, progressively ending up with less responsible owners. It is significant therefore that the average age of the three main commercial ship classes (general cargo vessels, bulk carriers and all types of tanker) hijacked by Somali pirates during the first nine months of 2009, was much higher than the global average for that class of ship.<sup>24</sup>

Leaving aside fishing vessels, yachts, tugs and dhows, 30 commercial vessels were hijacked during the period consisting of:

- 8 general cargo ships with an average age of 25.1 years (global average age is 17.1 years)
- 8 were tankers with an average age of 22.7 years (global average age is 10.1 years)
- 11 were bulk carriers with an average age of 15.7 years (global average age is 12.7 years)
- 3 were container ships with an average age 15.3 years (global average age is 9 years).

The oldest ship hijacked was the 36-year-old, 4932grt general cargo ship *Sea Horse* taken off Somalia on 14 April 2009. Coincidentally, this ship also has a very poor PSC record with several detentions for excessive deficiencies found during inspections.

The responses to piracy off the Horn of Africa include:

- multinational naval patrols, although most navies have restrictive ROE and a lack of national legal authority
- the establishment of a Maritime Security Patrol Area in Gulf of Aden with an Internationally Recommended Transit Corridor protected by international shipping patrols
- the option of escorted convoys at different speeds for ships passing through the area
- improved arrangements for surveillance and information sharing between participating navies

- a series of IMO Meetings that have developed a Code of Conduct between littoral countries covering matters such as the prosecution of offences.

## Southeast Asia

There are several reasons for the improved situation in Southeast Asian waters. The peace agreement between the Indonesian government and the Gerakan Aceh Merdeka movement resulted in fewer attacks in the Malacca Strait since 2005. National and regional responses, including increased patrolling and surveillance, have been important although operations at sea mainly have a deterrent effect and few pirates or sea robbers are actually caught at sea. Tighter government control and local policing onshore are other factors that have contributed to the improved situation, as well as greater awareness within the shipping industry of the importance of security, with the ISPS Code coming into force in July 2004.

Many attacks in the region are on vessels at anchor, in port, or entering or leaving a harbour. These attacks are usually of a minor nature and are best countered by more effective policing by port authorities, including active patrolling of ports and anchorages. Some international involvement through capacity building assistance with local authorities may be useful.

Successful attacks that do occur at sea in Southeast Asia are on small or larger vessels that are stopped or proceeding slowly. Most high value seaborne trade is carried in larger vessels transiting the region, but the actual attacks at sea are mainly on smaller, more vulnerable vessels carrying regional trade, or on local fishing and trading vessels, as well as cruising yachts. Larger vessels gain considerable protection from their size and speed. Most large, modern merchant ships engaged in international trade travel at speeds in excess of 14 knots, and it is both difficult and dangerous for small craft to attempt to approach them at this speed.

In Southeast Asian waters, where the number of incidents is increasing, two regional hot spots can be identified. The first area of concern is the southern part of the South China Sea near Pulau Tioman and Pulau Aur off the east coast of Malaysia and near Mangkai, Anambas and Natuna islands in Indonesia. These attacks are listed by the IMB as having occurred in Malaysia and Indonesia respectively. These areas are not much more than 100nm apart and the attacks may involve the same group, probably Indonesian. Most of the attacks involved robbers armed with knives and machetes boarding the vessels and stealing personal valuables, cash and ship's property. However, the tug *Whale 7* and its barge were hijacked in 2008 and their crews put ashore; the vessels were subsequently recovered.

There were four attacks off Pulau Aur in 2009 (three tugs/barges and one general cargo ship), but the last attack occurred in June 2009. However, attacks have resumed in 2010 with four in the first half of the year, including two tug hijackings. The temporary improvement in 2009 might be attributed to increased surveillance and presence in this area by the Malaysian Maritime Enforcement Agency.

The situation off Mangkai and Anambas islands is still serious with 13 attacks in 2009, and five in the first half of 2010, as well as two attacks further eastward in the vicinity of Natuna Island. These attacks tend to be hit and run, usually under cover of darkness, with parangs and pistols as the main weapons. The pirates are normally satisfied if they can gain access to the ship's safe, seize any valuables and rob the crew.

Eric Frecon has speculated on possible reasons for the increased attacks off the Anambas and Mangkai islands.<sup>25</sup> A lot of shipping passes near these islands, which are remote with a limited police and naval presence relative to the activity in the Malacca Strait. Frecon also canvasses the possibility that the perpetrators could come from Thailand, particularly as some of the vessels attacked were en route there.

The second area of concern is the Singapore Strait's eastern approaches off Tanjong Ayam and Tanjong Ramunia in Johore, Malaysia. Thirteen incidents occurred in this area in 2009 while six took place in the first half of 2010, all involved ships at anchor, except in one case, an attempted attack on a ship manoeuvring in the anchorage. This is an area where many ships are laid up with skeleton crews as a consequence of the downturn in international shipping associated with the global financial crisis (GFC).<sup>26</sup> The anchorage in the eastern part of the Singapore Strait is in Malaysian waters and is the preferred location for shipowners to lay up their ships or take on bunkers as they do not have to pay anchorage fees.<sup>27</sup>

## Will Somali-type piracy occur in Asia?

There has been some speculation that sea robbers in Asia might adopt the Somali model of piracy. However, this is unlikely for several reasons. First, Somali pirates can get away with their actions because they are operating off a lawless land. Good order at sea begins with good order on land. If there is disorder on land, then disorder in adjacent sea areas is likely. Pirates are well supported by infrastructure on land. While just ten or so pirates might actually conduct an attack, they subsequently have the assistance of many more people, in fact whole villages, to help guard a hijacked ship and look after her crew. All share in the spoils.

Geography is a second area of difference. Southeast Asian waters are relatively confined while the Somali pirates operate in the open ocean, using motherships to support small craft operations. Southeast Asian waters with many small islands and narrow shipping lanes may be suitable for the hit and run attacks that occur in the region, but are unsuited for the type of operations conducted by Somali pirates.



The last reason why Somalia-type attacks are unlikely in Southeast Asia is that the *modus operandi* of pirates and sea robbers in the two areas are different. Attacks off the Horn of Africa are brazen, usually conducted in daylight, with an overt display of weaponry to intimidate the target vessel to get it to slow down. In contrast, attacks in Southeast Asian waters are mostly made secretly under cover of darkness with the robbers boarding to steal whatever valuables they can. Many attacks are also on vessels at anchor or in port where security may be lax.

Somali pirates are organised, well-armed with automatic weapons and rocket-propelled grenades, and have the ability to operate far offshore. They sometimes operate more than 200nm to sea, using motherships. In contrast, pirates in Southeast Asia are less well armed and organised, being generally small-time robbers and petty criminals conducting opportunistic raids. Their range of operations is limited. Firearms are not often used and the weapons of choice are generally knives and machetes.

## Vulnerability of Ships

The vulnerability of ships to piratical attack and sea robbery depends on factors, such as the ship type, size, speed, freeboard and the type of voyage it is undertaking. It may also be the case that substandard ships are more vulnerable than well-operated and maintained vessels with well-trained and efficient crews. The latter are much more likely to take all the precautions against attack recommended by the IMO, shipowner associations and flag states.<sup>28</sup> The IMO has frequently drawn attention to the number of substandard ships engaged in bulk trades, often operating within complex ownership structures that obscure the background of a vessel.<sup>29</sup> The author has heard anecdotal reports that Somali pirates appreciate these factors and are likely to target vessels that might be substandard.

While not always the case, a large merchant vessel travelling at its normal operating speed, and taking all the appropriate precautions, should avoid successful attack unless it slows down or stops. The pirates, of course, understand this as well, and will do what they can through intimidation to slow down or stop a vessel. VLCCs that have been hijacked appear to be exceptions to this principle, but the full circumstances of each attack need to be known to determine whether there was anything that facilitated the attack. For example, information suggests that *Sirius Star*, hijacked by Somali pirates in November 2008 may have been steaming slowly or stopped at the time of the attack.<sup>30</sup> This attack occurred in an area further south of where the pirates had previously operated and the crew may have assumed they were safe before stopping or slowing down.

In August-September 2009, the author travelled in the large and fast container ship *CMA CGM Strauss* from Hong Kong to Marseille. No anti-piracy measures were taken in the South China Sea or the Singapore and Malacca straits, but upon entering the Gulf of Aden transit corridor the ship moved to Security Level 1. This involved posting extra bridge lookouts and

rigging fire hoses. The ship's speed was not less than 21 knots while navigating the transit corridor. The ship's size and speed were considered by her officers to provide the main defence against being boarded. Other large container ships were also observed proceeding independently. The vessels joining the warship escorted convoys appeared to be mainly laden tankers and bulk carriers. Nevertheless, some ships, including bulk carriers and small product tankers were observed proceeding independently.

Attacks often occur on bulk carriers while underway although they are relatively large ships. There are three factors that might help explain why this is so. First, bulk carriers are generally quite slow compared with other vessel types and have a low freeboard when laden. Second, bulk carriers are relatively unsophisticated vessels with a reputation of lower standards of ship maintenance and crew proficiency than ships such as tankers and container ships with higher value cargoes. This suggests that these vessels might be less vigilant and security conscious even when in high-risk areas. The third factor is the way in which bulk carriers are employed. The author's analysis of ship voyage records shows that at the time of being attacked many bulk carriers appear to either be on a very slow passage, possibly unemployed and waiting around for a new spot charter, preparing to enter port for maintenance or bunkering.<sup>31</sup> That means they might be stopped or loitering even in potentially high risk areas, which appears to be a consideration with attacks on bulk carriers both off the Horn of Africa and in Southeast Asian waters.

## International Shipping Recession

The GFC and the associated downturn in international shipping have had implications for maritime security, including for the incidence of piracy.<sup>32</sup> It certainly has contributed to the resurgence of attacks in Southeast Asia, as well as possibly to those off Somalia. There are larger numbers of laid up ships with skeleton crews in anchorages that are prone to acts of armed robbery, such as off Johore in the eastern approaches to the Singapore Strait. Laid up ships are major problems for marine authorities, especially in terms of providing additional security. Singapore has denied that any ships are lying idle in its waters, but this just means there are many ships laid up in nearby Malaysian and Indonesian waters where security is not as tight.

Instead of reducing the crew and laying up a ship, a shipowner may prefer to keep it in service waiting for its next charter, particularly in the case of bulk carriers. In these circumstances, a ship may be loitering at sea, including in high risk areas in the southern part of the South China Sea. An Australian government inquiry into international piracy and armed robbery at sea also noted that because most insurance policies cover the entire period a ship is held for ransom, some owners may chose to leave a ship in the hands of pirates because they can recover daily ship costs while it is detained - such costs could not be recovered if the ship was not detained and no cargo was offering for the ship.<sup>33</sup>

In the face of the shipping downturn, some shipowners may be tempted to cut corners by employing cheaper crews, reducing crew numbers and lowering maintenance standards.<sup>34</sup> Det Norske Veritas, the Norwegian ship classification society, has found that some owners are skimping on maintenance budgets. This cost-cutting could increase the risks of accidents at sea, including groundings, collisions and ship losses, with greater risks of marine pollution and vulnerability to piracy. Underpaid and overworked seafarers are not conducive to maritime security.

Most shipping transiting high risk areas is doing the right thing, complying with best management practice and engaging fully with the security forces.<sup>35</sup> However, there are still many substandard ships at sea, and many ships are apparently not following guidelines for best management practice and recommended procedures for countering piracy.<sup>36</sup> A survey conducted by the commander of Combined Task Force 151, the multinational counter-piracy force patrolling the Horn of Africa, indicated that 48 per cent of merchant ships transiting the area were not following the recommended guidelines fully.<sup>37</sup>

## Conclusions

The situation with piratical attacks off the Horn of Africa remains serious, but it still needs to be kept in perspective. Only a very small proportion of the ships passing through the area are hijacked, and those that are, tend to be at the lower end of the spectrum in terms of the value and standard of the ship and her cargo. The direct economic losses to the shipping industry are relatively low, although insurance premiums for ships passing through this area have increased. Much depends on the quality of a ship and her crew as a valuable ship with a valuable cargo is more likely to be operated by a well trained and motivated crew that takes all precautions against hijacking.

How piracy and armed robbery against ships has been combated in other parts of the world provides grounds for believing that the Somali pirates will also be defeated eventually. Measures such as improved governance onshore, which is the most vital factor but also the most difficult to achieve; better enforcement by local security forces enabled by international support for capacity building; enhanced cooperation between the foreign navies engaged in counter-piracy operations in the area; and greater vigilance by the crews of merchant ships passing through the area support for optimistic assessment.

Aggregate statistics for the incidence of piracy and armed robbery at sea can be misleading. We need to look beyond statistics to understand why some ships are successfully attacked and others are not. The downturn in the shipping industry has many implications for maritime security as shipowners seek to reduce costs through such measures as cutting the size of crews and reducing wages. The shipping industry could do more to help counter piracy by ensuring that crews are well trained and efficient, maintaining adequate crew numbers, and by reducing the employment of substandard ships. There are challenges here for flag states, shipowners, ship owning associations, seafarer unions, crewing agencies and the IMO.

## Endnotes

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1. The Horn of Africa is the northeastern corner of Africa, including Somalia and surrounding territories.
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5. The war risk areas as of 25 November 2009 may be found at: <[www.lmalloyds.com/AM/Template.cfm?Section=Joint\\_War1&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=3&ContentID=3888](http://www.lmalloyds.com/AM/Template.cfm?Section=Joint_War1&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=3&ContentID=3888)>.
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7. Stephen Saunders, 'Executive Overview: Fighting Ships', *Jane's Fighting Ships 2009-2010*, May 2009, p. 19.
8. The International Maritime Bureau (IMB) is part of the International Chamber of Commerce and was initially established by marine insurance companies to counter maritime fraud. The IMB Piracy Reporting Centre in Kuala Lumpur was established in 1992 to:
  - receive reports of piracy on a global basis
  - warn ships against piratical attacks
  - analyse reported incidents of piracy worldwide
  - issue regular reports.

The IMB and the International Maritime Organization (IMO) are not related. The IMB is a commercially funded operation, while the IMO is an instrument of the United Nations tasked with regulating international shipping to provide ship safety, security and the prevention of ship-sourced marine pollution.
9. International Maritime Bureau, *Piracy and Armed Robbery Against Ships - Annual Report for the Period 1 January- 31 December 2008*, January 2009, p. 4.
10. Max Boot, 'Pirates, Then and Now - How Piracy was Defeated in the Past and Can Be Again', *Foreign Affairs*, vol. 88, no. 4, July/August 2009, p. 104.
11. Clive Schofield, 'Plundered Waters: Somalia's Maritime Resource Insecurity', in Timothy Doyle and Melissa Risely (eds), *Crucible for Survival - Environmental Security and Justice in the Indian Ocean Region*, Rutgers, New Brunswick, 2008, pp. 101-115, and Clive Schofield, 'The Other "Pirates" of the Horn of Africa', *RSIS Commentary 2/2009*, S Rajaratnam School of International Studies, Nanyang Technological University, Singapore, 5 January 2009.

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15. International Maritime Bureau, *Annual Report for the Period 1 January - 31 December 2009 and Report for the Period 1 January - 30 June 2010*.
16. International Maritime Bureau, *Annual Report for the Period 1 January - 31 December 2009*.
17. International Maritime Bureau, *Annual Report for the Period 1 January - 31 December 2009*, Table 1 and *Report for the Period 1 January - 30 June 2010*, Table 1.
18. According to the IMB one example shows the feeder container ship *Sinar Merak* was attacked on 22 January 2007 in the Malacca Strait after leaving Belawan in Sumatra for Singapore. However, subsequent investigations by Singapore security agencies revealed that the two persons found onboard *Sinar Merak* were actually innocent Indonesian fishermen who were survivors of a small craft that was run down by the container ship manoeuvring aggressively to avoid a suspected attack. Nevertheless, the IMB continues to show this incident as an actual attack.
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23. International Maritime Bureau, *Report for the Period 1 January - 30 June 2010*, p. 20.
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28. For an example of such guidelines see Office of the Inspector of Transport Security, *Australian shipping counter piracy and armed robbery at sea advisory guidelines*, Department of Infrastructure, Transport, Regional Development and Local Government, Canberra, 2009, <[www.infrastructure.gov.au/transport/security/oits/files/ASCPiracy\\_Armed\\_Robbery\\_Sea\\_Guidelines.pdf](http://www.infrastructure.gov.au/transport/security/oits/files/ASCPiracy_Armed_Robbery_Sea_Guidelines.pdf)>. The IMO Guidelines are in MSC.1/Circ.1334 dated 23 June 2009, and the guidance for governments is MSC.1/Circ.1333 dated 26 June 2009.
29. John King, 'The Security of Merchant Shipping', *Marine Policy*, vol. 29, 2005, p. 242.
30. Personal communication to the author from an anonymous source.
31. A spot charter a charter when a particular vessel moves a single cargo between specified loading port(s) and discharge port(s) in the immediate future. Bulk carriers are the modern day 'tramps' of the sea often being chartered for single voyages rather than being on time charters covering several voyages. They might loiter around at sea waiting for a new spot charter.
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33. Office of the Inspector of Transport Security, *International Piracy and Armed Robbery at Sea Security Inquiry Report*, Department of Infrastructure, Transport, Regional Development and Local Government, Canberra, April 2010, p. 18
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35. Office of the Inspector of Transport Security, *International Piracy and Armed Robbery at Sea Security Inquiry Report*, p. 13.
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# The International Legal Framework for Piracy

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Stuart Kaye

In recent years, piracy around the Horn of Africa has become an increasing concern. Yet despite the currency of the problem, piracy is a crime that has been a challenge for humanity throughout recorded history. It is sometimes referred to as an 'international crime' and has, for centuries, attracted universal jurisdiction to combat it on the high seas.<sup>1</sup> This paper considers the nature and substance of the legal framework for piracy at international law, tracing it from its origins to the contemporary challenges faced today.

## Historical Background

Piracy as a term has its origins in the classical world. Greek and Roman texts refer to *peirato* and *pirata* respectively, although these epithets referred to whole communities which were sustained by raiding ships at sea rather than merely those who engaged in the activity. Nor was the criminality of the activity as clear cut as it is today. The Romans referred to alliances they had from time to time with *pirata*, suggesting that if communities sustained by piracy directed their attacks against the enemies of Rome, they were not committing criminal offences in the eyes of the Romans.<sup>2</sup>

After the fall of the Western Roman Empire, the term *pirata* appears to fall out of use, although it is reasonable to assume that ship attacks did not end. The modern equivalent usage of the term 'pirate' more accurately has its origins during the Renaissance, when the ships of the western European powers engaging in widening trade, particularly those of Venice, England, France and Spain, began to increasingly fall victim to pirate attacks. Reaction to these attacks was an increasing recognition that attacks on ships at sea outside of wartime was a criminal offence, and further, that pirates could be captured and punished by any state, wherever they were encountered.<sup>3</sup>

It is important to note that from the 16th century through into the 19th century, pirate attacks could be legitimated by governments through the authorising of such activities as privateers, under a letter of marque.<sup>4</sup> Such an instrument would permit attacks on enemy vessels, and would clothe what would otherwise be characterised as a pirate attack as a legitimate part of war at sea. Its scope would typically restrict attacks to vessels of a particular nationality, and extend over perhaps a limited geographical area or a limited period of time. Letters of marque were prohibited by the Declaration of Paris in 1856, although a number of states did not participate. As late as 1898, the United States (US) explicitly reserved the right to issue letters of marque during the Spanish-American War.<sup>5</sup>



British efforts to curb piracy saw early consideration of the nature of piracy as a crime, and in view of subsequent events, it is logical to consider the development of the law of piracy in England, as it exerted a significant impact on the subsequent development of international law. Both Sir Edward Coke and Sir William Blackstone in their respective works identified piracy as a serious crime, one that states could respond to at sea when and where it was found. Writing in 1628, Coke stated that pirates were '*hostis humani generis*' or literally 'the enemies of all mankind', which was quoted with approval by Blackstone over a century later in an oft cited passage:

Lastly, the crime of piracy, or robbery and depredation upon the high seas, a pirate being, according to Sir Edward Coke, *hostis humani generis*. As therefore he has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him: So that every community hath a right, by rule of self defence, to inflict that punishment upon him, which every individual would in a state of nature been otherwise entitled to do, for any invasion of his person or personal property.<sup>6</sup>

Parliament also passed a series of acts from the 16th century aimed at ensuring the ships of the Royal Navy (RN) had legislative authority to deal with pirates.<sup>7</sup>

Substantial development of the law of piracy in England took place in the 19th century, when, through a series of Admiralty cases, the operative extent of the law began to take place. For example in the *Le Louis* Case in 1817, Justice Sir William Scott held that pirates were essentially the equivalent of enemy belligerents in time of war, and therefore could be treated as subject to the 'extreme rights of war'.<sup>8</sup>

The extent of the law of piracy in England reached its apogee in *The Magellan Pirates* where the Chief Judge in Admiralty, Dr Stephen Lushington, held that the pursuit of pirates within the Strait of Magellan, even to the extent of pursuing them to anchor and on to their base onshore in Chilean territory was lawful. Lushington indicated that in the case of pirates pursued on to land, their arrest was lawful, but there was an obligation to hand the individuals over to lawful authority within the state on whose territory they were apprehended.<sup>9</sup>

The modern exposition of the offence of piracy at English law came in a reference to the Privy Council in *re Piracy Jure Gentium* where the judges looked favourably upon a definition of piracy given by Kenny that 'piracy is any armed violence at sea which is not a lawful act of war' which given its brevity came closest to the mark. The judges also indicated that attempt could also constitute an offence. What was significant in the definition apparently used by the Privy Council was that piracy would not encompass any assault that took place at sea. Rather, there was a necessity of the piratical act to include some element of assimilating the cargo, the ship or both to the pirate's control and personal benefit.<sup>10</sup>

## Modern Piracy in International Law

The size and reach of the RN saw it at the forefront of counter-piracy operations in the 19th century and British practice had a significant role in the formulation of the law of piracy in international law. The International Law Commission, in the lead up to the first United Nations Conference of the Law of the Sea in 1958, adopted a definition and operative provisions closely modelled on British law and practice. Their articles were transmitted essentially intact into the *Convention on the High Seas 1958*, which opened for signature in April 1958.<sup>11</sup> Article 15 defined piracy as:

- (1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
  - (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
  - (b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (3) Any act of inciting or of intentionally facilitating an act described in subparagraph 1 or subparagraph 2 of this article.

