

MARITIME PIRACY – THE AUSTRALIAN JURISDICTION

From 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.¹

The frequency of piracy has created immense challenges for the international shipping industry. As Professor 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.²

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*, that 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.*³ 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 Kenny, namely that 'piracy is any armed violence at sea which is not a lawful act of war'⁴ as coming 'nearest to accuracy coupled with brevity'.

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
- provided the conduct is not authorised by any State and the conduct occurs on the high seas or in the 'Admiral's jurisdiction' (that is to say, the territorial jurisdiction of the Admiralty court).⁵

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.⁶

Imperial Acts

A series of British enactments conferred jurisdiction upon Australian courts over offences committed at sea.⁷ 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 date from the 17th century to the 19th century. They include: the *Piracy Acts* of 1670, 1698, 1721 & 1744 the *Slave Trade Act (1824)*, and the *Piracy Act (1837)*.⁸



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

A number of States have re-enacted the Imperial Piracy Acts – namely, 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.⁹

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'.¹⁰ 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. Northern Territory and Australian Capital 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 the State provisions. It is arguable that several of the State enactments are invalid on the ground that they exceed the extra-territorial 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 (Commonwealth)

The *Crimes At Sea Act 2000* (Commonwealth) [CASA] came into force on 31 March 2001. It enacts a co-operative 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, CASA 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.



Figure 1 – ‘Send Lawyers, Guns and Money!’ - Even pirates cry when lawyers get involved. Abdiwali Abdiqadir Muse, the sole survivor of the group that boarded the *Maersk Alabama* is comforted during a pre-trial hearing in a Manhattan Court, April 2009. Source: www.nydailynews.com

The *United Nations Convention on the Law of the Sea 1982* (UNCLOS) deals with piracy under Articles 100-107 (inclusive). 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 Convention offence applies regardless of the nationality of the offenders or their victims and regardless of the registration of the vessels concerned. Furthermore, under UNCLOS 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 UNCLOS 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 UNCLOS 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.¹¹

Article 105 of UNCLOS 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 on-board. 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 of UNCLOS 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.¹²

The UNCLOS 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. 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.

Piracy, under UNCLOS, 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, such as Al Qaeda, Abu Sayeff or Jemah Islamiah – for exclusively political ends, or by nationalist or ethnic groups – that might fill the political vacuum created by a failed state such as the ‘Somali Marines’¹³, ‘Puntland Coastguard’ or, closer to home, the ‘Malaita Eagle Force’ – can fall within the international offence.

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.¹⁴ 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.¹⁵

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 UNCLOS 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.¹⁶

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 UNCLOS definition does apply to all illegal acts of violence and detention and acts of depredation against a ship. The UNCLOS definition also expressly includes aircraft at sea.

The Commonwealth Piracy Provisions

The uncertainty of the scope and application of the common law offence and the State and Territory offences gave impetus to the Commonwealth legislature to create a Commonwealth statutory offence. This was realised after the ratification of UNCLOS. 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 follows:-
‘In this Part: *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.

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 sea-bed, 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 1914 (see section 55).

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

The other limitations with the UNCLOS 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 and the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms: and
- 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 co-operative scheme enacted through CASA. While CASA extends the jurisdiction of the States and Territories to the 'Adjacent Area', CASA 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 1914* 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 less well defined 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.

End Notes

1. Davis, A 'Tracing the Dynamics of the Illicit Arms Trade' *Janes Intelligence Review*, September 2003
2. Till, G *Sea Power, A Guide for the 21st Century*, Routledge, 2nd ed. (2009) p. 290
3. [1909] 1 KB 785
4. *Outlines of Criminal Law*, new ed. (1952) p. 354
5. *In Re Piracy Jure Gentium* [1934] AC 586; *H.M. 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 at para. 102.
7. See *Australian Courts Act* (1828); *Admiralty Offences (Colonial) Act* 1849; *Courts (Colonial) Jurisdiction Act* 1874.
8. The 1698 Act 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 Act of 1721 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. 72-5.
 10. *Phillips v Eyre* (1870) LR 6 QB 1
 11. In 2004, it was suggested that the USN and USMC 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 – Chalk, P. *The Maritime Dimension of International Security* (2008) Rand Corp. p.46
 12. See YILC 1956 Vol II, p. 282, Commentary.
 13. 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', Admiral', 'Vice-Admiral' and a head of financial operations. See *Counting the Costs of Somali Piracy*, USIOP- Working Paper, June 2009 at p 4.
 14. *The Magellan Pirates* (1853) 164 ER 47.
 15. *The Ambrose Light* 25 Fed 408 (1885); see also G. Fenwick, *Piracy in the Caribbean*, *American Journal of International Law*, (1961) Vol 55; F. Valli, *The Santa Maria Case*, *North Western University Law Review* (1961) Vol 56, and L. Green, *'The Santa Maria: Rebels or Pirates?'*, *BYIL* (1961) Vol 37.
 16. See A. Rubin, *'Is Piracy Illegal?'* *American Journal of International Law*, Vol 70, 1976, pp 92-95. The author of 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.

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Published by: [The RANR Professional Studies Program, Office of the Director General Reserves \(Navy\)](#). The views expressed in this publication are entirely those of the author and do not necessarily represent those of the RAN, The Department of Defence or the Australian Government.

