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# The Naval Protection of Shipping in the 21st Century: An Australian Perspective

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by Stuart Kaye and Lowell Bautista

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OF SHIPPING IN THE  
21st CENTURY:  
AN AUSTRALIAN  
PERSPECTIVE

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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.

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## Abbreviations

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ADF	Australian Defence Force
AMIS	Australian Maritime Identification System
AMSA	Australian Maritime Safety Authority
BPC	Border Protection Command
CVP	Continuing Voyage Permit
dwt	deadweight tons
EEZ	Exclusive Economic Zone
GDP	Gross Domestic Product
gt	gross tons
IMO	International Monetary Organization
ISPS	<i>International Ship and Port Facility Security Code</i>
ITLOS	International Tribunal for the Law of the Sea
IUU Fishing	Illegal, Unregulated and Unreported Fishing
GFC	Global Financial Crisis
LOSC	<i>United Nations Convention on the Law of the Sea 1982</i>
m	metre
MARPOL 73/78	<i>International Convention for the Prevention of Pollution From Ships 1973 and 1978 Protocol</i>
mt	million tonnes
MTOFSA	<i>Maritime Transportation and Offshore Facility Security Act 2003</i>
nm	nautical miles
PSI	Proliferation Security Initiative
RAN	Royal Australian Navy
RFMO	Regional fisheries management organisation
SOLAS	<i>International Convention for the Safety of Life at Sea 1974</i>

STCW Convention	<i>International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978</i>
SUA Convention	<i>Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988</i>
SVP	Single Voyage Permit
UNCTAD	United Nations Conference on Trade and Development
UNFSA	<i>United Nations Straddling and Highly Migratory Fish Stocks Agreement 1995</i>
WMD	Weapons of Mass Destruction
WTO	World Trade Organization
WWII	World War II

# Introduction

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This study examines Australia's interests in seaborne trade and the legal rights and limitations Australia and the Royal Australian Navy (RAN) faces in protecting those shipping interests. It also establishes the basic character of the relevant international law that is very restrictive in assigning jurisdiction over ships. Australian shipping interests involve far more than just the small number of vessels flying the Australian flag, however, and include the actual cargoes being shipped to and from Australia and the safety of Australian nationals on board merchant shipping. More generally, Australia has a broader interest in the safety and security of the global maritime trading system, as demonstrated by the RAN's contributions to counter-piracy operations in the Gulf of Aden region.<sup>1</sup>

The study first outlines the nature of international seaborne trade followed by a short analysis of Australia's seaborne trade. The maritime industry is fundamentally important to the Australian economy. As an island nation, the Australian economy is profoundly dependent upon the oceans. The efficient, cost-effective and safe transport of the nation's agricultural, mining and manufactured goods to their intended domestic and international destinations and the safe arrival of essential imports via the sea is vital to Australia's economic and social development. The strategic context of securing Australia's shipping and seaborne trade involves consideration of economic, national security, defence and environmental implications. This context includes the identification of conventional threats such as piracy and terrorism and the implications of technological, legal and regulatory changes and innovation for the protection of shipping. The second chapter establishes the international law related to jurisdiction over vessels. Chapter 3 sets out the international legal framework for interdiction at sea, whilst Chapter 4 outlines the Australian domestic framework. Chapter 5 covers the rules governing the protection of shipping and interdiction of ships during wartime.

The study concludes that the legal framework for jurisdiction over vessels is very restrictive, particularly given that the vast majority of Australia's trade is carried on foreign-flagged ships, a situation is likely to persist. International efforts, including the promulgation of UN Security Council resolutions, to combat piracy in the Gulf of Aden and in the waters off Somalia are very specific to that problem and are unlikely to be more widely applicable. The options available to Australia are thus very limited, but might include the negotiation of bilateral ship boarding agreements with major flag states, as the United States has done in the context of combating the proliferation of weapons of mass destruction under the Proliferation Security Initiative.

## Notes

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1. For a general overview of that system see, for example, Martin Stopford, *Maritime Economics* (3rd edn), Routledge, London, 2009, Chapter 9: The Geography of Maritime Trade.

# 1. Background

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## World Seaborne Trade

For centuries, countries across the globe have relied upon the free passage of goods across the seas for their existence. The same is true in modern times. During the course of human history the oceans have been transformed from being a barrier to progress into a highway interconnecting the world into one. Seaborne trade is not only a global industry; it is the industry that makes the global economy function. The importance of ocean commerce makes its protection a vital security concern. Thus, alongside the modernisation of the shipping industry with advances in shipbuilding and navigation; should also come improved, increased and better enforced regulations that ensure the safety of life and property, improve the conditions of employment, and maximise economic efficiency.