A significant element of the definition was the indication that the illegal acts must be committed for private ends. This would potentially remove certain acts that might closely resemble piracy when those acts were undertaken by a political movement for political purposes, thereby leaving a lacuna in the definition which was not formally corrected until 1988 in a very different instrument.

In addition, piracy under this definition will always require the involvement of more than one ship. The situation of a crew mutinying or the passengers rising up and seizing the ship will not, of itself, amount to piracy. A second, or additional vessels, are always needed to make out the offence.<sup>12</sup> This restriction does not preclude the use of aircraft, either from the point of view of victim or pirate, although practically speaking piracy against aircraft presents a level of technical difficulty that would be beyond most pirates.

As well as defining piracy, the *Convention on the High Seas* also indicated states should cooperate to combat it and the circumstances where the jurisdiction of a state could be exercised to arrest pirates:

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.<sup>13</sup>

This provision reflects the view expressed in the English cases that pirates were essentially *hostis humani generis* as the crime of piracy was subject to universal jurisdiction, as every state, outside of the territorial seas of other states, was empowered to arrest, try and prosecute individuals as pirates if it chose to do so.

The provisions in the *Convention on the High Seas* have been substantially duplicated in the *United Nations Convention on the Law of the Sea 1982* (LOSC). The definition of piracy is virtually identical in LOSC Article 101, and the confirmation of universal jurisdiction in LOSC Article 105 is exactly the same as the definition in the *Convention on the High Seas*. In addition, a right of visit to vessels suspected of piratical acts by any authorised government ship, including warships, is explicitly confirmed in Article 110.<sup>14</sup> This provision makes it clear that the universal nature of the crime of piracy will allow states to not merely seize pirates caught in the act, but also to stop and board vessels if there is a reasonable suspicion the vessel was engaged in piracy.<sup>15</sup> Protection for wrongful use of this provision is in place, with a flag state of an arresting vessel liable at a state-to-state level to the flag state of the wrongfully boarded vessel.<sup>16</sup>

The definition of a pirate ship is also clarified in LOSC. A pirate ship is a vessel under the dominant control of persons who intend to use it to undertake piratical purpose.<sup>17</sup> Interestingly, there is also provision for the mutiny of a warship or other government ship or aircraft that subsequently engages in piracy. In keeping with the universal jurisdiction of the offence, a warship or government ship in this position is treated as if it were a private vessel, removing its sovereign immunity, and rendering it liable to arrest.<sup>18</sup> Although sovereign immunity may be lost, in such a case, as with any pirate vessel, the vessel retains the nationality it possessed upon registration even though its activities have attracted universal jurisdiction. As such, no pirate vessel is stateless, unless it was a stateless vessel previously, or has been deregistered pursuant to the law of its flag state.<sup>19</sup>

These provisions imply an obligation upon all states to provide for a domestic law offence of piracy to deal with the offence when encountered in waters other than the territorial sea of another state. Many states have taken up this implicit obligation and the offence of piracy is found within the domestic statute books of many states including Australia and Somalia.<sup>20</sup>

## Jurisdictional Issues

The universal jurisdiction attaching to piracy means that all states are empowered to deal with piratical acts, wherever they occur. In theory, the ramifications of such a notion are not small, as much pirate activity takes place relatively close to the coast, and therefore would take place within the territorial sea of a coastal state. If the coastal state does not take action, the question could be put as to whether third states might deal with pirates as they find them, even if this is inside the territorial waters of another state?

The answer to this question is resoundingly in the negative. The operation of LOSC Article 105, which contains the operative provision, indicates jurisdiction to apprehend pirate vessels extends 'on the high seas, or in any other place outside the jurisdiction of any State'. This has been interpreted to mean areas where a state may exercise its jurisdiction over criminal activity, which in this case is within its territorial sea. As such, piracy occurring within the territorial sea, usually 12nm width, falls within the exclusive jurisdiction of a coastal state to enforce in the absence of an agreement or other supervening authority.<sup>21</sup>

There are good reasons why this interpretation is correct. Most cogent of these is the definition of innocent passage under LOSC Part II. Article 18 indicates some detail as to the nature of passage in the context of innocent passage through the territorial sea of a coastal state. Passage is to be 'continuous and expeditious' save when rendered necessary by safe navigation, *force majeure*, distress or rendering assistance to persons, ship and aircraft in danger or distress. No exception is made for enforcement against pirates.<sup>22</sup> In addition, a list of activities deemed inconsistent with innocent passage is found in LOSC Article 19, and these include 'any other activity not having a direct bearing on passage' which would seem to be sufficient to exclude piracy enforcement.

This restriction on enforcement actions against piratical acts created a potential difficulty in dealing with pirate attacks off the Horn of Africa, as Somalia lacked the ability to take any action to prevent attacks within its territorial sea. The operation of international law would mean that other states would not be in a position to apprehend pirates or take action against them, beyond what was necessary in self defence for an attacked vessel. Recognising this deficiency, the United Nations Security Council adopted resolutions 1816 and 1846 in 2008. It is worth noting that even in this circumstance, there was some reluctance from the Security Council to authorise counter-piracy operations in the territorial sea, as there was a requirement of authorisation for states to have authority from the Somali Transitional Federal Government, and for the resolutions to have limited periods of time in which they would operate.<sup>23</sup> In addition, United Nations Security Council in resolution 1851 stated *inter alia*:

10. *Affirms* that the authorization provided in this resolution apply only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of Member States under international law, including any rights or obligations under UNCLOS, with respect to any other situation, and underscores in particular that this resolution shall not be considered as establishing customary international law, and *affirms further* that such authorizations have been provided only following the receipt of the 9 December 2008 letter conveying the consent of the TFG.

It is very clear that the Security Council did not want to create any state practice that might provide a basis to argue that customary international law would accommodate interventions against pirates within another state's territorial sea.

Again, as with the *Convention on the High Seas*, LOSC actively encourages cooperation between states in responding to piracy. Article 100 provides 'all States shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State'.

While encapsulating a strong exhortation to cooperate, the reality of Article 100 is that there is no specific obligation which a state must undertake. There are no shortage of examples of cooperation in dealing with piracy throughout of the world, such as the Combined Task Force 151 off the Horn of Africa or the joint patrols and arrangements under the *Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia* (ReCAAP) in and around the Malacca Strait.<sup>24</sup> However participation in these activities is by no means compulsory, nor does international law through LOSC Article 100 impose any sanction for failing to do so. For example, neither Indonesia nor Malaysia, the two littoral states with the longest coastlines in the region of the Malacca Strait, has ratified ReCAAP.<sup>25</sup>

## Piracy and Terrorism

A significant challenge for international law regarding piracy is the relationship between the anti-piracy provisions of LOSC and measures designed to combat terrorist activities internationally. The distinction between pirate activities and a terrorist attack on a ship at sea is not immediately apparent from either the manner in which the activities are carried or the response by naval vessels as both may be essentially the same. Yet the legal regimes for each are somewhat different, with piracy being an offence of great antiquity with a long pedigree in international law, while maritime terrorism is a much more recent phenomenon with an equally more recent international response that is clearly distinguished from piracy.

The necessity for a different regime hinges upon the requirement that pirates engage in piratical acts for 'private ends'. This language is used in the definition of piracy in LOSC Article 101 reflecting identical language used in Article 15 of the *Convention on the High Seas*. The reference to private ends has raised the issue that insurgents, rebellions and vessels involved in non-international conflicts could be construed as piratical acts.<sup>26</sup> Nineteenth century practice appears to proceed from the theory that insurgents are not pirates, although there is a marked lack of consistency in its application.<sup>27</sup> In contemporary terms, the situation is somewhat changed, due to developments in international humanitarian law. The existence of an armed conflict, of an international character or otherwise, creates obligations on states under international humanitarian law. Certainly under Common Article III of the Geneva Conventions, which will apply to all states, and Additional Protocol II, which apply to some, there are limitations on the ability of states to treat insurgents as criminals in all circumstances.<sup>28</sup>

A similar issue is raised by maritime terrorism. Again the consequences and acts involved may be indistinguishable from piratical acts, but the offence will not be piracy because the motivation of the individuals lacks the 'private ends' requirement within the definition. Although indirectly raised by the events surrounding the seizure of the Portuguese vessel *Santa Maria* in 1961, it was the hijacking of the Italian cruise liner *Achille Lauro* in 1985 that placed the differences between maritime terrorism and piracy in sharp relief. The hijackers, members of the Palestine Liberation Front, after seizing the vessel and killing an American national, escaped.<sup>29</sup>

In the efforts to catch the terrorists after the attack a significant difference emerged between states such as the United States, who viewed the incident as piracy, and states who viewed it as something other than piracy due to the political motivation of the terrorists.<sup>30</sup> The lack of consensus crystallised a need to develop some kind of international response, all states accepted that incidents of maritime terrorism were clearly unlawful, and this should be reflected in international law.

The result was the negotiation of the *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988* (SUA Convention) and its protocol, dealing with offshore installations. The SUA Convention provides protection for shipping against certain acts, including seizing a ship, performing acts of violence against individuals on a ship, and other activities designed to cause harm to the ship, persons aboard and/or its cargo.<sup>31</sup> The SUA Convention does not rely upon the motivation for the acts, so it would include piratical acts, but also maritime terrorism without any intention for personal gain.<sup>32</sup> The SUA Convention applies to ships that are outside the territorial sea, or which are intending to sail beyond the territorial sea of a single state.<sup>33</sup> Wide jurisdiction is given to states to deal with these offences, but significantly this falls short of universal jurisdiction. Even after an extension in the convention's ambit and the jurisdiction of states engaged in enforcement activity was agreed in a new protocol in 2005, the SUA Convention will not countenance

the boarding of suspect vessels flagged in states that are not parties to it.<sup>34</sup> In fact, it reinforces the existing international law rules, as the preamble of the SUA Convention provided 'that matters not regulated by this Convention continue to be governed by the rules and principles of general international law', leaving the law of piracy intact and unaffected.

## Endnotes

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- 1.. J Colombos, *The International Law of the Sea* (6th edn), Longmans, London, 1967, p. 448.
2. Alfred P Rubin, *The Law of Piracy* (2nd edn), Transnational Publishers, New York, 1998, pp. 6-19.
3. H Lauterpacht, *Oppenheim's International Law*, Longmans, Green & Co, London, 1948, vol. 1, p. 279.
4. See Rubin, *The Law of Piracy*, p. 58.
5. See Colombos, *The International Law of the Sea*, pp. 514-515.
6. W Blackstone, *Commentaries on the Laws of England*, Professional Books, Abingdon, 1982 (reprint of 1802 edition), vol. 4, pp. 71-72.
7. See 27 Hen. VIII c.4 (1535); 28 Hen. VIII c.15 (1536); 11 & 12 Will. III c.7 (1700); 4 Geo. I c.11 (1717); 8 Geo. I c.24 (1721); 18 Geo. II c.30 (1744); 6 Geo. IV c.49; 7 Will. IV & 1 Vict. c.88.
8. *Le Louis* 165 ER 1464.
9. *The Magellan Pirates* 164 ER 47
10. *In re Piracy Jure Gentium* [1934] AC 586
11. *Convention on the High Seas*, done at Geneva on 29 April 1958, entered into force 30 September 1962: 450 UNTS 11.
12. JL Jesus, 'Protection of Foreign Ships Against Piracy', vol. 18, *International Journal of Marine and Coastal Law*, 2003, p. 376.
13. *Convention on the High Seas*, Article 19.
14. Article 107 of the *United Nations Convention on the Law of the Sea 1982* (LOSC) deals with the categories of vessel and aircraft that may enforce state law with respect to piracy.
15. LOSC Article 110 provides in part:
  1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:
    - (a) the ship is engaged in piracy.
16. LOSC Article 106 provides:

Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure.

17. LOSC Article 103.
18. LOSC Article 102.
19. LOSC Article 104
20. Part IV, *Crimes Act 1914*; the Somali Maritime Code provides:
  - Article 205 Piracy
 

The master or officer of Somali or foreign vessels who commit acts of depredation to the damage of a Somali or foreign vessel or its cargo, or for this purpose commit violence against persons on board Somali or foreign vessels, are punished by imprisonment from 10 to 20 years.
  - Article 206 Taking Possession of the Vessel
 

Crew members of a vessel who take possession of the same are punished:-

    1. by imprisonment from 10 to 20 years if the facts is committed with violence or threat against the master the other officers.
    2. by imprisonment from 3 to 10 years if the facts is committed clandestinely or by fraudulent means.
    3. For promoters and heads, the punishment is increased up to one third
    4. If the fact is committed by a person extraneous to the crew the punishment is reduced by one third.
21. Jesus, 'Protection of Foreign Ships against Piracy', p. 376.
22. Although note Judge Rüdiger Wolfrum of the International Tribunal for the Law of the Sea suggests that a rescue of persons from an ongoing pirate attack could constitute a basis for intervening against pirates within the territorial sea of a coastal state, R Wolfrum, 'Fighting Terrorism at Sea: Options and Limitations under International Law' in M Nordquist, R Wolfrum, J Norton Moore and R Long (eds), *Legal Challenges in Maritime Security*, Martinus Nijhoff, Leiden, 2008, p. 10.
23. Security Council Resolution 1816 (2008) had a six month window of operation from 2 June 2008, while Security Council Resolution 1846 operated for the year from 2 December 2008.
24. See Jesus, 'Protection of Foreign Ships against Piracy', pp. 368-370.
25. Similarly, both Indonesia and Malaysia resisted a proposal by the United States for greater cooperation in action against pirates in the Malacca Strait to 'internationalise' the waterway: see R Barnes, D Freestone and D Ong, 'The Law of the Sea: Progress and Prospects', in D Freestone, R Barnes and D Ong (eds), *The Law of the Sea: Progress and Prospects*, Oxford University Press, Oxford, 2006, p. 24.
26. Judge Jose Luis Jesus of the International Tribunal for the Law of the Sea notes that 'private ends' might include personal malice or a desire for revenge. Jesus, 'Protection of Foreign Ships Against Piracy', p. 378.
27. Colombos, *The International Law of the Sea*, pp. 450-454.
28. See generally MH Passman, 'Protections Afforded to Captured Pirates Under the Law of War and International Law', *Tulane Maritime Law Journal*, vol. 33, 2008, p. 1.



29. M Haberstam, 'Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety', *American Journal of International Law*, 1985, vol. 82, p. 349. The International Maritime Organization adopted in 1985 Int'l Maritime Org. [IMO] Assemb. Res. A. 584(14) to encourage states to take measures to combat terrorist activity against ships.
30. SP Menefee, 'Anti-Piracy Law in the Year of the Ocean: Problems and Opportunity', *ILSA Journal of International and Comparative Law*, 1999, vol. 5, pp. 310-313; Haberstam, 'Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety', pp. 270-291.
31. Article 3 of the *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988* provides:
  1. Any person commits an offence if that person unlawfully and intentionally:
    - (a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
    - (b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or
    - (c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or
    - (d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or
    - (e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or
    - (f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or
    - (g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).
32. See AS Skaridov, 'Hostis Humani Generis', in Nordquist et al, *Legal Challenges in Maritime Security*, p. 482.
33. *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988*, Article 4.
34. *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, done at London on 1 November 2005, IMO Doc: LEG/CONF.15/21.

# Scuppering Somali Piracy: Global Responses and Paths to Justice

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Clive Schofield and Robin Warner

Since late 2008 significant increases in acts of piracy and attacks against shipping off the Horn of Africa have led to unprecedented international maritime cooperation, most notably naval patrols and escorts involving warships from numerous states. Despite these efforts piratical attacks in the region continue with increased frequency (although the proportion of successful hijackings of vessels has been reduced). Additionally, there are indications that they are changing in character. This chapter explores some of the key underlying causes of the Somali piracy phenomenon before examining the multifaceted global response including United Nations (UN) resolutions, naval responses and practical measures adopted by ships transiting the region.

The latter part of the chapter is devoted to an analysis of the international legal regime for bringing the pirates to justice, obstacles that exist on paths to justice and how these challenges can be overcome. Elements of the piracy offense in international law are examined and the degree to which states have promulgated national legislation to address this oldest of universal crimes. The chapter reviews the disparate approaches being adopted by apprehending states to deal with alleged pirates once in custody as well as the ad hoc nature of criminal justice outcomes for the offenders. The chapter explores a number of options for improving the ways in which pirates may be brought to justice with a view to sharing the burden of investigating and prosecuting the offences more equitably among states in the international community. It concludes that current international responses, whether through naval patrols, preventive measures by ships and legal measures, only serve to diminish the manifestations of piracy off the Horn of Africa rather than tackling the root causes of the problem or providing an effective deterrent to the perpetrators.

## Troubles Ashore: The Failed State

Somalia stands out, even in a region beset by political instability and conflict, as perhaps the classic failed state exhibiting chronic political instability, anarchic factional violence, grinding poverty and humanitarian crisis. With the fall of the Siad Barre dictatorship in 1991, Somalia's central government collapsed and the country has since been riven by deep-seated clan rivalries and civil strife, coupled with, more recently, radical Islamic insurgency. The situation in Somalia deteriorated still further with the withdrawal of the UN humanitarian and subsequently military missions in 1995.<sup>1</sup> Despite these developments, it is an over-simplification to suggest that Somalia is entirely ungoverned (or ungovernable, as it is sometimes portrayed).

Indeed, certain parts of Somalia have enjoyed a degree of relative stability and security over the years which, in turn, had a significant impact on management and security offshore. Of particular note in this context is the independence-seeking Republic of Somaliland in the northwest of the country which territorially coincides with former British Somaliland (as opposed to the remainder of Somalia which constituted Italian Somaliland). The Republic of Somaliland declared its independence from Somalia on 18 May 1991 and boasts many of the key attributes of statehood that Somalia itself lacks. The *Montevideo Convention on the Rights and Duties of States* outlines the international legal requirements of statehood as the possession of a permanent population, a defined territory, a government and the capacity to enter into international relations with other states.<sup>2</sup> Arguably, Somaliland possesses the first three attributes of statehood.<sup>3</sup> This has led observers to conclude that 'from a purely international legal standpoint, Somaliland could indeed pass the statehood test'.<sup>4</sup> However, Somaliland has to date not secured recognition of its independence and statehood from any government.

In the northeast of Somalia (at the tip of the Horn of Africa) there is another largely autonomous region, which terms itself Puntland State of Somalia. Rather than seeking full independence, Puntland has instead long sought autonomy within a revitalised Somalia. Puntland appeared to have achieved that aim with the 23 August 2009 signing of an agreement between its government and Somalia's Transitional Federal Government (TFG). This agreement provides that Puntland will remain an integral part of Somalia and, incidentally, facilitate the establishment of a Somali naval base within its territory, whilst simultaneously granting it a substantial degree of autonomy.<sup>5</sup> However, the fact that the Puntland and the TFG administrations swiftly disputed how the federal/autonomy agreement was to be implemented is indicative of the uneasy relationship and mutual suspicions that remain between the parties.<sup>6</sup> It is in Puntland where many of the pirate groups reside, though it should be noted that the picture here is complex. Indeed, in June 2009 the President of Puntland called for international support to enhance his government's control over its territory, oppose the pirates in their safe havens and establish an effective coastguard.<sup>7</sup> Such support has been slow in coming amid fears on the part of potential donors that funds and equipment will be wasted, disappear or, worse, simply be diverted to pirate (or insurgent/terrorist) interests.<sup>8</sup> The challenges involved in countering piracy in Puntland were highlighted in late 2009 when a Bossaso based judge, with a strong record of action against pirates and people smugglers, was assassinated.<sup>9</sup>

There has been great resistance internationally to formally recognising Somalia's political and territorial fragmentation, in particular Somaliland independence, for fear of opening up a Pandora's box of claims leading to the disintegration of post-colonial states in Africa and elsewhere. Instead, the political fiction of Somalia has been maintained and the international community has sought to resurrect a central government in Somalia by supporting efforts towards national reconciliation. In formal terms significant progress has been achieved with the formation of the TFG under UN

auspices in August 2000. However, the TFG has proven to be a deeply divided entity with little influence on the ground in Somalia. Consequently, much of southern Somalia was left to local clans, gangs and warlords.<sup>10</sup>

A significant shift did, however, occur in the latter half of 2006 when the Union of Islamic Courts (UIC), a loose coalition of both moderate and radical Islamic forces, succeeded in taking control over much of southern Somalia.<sup>11</sup> The UIC's strict imposition of Sharia law had a strong influence on the law and order situation in those areas under its control, which, in turn, had a significant impact on piracy. The UIC garnered broad-based support not least because of its ability to achieve what had long been regarded as a near-impossible task - securing a substantial measure of law, order and stability in the territories under its control.<sup>12</sup> These developments led directly to a Ethiopian military intervention into Somalia, backed by the United States (US), ostensibly in support of the TFG.<sup>13</sup>

The Ethiopian intervention led to the toppling of the UIC. However, this has merely led to the UIC fracturing and to growing anti-TFG and Ethiopian sentiment among the population of Somalia. The credibility of the TFG was severely undermined by its reliance on Ethiopian military support (Ethiopia being generally regarded as Somalia's traditional enemy). Islamic insurgent groups, notably al-Shabab, a transnational Islamic revolutionary group linked to Al Qaeda and Islamist-nationalist groups collectively known as Hisbul Islamiyya, have proved successful in opposing the TFG and its Ethiopian allies, which largely withdrew from Somalia in January 2009.<sup>14</sup>

In the same month Somalia's parliament, meeting in neighbouring Djibouti, elected almost 150 new members drawn from the main opposition grouping, the Alliance for the Re-liberation of Somalia.<sup>15</sup> The new parliament elected Sheikh Sharif Sheikh Ahmad, a moderate Islamist, as the new President of an expanded TFG, and he returned to Mogadishu in February 2009. Although there were high hopes that these changes would lead to the emergence of a revitalised TFG, this did not eventuate with a major offensive against TFG forces on the part of al-Shabab and Hisbul Islami insurgents from May 2009 leading to escalating conflict. As a consequence an estimated 170,000 people were displaced from Mogadishu, which resulted in calls from the TFG for international support and intervention.<sup>16</sup> Despite external support in the form of arms shipments from the United States, by July 2009 the insurgents had largely succeeded in restricting the TFG to control of a few key locations in Mogadishu, such as the Presidential palace, airport and port.<sup>17</sup> The writ of the TFG was essentially restricted to 35 per cent of the city, including those areas of the capital protected by the 4300 troops of the African Union Mission in Somalia (AMISOM).<sup>18</sup> Although AMISOM was intended to number 8000 troops, the hazardous nature of operating in Somalia has meant that promised contributions have been slow to deploy and it has consistently operated well under-strength. In early 2009 AMISOM boasted a force of only 3400 troops, predominantly from Burundi and Uganda. The arrival of additional battalions

from these states boosted the number to 5200 in September 2009 and by mid-2010 AMISOM had around 6000 troops at its disposal.<sup>19</sup> It remains to be seen whether a July 2010 African Union Summit pledge on the part of African heads of state to send an additional 4000 troops to Somalia as part of the AMISOM mission, increasing the number to 10,000, will eventuate.<sup>20</sup> In any case, AMISOM still faces significant hurdles to effective operations, notably in terms of lack of equipment as well as with financial and logistical constraints.

The situation on the ground in Somalia is, however, fluid as well as complex, as demonstrated by the fighting that broke out between nominal allies al-Shabab and Hisbul Islamiyya over control of the port of Kismayo in southern Somalia in October 2009.<sup>21</sup> These events have led to suggestions of the emergence of 'clan-based Islamic warlordism' in southern Somalia.<sup>22</sup> In short, the situation within Somalia remains unstable with violent conflict for control ongoing. This lack of stability and security onshore has not only had dire consequences for the civilian population of Somalia but has also spilled into the maritime domain.

### Somalia's Offshore Claims

At around 3300km, Somalia's coastline is the longest on the African continent. As a result of this long coastal front, Somalia's potential maritime claims have been estimated at 1.2 million km<sup>2</sup>. However, this figure is uncertain, primarily due to the lack of maritime boundaries agreed with neighbouring states.<sup>23</sup> Somalia signed the *United Nations Convention on the Law of the Sea 1982* (LOSC) and ratified it on 24 July 1989. Somalia's claims to maritime jurisdiction are, however, problematic. In particular, Somalia retains a claim to a 200nm territorial sea dating from 1972.<sup>24</sup> This runs counter to the internationally accepted maximum territorial sea limit of 12nm provided under the LOSC and has resulted in international protest from the United States.<sup>25</sup>

Within Somalia's broad maritime jurisdiction out to 200nm offshore, there are significant and, it is understood, under-utilised marine living resources.<sup>26</sup> As a consequence of the 'Somalia Current' marine ecosystem and its associated periodic but intense upwelling of nutrient-rich cold waters, Somali offshore areas are viewed as especially productive and attractive in fisheries terms, especially in the Indian Ocean context.<sup>27</sup>

While the inshore, artisanal fishery has traditionally been exploited by Somali coastal fishing communities, the oceanic stocks, located further offshore, are dominated by foreign and frequently distant water fishing nations. The presence of these fleets fishing illegally in Somalia's largely unprotected waters has led to concerns regarding over-exploitation and the potential collapse of Somali fish stocks. These activities have also resulted in competition and conflict between foreign and Somali fishermen and represent an important underlying cause of attacks on shipping off the Horn of Africa.<sup>28</sup>

It is also possible that Somalia's seabed contains oil and gas reserves. Despite the risks involved it appears that international oil firms are interested in exploring Somali waters as the geology off northern Somalia, for instance, is analogous to that of relatively nearby basins in Yemen which have yielded several hydrocarbon discoveries.<sup>29</sup> For example, in May 2009 Australian exploration company Range Resources, which holds concession rights to all mineral and petroleum resources in Puntland, stated that it would not be deterred from exploration activities by the threat of piracy.<sup>30</sup> However, the difficulties of working both on and offshore Somalia have moderated international interest. In June 2009 Somaliland's Ministry of Water and Mineral Resources extended Somaliland's first bidding round for hydrocarbon concessions from August to December 2009.<sup>31</sup> It is also the case that in April 2009 the TFG submitted preliminary information to the United Nations Commission on the Limits of the Continental Shelf in respect of areas of continental shelf located seawards of Somalia's 200nm limits.<sup>32</sup>

Somalia's waters lie in close proximity to key regional shipping lanes and this helps to explain concerns over maritime security off the Somali coast, particularly from the perspective of energy supply security. Around 33,000 ships transit the Red Sea chokepoint of the Bab el-Mandeb Strait annually, predominantly en route to or from the Suez Canal.<sup>33</sup> In 2006 it was estimated that around 3.3 million barrels of oil a day passed through the strait.<sup>34</sup> In this context it should be recalled that the vast majority of global trade by volume (in excess of 80 per cent) is carried by sea.<sup>35</sup>

## **Perilous Seas: Maritime Piracy and Armed Robbery against Ships off the Horn of Africa**

The problem of attacks on shipping off the Horn of Africa largely emerged from the breakdown in law and order in Somalia post-1991. Thus, while there has been a surge in piratical attacks off the Horn of Africa in the last two years, the problem is not a new one. Indeed, there were more than 700 piracy-style attacks recorded in the region between 1993 and 2005.<sup>36</sup>

In the second half of 2006 there was a noticeable dip in attacks on shipping off the Somali coast.<sup>37</sup> This positive development offshore coincided with the rise of the UIC. The UIC, when imposing law and order over the areas under its control, 'declared war' on piracy on the basis that such acts are contrary to sharia law.<sup>38</sup> The UIC succeeded in creating a hostile environment for piracy syndicates who were forced to radically curtail their operations.

Following the toppling of the UIC, the pirates returned to business and attacks once again grew, leading to a distinct surge in the incidence of piratical attacks off the Horn of Africa in 2008. Overall 2008 witnessed a 200 per cent increase in attacks over the previous year with 111 attacks against ships and 42 hijackings, representing almost 40 per cent of the global figure.<sup>39</sup> Despite the unprecedented efforts to combat the pirate

menace, especially from mid- to late-2008, the trend has continued with the number of attacks by Somali pirates in 2009 increasing to 217 (with 47 vessel hijackings and 867 crew members taken hostage) and accounted for over half of piracy acts reported globally in 2009.<sup>40</sup> While piratical attacks off the Horn of Africa almost doubled in 2009 as compared to 2008, it is also notable that the proportion of attacks that resulted in vessel hijackings fell substantially (from around 38 per cent to 22 per cent success rate for the pirates).<sup>41</sup>

While the majority of attacks have, in the past at least, tended to occur in the geographically restricted waters of the Gulf of Aden where shipping passing the Somali coast is concentrated, there are indications that the piracy problem is spreading with attacks taking place in Omani waters and in the Red Sea.<sup>42</sup> There is also evidence of a shift in pirate tactics; including attacks much further off the coasts of Somalia and Kenya into the Indian Ocean. For example, on 10 November 2009, the oil tanker *BWLion* was attacked around 1000nm off the Somali coast (400nm northeast of the Seychelles).<sup>43</sup> These attacks may represent a reaction to increased patrolling by international naval forces operating in these areas and illustrate how the pirates have developed greater reach in their operations, for instance by using motherships.

Piracy incidents have included attacks on a wide range of shipping from relatively small vessels such as traditional dhows, yachts and fishing trawlers to larger merchant vessels such as *MV Maersk Alabama* - a US-flagged vessel whose capture led to a tense standoff between pirates and the US warship *USS Bainbridge*.<sup>44</sup> This ended when US Navy SEAL snipers killed three of the pirates onboard the lifeboat and freed the captain.<sup>45</sup> The remaining pirate involved was transferred to New York where he has pleaded guilty to seizing a US ship and kidnapping its captain.<sup>46</sup> Among the more notable vessels hijacked are:

- cargo vessels chartered by the UN to deliver humanitarian aid to Somalia
- a freighter carrying a shipment of arms to Kenya<sup>47</sup>
- luxury cruise ships, notably *Seabourn Spirit*<sup>48</sup>
- super tankers such as the Saudi-owned *Sirius Star*,<sup>49</sup> and Greek-flagged *Maran Centaurus*.<sup>50</sup>

How do these pirates operate and what are the key factors behind these attacks?

### Piracy Somali-style

The activities and *modus operandi* of the Somali pirates are distinct from those elsewhere in the world. Pirates elsewhere tend to operate by night and focus on hit-and-run style attacks with the objective of robbing a ship's safe and relieving the crew of their valuables; Somali pirates are considerably bolder.<sup>51</sup> Attacks are often

blatant taking place in broad daylight. The defining characteristic of Somali piracy has been kidnap and ransom activities. The objective is to take control of ships, take the crew hostage and then engage in negotiations with the shipowners over a ransom in exchange for their release. As demonstrated by some of the examples mentioned above, multi-million dollar ransoms have been and continue to be paid for the release of vessels, crew and cargo.

In order to achieve these aims, at least some of the Somali pirate gangs tend to be well organised and equipped, using small, fast boats, nicknamed 'Volvos' in honour of their high-powered outboard engines.<sup>52</sup> The pirates have often acquired relatively high-technology equipment such as satellite phones and global positioning systems and are generally armed with Kalashnikov automatic rifles and rocket-propelled grenades. A frequently used tactic is to open fire in an attempt to make vessels slow down or heave-to. Often multiple boats are used in 'swarm' or decoy type tactics.<sup>53</sup>

Somali pirates have also been known to use fake distress calls as a ruse to lure unwary ships within range.<sup>54</sup> A further tactic relates to the use of motherships and 'brotherships' (a larger skiff, filled with fuel, towing other skiffs), in order to extend the range of operations, providing them with enormous reach as shown by the *Sirius Star* and *BW Lion* attacks.<sup>55</sup>

A further important characteristic of Somali piracy distinguishing it from analogous attacks elsewhere, is that the Somali pirate groups, whether small-scale so-called 'subsistence pirates' or more highly organised pirate syndicates, have access to safe havens on shore - for example Eyl in Puntland. The pirates themselves generally fall into the age range of 17-35 years-old, and anecdotal evidence suggests that many are former fishermen with maritime skills, disenfranchised largely as a consequence of the actions of foreign poachers.

## Key Causes: Understanding the Somali Piracy Phenomenon

The fundamental causes of the Somali piracy phenomenon lie ashore. In particular, the poverty, suffering and profound dislocation caused by the civil strife witnessed in Somalia over the past two decades. For example, in May 2010 the Office of the United Nations High Commissioner for Refugees reported that an estimated 200,000 Somalis had been displaced in the early months of 2010 alone. This added to approximately 550,000 Somali refugees beyond Somalia's international boundaries and 1.4 million internally displaced people.<sup>56</sup> These factors coupled with the lack of a functioning central government and law enforcement authorities contributing to a breakdown in law and order provide the impetus for the increase in piratical attacks.

Somali pirates have ready access to arms - the UN estimates that there are over two million small arms in Mogadishu alone, which have predominantly been smuggled across the Gulf of Aden from Yemen. A further contributing, though often under-



reported, factor is the fact that foreign fishing vessels routinely engage in illegal fishing in Somali waters. As noted above, Somali offshore areas are relatively productive, traditionally under-utilised (by Somali fishing communities at least) and therefore a magnet for foreign poachers.

The Food and Agriculture Organization estimates there are '700 foreign-owned vessels fully engaged in unlicensed fishing in Somali waters'.<sup>57</sup> These foreign fishing vessels reportedly originate from within the immediate region (Kenya, Pakistan, Saudi Arabia, Sri Lanka and Yemen) and from further afield (Belize, France, Honduras, Japan, the Republic of Korea, Spain and Taiwan).<sup>58</sup> There have been reports that foreign fishers have engaged in destructive fishing practices, endangering Somalia fishing stocks and seeking to aggressively chase local fishermen away from productive fishing grounds using high-pressure or boiling water hoses and even firearms for the purpose.<sup>59</sup> The uncontrolled nature of foreign poaching, coupled with unsustainable fishing practices such as bottom-trawling, has led to concerns that Somali fish stocks are on the verge of collapse.<sup>60</sup> It is, however, impossible to determine this with any certainty, given the lack of reliable statistics on catches within Somalia's maritime jurisdiction and the undocumented nature of foreign fishing activities in Somali offshore areas.

Poaching on the part of foreign fishers provides pirates with a fig-leaf justification for their actions, leading them to style themselves 'coastguards' and characterise ransom demands as 'fines'.<sup>61</sup> Whilst foreign poaching of Somali fish in no way justifies violent acts of piracy or armed robbery at sea, with little apparent linkage between illegal fishing and a super tanker hijacking, the systematic plundering of Somalia's resources by foreign fishing fleets nonetheless remains a significant motivating factor in the Somali piracy phenomenon. In this context it is especially ironic that there is something of a correlation between states presently contributing warships to the counter-piracy flotillas off the Horn of Africa and the flags or nationalities of the owners of the vessels that are busily plundering Somalia's offshore resources.<sup>62</sup>

That said, removing the illegal fishing problem would not, in all likelihood, lead to a resolution of the piracy problem as piracy is now a well established highly lucrative business. The profits derived from piracy have proved too substantial with estimates of the ransoms paid to pirates in 2008 alone ranging from US\$30 million to US\$150 million.<sup>63</sup> A further important contributing factor in this equation is the willingness of the shipping industry and insurers to pay these enormous ransoms. The incentives for Somalis to engage in piracy are therefore great, especially in light of widespread poverty ashore. Concomitantly, it is also the case that at present the deterrents to engaging in piracy are far from compelling.

## Global Responses

### United Nations Resolutions

The international naval operations are set against the backdrop of a series of UN Security Council resolutions under Chapter VII of the UN Charter notably resolution 1816 (2 June 2008). This authorises states cooperating with the TFG to enter the territorial waters of Somalia and to use 'all necessary means' to repress acts of piracy and armed robbery at sea in a manner 'consistent with the relevant provisions of international law'.<sup>64</sup> In passing this resolution, the Security Council was clearly recognising the fact Somalia was unable to provide its own maritime security and law enforcement in its waters. Security Council resolution 1838 (7 October 2008) reinforces the earlier resolution calling:

Upon all States interested in the security of maritime activities to take part actively in the fight against piracy on the high seas off the coast of Somalia, in particular by deploying naval vessels and military aircraft.<sup>65</sup>

Resolution 1816 was renewed with the adoption of resolution 1846 on 2 December 2008 which extended the international community's mandate for another year.<sup>66</sup> On 16 December 2008 in resolution 1851, the Security Council invited all states and regional organisations participating in the anti-piracy patrols off Somalia to conclude special agreements or arrangements, known as 'ship rider agreements' with countries willing to take custody of the pirates to embark law enforcement officials to facilitate the investigation and prosecution of persons detained through counter-piracy operations.<sup>67</sup> States were also encouraged to establish an international cooperation mechanism to act as a common point of contact among them all on aspects of the fight against piracy off Somalia. In accordance with resolution 1851, the Contact Group on Piracy off the Coast of Somalia which held its inaugural meeting on 14 January 2009, was established as the principal contact point between states and regional and international organisations on combating piracy. It is supported by four working groups that cover:

- military and operational coordination
- the establishment of a regional coordination centre
- legal issues including the prosecution of suspected pirates; and strengthening of shipping awareness
- diplomatic and public information.

On 10 September 2009, the contact group approved the terms of reference of an international trust fund to help defray prosecution expenses.<sup>68</sup>

Concerned with the ad hoc and inconsistent nature of criminal justice outcomes for apprehended Somali pirates, the UN Security Council passed resolution 1918, sponsored

by Russia on 27 April 2010.<sup>69</sup> Resolution 1918 expressed continuing concern about the threat posed by piracy and armed robbery to the situation in Somalia, nearby states and international shipping, and reiterated the need to address problems caused by the limited capacity of the judicial systems in Somalia and neighbouring states to effectively prosecute those suspected of involvement in piracy. While the resolution praised the efforts of Kenya, the Seychelles and other states to prosecute pirates in their countries, it also expressed concern that some suspected pirates had been released without facing justice due to uncertainty over who could prosecute them. The resolution called upon UN member states to criminalise piracy in their national laws and to detain and prosecute suspected pirates off the coast of Somalia in accordance with international human rights law. Progress made towards implementation of the International Maritime Organization's (IMO's) *Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden* was praised. Finally the UN Secretary General was requested, within three months, to report on options for prosecuting and imprisoning those responsible for piracy and armed robbery at sea as well as the possibility of establishing a regional or international tribunal to deal with piracy cases.

## Naval Responses

The primary international response to piracy off Somalia has been a naval one with an increase in naval presence and patrols or through preventive or defensive measures on the part of mariners. Naval vessels from the United States, Canada, a number of European states (notably Britain, Germany, France, Spain, the Netherlands and Denmark), Russia, India, China, Malaysia and Australia are now or have been active in the waters off the Horn of Africa.<sup>70</sup> This has led to unparalleled international naval cooperation designed to counter piracy involving warships from countries such as China, Japan and the United States operating in close proximity and with largely common objectives. Within the region, counter-piracy efforts are coordinated and information shared under the *Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden*, concluded in Djibouti in January 2009.<sup>71</sup> Several interlocking naval operations also now exist in the region. In October 2008 NATO launched a counter-piracy operation called ALLIED PROVIDER which was succeeded on 17 August 2009 by Operation OCEAN SHIELD.<sup>72</sup> In December 2008 the European Union initiated Operation ATALANTA, consisting of warships from ten countries, while in January 2009 the United States established Combined Task Force (CTF) 151.<sup>73</sup> The navies deployed to the region have developed a number of practical cooperation and coordination mechanisms. Monthly meetings of by the Shared Awareness and Deconfliction Group co-chaired by officials from the US-led combined maritime forces and European Union Naval Forces (EU NAVFOR) provide a forum for tactical coordination among representatives of the deployed navies and the shipping community.<sup>74</sup>

The naval vessels rushed to the region started by providing escorts for World Food Program chartered cargo ships delivering humanitarian aid shipments to Somalia.<sup>75</sup> In order to better protect shipping in the Gulf of Aden area, a Maritime Security Patrol Area (MSPA) has been defined to provide a common system of reference which allows the different patrolling navies to de-conflict their activities. Running through the MSPA, an Internationally Recommended Transit Corridor (IRTC) has been established where group transits are protected by ships from CTF 151, NATO and EU NAVFOR.<sup>76</sup> However, even these mechanisms have not always guaranteed security as, even with the significantly enhanced naval presence now in the region, there are simply not enough warships to provide comprehensive patrols. The gaps in the system are most starkly illustrated by the fact that vessels have been hijacked whilst passing through the supposedly safe corridor.<sup>77</sup>

A key practical concern for the commanders of the naval vessels involved is the brief window they have to catch pirates in the act - an extremely difficult task. Commonly, as little as 15 minutes may elapse from attack detection to hijacking.<sup>78</sup> Once the pirates are in control of a vessel and have hostages at their disposal, the problem becomes significantly more complicated. In this context, a series of French yachts have been seized off the Horn of Africa and France has responded in a particularly robust manner. While these actions, commonly featuring the deployment of French special forces, have met with considerable success, they have also come at a cost. In the storming of the yacht *Tanit* in April 2009, for example, although the operation was a success in that four hostages were freed, one hostage (and two pirates) lost their lives in the action.<sup>79</sup> The successful but costly *Tanit* recapture demonstrates the hazards of this type of intervention. In May 2010 Russian authorities responded in a similarly robust fashion in despatching special forces based on the warship *Marshal Shaposhnikov* to successfully regain control of the Russian tanker *MV Moscow University* the day after its hijacking.<sup>80</sup> The apprehended pirates were then reportedly set adrift in an inflatable boat lacking navigational gear and were presumed to have subsequently drowned.<sup>81</sup> The forceful approach adopted by the French and Russian authorities is in marked contrast to that of many other states that have generally proved reluctant to put the lives of hostages at risk.

Given the reach of the pirates covers at least two million km<sup>2</sup> the scale of the challenge is daunting. Even with more warships operating off the Horn, patrols cannot be everywhere at once.<sup>82</sup> This is why measures such as escorts, safe corridors and the presence of special forces in merchant ships are proving attractive.

A further problem relates to how to tell with certainty who exactly the pirates really are. As noted, pirates often masquerade as innocent (albeit heavily armed) fishermen. The mere possession of arms is not proof of piratical intent or guilt (almost every small vessel operating in these waters will carry arms for self-protection). Consequently, the international naval forces operating in the region use surveillance footage

from maritime patrol aircraft or drones to provide indicators of piratical intent. Key indicators or 'tripwires' include the presence of a ladder and other boarding equipment on board a small skiff, lack of fishing gear and the stowing of additional fuel supplies. The number of people aboard a particular small boat is also taken as an indicator of intent. As a rule of thumb if there are six to nine people on board the skiff it is considered likely that they are engaged in piracy. If there is less, then they are probably undertaking fishing activities, and if more, they are likely to be people smugglers.

## Shipping Industry Responses

The International Maritime Bureau (IMB) recommends that all vessels 'keep as far away as possible from the Somali coast, ideally more than 600 nautical miles' offshore.<sup>83</sup> If the IMB's advice is followed, shipping will be well out of very high frequency radio range of land and, therefore, less likely to be detected by vigilant pirate groups on shore. However, a glance at a map suggests that this is easier said than done. The coastal geography of the Horn of Africa and the proximity of Somalia to the constricted approaches to the Bab el-Mandeb Strait make staying 600nm distant from the Somali coast an impossible task. This provides the pirates with a 'target rich' environment in which to operate.

Although shipping has tended to stay as far as possible from the Somali coastline, the pirates do not confine themselves to Somali waters. Thus, in recent months attacks have been concentrated in the northern part of the Gulf of Aden. This means that many attacks actually take place in Yemeni rather than Somali waters. It is also the case that the shipping industry is notoriously cost-conscious and pressure exists for vessels to opt for the most direct route to save time and money - potentially a seriously false economy given the severe risks of a pirate attack off the Horn of Africa.

The alternative way of steering clear of the Somali pirates is to avoid the Suez Canal route entirely and opt for the significantly longer, and thus considerably more expensive (additional costs will no doubt be passed on to consumers) route by way of the Cape of Good Hope which entails navigating round the southern tip of the African continent. This option does not, however, guarantee safety from piracy as through the use of motherships, pirates have a remarkable reach. *Sirius Star*, for instance, was hijacked whilst taking precisely this option - en route from the Persian Gulf to the United States. Similarly *BW Lion* was taken a staggering 1000nm offshore. Several recent attacks have even occurred north of the Seychelles more than 600nm from the Somali coast against ships not headed for the Gulf of Aden.<sup>84</sup>

Ordinarily, a large vessel such as *Sirius Star*, when under way, represents a formidable target for pirates seeking to board from small boats. When moving slowly and when fully laden, however, such vessels become easy prey. With a full load of oil, the freeboard (the distance from the surface of the water to the ship's deck) on such vessels can be as little as 3-4m, a distance easily overcome with a grappling hook and line.<sup>85</sup>

The IMB also advises vessels traversing pirate-threatened waters to maintain a strict 24-hour radar and anti-piracy watch for 'small suspicious boats converging on the vessel'.<sup>86</sup> Coordination with the international naval forces present in the region is also highly recommended.<sup>87</sup> Vigilance and early detection enables the master of the threatened vessel maximum opportunity to increase speed, engage in evasive manoeuvres and mobilise anti-piracy responses. Indeed, speed is regarded as a key factor with vessels travelling at 18 knots and above generally considered to be immune to boarding from small boats. Similarly, if a vessel's freeboard is 8m or more, this also seems to provide adequate protection when under way.