The global shipping industry, throughout most of the last century, has seen a general steady trend of growth in the total volume of goods traded. The liberalisation of national economies, along with industrialisation and the rising demand for consumer products have fuelled the free movement of goods across countries. The liberalisation of trade through the removal of tariff and non-tariff barriers to trade has opened a flood of imported products which are more competitively priced than domestically-sourced goods. Over the years, the maritime transport of goods has become safer, swifter, and more efficient due to logistical and technological advances; as well as significant improvements in laws and regulations. Over the last four decades, total seaborne trade have quadrupled from just over 8 thousand billion tonne-miles in 1968 to over 32 thousand billion tonne-miles in 2008.<sup>1</sup>

Shipping, just like any other economic activity, is driven by market forces of supply and demand. This makes shipping vulnerable to shifting patterns of trade and economic activity. While on the demand side, the steady increase in overall seaborne trade has buoyed lucrative freight rates; on the supply side, heavy investments in shipbuilding have lead to an oversupply of ships in the container, bulk and tank markets. The increased global tonnage has impelled shipping lines to improve levels of efficiency. This has spurred remarkable increases in the size and capacity of container vessels in order to achieve greater economies of scale. According to the United Nations Conference on Trade and Development (UNCTAD) *Review of Maritime Transport 2010*, by the beginning of 2010, the world merchant fleet had reached 1276 million deadweight tons (dwt), an increase of 84 million dwt over 2009.<sup>2</sup> The world fleet grew by 7 per cent in 2009 and by January 2010, there were 102,194 commercial ships in service, with oil tankers accounting for 450 million dwt (35.3 per cent), dry bulk carriers with 457 million dwt (35.8 per cent), container ships with 169 million dwt, and general cargo ships with 108 million dwt in January 2010.

## Global Survey of the Changing Nature of Shipping and Flagging

In international law, every ship is required to be registered in a country, which is referred to as its flag state. The flag state exercises authority, regulatory control and responsibility over vessels registered under its flag including the inspection, certification and issuance of safety and pollution prevention documents. The flag state exercises exclusive jurisdiction, subject to certain exceptions, over a vessel flying its flag, and actions aboard the vessel are subject to the laws of the flag state.<sup>3</sup> The exclusive jurisdiction of the flag state is essentially applicable on the high seas, but is not exclusive when the vessel is in a port or in the internal waters of another state. In this instance, the territorial jurisdiction of the coastal state to prosecute violations of its laws will operate.<sup>4</sup>

International law requires that a genuine link must exist between the state and the ship.<sup>5</sup> However, there are states that allow foreign ships to be registered without any real connection to them. These states, which are referred to as flags of convenience or open registry states, allow the ship's foreign owners to benefit from low taxation, reduced operating costs, especially low wages paid to the crews, and avoid the application of laws of the owner's country such as labour and environmental regulations.

The International Transport Workers' Federation maintains a list of registries that it considers to be flags of convenience registries on the basis of three criteria:

- The ability and willingness of the flag state to enforce international minimum social standards on its vessels.
- The degree of ratification and enforcement of International Labour Organization conventions and recommendations.
- Safety and environmental record.<sup>6</sup>

In 2010, this list included the following 32 registries: Antigua and Barbuda, Bahamas, Barbados, Belize, Bermuda, Bolivia, Burma, Cambodia, Cayman Islands, Comoros, Cyprus, Equatorial Guinea, French International Ship Register, German International Ship Register, Georgia, Gibraltar, Honduras, Jamaica, Lebanon, Liberia, Malta, Marshall Islands, Mauritius, Mongolia, Netherlands Antilles, North Korea, Panama, Sao Tome and Principe, St Vincent, Sri Lanka, Tonga, and Vanuatu.<sup>7</sup>

Open registries are a concern of the maritime industry for several reasons. First, open registry states provide an unfair competitive advantage to ships flying their flags over ships registered under the flags of the traditional maritime nations because they offer the lowest possible fees and the minimum of regulations. Open registry vessels often recruit the cheapest labour and pay minimal wages, maintain poor safety and training

standards, and provide lower standards of living and working conditions for the crew in order to reduce costs.