Anti-piracy measures may involve the use of high-pressure water hoses and foam. Measures may also include the use of barbed or razor wire to make boarding more difficult. Fences may also be installed to make access to the bridge more challenging and thus delay pirates from taking control of the vessel, allowing more time for international security forces to intervene. More low technology measures include the use of mannequins or dummy sailors to give the appearance that more crew/guards are on board the vessel than there actually are. Additionally, new technologies are increasingly being introduced such as electric fencing for shipping (though this is not suitable in all cases as electricity and flammable vapour makes for an explosive mix) and the use of 'sonic weapons' such as long-range acoustic devices, which generate noises at painful, but non-lethal decibel levels with the aim of disorienting and deterring potential pirates.<sup>88</sup>

The option of arming non-military vessels has, however, not generally been greeted with much enthusiasm from authorities or mariners. In certain circumstances, such as vessels carrying humanitarian aid shipments, private security guards, often recruited from Somali militia, have been hired. Similarly, the aforementioned attack on *Melody* was eventually broken off when security guards onboard the cruise ship fired over the pirates' heads.<sup>89</sup> Alternatively in some instances, states have embarked special forces teams on merchant vessels, usually of their own flag, to provide ship borne security.<sup>90</sup> A further innovative, if rather surprising, option has been pioneered by Danish shipping company AP Moller-Maersk which in early 2010 confirmed that it had hired a Tanzanian military patrol vessel to escort one of its ships from Dar es Salaam to Mombasa in 2008. The Danish firm reportedly paid the salaries of the Tanzanian People's Defence Force crew, as well as related fuel costs.<sup>91</sup> Another unconventional tactic was that employed by Chinese sailors in late 2008, who used improvised Molotov cocktails to fight off pirates attacking their vessel.<sup>92</sup> The practical, logistical (as well as financial) challenges that these practices raise are substantial.

## Bringing the Pirates to Justice

Piracy has long been regarded as a crime against humanity as a whole and one of the limited number of crimes subject to universal jurisdiction which is punishable by any state regardless of the nationality of the victim or perpetrators.<sup>93</sup> This unusual exception to the norm of territorial and nationality based criminal jurisdiction indicates the extent to which piratical activities have been regarded as a widespread scourge.<sup>94</sup>

During the 19th century an international law regime developed to in response to the threat of piracy.<sup>95</sup> This was codified in the 20th century in LOSC which contains both provisions recognising the universal jurisdiction of states to repress piracy and investigate and prosecute its perpetrators.<sup>96</sup> The LOSC provisions are considered to be reflective of customary international law on piracy.<sup>97</sup>

LOSC Article 100 commits states parties to cooperate in the suppression of piracy on the high seas, with piracy in Article 101 defined as:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
  - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
  - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

The important elements of the definition are the criminal intent, the use of force; the taking over of a vessel against the wishes of its master; and the robbery of cargo, the possessions of those on board, or even the vessel itself, as the ultimate objective.<sup>98</sup> Piracy can only be committed for private ends so any acts committed for political motives are excluded from its definition.<sup>99</sup> It is true that robbery *per se* does not appear to be the major objective of some contemporary Somali pirates, because vessel, crew, and cargo are released after the payment of ransom. But the taking over of a vessel by forcible means with the intent of obtaining financial gains can be regarded as a piratical act.

Piracy also extends to the operation of a pirate ship which is a ship used to commit piratical acts.<sup>100</sup> In the Somali context, this ancillary provision may cover the operations of motherships.

One notable issue here is that the term piracy as defined under international law is frequently misused. Piracy within the LOSC definitions, only applies to acts taking place within the exclusive economic zone (EEZ) or on the high seas - not analogous acts within the territorial sea which are subject to the criminal jurisdiction of the relevant coastal state.<sup>101</sup> The vast majority of attacks on shipping, including many off the Horn of Africa, tend to take place relatively close to shore, and thus within the territorial seas of coastal states. Technically, therefore, the majority of piracy-style attacks are not deemed piracy under the LOSC definition. An added complication in the Somali context is the fact that, as mentioned, Somalia still claims a 200nm territorial sea. The IMO instead uses the term 'armed robbery against ships' to cover piracy-style attacks taking place within the territorial sea.<sup>102</sup> In contrast, the IMB takes a more all-encompassing approach defining piracy as 'an act of boarding any vessel with the intent to commit theft or any other crime and with the intent or capability to use force in the furtherance thereof', whether within the territorial sea, EEZ or on the high seas.<sup>103</sup>

### Gaps in the current international law regime

The current UN and international responses predominantly address the manifestations of piracy rather than the practical measures necessary to bring the pirates to justice. Investigation and prosecution depend on applicable provisions criminalising the relevant piratical acts in the domestic law of states and their political will to take jurisdiction.<sup>104</sup> The ability of a state to apply and enforce its own laws against piracy will depend on whether the pirate ship or the pirates have the nationality or are in the territory of that state, or the extent that the enforcing state's national law makes piracy a universal crime. Initial responses to questionnaires by the IMO-sponsored Contact Group on Piracy off the Coast of Somalia indicate that the criminalisation of piracy in national legislation is far from comprehensive.<sup>105</sup>

Another possibility for investigating and prosecuting those involved in piracy resides in the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988* (SUA Convention). Maritime violence, including piracy and maritime terrorism became an issue of increasing concern to the international community during the 1980s following the *Achille Lauro* hijacking in 1985 off Egypt by terrorists representing the Palestine Liberation Front. As a consequence, the United States submitted a proposal to the Assembly of the International Maritime Organization that further measures were required, and a regime dealing with all aspects of suppression of acts of maritime violence should be drafted.<sup>106</sup> As a result, the SUA Convention was adopted on 10 March 1988 and entered into force on 1 March 1994. The convention makes it an offence for a person to seize or exercise control over a ship by threat or use of force or any other form of intimidation.<sup>107</sup> Under the convention, states parties must create criminal offences, establish jurisdiction and accept into their custody persons responsible for such acts.<sup>108</sup> The convention was accompanied by a protocol for the suppression of unlawful acts against the safety of fixed platforms located on the continental shelf.<sup>109</sup> Measures to amend both were adopted in 2005, but, as of mid-



2010, these amendments have attracted only a handful of states parties representing a very small percentage of the world's shipping tonnage although they will enter into force on 28 July 2010. The most recent amendments concern the unlawful use of a ship to attempt to intimidate governments or international organisations, or to use the ship or any of its cargo, fuel, and so forth, in a manner likely to cause serious injury, death, or destruction. These amendments are essentially targeting international terrorism such that they are not especially relevant to the suppression of piracy.<sup>110</sup>

The importance of the SUA Convention is that it commits states parties not only to exercising their jurisdiction where possible to arrest those engaged in the relevant activities and to seize their vessels and equipment, but also to either try offenders before their domestic courts, or to extradite them to their own state or a state which has interests in acts of which the accused are suspected.<sup>111</sup> Enforcement of SUA Convention provisions, however, relies on the traditional international law jurisdictional bases of nationality and territoriality.<sup>112</sup> Ratification of the SUA Convention has improved considerably in the 21st century, however, many countries in piracy-ridden areas such as Indonesia and Malaysia have yet to ratify it. In the Horn of Africa region, Ethiopia, Eritrea and Somalia likewise remain outside the regime.<sup>113</sup>

If pirates are captured, the question then becomes one of what to do with them. As there is no functioning central government operating in Somalia, captured pirates cannot be handed over to Somali authorities. Although they can be tried under the capturing state's laws, if they are to be dealt with and imprisoned in the capturing state this actually represents a considerable burden to that state. Moreover, even when such individuals have served their time, it may be difficult to return them to Somalia on human rights grounds as there is a legitimate concern that they may be subject to torture or execution on their return.<sup>114</sup> Considerable practical difficulties also arise in relation to the holding of captured pirates, potentially for considerable periods of time, on an operating naval vessel. All of these factors serve as disincentives to criminal justice action and have led to some states adopting a 'catch and release policy'.<sup>115</sup>

## More Comprehensive and Effective Measures

In the interim, tackling the effects of the piratical activity off Somalia requires a more effective and comprehensive international law regime, one capable of bringing the pirates to justice in a more efficient and timely manner. There are a range of options which could be considered including:

- a specialist international or regional tribunal to deal with piracy
- bilateral and multilateral agreements between states to transfer pirates to appropriate jurisdictions for investigation and prosecution
- tracing and freezing the pirate's assets.

## A Specialist International Tribunal

As previously noted the UN Security Council has recognised the threat to international peace and security posed by piracy and has used its Chapter VII powers to allow for intervention in Somali waters and on Somali land. A further step could be the creation of a specialist international or regional criminal tribunal by the Security Council to deal with piracy following such precedents as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Such a specialist tribunal could be given powers to prosecute individuals responsible for piracy under LOSC or crimes against international shipping under the SUA Convention particularly in instances where individual states were unable or unwilling to do so. All member states could have a mandate to detain, arrest and cooperate in handing over suspected pirates for committal to trial before the tribunal. While this solution is seemingly attractive, it would be costly to establish the necessary criminal justice infrastructure. Also, it is unlikely whether Security Council and other UN member states would view piratical acts taking place off the Somali coast in a comparable light to exceptionally heinous crimes such as genocide, war crimes and crimes against humanity which are the jurisdiction of the ICTY, ICTR and the complementary jurisdiction of the International Criminal Court.<sup>116</sup> Alternatively a hybrid tribunal comprising regional and international judges somewhat like the Special Court for Sierra Leone or the Special Panels for Serious Crimes in East Timor could be formed to try the pirates; however, it would undoubtedly face the same obstacles of cost, lack of political will and delays. The response of UN Security Council to the UN Secretary General's report on the creation of such a specialist tribunal called for in UN Security Council Resolution 1918 will determine the future of this option.

## Developing Criminal Justice Cooperation Networks

A critical factor in bringing pirates to justice is the existence of effective criminal justice cooperation links between states that apprehend the alleged offenders and those which are able to investigate and prosecute piracy offences. LOSC emphasises the role of the seizing state, providing that every state may seize a pirate ship or aircraft, arrest the persons and seize the property on board and that the courts of the seizing state may decide upon the penalties to be imposed and determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.<sup>117</sup> These LOSC provisions are cast in discretionary terms and the seizing state may be unable or unwilling to follow through with investigation and prosecution of the offences. LOSC does not cover this eventuality and has no detailed provisions on the transfer of alleged pirates to states other than the seizing state. This gap in LOSC combined with the absence of domestic legislation making piracy a universal crime in many countries and the lack of an international criminal tribunal empowered to exercise a first instance or complementary jurisdiction over piracy increases the possibility that many pirates will escape justice.<sup>118</sup>

Faced with this dilemma, some states involved in apprehending pirates in the Horn of Africa region have attempted to close these legal lacunae by negotiating bilateral transfer agreements with states such as Kenya, the Seychelles and Tanzania which have agreed to accept apprehended pirates and to investigate and prosecute the alleged offences.<sup>119</sup> The United States, the United Kingdom (UK) and more recently the European Union have negotiated transfer agreements with Kenya. These agreements, while providing an expedient remedy to the problem faced by some of the states participating in counter-piracy patrols are unlikely to provide a comprehensive, equitable and long-term solution to the problem of bringing pirates to justice. The capacity of one state in the region to absorb all the alleged offenders is limited. Further as the transfer agreements are confidential between the parties with the exception of the European Union transfer agreement with Kenya it is not clear whether the human rights safeguards present in other traditional criminal justice cooperation processes such as extradition have been incorporated in all the transfer agreements.<sup>120</sup> The criminal justice system of Kenya is reported to be manifestly overloaded.<sup>121</sup> Indeed, in early 2010 it was stated in a House of Lords report to the UK parliament that 117 alleged pirates held in Kenyan custody were awaiting trial.<sup>122</sup> It is also the case that some of the alleged offenders transferred to Kenyan prisons have reported instances of physical abuse and at least one is taking legal action against an apprehending state for alleged violations of human rights.<sup>123</sup> Seizing states which facilitate transfers to countries where alleged offenders are subject to torture run the risk of being implicated in human rights violations.<sup>124</sup> Furthermore, there exist practical difficulties for the transferring state as personnel involved in the capture of alleged pirates may be required to give evidence at their trial. In April 2010, Kenya announced its intention not to accept any more pirates for prosecution unless other countries gave security guarantees and shared the costs. In some states such as the United States this has resulted in sending pirates to their own jurisdictions for investigation and prosecution. Consequently, some pirates apprehended by US Navy warships have been sent to the eastern district of Virginia for processing.<sup>125</sup> A specialist court has now been opened in Kenya to clear the backlog of pirates to be tried.<sup>126</sup>

Although, theoretically, the existence of universal jurisdiction over piracy should obviate the need to rely on extradition of alleged pirates between jurisdictions for investigation and prosecution, some states affected by the upsurge in piracy incidents in the Horn of Africa region have requested the extradition of pirates from the seizing state.<sup>127</sup> The Netherlands requested the extradition of five pirates captured by a Danish navy frigate participating in the NATO-led CTF 150 when they attacked a Dutch cargo vessel in the Gulf of Aden on 2 January 2009.<sup>128</sup> These pirates were tried in the Netherlands and sentenced to five years imprisonment in June 2010.<sup>129</sup> Acceptance of a request for the extradition of pirates from a seizing state by another state would normally depend on whether extradition arrangements exist between both states and whether both have criminalised the alleged conduct. A request for extradition of the Somali pirates to the seizing state by another state could also be made on the basis of the SUA Convention,

where both states are parties to it, as the activities of Somali pirates in the Horn of Africa region constitute offences which states parties are obliged to criminalise under their domestic legislation. The SUA Convention contains extradition provisions in Article 11 which provide that the offences contained in the convention are deemed to be included as extraditable offences in every extradition treaty to be concluded between the states parties. States parties to the SUA Convention are also required to provide each other with the widest possible measure of assistance in relation to the investigation and prosecution of offences under the mutual legal assistance provisions in Article 12.

A durable solution to bringing piracy offenders to justice which is consistent with human rights prescriptions and distributes the burden of investigation, prosecution and punishment more equitably among states will depend on further development of the international law framework and its domestic implementation. The duty to cooperate to the fullest possible extent in the repression of piracy in LOSC Article 100 could form the basis for an implementing agreement which obligates states parties to criminalise piracy in their domestic law and contains provisions on the transfer of pirates to face justice in situations where the seizing state is unable or unwilling to investigate and prosecute the alleged offenders. A global counter-piracy agreement of this nature could contain similar provisions to other crime suppression treaties such as the *United Nations Convention against Transnational Organized Crime 2000* and the SUA Convention obligating states parties to cooperate with each other in providing evidence for the investigation and prosecution of pirates and to accept transfer of alleged pirates for investigation and prosecution subject to prescribed criteria. States parties to the agreement whose flag vessels are attacked could be obliged to accept transfer of the alleged offenders as could states parties of the same nationality as the pirates. Transfer of alleged offenders to receiving states could be made dependent on undertakings common in extradition agreements that the death penalty would not be imposed or if imposed, would not be carried out and prohibitions on transfer in the likelihood of torture or discrimination on the basis of race, religion, nationality or political opinion. The *Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden* represents a political and moral commitment by relevant states to cooperate in the arrest, investigation and prosecution of persons alleged to have committed acts of piracy.<sup>130</sup> This could form the basis of a regional agreement to spread the burden of criminal justice action concerning the Somali pirates among states in the immediate region.

Establishing more fully-fledged criminal justice cooperation mechanisms between states for piracy offences and promoting wide-spread criminalisation of piracy in the domestic legislation of states are integral steps in the effective repression of piracy. Tightening the net around the perpetrators of this egregious crime goes beyond apprehension of the culprits and requires further expansion and strengthening of criminal justice links between seizing states and others able and willing to investigate and prosecute the offences.

## Tracking and Freezing Pirate Assets

The US government announced, following the *Maersk Alabama* incident, that it would explore the tracking and freezing of pirate assets.<sup>131</sup> This initiative has been implemented in Executive Order 13536 of 12 April 2010, 'Blocking Property of Certain Persons Contributing to the Conflict in Somalia', which prevents payments and other asset transfers to certain persons listed in an Annex to the executive order including two individuals linked to 1300 pirates where such persons come under the jurisdiction or control of the United States.<sup>132</sup> While superficially attractive, this option may encounter practical obstacles. The model used for tracking terrorist financing may not necessarily work for pirates' assets in Somalia where the money filters away into a localised economy and industry in a safe haven essentially divorced from the global financial market. Simple questions about relevant assets may be difficult to answer such as whether a boat suspected of being involved in piracy was bought for fishing or piracy. In the absence of relevant instruments, proceeds of crime legislation and a functioning court system, tracking and seizing the assets may not be possible. In a practical sense, urging clan leaders and the Somali business community to help restrain piracy might lead to greater success against the pirates.

## Conclusions

The significant increases in piratical attacks against shipping off the Horn of Africa in the last three years and the threat to freedom of navigation that they pose have provoked multifaceted responses from the international community. These efforts, however, are yet to bear credible fruit in terms of reducing the number of attacks and bringing substantial numbers of pirates to justice. International responses to the problem have tended to address the manifestations rather than the underlying causes of the piracy attacks and failed to provide an effective deterrent to the perpetrators. Fundamentally, the roots of piracy off the Horn of Africa lie ashore in unstable and conflict beset Somalia, directly linked to the failure of the central government of that state. Naval responses in the shape of warship flotillas and convoys do not begin to address the roots of the Somali piracy problem - how pirates are able to operate from secure safe havens on land and why individuals are driven to become pirates in the first place. Driven by poverty and the blatant theft of Somali offshore resources, in the absence of governmental control on land to restrain criminal activities and with ready access to maritime skills and military hardware plus proximity to busy shipping lanes replete with tempting targets, it is little wonder that piracy has flourished off Somalia. Until peace, stable political governance and the rule of law are restored in Somalia, piracy seems set to continue off the Horn of Africa. Arguably, cooperation among international forces on the ground to address the roots of piracy, although fraught with challenges, offers a more viable long-term solution to the problem.

A key contributing factor which has not been addressed in the global responses to the problem thus far is the willingness of the international shipping industry and insurers to pay out huge ransoms. The payment of multi-million dollar ransoms for the release of captured vessels, cargoes and crew is a key incentive for piratical attacks. This is, however, a delicate issue with the lives of crew members are under threat. It appears that the shipping industry, and consequently consumers, have been willing to shoulder the financial burden of Somali piracy in terms of ransoms and increased insurance costs as an unpleasant but acceptable price for transiting the waters off the Horn of Africa.

While it is clear that piracy and attacks against shipping in the Horn of Africa region have escalated significantly since 2008, it remains the case that these incidents only affect a small proportion of the shipping traversing the waters off the Horn of Africa (under 1 per cent).<sup>133</sup> Nonetheless, even though only a relatively small fraction of shipping passing through the region is subject to attack, piracy does represent a real and present threat to freedom of navigation which, if not checked, is highly likely to persist and become a more virulent problem akin to other forms of corruption such as bribery. If Somali piracy initially emerged from disgruntled and disenfranchised fishermen seeking restitution, it has now evolved into a multi-million dollar business that has spawned relatively sophisticated, organised and equipped transnational crime syndicates. Piracy attacks off the coast of Somalia are only likely to get worse with the tantalising prospect of substantial ransoms still a reality for the criminal gangs involved. The question arises as to whether the current mix of global responses to this problem is appropriate and well targeted. The lack of a compelling deterrent created by the large naval presence in the region and the shipping industry's apparent readiness to treat the ransoms as an operational cost to be passed on to consumers calls into question the long term efficacy of deploying vessels designed for high-end warfighting operations to counter this threat.

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# Maritime Piracy: The Australian Jurisdiction

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Blair Ussher

Since 2008 there has been a dramatic upsurge in maritime piracy. This upsurge has been magnified by the global proliferation of small arms which, in turn, has provided pirates (and for that matter, other criminal and non-state elements) with the means to operate on a more harmful and menacing level.<sup>1</sup>

The frequency of piracy acts has created immense challenges for the international shipping industry. As Professor Geoffrey Till has noted, international shipping, in a globalised world, is more fragile and less resilient than it once was. In the current era, piracy can disrupt the operations of a system sustained by a 'just enough, just in time' operating methodology, thereby triggering a cascade of financial impacts.<sup>2</sup>

The challenges posed by modern-day piracy to globalised trade have brought into question the legal regimes that proscribe the offence of piracy.

The legal definition of piracy has evolved over the years in response to state practice. The types of conduct constituting piracy can be broken down into two main streams, those that constitute piracy under municipal law and those that constitute the offence under international law.

## Municipal Law

Each state can develop and promulgate laws to proscribe the offence of piracy to the extent of the state's territorial and jurisdictional reach. These laws may, but are not required to, conform to the international definition of the offence and may or may not extend from the state's territorial seas and its flagged vessels to the high seas. Further, states can prescribe their own penalties. Penalties are not laid down by international law. The laws of each state may thus vary in content, penalty and reach.

In Australian jurisdictions, the municipal offence of piracy encompasses a variety of activities, some of which constitute an offence at common law, and some of which have been defined as piracy by statute.

Under English common law, the piracy jurisdiction was held to be derived *jure gentium*, which is to say, derived from the law of nations. Over the past century the English courts have failed to give a comprehensive definition of piracy. Various common law definitions of piracy were examined by the English Court of Appeal in *Republic of Bolivia v Indemnity Mutual Marine Assurance Co.*<sup>3</sup> In the leading case of *In Re Piracy Jure Gentium* the Judicial Committee of the Privy Council expressly refrained from



giving a definition of piracy, but favoured the definition advanced by the learned author Courtney Stanhope Kenny, namely that 'piracy is any armed violence at sea which is not a lawful act of war' as coming 'nearest to accuracy coupled with brevity'.<sup>4</sup>

From these leading cases, and from the more recent decision in the *Mary Craig* Case of 1971, it may be discerned that the common law offence can cover the following conduct:

- (a) robbery, attempted robbery, or armed violence at sea by one ship against another; or
- (b) armed violence against a ship at sea by its passengers or crew
- (c) provided the conduct is not authorised by any State and the conduct occurs on the high seas or in the 'Admiral's jurisdiction'.<sup>5</sup>

The Admiral's jurisdiction being the territorial jurisdiction of the Admiralty court.

The exact ambit of the common law offence, as it applies under Australian law, is unclear. As the common law of piracy is derived *jure gentium* it is likely that the elements set out above have been circumscribed by subsequent international conventions. Several legal commentators have concluded that the international conventions on piracy represent the current law of nations on the topic and that the law of nations now controls the common law offence. There is, however, no conclusive authority on this issue.<sup>6</sup>

## Imperial Acts

A series of British enactments conferred jurisdiction upon Australian courts over offences committed at sea.<sup>7</sup> These enactments permitted the application of even earlier statutes in which the British Parliament specifically defined those offences that constituted piracy.

The British Acts dealing with piracy cover a period from the 17th century to the 19th century and include: the Piracy acts of 1670, 1698, 1721 and 1744, the *Slave Trade Act 1824* and the *Piracy Act 1837*.<sup>8</sup>

These offences still apply, indirectly, in certain Australian jurisdictions (in whole or in part) by enactment of state legislatures. Any argument, however, as to the direct application of these imperial Acts has been settled by the Commonwealth's enactment of the *Admiralty Act 1988*. This act expressly repealed the Imperial Admiralty Acts and those provisions of the *Merchant Shipping Act 1894* (UK) which purported to confer British Admiralty jurisdiction to Australia.

## State Piracy Provisions

The Australian states that re-enacted the Imperial Piracy acts are Queensland, Western Australia, South Australia and Victoria, where offences from most, if not all, of the five English statutes have been duplicated. In New South Wales only the *Piracy Act 1837* (UK) has been re-enacted, while Tasmania has enacted no piracy offences of its own. The Australian Capital Territory has followed New South Wales, while the Northern Territory has gone further than the states by enacting its own comprehensive list of piracy offences.<sup>9</sup>

Prior to the enactment of the *Admiralty Act 1988* there was considerable confusion in relation to the interplay between the Imperial Acts and the state piracy provisions.

The Imperial Piracy acts applied in Australia either by paramount force or as received enactments. If they applied by paramount force then, pursuant to section 2 of the *Colonial Laws Validity Act 1865* (UK), they necessarily overrode any state piracy provisions that were repugnant to them.

Although never tested, it was strongly arguable that the Imperial Piracy acts applied to the Australian states by paramount force. That is to say they applied 'by express words or necessary intendment'.<sup>10</sup> Further, or alternatively, the Imperial Piracy acts may have applied to the states by paramount force as a result of the *Offences at Sea Act 1799* (UK) and/or by the *Merchant Shipping Act 1894* (UK).

It was also strongly arguable that the state piracy provisions were inconsistent with and, therefore repugnant to, the imperial offences. Territory offences, however, overrode the paramount force of the imperial provisions to the extent of any inconsistency.

On the other hand, if the Imperial Piracy acts did not apply in Australia by paramount force, their application depended on whether they initially formed part of the received law in each state and territory and, if so, whether they had since been expressly repealed by state or territory enactments or impliedly repealed by the state and territory piracy provisions. In that regard, the 1670 Act has been expressly repealed in New South Wales, Victoria and Queensland. The 1698 Act has been expressly repealed in Victoria, Queensland, South Australia and Western Australia but confirmed in force in New South Wales and the Australian Capital Territory. The 1721 and 1744 acts have been expressly repealed in Victoria, Queensland, Western Australia and South Australia, but confirmed in force in New South Wales and the Australian Capital Territory. In the Northern Territory, if the Imperial acts were received, then they were impliedly repealed by the territory's own piracy offences.

While the interplay between the Imperial acts and state provisions caused confusion, questions also arose in relation to the validity and jurisdictional reach of state provisions. It is arguable that several of the state enactments are invalid on the ground that they exceed the extraterritorial legislative competence of their enacting

legislatures. This is so because they purport to apply beyond the actual state boundaries (some to the high seas, others to the Admiral's jurisdiction) without establishing any connection with the territory of the state. As a consequence, they are arguably invalid unless they can be read down in a way that gives them a valid operation. If the states have always been able to enact legislation that applies to the territorial sea, without the enactment demonstrating any further nexus with the state, then it might be that they are valid, as long as the piracy provisions are capable of being read as intended as applying only within the territorial sea. If, however, the states cannot legislate for the territorial sea without demonstrating some other nexus with the state, then these provisions would have to be read as being intended to only apply within the actual territory of the state – in other words only to the internal waters of the state. It is very doubtful that the provisions are capable of being validly read down to this degree.

### *Crimes at Sea Act 2000*

The *Crimes at Sea Act 2000* came into force on 31 March 2001. It enacts a cooperative scheme agreed between the Commonwealth and the states and territories whereby the criminal laws of the states are applied extraterritorially to the areas adjacent to the coast of Australia. Under the scheme, the 'criminal law' of each state is to apply in the area adjacent to the state ('the adjacent area'):

- (a) for a distance of 12 nautical miles from the baseline for the State ('the Inner Adjacent Area') - by force of State law; and
- (b) beyond 12 nautical miles up to a distance of 200 nautical miles from the baseline for the State or the outer limit of the continental shelf, whichever is greater ('the Outer Adjacent Area') - by force of Commonwealth law.

The 'criminal laws' in force in the state or territory includes both local statutes as well as the derived common law. If an act of piracy were to occur within any of the adjacent areas, the *Crimes at Sea Act* would apply the law on piracy of the relevant state or territory. Left simply like this, the difficulty remains - just what that law would be.

### **Jurisdiction through International Law**

Piracy offences are also defined under international law. Offences that fall within the internationally accepted definition of piracy have a significant consequence as the jurisdiction of all states may be asserted to pursue, capture and punish pirates and to seize and condemn the pirate ship. Jurisdiction is not confined to the countries whose subjects or interests have been directly affected. The form of punishment is left to the municipal law of the country asserting jurisdiction. This international jurisdiction cannot be enlarged by any municipal law which may purport to extend the definition of the conduct that constitutes piracy.

The *United Nations Convention on the Law of the Sea 1982* (LOSC) deals with piracy under Articles 100-107. Under Article 101, piracy is defined as:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or private aircraft, and directed:
  - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
  - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State.
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or intentionally facilitating an act described in sub-paragraphs (a) or (b).

The offence applies regardless of the nationality of the offenders or their victims and regardless of the registration of the vessels concerned. Furthermore, under Article 58(2), jurisdiction in relation to the piracy provisions contained in Articles 101-107 (under Part VII dealing with the high seas) is extended to the exclusive economic zone (EEZ) provided there is no incompatibility with Part V that covers the EEZ. This means that the provisions dealing with piracy apply not only to acts of piracy committed on the high seas but also to those that take place within the EEZ of a state.

It is important to note, however, that acts of piracy committed within the internal waters or territorial seas of any other country are a matter for the municipal laws of that country alone. No universal jurisdiction is created by the LOSC with respect to piratical acts in those regions. The significance of this lies in the fact that most armed attacks on merchant ships occur, not on the high seas, but in the territorial waters of developing states - most of which do not possess the means to adequately police their territorial seas but which remain highly sensitive to any perceived encroachment upon their sovereignty.<sup>11</sup>

Article 105 provides that on the high seas, or in any other place outside the jurisdiction of any state, any state may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property onboard. Moreover, the courts of the state that carried out the seizure may decide upon the penalties to be imposed, and determine the action to be taken with regard to the ship, aircraft or property, subject to the rights of third parties acting in good faith. In relation to seizure, Article 107 stipulates that such seizure may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorised to that effect.

The expression 'in a place outside the jurisdiction of any state' apparently contemplates acts committed by persons connected with a ship or aircraft on an island constituting *terra nullius* or on shores of an unoccupied territory.<sup>12</sup>

The LOSC definition only applies to offences involving ships or aircraft. The provision seems to exclude structures such as drilling rigs and other objects fixed to the seabed; although these fixtures are generally restricted to territorial seas in any event.

The definition also requires more than one ship to be involved. There must be an action by the crew or passengers of one ship against another ship (or the persons or property on board). That excludes the seizure of a ship by its passengers or crew, as arose in the *Santa Maria* incident.<sup>13</sup>

Piracy, under LOSC, is confined to 'private ends'. This requirement has been interpreted to exclude at least some acts of politically motivated violence. The definition also excludes acts of violence by warships or government ships (except where the crew has mutinied and taken control of the ship). This leaves in some doubt whether depredations carried out by international terrorist organisations (Al Qaeda, Abu Sayyaf and Jemaah Islamiyah) for exclusively political ends, or by nationalist or ethnic groups that might fill the political vacuum created by a failed state (the 'Somali Marines', the 'Puntland Coastguard' and the Malaita Eagle Force) can fall within the international offence.<sup>14</sup>

Common law authorities cast little light on this issue. Most expositions of the offence exclude the acts of recognised states. The conduct of insurgents or *de facto* states under the international offence remains uncertain. Whether their actions could be regarded as piracy depends, under one line of authority, upon the nature of those actions. Thus acts of depredation against the ships or nationals of those governments they oppose might not be regarded as piracy, even if the insurgents enjoyed no political recognition.<sup>15</sup> The same acts of depredation, if directed at the ships or nationals of neutral third parties might be regarded as piratical. Other authorities indicate that the validity of a charge of piracy against insurgents is to be determined by their political status.<sup>16</sup>

In addition to this uncertainty, there is also the practical difficulty of dealing with 'pirate-insurgents' with respect to their eventual repatriation and the prospect of them claiming political asylum from the country of the apprehending vessel.

Finally, the LOSC definition of piracy is rendered even less clear by the use of the expression 'any illegal acts.' This expression is ambiguous. It could refer to illegality under international law or under the law of the flag of the vessel attacked. If it refers to illegality under international law, which would seem most likely, what is its purpose? Does this imply that acts of piracy can be authorised by a recognised government and thus be legal? If it refers to illegality under the laws of the flag state of the vessel attacked, does this mean that the state asserting jurisdiction over an apparent act of piracy has to determine the validity of the charge in accordance with the municipal law

of the flag state of the attacked vessel? Legal commentators have differing views, it may be that the expression is simply otiose, that is to say it adds nothing to the definition.<sup>17</sup>

The international offence is, in some respects narrower than the common law offence as stated by the Privy Council in *Re Piracy Jure Gentium*. In particular, offences by passengers and crew against their own ship, such as hijacking, are not included. Nor are those offences committed in territorial seas. On the positive side, the LOSC definition does apply to all illegal acts of violence and detention and acts of depredation against a ship; and also expressly includes aircraft at sea.

## The Commonwealth Piracy Provisions

The uncertainty of the scope and application of the common law and state and territory offences gave impetus to the Commonwealth legislature to create a Commonwealth statutory offence. This was realised after the ratification of LOSC. By Act Number 164 of 1992, a new section 52 was inserted into the *Crimes Act 1914* to provide that: 'A person must not perform an act of piracy. Penalty: Imprisonment for life.'

An 'act of piracy' was defined by section 51 as:

An act of violence, detention or depredation committed for private ends by the crew or passengers of a private ship or aircraft and directed:

- (a) if the act is done on the high seas or in the coastal sea of Australia - against another ship or aircraft or against persons or property on board another ship or aircraft; or
- (b) if the act is done in a place beyond the jurisdiction of any country - against a ship, aircraft, persons or property.

*Australia* includes the External Territories

*coastal sea of Australia* means:

- (a) the territorial sea of Australia; and
- (b) the sea on the landward side of the territorial sea of Australia and not within the limits of a State or Territory;

and includes airspace over those seas.

*high seas* means seas that are beyond the territorial sea of Australia and of any foreign country and includes the airspace over those seas.

*offence against this Part* includes:

- (a) an offence against a provision of this Part because of section 5; and

(b) an offence against section 6,7 or 7A that relates to an offence against a provision of this Part; and

(c) an offence against subsection 86(1) because of paragraph (a) of that subsection, being an offence that relates to an offence against a provision of this Part.

*pirate-controlled ship or aircraft* means a private ship or aircraft which is under the control of persons that:

(a) have used, are using or intend to use the ship or aircraft in the commission of acts of piracy; or

(b) have seized control of the ship or aircraft by an act of piracy.

*place beyond the jurisdiction of any country* means a place, other than the high seas, that is not within the territorial jurisdiction of Australia or of any foreign country.

*private ship or aircraft* means a ship or aircraft that is not being operated for naval, military, customs or law enforcement purposes by Australia or by a foreign country, and includes a ship or aircraft that has been taken over by its crew or passengers.

*ship* means a vessel of any type not permanently attached to the seabed, and includes any dynamically supported craft, submersible, or any other floating craft, other than a vessel that has been withdrawn from navigation or is laid up.

To deal with accessories, a new section 53 was inserted to provide:

(1) A person must not voluntarily participate in the operation of a pirate-controlled ship or aircraft knowing that it is such a ship or aircraft.

Penalty: Imprisonment for 15 years.

(2) This section applies to acts performed on the high seas, in places beyond the jurisdiction of any country or in Australia.

While a new section 54 provides:

(1) A member of the Defence Force or a member of the Australian Federal Police may seize:

(a) a ship or aircraft that he or she reasonably believes to be a pirate-controlled ship or aircraft; or

(b) a thing on board such a ship or aircraft, being a thing that appears to be connected with the commission of an offence against this Part.

(2) A seizure may be effected:

- (a) in Australia; or
- (b) on the high seas; or
- (c) in a place beyond the jurisdiction of any country.

(3) The Supreme Court of a State or Territory may:

(a) on the application by the custodian of, or a person with an interest in, a ship, aircraft or thing seized under this section, order that the ship, aircraft or thing be returned to its lawful owner; or

(b) on its own motion, or on application:

(i) if:

(A) a person has been convicted of an offence against this Part; and

(B) the ship, aircraft or thing was used in, or was otherwise involved in the commission of, the offence;

order that the ship, aircraft or thing be forfeited to the Commonwealth; or

(ii) make any order relating to the seizure, detention or disposal of the ship, aircraft or thing.

(4) An order to return a ship, aircraft or thing may be made subject to conditions, including conditions as to the payment to the Commonwealth of reasonable costs of seizure and detention and conditions as to the giving of security for payment of its value should it be forfeited.

Owing to the international character of the offence and the attendant political consequences that could flow from the seizure and trial of alleged pirates the amending act provided that the consent of the Commonwealth Attorney-General is required for any prosecutions under Part V of the *Crimes Act* (see section 55).

The Commonwealth statutory offence essentially mirrors LOSC save that it extends the offence of piracy to the territorial seas of Australia and removes the troubling word 'illegal' from the substantive definition of the offence.

The other limitations with the LOSC definition have been dealt with under separate Commonwealth enactments. These include:

- the *Crimes (Ships and Platforms) Act 1992* which has given effect to the *Convention for the Suppression of Unlawful Acts Against the Safety*



*of Maritime Navigation 1988 and the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms*

- the *Criminal Code Amendment (Slavery and Sexual Servitude) Act* which was enacted in August 1999. This act has implemented and ratified Australia's obligations under international instruments to prohibit servitude and the trafficking in people for the purposes of sexual servitude.

These offences do not conflict with the cooperative scheme enacted through the *Crimes at Sea Act*. While it extends the jurisdiction of the states and territories to the 'Adjacent Area', the *Crimes at Sea Act* does not require only state criminal laws to apply in the territorial sea. Commonwealth legislation applies in the adjacent area according to the statutory ambit of each act. While Part V of the *Crimes Act* does not repeal the state and territory provisions, it effectively covers the field and provides much needed clarity.

Clarity is all-important, even more so in an era where the traditional threats to international stability and maritime trade, stemming from the machinations of clearly defined sovereign powers, have given way to a more ambiguous operational landscape. Today, when a merchant vessel is attacked, it may not be readily apparent who is attacking whom, whose national and/or economic interests are at stake and what should be done about it. In this uncertain environment, clear municipal and international laws are critically important.

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## Endnotes

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1. A Davis, 'Tracing the Dynamics of the Illicit Arms Trade', *Jane's Intelligence Review*, September 2003.
2. G Till, *Sea Power: A Guide for the 21st Century* (2nd edn), Routledge, London, 2009, p. 290.
3. [1909] 1 KB 785.
4. CS Kenny, *Outlines of Criminal Law*, (16th edn and edited by JWC Turner), Cambridge University Press, Cambridge, 1952, p. 354.

5. In *Re Piracy Jure Gentium* [1934] AC 586; *HM Advocate v Cameron & Ors* (1971) SC 50 ('the Mary Craig').
6. The English Law Commission concluded that the existence of the common law offence was doubtful. See Law Commission, Report 91: *Criminal Law: Report on the Territorial and Extra-Territorial Extent of the Criminal Law (HC75)*, London, 1978, para. 102.
7. See *Australian Courts Act 1828*; *Admiralty Offences (Colonial) Act 1849*; *Courts (Colonial) Jurisdiction Act 1874*.
8. The *Piracy Act 1698* provided that if any of His Majesty's natural-born subjects or denizens committed piracy, robbery or any act of hostility upon the sea against British subjects under colour of a commission from any foreign prince or state, such offenders shall be deemed pirates, felons and robbers. The act also punished as a pirate any master or seaman who turned his ship or other property, voluntarily, to any pirate. The subsequent 1721 Act declared that persons who trade with or fit out pirates are themselves guilty of piracy. The *Slave Trade Act 1824* provided that British subjects or residents are guilty of piracy who upon the high seas, or in any place where the admiral has jurisdiction, knowingly and wilfully carry away, convey or remove any person as a slave or confine any person on board a ship for the purpose of his being brought as a slave into any country or place whatsoever.
9. See *Criminal Code (Qld)* s.79-83; *Criminal Code (WA)* s. 76-80; *Criminal Law Consolidation Act 1935 (SA)* s. 206-11; *Crimes Act (Vic)* s. 70A-D; *Piracy Punishment Act (NSW)* & *Criminal Code (1983) (NT)* s. 72-75.
10. *Phillips v Eyre* (1870) LR 6 QB 1.
11. In 2004, it was suggested that the US Navy and United States Marine Corps could assist in the protection of vessels transiting the Malacca Strait. Malaysia and Indonesia strenuously objected to these proposals as an unjustified expansion of US influence into their region. Singapore also expressed reservations based upon the political implications that might flow from the implementation of any such proposal; see P Chalk, *The Maritime Dimension of International Security*, RAND Corporation, Santa Monica, 2008, p. 46.
12. See 'Commentary', *Yearbook of the International Law Commission*, vol. II, 1956, p. 282.
13. *Santa Maria* was a 21,000 gross register tonnage cruise ship, registered in Portugal. The ship was hijacked by a group of 70 men, who had come aboard as passengers. The leader was Captain Henriques Galvao, a Portuguese political exile. The ship was undertaking a holiday cruise in the Caribbean and its 600 passengers were held for 11 days before Galvao surrendered to the Brazilian Navy. Galvao variously claimed to be representing the Portuguese National Independence Movement, the Iberian Liberation Movement or General Delgado's Liberal Junta. The Portuguese Government asserted that the hijackers were pirates. See J Colombos, *The International Law of the Sea* (6th edn), Longmans, London, 1967, p. 445.
14. The Somali Marines are said to be the most sophisticated and powerful of the pirate groups operating out of Somalia. The group has a 'Fleet Admiral', an 'Admiral', a 'Vice-Admiral' and a 'Head of Financial Operations'. See Raymond Gilpin, *Counting the Costs of Somali Piracy*, United States Institute of Peace, Working Paper, 22 June 2009, Washington DC, p. 4.
15. *The Magellan Pirates* (1853) 164 ER 47.
16. *The Ambrose Light* 25 Fed 408 (1885); see also G Fenwick, 'Piracy in the Caribbean', *American Journal of International Law*, vol. 55, 1961; F Valli, 'The Santa Maria Case', *North Western University Law Review*, vol. 56, 1961, and L Green, 'The Santa Maria: Rebels or Pirates?', *British Yearbook of International Law*, vol. 37, 1961.

17. See A Rubin, 'Is Piracy Illegal?', *American Journal of International Law*, vol. 70, 1976, pp. 92-95. This article traces the drafting history of this provision and proposes that the words 'illegal' in sub-article (a) and the word 'another' in clause (i) be deleted from the provision.

# Piracy and the use of Force in Australia

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Cameron Moore

The Commanding Officer (CO) of a Royal Australian Navy (RAN) warship sent to apprehend pirates might be forgiven for thinking that piracy would be a fairly settled issue in law. The ancient character of the crime suggests that there has been ample opportunity for the law to respond to it, and international law has had a reasonably comprehensive approach to piracy for at least a century. Australia has diligently ratified and implemented all of the relevant obligations. The problem is that this is all Australia has done. The authority to use force at sea to apprehend pirates under Australian law is quite limited, most likely due to the fact there has not been an Australian piracy case since the early 19th century. The relevant Australian legislation is effectively a reproduction of the *United Nations Law of the Sea Convention 1982* (LOSC), an orthodox international law instrument concerning obligations between states which characteristically has little provision for the detail of law enforcement. Consequently, the provisions under the *Crimes Act 1914* for arrest of pirates and seizure of their vessels and evidence are fairly bald; they stand in contrast to the elaborate machinery in the *Customs Act 1901* or the *Fisheries Management Act 1991* for enforcing the law at sea.<sup>1</sup>

Another issue is that while the international law on piracy may be fairly well developed, the distinct facts of the recent Somali piracy phenomenon complicate matters for Australian warships. Although there are United Nations (UN) Security Council resolutions authorising the same action in Somalia's territorial sea as could be taken on the high seas, Australian piracy provisions in the *Crimes Act* do not operate in foreign territorial seas.<sup>2</sup> Additionally, given the limited prospects for piracy prosecutions in Somali courts, it could be quite possible that Australia would have to hold pirates and their vessels for at least some time on behalf of the prosecution authorities of a third country.<sup>3</sup> There is no provision in the *Crimes Act*, however, for such action. Where there is no authority under the *Crimes Act*, any enforcement action would have to rely upon the executive power.