Second, open registry vessels compromise navigational safety and marine pollution regulations. Flags of convenience do not ratify important treaties pertaining to the maritime industry in order to avoid their enforcement on vessels that fly their flags. From the viewpoint of ship owners, the 2009 Flag State Performance Table by the Maritime International Secretariat Services six conventions representing a minimum level of maritime regulation. Those being:

- *International Convention for the Safety of Life at Sea 1974 (SOLAS)* as amended, including the 1988 Protocol; the *International Safety Management Code 2002* and the *International Ship and Port Facility Security (ISPS) Code*
- *International Convention for the Prevention of Pollution from Ships 1973* as modified by the Protocol of 1978, including Annexes I - VI (MARPOL 73/78)
- *International Convention on Load Lines 1966*, including the 1988 Protocol
- *International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978 (STCW) Convention*
- *International Labour Organization Merchant Shipping (Minimum Standards) Convention 1976*, including the 1996 Protocol
- *International Convention on Civil Liability for Oil Pollution Damage 1992* and the *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992*.

Several flags of convenience countries have not ratified these six core conventions. According to the report, and on the basis of the data used, the following flag states have 12 or more negative performance indicators: Albania, Bolivia, Cambodia, Columbia, Costa Rica, Ivory Coast, Democratic Republic of the Congo, Georgia, Honduras, Lebanon, St Kitts and Nevis, Sao Tome and Sierra Leone.<sup>8</sup>

Third, is the growing concern that the secrecy surrounding the ownership of ships registered in flags of convenience states make them susceptible for use in criminal activities and even for terrorism. Flags of convenience ships can be used in the transport of illicit cargoes, such as prohibited drugs, missiles or nuclear weapon fuel or components used to manufacture or required for the assembly of these. In fact, ships in their own right, can be used as weapons. These vessels can also be used to facilitate Illegal, Unregulated and Unreported (IUU) fishing. Since a flag state not party to a regional fisheries management organisation (RFMO) does not have the obligation to enforce management and conservation measures promulgated by the RFMO, such

vessels can jeopardise these measures by disregarding them. Ship registration has become easier, faster and cheaper, and can even be done online. This makes it easy for vessels to be re-flagged and renamed in order to confuse management and surveillance authorities. The confusing chain of flags, owners and beneficial owners make it difficult to locate and penalise the real owner of the vessel. Thus, there is a need for greater transparency in the flagging and ownership information of vessels.

## World Fleet Structure, Ownership and Registration

At the beginning of 2010, the world merchant fleet stood at 1,276,137 thousand dwt with 102,194 commercial ships in service. This represents a 7 per cent increase compared to 2009 figures or a net gain of 83.82 million dwt. In 2010, the tonnage of oil tankers increased by 7.6 per cent and that of bulk carriers by 9.1 per cent. These two types of ships represented 71.1 per cent of total world tonnage. The fleet of general cargo ships continued to decline in 2010; with ships in this category representing 8.5 per cent of the total world fleet in comparison with 9.1 per cent in 2009. The fleet of container ships increased by 7.2 million dwt, or 4.5 per cent, and represented 13.3 per cent of the total world fleet. The deadweight tonnage of liquid gas carriers and offshore supply ships continued to increase in 2010, while chemical tankers decreased by 9.7 per cent.<sup>9</sup>

In terms of flags of registration, the 35 largest flags account for 93.23 per cent of the world fleet. Panama continues to be the largest flag of registration with 289 million dwt (22.6 per cent of the world fleet), followed by Liberia (11.1 per cent), the Marshall Islands (6.1 per cent), Hong Kong, China (5.8 per cent), Greece (5.3 per cent) and the Bahamas (5.02 per cent). The top five registries account for 51 per cent of the world's deadweight tonnage, and the top 10 registries account for 71.3 per cent.<sup>10</sup>

With respect to the number of ships, the top five flags with the largest fleets having vessels of 100 gross tonnage (gt) and above are: Panama (8100 vessels), the United States (6546), Japan (6221), Indonesia (5205), China (4064) and the Russian Federation (3465). With the exception of Panama, these vessels are employed mostly for general cargo, as well as for coastal, inter-island and inland waterway cabotage services.<sup>11</sup>

In terms of ownership, on January 2010, half of the world's tonnage is held by four countries: Greece with 15.96 per cent, then Japan with 15.73 per cent, China with 8.96 per cent, and lastly by Germany with 8.91 per cent.<sup>12</sup> Japan still has the most number of vessels with 3751 ships of 1000gt and above, followed closely by China with 3633 ships, Germany with 3627 ships, and Greece with 3150 ships. The Greek fleet is still the leading country in terms of nationally-flagged and beneficially-owned tonnage with 58.5 million dwt, followed by China with 41 million dwt. In terms of foreign-flagged vessels, Japan holds the top spot with 168.87 million dwt, followed by Greece and China with 127.61 million dwt and 63.42 million dwt respectively.