This paper will consider the limited *Crimes Act* provisions for piracy before addressing the extent to which the Commonwealth can rely upon executive power to conduct counter-piracy operations off Somalia. It will conclude that, despite the extent of international law on piracy, Australian law on the use of force against pirates is perilously thin.

## National or International Law Enforcement

When it comes to considering the use of force under Australian law for counter-piracy operations, an essential preliminary question must be whether the operations are for an international or national law enforcement purpose, or both? A national law enforcement

purpose must almost certainly rely upon the *Crimes Act*. Australian practice has usually been to rely upon statute law when conducting a national law enforcement operation at sea that is likely to result in a prosecution. This has been the case with operations to enforce fisheries, customs and immigration laws.<sup>4</sup> There are very few examples of reliance upon executive power for these purposes. The most prominent exception to this would be the boarding of MV *Tampa* in 2001, although this was not for the purpose of a prosecution.<sup>5</sup> On the other hand, when Australian warships have operated to enforce law for primarily international purposes, such as under a UN Security Council resolution, such action has solely relied upon executive power.<sup>6</sup> The question then becomes: would an Australian counter-piracy operation be for the purpose of a prosecution in an Australian court? If so, then the authority should derive from the *Crimes Act*. If not and the operation is either for the purpose of a prosecution elsewhere or to release vessels from pirate control without any prosecution, the authority may derive only from the executive power. It is quite possible that the answer to this question might only unfold in the course of an actual operation, with much turning upon its particular circumstances. This paper will therefore deal with both statutory and executive power authority for counter-piracy operations.

### *Crimes Act 1914*

The only Australian statute to provide enforcement power at sea with respect to piracy is the *Crimes Act*. There is state or territory law which criminalises piracy, some of it applied imperial law, in most jurisdictions.<sup>7</sup> However, none of these acts provide specific enforcement powers at sea. There is also the *Crimes (Ships and Fixed Platforms) Act 1992* which criminalises a range of activities that endanger navigation – such as ship hijacking – wherever they might occur in the world. It implements the *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988* and its protocol with respect to offshore platforms.<sup>8</sup> It does not have any enforcement powers at sea though and relies upon alleged offenders being already within jurisdiction somehow before any prosecution can take place. Two further protocols of 2005 seek to provide for limited enforcement at sea, with flag state consent.<sup>9</sup>

## Definitions

As stated above, the *Crimes Act* very closely reflects the corresponding provisions of LOSC, as can be seen in some key definitions to Part IV of the Act, at s 51, which concern piracy:

Pirate-controlled ship or aircraft means a private ship or aircraft which is under the control of persons that:

- (a) have used, are using or intend to use the ship or aircraft in the commission of acts of piracy; or

(b) have seized control of the ship or aircraft by an act of piracy.

Act of piracy means an act of violence, detention or depredation committed for private ends by the crew or passengers of a private ship or aircraft and directed:

(a) if the act is done on the high seas or in the coastal sea of Australia against another ship or aircraft or against persons or property on board another ship or aircraft; or

(b) if the act is done in a place beyond the jurisdiction of any country - against a ship, aircraft, persons or property.

The key part of this definition is the geographical limitation to high seas, coastal seas of Australia and places beyond the jurisdiction of any country.<sup>10</sup> This would exclude the territorial sea of Somalia, which still exists in international law despite Somalia's chaotic recent history.<sup>11</sup>

## Seizure

These definitions suggest a legislative intention to implement Australia's LOSC obligations faithfully but the legislation does not actually provide a comprehensive set of enforcement powers to deal with piracy. Part IV of the *Crimes Act* contains only one provision which grants power to use force against pirates. Section 54 provides,

Seizure of pirate ships and aircraft etc.

(1) A member of the Defence Force or a member of the Australian Federal Police may seize:

(a) a ship or aircraft that he or she reasonably believes to be a pirate-controlled ship or aircraft; or

(b) a thing on board such a ship or aircraft, being a thing that appears to be connected with the commission of an offence against this Part.

(2) A seizure may be effected:

(a) in Australia; or

(b) on the high seas; or

(c) in a place beyond the jurisdiction of any country.

## Arrest

As far as members of the Australian Defence Force (ADF) are concerned, there is only one other power which the *Crimes Act* provides. Section 3Z grants a power of arrest without warrant to any person where an indictable offence is being or has been committed. This is effectively just an ordinary citizens' arrest power. Given that the piracy offences have penalties ranging from 15 years to life imprisonment, they are clearly indictable offences so the s 3Z arrest power is available.<sup>12</sup> There is no prospective element to the power, however, so it is not possible to arrest a person who is *about to* commit an indictable offence. The power is also only available where a summons is not likely to be effective. Regarding piracy off Somalia this might be a reasonable assumption, although this condition does suggest that counter-piracy operations did not inform the drafting of the power. There is also a requirement to convey the person arrested and any property found on them into the custody of a constable. For the ADF operating off the coast of Somalia this may present some significant logistical considerations. If a member of the Australian Federal Police (AFP) is borne within the warship conducting the operation this may make the exercise of the s 3Z power a little less complicated legally for members of the ADF. It could still though be complicated for a member of the AFP to have custody of an alleged pirate in a warship thousands of nautical miles from the nearest Australian magistrate. The question of having a member of the AFP borne in the warship is discussed below.

Section 3ZC of the *Crimes Act* permits the use of necessary and reasonable force in making an arrest or preventing an escape after arrest. It also requires that the arresting person subject the person being arrested to no greater indignity than is necessary and reasonable to make the arrest or prevent escape post-arrest. There are provisions in s 3ZC that apply only to constables on the use of lethal force or causing grievous bodily harm in making an arrest or preventing an escape. This would exclude members of the ADF. As a result, members of the ADF could only use lethal force or cause grievous bodily harm in circumstances of self-defence, rather than to make an arrest.<sup>13</sup> While this may not be a significant practical limitation for the ADF it is a limitation nonetheless.

The overall effect then of the *Crimes Act* is to provide limited powers to members of the ADF for seizure and arrest. There are other powers though which could be useful and important in carrying out counter-piracy operations.

## Other Powers

Other legislation providing powers for law enforcement at sea give an indication of the sort of powers that might be desirable to for counter-piracy operations. Whilst there are a range of powers, the three of perhaps greatest significance are firing at or into a vessel, searching, and maintaining control of vessels after a boarding. Two of the more comprehensive acts for Commonwealth maritime law enforcement are the *Customs Act* and the *Fisheries Management Act*, each act:

- has the power to fire at or into foreign vessels for the purpose of enabling boarding
- has extensive powers to search persons and vessels for both security and evidence gathering purposes
- provides for members of the ADF and other authorised officers to maintain control of vessels after boarding in order to move them or keep them in place for further investigation and other purposes.<sup>14</sup>

## AFP Powers

The *Crimes Act* does not provide any of these additional powers to members of the ADF though it does provide some search powers to members of the AFP. Under s 3T there is a power for constables to search conveyances without a warrant in emergency situations. The search can only be for evidence of offences, not for weapons or dangerous objects which may pose a threat to a boarding party as the *Customs Act* and the *Fisheries Management Act* provide. Constables also have powers to conduct frisk, ordinary and strip searches of persons upon making an arrest, which can be for dangerous items as well as evidence.<sup>15</sup> There are stronger powers available to constables under the *Crimes Act* with respect to terrorism offences.<sup>16</sup> Piracy would not likely meet the definition of terrorism though as it would be difficult to characterise as being done with ‘the intention of advancing a political, religious or ideological cause’ and to intimidate a government or a section of the public.<sup>17</sup> Given that these extra powers are only available to members of the AFP and not the ADF, it would seem prudent to have AFP members aboard warships conducting counter-piracy operations. This may not be necessary though if there is no intention to prosecute pirates through Australian courts, an issue which arises further below. It is also possible for members of the ADF to be sworn as special constables of the AFP and to exercise the same powers as an AFP constable.<sup>18</sup> Given the particular requirements of the *Crimes Act* though with respect to the obligations of investigating officials in the case of recording interviews, minors, foreigners, communications with others and so on, it may be preferable to have AFP personnel embarked who are trained in and familiar with such requirements.<sup>19</sup>

## Common Law Search upon Arrest

Members of the ADF may be able to rely upon a common law power of search of a person incidental to their arrest.<sup>20</sup> It can be relied upon to protect the safety of the person exercising the power of arrest as well as to prevent evidence being destroyed or lost. It would presumably be limited to the power necessary to ensure the safety of the arresting person or to secure evidence.<sup>21</sup> It would not extend to any intrusion or indignity beyond these immediate concerns. It is also likely that it would only authorise same sex searches except in extreme circumstances.



## Case Law and Statutory Interpretation

This means that there are still other significant powers which the *Crimes Act* does not explicitly provide to either the ADF or the AFP in conducting counter-piracy operations. There is no explicit power to:

- fire at or into a vessel to compel it to stop
- to search the vessel for dangerous items
- maintain control of the vessel for a long period afterwards to conduct an investigation.

Is it possible to infer such powers from the *Crimes Act*? Are such powers necessarily implicit in the powers to seize the vessel and arrest the pirates?

The only Australian cases on piracy are not particularly helpful in interpreting the powers under the *Crimes Act* unfortunately. The research for this paper turned up newspaper reports covering five piracy cases, concerning mostly convicts taking over vessels as mutineers, which the Tasmanian Supreme Court heard between 1825 and 1842.<sup>22</sup> They do not assist here because there were no instances of the Royal Navy (RN) or colonial authorities boarding the victim vessels at sea to arrest the pirates and recover the vessels. Being extracts from local newspaper reporting they are quite readable and demonstrate a surprising amount of legal rigour for the time. More importantly they demonstrate how long it has been since piracy was matter for the courts in Australia.

There is nonetheless some guidance in the case law on this question. While the 1858 case of *Fenton v Hampton* does not deal with piracy it is, coincidentally, not that far removed in space and time from the cases on piracy referred to above.<sup>23</sup> This case dealt with whether the Legislative Council of Van Diemen's Land had the inherent power to punish for contempt of parliament. It had statutory power to conduct an inquiry but the Privy Council found that this did not imply a power to punish a person summonsed to appear before that inquiry:

Whenever anything is authorized, and especially if, as a matter of duty, required to be done by law, and it is found impossible to do that thing unless something else not authorized in express terms be also done, then that something else will be supplied by necessary intendment. But, if, when the maxim comes to be applied adversely to the liberties or interests of others, it be found that no such impossibility exists, that the power may be legally exercised without the doing that something else, or even going a step farther, that it is only in some particular instances, as opposed to its general operation, that the law fails in its intention, unless the enforcing power be supplied, then, in any such case, the soundest rules of construction point to the exclusion of the maxim, and regard the absence of the power which it would supply by implication as a *casus omissus*.<sup>24</sup>

Three subsequent High Court decisions have affirmed this rule, most recently in *Egan v Willis* in 1998.<sup>25</sup> The question it raises then is whether it is impossible to exercise the statutory counter-piracy powers of arrest and seizure without also exercising implied powers? The long last sentence of the passage suggests that some analysis of the circumstances of the particular case is necessary. The result is that if, generally, it is impossible to exercise the power without doing something extra then it is lawful to exercise the implied power. If, in a particular case however, it is possible to exercise the power without relying on implied powers then no implied powers exist. In simpler words, is it possible to exercise the powers of arrest and seizure without relying on implied powers? This could include things such as firing at or into, searching the ship and holding it for a period of time afterwards. The answers must rely on the facts of the particular case but it is worth contemplating what might occur.

### Firing at or into Vessels

It is arguable that to seize a vessel at sea and underway after being taken over by pirates, it is not always going to be necessary or even desirable to fire at or into it. There may be other means to board it and take control, such as boarding by helicopter or fast boat. If these other means are not operationally realistic and the only way to get the vessel to stop is by firing at or into it, then the question remains of whether there is an implicit power to do so. This may well be the case but it is not certain. The potential threat to life if the boarding does not occur would most likely be a factor. This uncertainty is not satisfactory for ADF personnel required to enforce the law against pirates.

### Searching Vessels

There might be a stronger argument for searching vessels in the process of seizing them. It is arguable that to seize a pirate-controlled vessel implies taking control of it. To take control of a vessel requires removing obstacles and resistance to that control, as well as potential threats to those taking control. This should extend to searching the ship for pirates, weapons and other hazards, and then arresting the pirates and seizing the weapons and hazards to effect seizure of the vessel. This view stretches the legal meaning of seizure however. Seizure in a criminal law context does not usually refer to such actions. It is distinct from the power to search and usually arises as a consequence of a search, not the other way around as in this case where the search is subsequent to, or part of, the seizure. Ordinarily, the law relating to seizure in Australia relates to the police seizing evidence such as drugs and weapons where the need to search the seized objects in order to take control of them is minimal.<sup>26</sup> This law does not really take into account ships at sea. There are parallels in the context of shipping law for actions *in rem* where ships are arrested in relation to civil disputes. This usually occurs in port though. It is also a legal procedure more than a forceful takeover of the vessel in the face of possible resistance.<sup>27</sup>

The best examples of powers to search vessels in order to seize them at sea are in the *Customs Act* and the *Fisheries Management Act* and those powers are clearly not provided in the *Crimes Act*.<sup>28</sup> Even so, it is arguable that this other legislation provided such powers because it is not possible to seize a vessel without searching it in order to take effective control. A search of the vessel in order to seize it certainly meets the test of common sense in securing the safety of the boarding party. This situation is analogous to the *Clarke v Bailey* common law right to search upon making an arrest. It should meet the *Fenton v Hampton* test that it is impossible to exercise the explicit power to seize without exercising an implicit power to search the vessel. It is not certain though and it would only become so when a court made a decision upon the question.

### Safety Searches of Persons

There is a further question regarding searching people on board who are not being arrested. Searching a person is more intrusive than searching a vessel but is perhaps just as, if not more, important for the safety of the boarding party. Where suspected pirates are to be arrested then the powers to search discussed above are relevant. Depending on the vessel and a range of other possibilities it may not be easy to distinguish a pirate from a crew member or a passenger. In the case of Somali piracy a number of circumstances could make this difficult, such as if the victim vessel's crew is also from Somalia and dressed in a similar fashion to the pirates, as well as if there has been time for the pirates to blend in with the crew or passengers or to hide before the arrival of the boarding party. A boarding party cannot always assume that some people on board do not pose a threat without searching them for concealed weapons. It should also meet the *Fenton v Hampton* test that it is impossible to exercise the explicit power to seize without exercising an implicit power to search the people on board a vessel. Whether the *Crimes Act* implicitly authorises this even greater level of intrusion is not at all certain though and again could only ever become so when a court decided upon a specific case.

### Holding Vessels

It is also an open question as to how long the ADF or AFP could hold a vessel after seizing it. This may be necessary to conduct a thorough forensic examination or indeed to hold the pirates until arrangements are made to try them in Australia or another country. Would this be implicit in the power to seize? This is not so much a *Fenton v Hampton* question of there being an implicit additional power in order to exercise the explicit power of seizure, but rather trying to ascertain the full extent of the explicit power of seizure itself. Seizure in criminal law usually means to hold an object to produce as evidence to a court.<sup>29</sup> This may mean that it is possible to hold the ship until the trial although it is unlikely the ship itself would be required as evidence. The difficulty here is that shipowners or parties with a financial interest in the ship would most likely want the ship released as soon as possible. This was an issue with the 1997 apprehension

of the fishing vessel *Aliza Glacial*. The RAN and the Australian Fisheries Management Authority (AFMA) apprehended the vessel under *Fisheries Management Act* powers. Following apprehension AFMA detained the vessel in Fremantle. The Norwegian bank that had a mortgage over the vessel moved to have it sold in an Admiralty proceeding and the Marshall of the Court arrested the ship. The Federal Court decision of *Redhead & Ors v Admiralty Marshall & Ors* determined that the Admiralty proceeding prevailed over the fisheries law enforcement proceeding.<sup>30</sup> This was so that the vessel could be sold unencumbered and because the *Fisheries Management Act* had not affected the Admiralty jurisdiction of the court. The Australian government subsequently amended the *Fisheries Management Act* so that this could not occur again.<sup>31</sup> However, there is no equivalent provision in the *Crimes Act* meaning similar arguments could arise in the future. It is only possible at this stage to say that the matter is uncertain. Although this is not an ideal basis upon which to conduct law enforcement operations, continued seizure of the vessel is arguably lawful and it would be for a court to determine otherwise were an interested party to bring an action.

## The Proposed Maritime Powers Bill

An Australian warship CO conducting counter-piracy operations would probably prefer a more certain legal basis than the *Crimes Act* currently provides. It is not a surprising conclusion that, if the ADF and AFP are going to rely on these powers, the Australian government should reform the legislation to reflect, at the least, the powers available in the *Customs Act* and the *Fisheries Management Act*. The Commonwealth Attorney-General has recently announced that:

The Government will introduce new legislation to provide a clear and simple set of maritime enforcement powers ... The proposed Maritime Powers Bill ... will provide a unified and comprehensive suite of powers that will be available to enforce a diverse range of Australia's laws, including illegal foreign fishing, customs, quarantine and drug trafficking.<sup>32</sup>

Hopefully this will include powers with respect to piracy as the words 'unified and comprehensive suite of powers' suggest.

## Executive Power

Executive power has an elusive character so this paper will not attempt to define it to any great extent.<sup>33</sup> In very simple terms it is governmental power which does not rely on parliamentary authority as found in legislation like the *Crimes Act*.<sup>34</sup> For the purpose of ADF operations outside Australia much relies on ancient Crown prerogatives with respect to war, defence of the realm and foreign affairs, which form part of the executive power.<sup>35</sup> Counter-piracy operations off Somalia that do not rely

on the *Crimes Act* derive authority in international law from LOSC and the relevant UN Security Council resolutions. For this reason, and because such operations are really not war nor defence of the realm, counter-piracy operations draw authority in Australian law from the Crown prerogative with respect to foreign affairs.

### *Defence Force Discipline Act 1982*

The presence in the *Defence Force Discipline Act 1982* of pirates and mutineers within the definition of the 'enemy' potentially complicates the issue of the appropriate source of prerogative power. Section 3 provides:

'The enemy' means a body politic or an armed force engaged in operations of war against Australia or an allied force and includes any force (including mutineers and pirates) engaged in armed hostilities against the Defence Force or an allied force.

This definition indicates that in order to be 'the enemy' the actions of pirates would have to amount to armed hostilities against the ADF or an allied force. While the threshold is not really clear, this is probably not the case with Somali pirates at this stage as, to the knowledge of this author, the pirate's targets have been merchant vessels. They have not been engaging in armed hostilities against the ADF or allied forces as such. Were it so, it could mean that members of the ADF were subject to a range of offences with respect to aiding or communicating with the enemy, such as not using 'utmost exertions ... to carry out operations against the enemy'.<sup>36</sup> By implication, actions against pirates might also be characterised as combat operations which could attract the immunity from tortious liability found in *Shaw Savill Albion & Co Ltd v the Commonwealth*.<sup>37</sup> It also raises the vexing question of whether pirates could be subject to offensive action in much the same way as the Taliban in Afghanistan. This does blur the line somewhat in Australian law as to whether counter-piracy operations are purely law enforcement action, or can become a form of warfare when pirates cross the threshold of hostilities against the ADF or allies. The question might be clearer in international law, however, that is outside the scope of this paper. As it is, the factual situation off Somalia does not suggest that Somali pirates meet the definition of 'the enemy' so this paper will not pursue the issue further. The key point to make is that counter-piracy operations under the executive power could possibly find authority in the Crown war prerogative in certain circumstances, although this paper will proceed on the basis that the Crown prerogative with respect to foreign affairs is the most relevant.

## Act of State

The problem with relying on the Crown prerogative with respect to foreign affairs is that there is a dearth of authority for using force on this basis. Since the RAN began operations pursuant to UN Security Council resolutions in the Arabian Gulf in 1990, their legality has not been questioned in any court. There is no legislation authorising such actions either. UN Security Council resolutions are not automatically part of Australian law, and, where legislation has incorporated them, it has explicitly not incorporated the aspects relating to the use of force.<sup>38</sup> The most useful case on this question is that of *Buron v Denman* from 1848.<sup>39</sup> This case concerned an RN officer, Captain Joseph Denman, going ashore in West Africa to free two British subjects from a Spanish owned slaving business. He freed all of the slaves, not just the British subjects, and torched the buildings. The Spanish owner took this matter to an English court to recover his losses. The British government 'ratified' the action of Captain Denman as an 'act of state' (presumably as opposed to an act of war) in furthering its commitment to eradicating slavery. This meant that the action attracted the Crown's immunity from liability for actions against foreigners outside the realm.

It is likely that any action against the ADF arising out of counter-piracy operations would need to rely upon the same authority, in so far as such operations are implementing Australia's rights and obligations under the LOSC and the relevant UN Security Council resolutions. With respect to boarding and searching vessels, and seizing weapons, this may not be a significant issue. This is similar to operations in the Arabian Gulf over the last 20 years and there is little to suggest that such action would excite any more controversy. There may be more questions, however, where the ADF holds suspected pirates and vessels in order to hand them over to a third country for investigation and prosecution. If the detention extends for any period of time, it is possible that the pirates or others acting on their behalf could seek to challenge the legality of their detention through a writ of *habeas corpus* or like action. There is precedent for this in the *Tampa Case of Ruddock v Vadarlis* wherein executive power was sufficient to authorise the effective detention of boat people at sea until they could be taken to a third country.<sup>40</sup> The factual situation was quite distinct but the case also suggests though that detaining people for any length of time at sea could possibly attract a challenge in Australian courts if the circumstances permitted.

In respect of detaining vessels, the discussion of the *Aliza Glacial Case* is also relevant. In the event of a violent incident onboard which authorities of a third country wish to investigate and it may be that the ADF is in the position of holding the vessel for this purpose. There is nothing to suggest that a shipowner or other interested party might not seek an order from an Australian court to have a ship that has been freed from pirate control released to go about its business. A plea of act of state doctrine by the Commonwealth in its defence may or may not be successful. It is not possible to predict.

Overall these factors would favour a 'catch and release' policy where the ADF could apprehend pirates, disarm them and let them go. This is what has happened in the only piracy boarding by the RAN off Somalia to date.<sup>41</sup> This may not bring pirates to justice but it may impede their operations somewhat and avoid many of the difficult legal questions.

### Firing at or into

It should be lawful to fire at or into vessels in order to compel them to stop in counter-piracy operations under the executive power. Presuming that act of state doctrine would protect ADF actions in so far as they were an exercise of Australia's rights and obligations with respect to piracy in international law, the relevant international law provisions for firing at or into vessels should apply. In brief, the International Tribunal for the Law of the Sea determined in the *Saiga* Case that firing at or into a vessel in order to compel it to stop for a law enforcement purpose was lawful as a last resort, after a warning and that 'all efforts should be made to ensure life is not endangered'.<sup>42</sup> This standard is incorporated into the *Customs Act* and the *Fisheries Management Act* under which the ADF operates.<sup>43</sup> If counter-piracy operations under the executive power conform to similar constraints, then it should follow that firing at or into a vessel to compel it to stop is lawful under the same prerogative power that authorises the operations overall.

### *Crimes at Sea Act 2000/Defence Force Discipline Act 1982*

It is important to note that there is actually some legislative regulation of counter-piracy operations under the executive power. The *Crimes at Sea Act 2000* applies to actions on and from Australian ships, which includes RAN warships. Strictly speaking ADF actions in stopping, boarding, searching and seizing weapons from vessels involved in pirate activities without clear legal authority could be construed as criminal offences. However, a prosecution is unlikely as it would require the consent of the Commonwealth Attorney-General, a member of the Cabinet which approved the counter-piracy operation to begin with.<sup>44</sup> Where the *Crimes at Sea Act* could be of significance is if an ADF member used an excessive amount of force during a boarding operation. In serious circumstances the Commonwealth Attorney-General may authorise prosecution of an ADF member under the act. The *Defence Force Discipline Act* would also apply to ADF members in addition to the *Crimes at Sea Act*.<sup>45</sup> The ADF may prosecute its own members in a disciplinary tribunal for excessive uses of force not at the most serious end of the scale.

## Conclusion

The provisions for using force against piracy in Australian legislation are perilously thin. They reflect international law very well but do little more. Use of force provisions in the *Customs Act* and the *Fisheries Management Act* are much more elaborate. This is not surprising given the degree of regulatory activity in these areas in recent decades.<sup>46</sup> Piracy on the other hand has been dormant in Australian law really since the early 19th century. The *Crimes Act* reflects that piracy has been an issue of international obligation for Australia rather than one of practical law enforcement. The effect is that, under the *Crimes Act*, the ADF has the power only to arrest pirates and seize pirate controlled vessels. The AFP has slightly more power to use force and search people upon arresting them. The ADF might be able to rely on a common law power of search upon arrest. Should the government wish to prosecute pirates in Australian courts it may be a good idea for the ADF to take AFP members with them for this reason, as well as to take advantage of the AFP's expertise in *Crimes Act* post-arrest requirements. Even then, there remains a range of desirable powers which the *Crimes Act* does not explicitly provide to the ADF or the AFP. The power to fire at or into pirate controlled vessels and search them upon boarding, as well as those on board, and then hold the vessel for a time, could be implied but this is a matter of interpretation and not certain. Where counter-piracy operations occur in Somalia's territorial sea, or there is no intention to prosecute under the *Crimes Act*, the executive power could authorise a range of action. There is no direct authority for this in Australian law though. Act of state doctrine should protect the Commonwealth from legal liability for counter-piracy operations which enforce Australia's rights and obligations in international law. The authority for this is the 1848 slaving case of *Buron v Denman* though and it may or may not extend to cover extraditing pirates to a third country or holding seized vessels for a period of time. There are some other authorities which could support using executive power for this purpose but it may well be that it is more prudent simply to catch pirates, disarm and release them. If the Australian government and the ADF do pursue this policy in counter-piracy operations it would reflect to some extent just how thin Australian law is with respect to using force against pirates. Hopefully the Attorney-General's proposed Maritime Powers Bill will address this.



## Endnotes

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1. See *Customs Act 1901*, Part 12 Div 1 and *Fisheries Management Act 1991*, s 84 respectively.
2. See Security Council Resolution 1816, UN SCOR, 5902nd meeting UN Doc S/Res/1816 (2008), para 7.
3. See Security Council Resolution 1816, UN SCOR, 5902nd meeting UN Doc S/Res/1816 (2008), preamble.
4. See *Fisheries Management Act 1991*, *Customs Act 1901* and the *Migration Act 1958*.
5. See *Ruddock v Vadarlis* ('the Tampa Case') (2001) 110 FCR 491.
6. See Cameron Moore, 'Act of State Doctrine in the Antipodes: The Intersection of National and International Law in Naval Constabulary Operations' in Natalie Klein, Joanna Mossop, and Donald R Rothwell (eds), *Maritime Security: International Law and Policy Perspectives from Australia and New Zealand*, Routledge, London and New York, 2010, pp. 172-185.
7. See *Piracy Punishment Act 1902 (NSW)*, sections 72-75; *Criminal Code of the Northern Territory of Australia*, sections 79-83; *Criminal Code Act 1899 (Qld)*, 11 William 3 ch 7; *Piracy Act 1698 (Imp)* continued in force by the *Imperial Acts Application Act 1984 (Qld)*, sections 206-207; *Criminal Law Consolidation Act 1935 (SA)*, and sections 70A-D, *Crimes Act 1958 (Vic)*.
8. Opened for signature on 10 March 1988, 1993 ATS 10, (entered into force 1 March 1992) and the *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf 1988*, opened for signature 10 March 1988, 1993 ATS 11, (entered into force 1 March 1992).
9. *Protocol to the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* and *Protocol to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, both adopted in London, 14 October 2005, and open for signature, International Maritime Organization Document LEG/CONF.15/21 (1 November 2005 not yet in force).
10. This includes state coastal waters and internal waters but not internal waters within the limits of the states, *Crimes Act 1914*, s 51. While places beyond any country's jurisdiction would presumably include unclaimed areas of Antarctica.
11. See Security Council Resolution 1816, UN SCOR, 5902nd meeting UN Doc S/Res/1816 (2008), para 7.
12. *Crimes Act 1914*, sections 52, 53 and 4G.
13. *Criminal Code Act 1995*, section 10.4.
14. *Fisheries Management Act 1991*, sections 84(1)(aaa), 84(1)(b), 84(1)(k), s 84(1)(l) and 84(1)(m); *Customs Act 1901*, sections 184B, 185 and 185AA.
15. See *Crimes Act 1914*, sections 3ZE, 3ZF, 3ZG and 3ZI.
16. See *Crimes Act 1914*, Div 3A.
17. See *Crimes Act 1914*, section 3UA and *Criminal Code 1995 (Cth)*, section 100.1(1).
18. *Australian Federal Police Act 1979*, section 40E.
19. *Crimes Act 1914*, sections 23F-W.
20. *Clarke v Bailey* [1933], 33 NSWLR 303, applied in *Merritt & Roso v R* (1985), 19 A Crim R 360. Thank you to Michael Eburn for this reference.
21. *Clarke v Bailey* [1933], 33 NSWLR 303, 310.

22. *Laurie v Griffiths* [1825], TASSupC 21, *R v Cam* [1832], TASSupC 10, *R v Maguire* [1832], TASSupC 34, *R v Shiers* [1837], TASSupC 4. The oft cited Privy Council case of *Re Piracy Jure Gentium* [1934], AC 586 is also not helpful in this regard.
23. *Fenton v Hampton* (1858) 11 Moo 347; 14 ER 727.
24. *Fenton v Hampton* (1858), 360; 14 ER 727, 732.
25. 195 CLR 424, as well as *Trolly, Draymen & Carters Union of Sydney & Suburbs v Master Carriers Association of NSW* (1905), 2 CLR 509 and *Commercial Radio Coffs Harbour v Fuller* (1986), 161 CLR 47.
26. See *Crimes Act 1914*, Part 1AA.
27. *Admiralty Act 1988*, Pt III.
28. *Customs Act 1901*, sections 184B, 185 and 185AA; *Fisheries Management Act 1991*, sections 84(1)(aaa), and 84(1)(b).
29. See discussion of Australian Federal Police powers above.
30. *Phillip Redhead & Ors v Admiralty Marshall, Western Australia District Registry & Ors* [1998], FCA 1173 (18 September 1998).
31. *Fisheries Management Act 1991*, section 108A, insert by the *Fisheries Legislation Amendment Act 1999*.
32. 'Reform of Maritime Enforcement Legislation', <[www.ag.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases\\_2009\\_ThirdQuarter\\_15September2009-ReformofMaritimeEnforcementLegislation](http://www.ag.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2009_ThirdQuarter_15September2009-ReformofMaritimeEnforcementLegislation)>, (10 November 2010).
33. *Davis v Commonwealth* (1988), 166 CLR 79, 93.
34. *Barton v Commonwealth* (1974), 131 CLR 477, 498.
35. *Attorney-General v De Keyser's Royal Hotel Ltd.* [1920], AC 508; *Burmah Oil Co. Ltd. v Lord Advocate* [1965] AC 75. *Re: Tracey; Ex Parte Ryan* 166 CLR 518.
36. *Defence Force Discipline Act 1982*, section 15F.
37. (1940) 66 CLR 344.
38. *Charter of the United Nations Act 1945*, section 6 and see discussion in Cameron Moore, 'Act of State Doctrine in the Antipodes'.
39. (1848) 154 All ER 450.
40. (2001) 110 FCR 491.
41. Department of Defence, 'HMAS *Toowoomba* disarms pirate threat in the Gulf of Aden', <[www.defence.gov.au/media/departementaltpl.cfm?CurrentId=9510](http://www.defence.gov.au/media/departementaltpl.cfm?CurrentId=9510)>, (10 November 2010).
42. *The 'M/V Saiga' (No. 2) Case* International Tribunal for the Law of the Sea, Year 1999, (Saint Vincent and the Grenadines v. Guinea), para 156.
43. *Customs Act 1901*, section 184B; *Fisheries Management Act 1991* section 84(1)(b).
44. *Crimes at Sea Act 2000*, section 6.
45. *Defence Force Discipline Act 1982*, section 61.
46. See Sam Bateman and Antony Bergin, *Sea Change: Advancing Australia's Ocean Interests*, Australian Strategic Policy Institute, Canberra, 2009, pp. 44-45.



# Australian Counter-Piracy Operations: A Gulf of Aden Experience

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Peter Leavy

In April 2009 a Royal Australian Navy Task Group (RAN TG) consisting of HMA Ships *Sydney* and *Ballarat* sailed from Sydney commencing Operation NORTHERN TRIDENT 2009, a global deployment in support of Australian diplomatic activities. The ships left Australian waters at the beginning of May and transited the Singapore and Malacca straits before conducting a port visit to Kochi Naval Base in India. After sailing from Kochi, the Australian vessels rendezvoused with three Indian Navy ships and participated in the first exercise of the deployment before sailing for the Suez Canal, a passage which required them to transit through the Gulf of Aden.

The Gulf of Aden is a major focal point for shipping passing through the Suez Canal and is, therefore, of great strategic importance. In recent times, piracy in the area has become a significant problem. Pirates, originating primarily from the lawless state of Somalia, have become increasingly brazen, operating at much greater distances from shore. Consequently, an Internationally Recommended Transit Corridor (IRTC) has been established in the Gulf of Aden. Merchant ships are advised to proceed down the corridor where an international naval presence is focused.

There are now a number of countries and international coalitions conducting dedicated counter-piracy operations in the region. One such organisation, Combined Task Force (CTF) 151, operates under the US-led Combined Maritime Forces (CMF) based with the US Navy's 5th Fleet Headquarters in Bahrain. At the time of *Sydney* and *Ballarat*'s passage, Australia had a frigate allocated to the CMF but it was assigned to CTF 150 and was operating inside the Arabian Gulf.

Given the prevalence of piracy around Somalia and the Horn of Africa, *Sydney* and *Ballarat* planned their passage within the IRTC to provide a visible presence, despite not being formally attached to CTF 151. The RAN's longstanding commitment to the Gulf region, coupled with regular exercises with the US Navy and other key allies meant that it was relatively easy for the ships to be force assigned to the Chief of Joint Operations (Australia) in support of the CMF counter-piracy effort for the duration of the transit. Fortunately, *Ballarat* had been fitted with a secure, web-based allied communications capability for her subsequent work in the United Kingdom meaning that, in addition to communications with Headquarters Joint Operations Command in Australia, the ships also had direct, secure communications with both CTF 151 and CMF Headquarters in Bahrain. Further, prior to arriving in the area the TG had established communications with CMF Headquarters and worked through some possible scenarios should piracy be encountered during their transit.

At 1116 (local time) on Sunday 17 May, while sailing west in the IRTC, the TG heard a VHF call for help from the oil tanker MV *Dubai Princess* which was claiming to be under attack by pirates. *Sydney's* initial response to the call went unanswered but two-way communications were soon established.

The following timeline provides a feel for the pace of events as they unfolded over the next few hours:

## 1120

Two-way communications established and *Dubai Princess* stated that a threatening skiff was closing her astern and requested urgent assistance. *Dubai Princess* was approximately 20nm ahead of the Australian ships and travelling in the same direction, so *Sydney* made preparations to launch her S-70B-2 Seahawk helicopter as both ships increased to maximum speed to close the scene. *Sydney* recommended that *Dubai Princess* reverse course so the warships could intercept more quickly, but the ship's master was initially reluctant as he felt that to do so would place his ship in closer proximity to the skiff astern of him.

## 1135

*Dubai Princess* reported that a skiff was 1000m astern with six armed men onboard.

## 1140-55

*Dubai Princess* reported that the six armed men were attempting to board over her stern and that she was being engaged with, and hit by, small arms and rocket propelled grenades. The crew launched flares and the master again requested assistance to repel boarders. At 1143 the TG went to Action Stations (the ships' highest degree of readiness).

## 1159

*Sydney* repeated her earlier request for *Dubai Princess* to reverse course to the east and this time she complied. *Dubai Princess* was at full power and the master reported that the heavy manoeuvring was straining her engines. Merchant ships are not generally designed for heavy manoeuvring at high speed and *Sydney's* bridge staff could hear engineering alarms sounding in the background when *Dubai Princess* transmitted on radio.

## 1208

As the TG arrived on the scene, two skiffs were observed to disengage from *Dubai Princess*. This was not unexpected as piracy in the Gulf of Aden is generally driven by purely financial incentives; warships on the scene provide a greater deterrence which will often lead the pirates to select a 'softer' target. Although the pirates made

numerous attempts to board *Dubai Princess*, they were unsuccessful due to the very good self-protection measures used by the tanker. Two key actions they adopted were manoeuvring at high speed and rigging a number of fire hoses to stream jets of water over the side.

## 1215

One skiff started to close *Sydney* and subsequently stopped. One of the crew was seen to raise his hands over his head, but no weapons were observed on the boat; *Sydney* covered the skiff as she sailed past the stationary vessel. Another of the skiff's crew waved what appeared to be a jerry can above his head, possibly attempting to demonstrate that they had run out of fuel.

## 1220

*Sydney* takes up station astern of *Dubai Princess*, on her port quarter, while *Ballarat* is on the starboard quarter. The initial aim was to provide close protection for *Dubai Princess* as a second skiff remained within 1000m. The first (stationary) skiff moved outside visual range as it was left behind.

## 1227

A second merchant ship, MV *MSC Stella*, 6nm east of the TG, made radio contact and requested assistance, reporting that a skiff was approaching her. *Ballarat* was tasked, along with *Sydney*'s Seahawk helicopter, to investigate this new report and provide support, while *Sydney* remained with *Dubai Princess*.

## 1234

*Ballarat* positioned herself astern of *MSC Stella* with a skiff now inside 3nm. The helicopter was then tasked to conduct a surface search to identify any further suspect vessels and to determine whether any other merchant ships were in distress or at risk of attack.

## 1254

After identifying a possible mothership approximately 20nm to the east, the Seahawk was tasked to investigate further. A few minutes later she reported the vessel as being 9-12m long and high powered, but unfortunately the helicopter was unable to determine the number of personnel onboard or if weapons were being carried. Three skiffs were reported in the vicinity of this potential mothership. *Ballarat* was then tasked to escort both *Dubai Princess* and *MSC Stella* while *Sydney* (with its greater speed) reversed course to the east to further investigate these new suspect vessels, collect intelligence and prevent any further attacks on shipping.

After reversing course *Sydney* passed the stationary skiff that had initially attempted to board *Dubai Princess*. The crew again waved at *Sydney* and raised the white scarf. Its position was noted in case it was in trouble and would require later assistance under the *International Convention for the Safety of Life at Sea 1974* (SOLAS), as they were in no evident danger at the time and priority was given to preventing other attacks.

### 1308

*Ballarat* secured from Action Stations.

### 1343

*Sydney* closed within visual range of the potential mothership and confirmed it was a larger skiff with what appeared to be fuel storage containers on deck. It was assessed as a possible refuelling vessel for the other skiffs, but it was not a substantial support vessel. While there were strong suspicions that the skiffs were operating together the evidence was circumstantial.

A group of six merchant vessels were approaching from the east and were going to pass through the danger area with at least two skiffs directly ahead on their course. *Ballarat* returned east to provide assistance, as *Dubai Princess* and *MSC Stella* were assessed as now being clear of the danger area. *Sydney's* helicopter returned to the ship.

### 1410

*Ballarat* began escorting the six merchant ships, passing *Sydney* who had remained in the vicinity of the skiffs. At 1415 *Sydney* secured from Action Stations.

### 1430

The second vessel in the group of six escorted merchant ships, MV *Halley*, reported a skiff was approaching her, so *Sydney* closed to provide assistance. This skiff was subsequently identified as the first skiff that had been stationary and waving a white flag. At 1440, *Sydney* went to Action Stations with *Ballarat* following suit a few minutes later.

### 1447

The skiff was now stopped in the water, its crew waving a white flag or scarf. *Sydney's* lookout reported that the crew appeared to be placing items under their seats before once more raising a jerry can in the air, again indicating they might be out of fuel. The skiff crew periodically waved and raised jerry cans, but as they had done this before and had then approached *Halley* in a threatening manner, it was assessed that the skiff was not in any immediate danger and may have been trying to lure the warships closer.

Given that the skiffs had already fired upon *Dubai Princess* - although no firings were witnessed by the TG - there was a clear risk in attempting a boarding, as such *Sydney* kept the vessel under observation from 2000m. The skiff was in no apparent distress and as the afternoon wore on it became apparent that she had, indeed, run out of fuel. *Ballarat* continued to escort the group of six merchant ships to the west and clear of the danger area.

## 1515

*Sydney* secured from Action Stations and remained in the vicinity of the skiff while coordination with CTF 151 was finalised. As the Australian ships were transiting the area en route to the Suez Canal and had standing commitments, it was decided that a dedicated CTF 151 ship would close the scene to assume responsibility for the situation.

## 1715

USS *New Orleans* arrived on the scene under the direction of Commander CTF 151. After a radio discussion between the two commands, a small team from *Sydney* was transferred across to *New Orleans* to provide a first-hand briefing. The team returned to *Sydney* at 1830 and the ship then continued her passage along the transit corridor towards the Suez Canal to rejoin *Ballarat*.

Feedback received from *New Orleans* following the incident confirmed that the stationary skiff that had been involved in the initial incident had, in fact, run out of fuel. This added evidence, albeit circumstantial, to the theory that the group of skiffs encountered by *Sydney* and *Ballarat* were working as a coordinated team with a possible refuelling vessel amongst them.

## Conclusions

The establishment of the IRTC in the Gulf of Aden has permitted a more focused naval presence to better protect concentrated merchant shipping; in essence capitalising on the benefits of the 'convoy system' used during World War II. However, concentrating merchant shipping in this manner can also make the pirate's reconnaissance task easier, especially as the coordinates of the IRTC are widely published and well known. As mentioned earlier, the key driver for piracy in the Gulf of Aden is financial and the pirates will generally prefer to attack easier targets to maximise their return while minimising risk so the presence of capable and alert warships will usually be enough to deter them. Effective countermeasures require careful coordination between merchant ships and the limited number of naval vessels to ensure they cover the greatest number of ships for the greatest period of time while reducing the number of ships transiting alone.



A visible naval presence is a key deterrent, but individual ship protective measures are also a vital component of defence against piracy. *Dubai Princess* used a number of recommended measures during the incident, those being:

- sailing within the IRTC
- using speed and manoeuvre to advantage
- locking the crew inside the superstructure
- discharging fire hoses over the side of the ship to hamper boarding attempts.

The events of 17 May 2009 highlighted some very important aspects of Australia's naval power. The almost continual presence of the RAN in the Gulf since 1991 has built a substantial body of experience in coalition operations and enabled it to gain a very good understanding of the operating environment and tempo within the region. The US Navy is the major maritime force operating in and around the Gulf of Aden region and provides the senior leadership within the CMF. A very strong relationship exists between the RAN and US Navy, characterised by a level of trust and mutual understanding built up over decades of exercises and operations. This proved instrumental in enabling an almost seamless integration of *Sydney* and *Ballarat* into the counter-piracy effort, albeit for a short period only. Modern secure, web-based communication systems enabled the TG to gain a good appreciation of the situation in the Gulf of Aden prior to arriving and facilitated regular contact with CMF Headquarters. The value in continual interaction with our key allies to build capabilities, skills and confidence in each other cannot be underestimated. It has given the RAN a high degree of trust and respect within the US Navy resulting in access to advanced communications and intelligence technologies, and information as well as being trusted to hold senior command positions within coalition operations.

One key indirect positive from the ongoing counter-piracy operations in the Gulf of Aden has been bringing normally diverse nations together in a common cause. In addition to serving the immediate aim of combating piracy, such cooperation between diverse naval forces has the benefit of helping to build confidence and trust between their respective nations despite any differences that they may have in their wider relationship. Given the world's oceans are essentially 'global commons', nations that are not normally viewed as 'aligned' can work together with relative ease in the maritime environment where a common goal, beneficial to all, exists.<sup>1</sup> This is much easier, both politically and in practice, than it is on land as sovereignty is rarely an issue. For example, in addition to CTF 151 there have been European and Chinese counter-piracy TGs operating in the Gulf of Aden as well as patrols by India, Russia, Malaysia and others. Their common cause meant that while these various groups - operating in the same area - were not always under the same command and control framework, there was usually dialogue between them which provided a degree of coordination in their activities.

From a personal perspective, the crews of both *Sydney* and *Ballarat* were proud of their actions in dealing with a potentially serious piracy situation. The RAN provides a dedicated work-up period for ships deploying to the Gulf region but neither *Sydney* nor *Ballarat* had the benefit of such a specific training period. The resident core skills that the RAN maintains in all ships again provided the flexibility and versatility shown in responding to a very dynamic situation. The initial stages of the incident unfolded quickly and demanded rapid decision making, especially when it became obvious that there were a number of skiffs, apparently working together, with numerous merchant ships spread out over the IRTC. Limited naval coverage had to be applied to a large area, and the value of organic helicopters in extending the visual deterrence capabilities of the TG proved a telling, if obvious, point.