The 35 countries and territories with the largest controlled fleets account for 95.5 per cent of the world tonnage. Ship owners from developing countries hold about one-third of world tonnage while about two-thirds are controlled by owners from developed countries. There are no countries from Africa or Oceania in the top 35 countries or territories controlling the world fleet, while 16 are from Asia, 15 are in Europe, and 4 in the Americas. As expected, out of the top 35 countries or territories controlling the world fleet, 18 are classified as developed, 16 as developing, and only 1 as an economy in transition.<sup>13</sup>

The majority of the world's tonnage continue to be foreign-flagged with 68.4 per cent, with a higher percentage of 75 per cent for developed countries compared to about 57 per cent for developing countries. For developed countries where labour laws are stricter and wage levels are high, registering a vessel to a foreign flag has the incentive of hiring foreign seafarers with lower wages.<sup>14</sup>

Vessel owners have a particular preference to register their vessels in certain open and international registries. For example, most of the owners of the vessels registered in Panama are from China, Greece, Japan and the Republic of Korea. The Liberian registry mostly has ships owned by German and Greek owners. The registry of the Marshall Islands, which used to be a United States dependent territory, caters mostly to vessel owners from Germany, Greece and the United States. The Bahamas registry is broadly spread while the registry in Malta mostly comes from Greece.<sup>15</sup>

In general, newly built ships are larger than most vessels in current fleets. Since most of the merchant vessels built since 2006 are on average six times larger than those built before 1990, there has been a decrease in the average age of vessels per deadweight ton. In 2009, notwithstanding the continuing global financial crisis (GFC), there were 3658 'new builds' recorded as delivered representing a 22 per cent increase in terms of vessel numbers and a 42 per cent increase in terms of deadweight tonnage compared to the previous year. The global shipbuilding industry is dominated by just three Asian countries, which account for over 90 per cent of construction: the Republic of Korea (37.3 per cent of gross tonnage), China (28.6 per cent) and Japan (24.6 per cent).<sup>16</sup>

The average age of the world's fleet in 2010 stood at almost 23 years. The decrease in average age was largely due to the delivery of new tonnage and the demolition of old ships spurred by the GFC. The average age of tankers decreased to around 17 years. The average age of bulk carriers decreased to 16.5 years, but general cargo ships showed an increase with an average age of 24.6 years. Container ships continued to be the youngest group of the fleet; the average age in 2010 was 8.7 years, slightly above the 9 years average age in 2009. The share of tonnage between 0 and 4 years of age is 28.8 per cent, the highest among all categories of vessels. However, 21.5 per cent of the world merchant fleet are still 20 years and older.<sup>17</sup>

## Developments in International Seaborne Trade

The contraction in trade resulting from the recent global economic downturn has definitely affected the international shipping industry. In the aftermath of the GFC of late 2008, world gross domestic product (GDP) contracted by 1.9 per cent, and 2009 saw the first and deepest drop in global output since the 1930s. In the midst of the worst global recession in over 70 years and the resulting decline in the volume of global merchandise trade, world seaborne trade declined by 4 per cent in 2009 compared to 2008. In 2009, the total goods loaded was 7.8 billion tons, a decline from the 8.2 billion tons recorded in 2008. UNCTAD estimates that world merchandise export volumes dropped by 13.7 per cent, or a decrease of 22.9 per cent in terms of value. For the period 2008-10, the total loss in world trade is estimated at \$5.0 trillion, or about 12.7 per cent of world output in 2009 (at constant 2000 dollars). The effective decline in world seaborne trade exacerbated the already existing oversupply of tonnage available, resulting in the decline of overall fleet productivity in 2009. Fleet productivity, measured in tons of cargo carried per deadweight ton, decreased further in 2009 compared to 2008 figures with the average ship fully loaded only 6.6 times in 2009, compared to 7.3 times in 2008. However, UNCTAD estimates that the prospects for 2010 are improving, and the World Trade Organization projects world exports to grow at 9.5 per cent in 2010 with developing countries driving the recovery with a projected annual growth rate of 11 per cent, compared to 7 per cent for developed economies.<sup>18</sup>