The dynamic nature of the situation is perhaps best shown by the ships being at Action Stations, covering a skiff that had reportedly fired upon a merchant ship, while at the same time making internal plans on how to deal with a SOLAS issue should that same skiff have subsequently become unseaworthy or if those onboard needed rescuing. Both ends of the spectrum were being covered.

Regular updates on the unfolding situation were passed to the crews in an attempt to provide all onboard with situational awareness and a sense of perspective. As the on-scene commander, I needed to ensure that the coalition operational/tactical level imperatives and the strategic interests of Australia were both understood and catered for. At times *Sydney* and *Ballarat* were operating in close proximity to vessels which had reportedly attacked merchant ships and there was the potential for the TG to come under small arms or rocket propelled grenade fire either as a last resort measure or in an attempt to gain a reaction that could then be capitalised on by the pirates or their sponsors. This balance of self-protection, without overreaction was critical to maintain. The other factor worth noting is that many of the pirates are reportedly under the influence of narcotics when they attack shipping, since they cannot be relied upon to follow a rational decision making process, anything is possible.

*Sydney* and *Ballarat*'s experience proved the value of a visible presence in deterring piracy and the inherent value in the flexibility and versatility of warships. Counter-piracy operations in the Gulf of Aden also provide a very good example of how the diverse maritime forces of the world can operate towards a common goal which is the protection of the globalised economic system upon which we all depend. Acknowledging and acting upon this fact is a very good example of what Professor Geoffrey Till terms 'post-modern' navies in action.<sup>2</sup>

## Endnotes

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1. 'Global commons' refers to the fact that both naval forces and commercial seafarers can generally operate at will anywhere outside a normal 12nm territorial sea from land. The ocean is not 'owned' by nations in the way that land territory is; they are available for the common use by all nations.
2. See Geoffrey Till, *Globalization: Implications of and for the Modern/Post-modern Navies of the Asia Pacific*, Working Paper No. 140, S Rajaratnam School of International Studies, Nanyang Technological university, Singapore, 2007, <[www.rsis.edu.sg/publications/WorkingPapers/WP140.pdf](http://www.rsis.edu.sg/publications/WorkingPapers/WP140.pdf)>, (21 June 2010); and Geoffrey Till, 'A Cooperative Strategy for 21st Century Sea Power: A View From Outside', *Naval War College Review*, Spring 2008, pp. 25-38, <[www.usnwc.edu/getattachment/5ee8dc34-ad28-4817-b76c-8b453365ba61/-Cooperative-Strategy-for-21st-Century-Seapower,-A-](http://www.usnwc.edu/getattachment/5ee8dc34-ad28-4817-b76c-8b453365ba61/-Cooperative-Strategy-for-21st-Century-Seapower,-A-)>, (21 June 2010).

Two years after the Australian government committed the Australian Defence Force to the counter-piracy role, where do things stand? This concluding paper outlines international jurisdictional issues, current arrangements for international naval cooperation and Royal Australian Navy (RAN) counter-piracy operations.

## International Jurisdictional Issues

At the international level, jurisdictional concerns over how to manage suspected pirates remain. As papers in this volume have shown, international law provides a framework for international action against piracy, predominantly under the *United Nations Convention on the Law of the Sea 1982* and the *Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988*. However, the greatest problem is at the national level, revolving around whether states that ‘intervene’ on piracy have the domestic legislation to prosecute and imprison pirates; where they do not, an option is to transfer the suspects to a third party for prosecution.

The United Nations Security Council is examining a range of possible options that might be used to better prosecute and imprison those found to be responsible for acts of piracy. Seven options are under active consideration:

- enhance current UN capacity building of regional states
- establish a Somali court that would sit in another regional state either with or without UN participation
- establish a special chamber within the national jurisdiction of a state or states in the region, without UN participation
- establish a special chamber within the national jurisdiction of a state or states in the region, with UN participation
- establish a regional tribunal based on a multilateral agreement amongst regional states with UN participation
- establish an international tribunal based on an agreement between a regional state and the UN
- establish an international tribunal by Security Council resolution.<sup>1</sup>

No decision has yet been reached, as each option has both a financial cost that must be weighed off against the expected number of prosecutions, and each option would

have to be negotiated with affected parties. That said, it has been reported that the Security Council has backed the idea of special courts but has put off a decision on where they might be located.<sup>2</sup>

The first option outlined above, is a continuation of activities already in place, where the United Nations Office on Drugs and Crime runs a counter-piracy program in Africa. This program aims to enhance the criminal justice systems capacity in Somalia's neighbours, so that trials and possible imprisonment will be conducted efficiently, humanely and within the 'rule of law'. Concurrently, similar programs are underway in Somalia to achieve the same result, but it is recognised that this is a longer-term solution. Funding comes from a number of states, including Australia, to provide for building (courts, prisons etc) as well as training in all aspects of criminal justice and management (police, prosecutors, and court and prison officials).<sup>3</sup> The immediate external focus has been on Kenya, which has become overburden with holding and prosecuting suspected pirates. As a result, in early 2010 the program was extended to the Seychelles.<sup>4</sup>

Within this mixture of international and domestic law (which determines a navy's rules of engagement (ROE)), for navies that capture suspected pirates the options are:

- to transfer them to Somalia, Kenya or the Seychelles for prosecution
- disarm, release and possibly destroy vessels
- prosecute under their national jurisdiction, as practised by a number of states including the United States, the Netherlands, Germany and Yemen.<sup>5</sup>

This later option has led to interesting results as often these states have not prosecuted pirates for centuries. Bateman in his paper noted the sensationalist reporting over piracy attacks, and that has continued when reporting the outcome of piracy court cases, where successful prosecutions 'strike a blow against piracy' but here a prosecution fails, the entire fight against piracy is called in to question.<sup>6</sup>

Ultimately, the restoration of law and order in Somalia, accompanied by economic development and growth would hopefully not only ameliorate the conditions leading to piracy, but also enable effective law enforcement to capture pirates on Somali soil.

## International Naval Cooperation

The suppression of piracy off Somalia is managed at both political and operational levels. At the political level, the Contact Group on Piracy off the Coast of Somalia operates under UN Security Council resolution 1851 to improve the coordination of information between parties committed to the counter-piracy operation. Created on 14 January 2009, the group meets regularly at the United Nations in New York and has four working groups, which meet around the world and examine:

- military and operational coordination, information sharing and capacity building
- judicial issues
- strengthening shipping self-awareness and other capabilities
- public information.

Currently participating in the contact group are 60 countries (including Australia), seven organisations (including the African Union, the European Union, NATO and the International Maritime Organization (IMO)) and two observers from the shipping industry (BIMCO and INTERTANKO).

At the operational level, there are three naval coalitions operating in the Gulf of Aden and off Somalia, a number of independent naval vessels, and a number of naval organisations that manage vessel separation or provide advice in these waters. The three naval coalitions are:

- the US-led Combined Maritime Forces (CMF) operating out of Bahrain with three separate but over-lapping task forces (combine task forces 150, 151 and 152)
- the NATO coalition under Operation OCEAN SHIELD
- the European Union Naval Force under Operation ATALANTA.<sup>7</sup>

While the composition of these coalitions, as well as their mandates, may vary widely, they are able to operate in conjunction with each other fairly well due to the standardisation of their equipment, training and procedures either through NATO or exercising with the US Navy.<sup>8</sup>

The operational planning and management of these naval coalitions, as well as independent warships, is difficult, as they have been committed on a voluntary basis in peacetime. The mechanism adopted to coordinate these naval forces is called 'shared awareness and deconfliction' (SHADE), which meets on a monthly basis and brings together the three naval coalitions as well as some of the 'independent' warships to ensure their activities are not counter to each other, while encouraging cooperation, and in the future, possible shared tasking.

In order to manage international shipping in the region and to protect it from piracy, the Internationally Recommended Transit Corridor (IRTC) was created in the Gulf of Aden in 2009 and subsequently endorsed by the IMO.<sup>9</sup> The IRTC allows the management of commercial shipping, as well as its protection through naval patrols to initially deter pirate attacks, but where they occur, to respond. Vessels can either transit independently along the IRTC or can wait and be part of a 'group transit' where a number of ships transit together for protection and might also have a naval escort.

Further, there are cases where some warships are escorting ships under their national flag.<sup>10</sup> Attacks still occur in the IRTC, which is not surprising given the size of the 'corridor' (let alone other shipping routes) and the small number of warships available for escort or response; but the number of attacks in the Gulf of Aden have decreased with attacks now occurring further into the Indian Ocean.<sup>11</sup>

The dilemmas facing navies operating in this peacetime environment are numerous, including the necessarily restrictive ROE under which they are operating, particularly as pirates are 'non-state actors' not enemy combatants; the sheer size of the operating area they must cover, including surveillance, monitoring, the ability to respond in a timely manner, and the ability to communicate with and understand the operating procedures of the international shipping industry.

Certainly the international naval effort has not stopped piracy off the coast of Somalia, which should come as no surprise because this is not the role of the navy (they are suppressing piracy not stopping it), and the solution to piracy is on land (as a law enforcement issue).

In previous centuries, navies were able to manage piracy relatively simply as there were no constraints on their operational methods; that is, pirates would be killed, their ships sunk or taken as a prize and their land bases destroyed.<sup>12</sup> Such operational methods are unacceptable today, so counter-piracy is a form of asymmetric warfare, where the costs of the naval response are disproportionate to the costs of the perpetrators. Moreover, international law has 'regulated' various aspects of warfare, to further restrict the operational responses that could be applied to pirates (that is, they are non-combatants and thus responses are effectively support to 'law enforcement'). Navies have increasingly begun to 'take back' ships and rescue hostages, but this only occurs with the agreement of the flag state and/or the shipowner. But the international naval response can be, at best, a holding pattern to deter attacks at sea, while the conditions ashore that lead to or encourage piracy, are resolved. Thus the use of naval forces in a counter-piracy role can be an open-ended, long-running and expensive commitment. The most credible costing thus far for global counter-piracy activities is between US\$7 to 12 billion pa to the end of 2010, with the cost for naval forces assessed to be in the order of US\$2 billion.<sup>13</sup> It is not clear for how long such costs are sustainable.

The commitment of naval forces is a political decision made by governments, and while the commitment might be expensive in terms of operating costs and additional wear and tear on warships and equipment, navies do benefit from the commitment. First, counter-piracy is a naval role, albeit one that many navies thought they might never undertake. Second, certain aspects of boarding, inspecting and seizing pirate vessels remain relevant to both other maritime security operations undertaken in the Middle East and constabulary tasks relating to intercepting suspected illegal fishing vessels and asylum seeking vessels in one's own waters. Third, the naval cooperation between navies as new relationships are made, individual and ship-level training and

skills sets are improved, and new tactics and the harmonisation of procedures are developed. Fourth, the knowledge gained of how the international shipping industry, the bedrock of globalisation through seaborne trade, functions is also invaluable to navies, as they have the wartime role of protecting shipping.

## Royal Australian Navy Counter-Piracy Operations

The ongoing RAN commitment to the Middle East Area of Operations is the six month deployment of a frigate. Prior to the 29 May 2009 announcement of a counter-piracy role, this deployment would be to CTF 152 under the CMF, but under new flexible tasking arrangements, the frigate can undertake tasks in any of the three CMF task forces. Thus far, six deployments have been committed to the counter-piracy role:

- Two deployments by HMAS *Toowoomba* (9 June to 7 December 2009 and departed Australia on 19 May 2011).
- Two deployments by HMAS *Stuart* (26 October 2009 to 24 April 2010 and 30 December 2010 to June 2011).
- One deployment by HMAS *Parramatta* (15 March to 15 September 2010).
- One deployment HMAS *Melbourne* (16 August 2010 to 17 February 2011).

What follows is an outline of publicly available information on their activities, noting that only about 30 per cent of their time is devoted to counter-piracy activities; a more detailed history of counter-piracy operations will be written on completion of the Australian commitment.<sup>14</sup>

### HMAS *Toowoomba*

*Toowoomba* deployed on 9 June 2009 from Fleet Base West. On her departure from Australia, it was reported that the RAN would not reveal whether its warships could attack pirate vessels and what would be done with any captured pirates, with speculation that the first act would be to warn off any pirates. She joined CTF 152 on 11 September, patrolling the waters of the Gulf of Aden, the Somalia Basin and the Horn of Africa, acting not only as a deterrent to pirates, but also escorting merchant shipping and tracking/reporting any piracy incidents. On 20 September she thwarted a pirate attack on the MV *BBC Portugal* in conjunction with a Japanese Orion maritime patrol aircraft and a helicopter for a German frigate. *BBC Portugal* was about 50nm off the coast of Yemen when it reported sighting a vessel carrying a group of armed individuals closing at high speed. *Toowoomba* was 17nm away, and moved to the scene at high speed to investigate. The German helicopter had fired warning shots at the vessel, and advised *Toowoomba* there were weapons onboard it, so *Toowoomba* launched its boarding team in two inflatable boats to investigate, search, disarm and seize the vessel. The quick intervention stopped an attack on the vessel, while the



presence of *Toowoomba* so close to the boat discouraged any resistance to the boarding party, important as a cache of weapons was discovered onboard. The suspected pirates were disarmed and the weapons confiscated; and on confirmation they had sufficient food, water and fuel to return to Somalia, they were released. It was also stated that the policy of the Australian government was to deter, warn, intercept and disarm vessels and individuals engaging in acts of piracy. Later *Toowoomba* also provided support to a Maltese bulk carrier that suffered a main reduction gearbox failure during its IRTC transit to Calcutta. She took up station for three days providing protection from possible pirate attack until relieved by another warship. During her six month deployment, *Toowoomba* completed six patrols: four in support of counter-terrorism and two in support of counter-piracy.<sup>15</sup>

### **HMAS *Stuart***

*Stuart* departed Fleet Base East on 26 October 2009, and her activities were far less reported on than her predecessor. She completed her first patrol just before Christmas, where she patrolled the waters off the Gulf of Aden, the Somalia Basin and the Horn of Africa to support and safeguard merchant vessels in the region. During her six month deployment *Stuart* steamed more than 36,000nm, conducted over 770 queries of merchant shipping and performed over 40 'approach assist visits' to local vessels. *Stuart's* helicopter flew over 120 sorties totalling more than 330 flying hours.<sup>16</sup>

### **HMAS *Parramatta***

*Parramatta* departed Fleet Base East on 15 March 2010, before beginning operations in April with her first counter-piracy patrol beginning on 23 May. Two days later on 25 May, she encountered a suspect pirate vessel in the heavily used shipping lanes and when observed, appeared to be throwing items overboard, including weapons. *Parramatta's* boarding party did not find any weapons onboard, and after removing equipment and supplies that might be used to undertake piracy, the vessel was released. Over the duration of her deployment *Parramatta*, in addition to the earlier incident, responded to 14 distress calls.<sup>17</sup>

### **HMAS *Melbourne***

*Melbourne* departed Fleet Base East on 16 August 2010 and commenced operations on 8 September in the Gulf of Aden and the Somali Basin, with a focus on patrolling close to shore near pirate camps to act as a deterrent and to conduct reconnaissance missions. On 3 January 2011 she came to the assistance of the UK-flagged chemical tanker MV *CPO China* which had been boarded by pirates. *Melbourne* was 265km north of *CPO China* and it took six hours to steam to her assistance; but while steaming, *Melbourne* launched her helicopter which then deterred the pirates from taking control

of the ship; and they abandoned their attack when *Melbourne* arrived on the scene. On her final day in theatre, *Melbourne* was tasked with responding to a distress call from MV *Tide* which was being harassed by a pirate mothership and two skiffs. *Melbourne* altered course and launched her helicopter, but *Tide* conducted evasive manoeuvres and escaped the pirates, allowing *Melbourne* to resume her patrolling duties. During her deployment, *Melbourne* responded to 14 distress calls.<sup>18</sup>

## HMAS *Stuart*

*Stuart* departed Fleet Base East on 30 December 2010, with the stated roles of conducting maritime interdiction and counter-piracy operations, as well as the tracking and reporting of piracy activities. On 22 March 2011, some 230nm south-east of Oman, *Stuart* fired on a skiff being towed the stolen MV *Sinar Kudus* that was being used as a pirate mothership. She was also involved in rescuing three crew members of the *Al Shahar 75* being held by pirates in a dhow.<sup>19</sup>

## Conclusion

The brief outline of Australian counter-piracy operations does not do justice to the extensive activities undertaken by each frigate during both their respective workup and deployment. All were involved in a myriad of other activities, including: maritime security operations (many with a counter-narcotics focus), exercising with other navies, providing support to other warships, search and rescue, and conducting port visits and naval diplomacy.

The RAN has long maintained a presence in the Middle East, with forces committed to the 1990-91 Gulf War and subsequent deployments ever since.<sup>20</sup> The more recent Australian policy of flexibly tasking a frigate across the three CMF-led task forces provides a highly trained and skilled crew that can be used in a variety of contingencies while also ensuring the prudent use of naval resources. The RAN has also provided leadership to the CTFs, enabling a greater understanding of the planning and management of naval coalitions while also providing for personal and professional development for the individuals involved.

The RAN has a lengthy experience with boarding operations in Australia's exclusive economic zone and these skills form the baseline for the more dangerous boarding operations conducted in the Middle East, where lessons learned can also inform current offshore constabulary operations.

## Notes

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1. See United Nations Security Council, *Report of the Secretary-General on Possible Options to Further the Aim of Prosecuting and Imprisoning Persons Responsible for Acts of Piracy and Armed Robbery at Sea off the Coast of Somalia*, S/2010/394, New York, 26 July 2010.
2. Patrick Worsnip, 'UN Security Council backs Somalia Piracy Courts', *Reuters*, 11 April 2011.
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4. United Nations Office of Drugs and Crime, *Counter-Piracy Programme: Support to the Trial and Related Treatment of Piracy Suspects*, Kenya, Issue Four, October 2010.
5. The 'release' of suspects is also problematic and allegations have been raised with Russia over possible pirates being released in such a way that they could not survive; see Abdiaziz Hassan, 'Somalia Calls for Russian Explanation on Pirates', *Reuters*, 14 May 2010.
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7. See <<http://combinedmaritimeforces.com/>>, <[www.nato.int/cps/en/natolive/topics\\_48815.htm](http://www.nato.int/cps/en/natolive/topics_48815.htm)> and <[www.eunavfor.eu/](http://www.eunavfor.eu/)> (20 January 2011).
8. An outline of this standardisation can be found in Andrew Muratore, 'EU-NATO Co-Operation and the Pirates of the Gulf of Aden', *Australian Journal of Maritime and Ocean Affairs*, vol. 2, no. 3, 2010.
9. See International Maritime Organization, *Piracy and Armed Robbery Against Ships in Waters off the Coast of Somalia: Information on Internationally Recommended Transit Corridor (IRTC) for Ships Transiting the Gulf of Aden*, SN.1/Circ.281, London, 3 August 2009.
10. As these activities are being conducted in peacetime, the NATO procedure of 'Naval Cooperation and Guidance for Shipping' (the wartime naval 'control' of shipping) has not been invoked, although INTERTANKO would appear to want more 'convoys' - see 'Intertanko slams anti-piracy convoy efforts', *Lloyd's List DCN*, 8 December 2010.
11. See Marc West, Tristan Cooper and Bernard Kachoyan, 'AIS Analysis in Support of Counter-Piracy Operations', *Australian Journal of Maritime and Ocean Affairs*, vol 2, no 4, 2010.
12. See 'Introduction' in Bruce A Elleman, Andrew Forbes and David Rosenberg, *Piracy and Maritime Crime: Historical and Modern Case Studies*, Newport Papers 35, Naval War College, Newport RI, 2010, pp. 1-18.

13. Oceans Beyond Piracy, *The Economic Cost of Piracy*, < [http://oceansbeyondpiracy.org/documents/The\\_Economic\\_Cost\\_of\\_Piracy\\_Summary.pdf](http://oceansbeyondpiracy.org/documents/The_Economic_Cost_of_Piracy_Summary.pdf)> (7 January 2011).
14. Advice from a former commander of Combined Task Force 150, 22 February 2011.
15. See Brendan Nicholson, 'Warship Sailing to Scuttle Pirates', *The Age*, 8 June 2009; Department of Defence, *Counter-Piracy First for Toowoomba*, Defence Media Release, MSPA 301/09, 11 September 2009; Department of Defence, *HMAS Toowoomba Disarms Pirate Threat in the Gulf of Aden*, Defence Media Release, MSPA 307/09, 23 September 2009; Max Blenkin, 'Hi-Tech Somali Pirates Outgunned by Aussie Navy', *The Daily Telegraph*, 30 October 2009; Royal Australian Navy, *Toowoomba Protects Maltese Cargo Ship*, 30 September 2009, <[www.navy.gov.au/Toowoomba\\_Protects\\_Maltese\\_Cargo\\_Ship](http://www.navy.gov.au/Toowoomba_Protects_Maltese_Cargo_Ship)> (7 January 2011); and Department of Defence, *HMAS Toowoomba Completes Deployment to the Middle East*, Defence Media Release, MSPA 403/09, 20 November 2009. HMAS *Toowoomba* was also the subject of a four-part documentary *Australian Pirate Patrol* that aired on the National Geographic Channel; see Royal Australian Navy, *HMAS Toowoomba Stars in Australian Pirate Patrol Show*, 5 October 2010, <[www.navy.gov.au/HMAS\\_Toowoomba\\_stars\\_in\\_Australia\\_Pirate\\_Patrol\\_show](http://www.navy.gov.au/HMAS_Toowoomba_stars_in_Australia_Pirate_Patrol_show)> (7 January 2011).
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17. Department of Defence, *HMAS Parramatta Intercepts Suspected Pirates*, Defence Media Release, MSPA 190/10, 28 May 2010; Department of Defence, *HMAS Parramatta Returns Home*, Defence Media Release, MSPA 431/10, 15 September 2010. On 5 May 2010, a Royal Australian Air Force AP-3C Orion maritime patrol aircraft responded to a merchant vessel in distress; it was 'dead' in the water and contact with the crew indicated suspected pirates were attempting to board it; the crew was rescued unharmed the next day by a Russian warship; see Department of Defence, *ADF Aircraft Assists with Rescue from Pirates*, Defence Media Release MSPA 154/10, 9 May 2010.
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