The rise of China as a key player in the global shipping industry is undeniable. Between 2008 and 2009, China became the world's third-largest ship owning country, the second-biggest shipbuilding country, and the leading ship-recycling country. In 2009, China overtook Germany as the world's leading exporter, with a share of 10 per cent of world merchandise exports by value. For the same period, containerised exports from China accounted for a quarter of the world total. These facts further highlight the increasing role of developing regions, especially in Asia and more specifically China, in driving global trade. In fact, developing countries accounted for the largest share of global seaborne trade at 61.2 per cent of all goods loaded and 55 per cent of all goods unloaded. Asia continues to be the leading region with 41 per cent of total goods loaded, followed in decreasing order by the Americas, Europe, Oceania and Africa. Oceania has overtaken Africa as the fourth largest loading region since 2008 which reflects the rise in iron ore and coal shipments from Australia.<sup>19</sup>

A major challenge affecting the shipping sector is the large imbalance in the growth rates of ship supply and demand. The growth in the supply of ships is expected to outpace the growth in the demand for ships which is made worse by declining trade volumes. In order to manage this imbalance, the shipping industry has considered measures such as the delay and cancellation of ship deliveries and orders, renegotiation of contracts, laying-up and idling ships, and accelerating scrapping.<sup>20</sup>

Some of the emerging global challenges affecting the shipping sector are:

- developments in the energy markets and their potential implications for transport costs and trade
- safety
- security
- labour/seafarers' considerations
- environmental protection and sustainability, with the challenge of climate change currently the top priority.<sup>21</sup>

## Summary of Legal Issues and Regulatory Developments

Summarised below is the international regulatory framework pertinent to the protection of shipping:

- *United Nations Convention on the Law of the Sea 1982* (LOSC).
- SOLAS as amended.
- ISPS Code.
- *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988* (SUA Convention) and *Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf* (and the 2005 Protocols).
- The STCW Convention as amended, including the 1995 and 2010 Manila Amendments.
- *International Convention on Maritime Search and Rescue 1979*.
- International Maritime Organization (IMO) resolution A.1025(26) on the Code of Practice for Investigation of Crimes of Piracy and Armed Robbery Against Ships.
- IMO resolution A.1026(26) on Piracy and Armed Robbery Against Ships in Waters off the Coast of Somalia.
- *Djibouti Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden*, 29 January 2009.
- United Nations Security Council resolutions on the piracy situation in Somalia [Resolutions 1814 (2008), 1816 (2008), 1838 (2008), 1844 (2008), 1846 (2008), 1851 (2008), 1897 (2009), 1950 (2010), and 1976 (2011)].

- United Nations Security Council resolution 1918 (2010), 27 April 2010. [calling on all states to criminalise piracy under their domestic law and favourably consider the prosecution of suspected, and imprisonment of convicted, pirates apprehended off the coast of Somalia, consistent with applicable international human rights law].

## Australian Seaborne Trade

The maritime industry is fundamentally important to the Australian economy. As an island nation, the Australian economy is profoundly dependent upon the oceans. The efficient, cost-effective and safe transport of the nation's agricultural, mining and manufactured goods to their intended domestic and international destinations via the sea is vital to Australia's economic and social development. The strategic context of securing Australia's shipping and seaborne trade involves consideration of economic, national security, defence and environmental implications. This context includes the identification of conventional threats such as piracy and terrorism and the implications of technological, legal and regulatory changes and innovation for the protection of shipping.

Australia relies on international shipping as the main mode of transporting exports and imports to and from foreign markets. In 2004-05, seaborne trade accounted for 99.9 percent of Australia's international trade by volume and 75.4 per cent by value.<sup>22</sup> Over the years, the Australian maritime industry has continued to steadily expand both in terms of volume and value. In 2007-08, over 70 per cent of imports and 80 per cent of exports by value were transported by sea, with a combined value of over \$311 billion. In the same year, there were over 27,000 visits by ships to Australian ports. In 2008-09, Australian ports handled 834.8 million tons (mt) of international cargo with a total value of \$368.3 billion.<sup>23</sup> Two out of five of Australia's capital city ports are included in the top 100 ports in the world with Melbourne ranking number 51 and Sydney (including Port Botany) ranked number 70.<sup>24</sup>

International sea freight to and from Australia has seen a constant increase over the years. From 420mt in 1995-96, it was 733.7mt in 2006-07.<sup>25</sup> It is projected that Australia's seaborne trade will continue to be robust and grow positively over the next 20 years, spurred by the positive economic outlook for Australia and its trading partners.<sup>26</sup> It is forecasted that vessel activity, as measured by the number of container, bulk, general cargo, passenger and port calls, will increase in line with Australian maritime activity.<sup>27</sup>

Australia's vast 37,000km of coastline and the fact that the majority of its population and industry are located on or near the coast highlight the importance of coastal transport. In 2008-09, Australian ports handled 103.2mt of coastal cargo. In the same year, 15mt of freight were moved around the Australian coast by ships using coasting trade permits.<sup>28</sup> In terms of containerised coastal freight, regional ports such as in

Northern Tasmania (Burnie, Bell Bay, and Devonport), the Bass Strait, and Fremantle are substantial players. Australia's two largest container ports, Sydney and Melbourne, which handled more than two-thirds of total containerised imports in 2007-08, are expected to remain Australia's busiest ports into the future.<sup>29</sup>

## Profile of vessels engaged in Australian trade

The Australian trading fleet, which includes coastal shipping, is defined by the Bureau of Infrastructure, Transport and Regional Economics, as 'cargo vessels owned and/or operated by Australian companies on trading routes to and from Australia.' This definition includes ships registered overseas and manned by foreign crew authorised to operate in Australian trades under licence.<sup>30</sup> It is challenging to ascertain the exact number of the Australian trading fleet and its coastal component due to the variance in the definition as well as due to statistical fluctuations.

The number of vessels in the Australian trading fleet (greater than 2000 dwt) has been declining for many years. In 2001-02, the number of ships stood at 117; by 2008-09, there were 80. The same is true for the total deadweight and gross registered tonnage. In 2001-02, the total deadweight tonnage of the Australian trading fleet was 3,486,534; by 2008-09, it had decreased to 2,094,099. The average age of the Australian trading fleet has also been increasing; from 16 years in 2001-02; it was 19.9 years in 2008-09.<sup>31</sup>

In 2008-09, the number of small ships which are mostly general cargo vessels decreased to 19 compared to 20 the previous year, and the number of large ships vessels decreased by 16 to 57. However, despite the decrease of the Australian trading fleet both in terms of gross and deadweight tonnage, the containership tonnage increased nearly six-fold.<sup>32</sup>

## Nationality

Foreign-flagged vessels as well as those registered in Australia operate on the Australian coast carrying both international cargo and coastal cargo. The 2008 parliamentary inquiry on the coastal shipping industry stated that the fact that 'a sizable proportion of Australia's major trading fleet is flagged on overseas registries' 'is a worrisome statistic that arguably signals a crisis for Australian registered shipping.'<sup>33</sup> It also has important connotations for the Royal Australian Navy's (RAN's) ability to protect those shipping interests under the existing international legal framework, as explained in Chapter 2.

From 75 vessels in 1996, the Australian registered trading fleet has decreased to 69 in 2000-01, and further dropped to 46 in 2005-06. The number of major trading vessels in Australia's coastal fleet that are registered in Australia also declined from 35 in 2000-01 to 33 in 2005-06. The same is true for major trading vessels registered in Australia involved in overseas trade, 23 vessels in 1996, dropping to 10 vessels in 2000-01, and 7 in 2005-06. The decline in the number of major trading vessels registered

in Australia involved in overseas trade, has also meant a considerable decline in both gross and deadweight tonnage of Australian flagged vessels for overseas trade; from 1.9 million dwt and 1.3 million gt in 1996, it has decreased to 575,298 dwt and 599,036 gt in 2005-06.<sup>34</sup>

Whilst seaborne trade accounts for 99 per cent of Australia's total trade volume, less than half a per cent of this is carried by Australian flagged vessels. Through various industry reforms, the number of foreign-flagged vessels without coastal trading permits has increased enormously over the years. From less than 1000 foreign-flagged vessels in 1999, it has increased to more than 3000 in 2008.<sup>35</sup>

## Types of vessel

As at 1 January 2010, there were 1837 Australian-flagged merchant vessels, consisting of 227 oil tankers, 363 bulk carriers, 144 general cargo vessels, with the rest classified as other types. For the same period, vessels registered in Australia had a total of 2,171,000dwt, with oil tankers having 394,000dwt, bulk carriers with 579,000dwt, and general cargo vessels with 133,000dwt. In 2010, Australia was ranked 41 in the UNCTAD Liner Shipping Connectivity Index, with an average annual growth rate of 0.25 for the 2004-10 period.<sup>36</sup>

Over the years, the number of port calls to Australia has shown a steady increase. The number of ships visiting a port is an important external factor that determines trade volumes, shipping patterns, and indirectly, the productivity of a port terminal. In 2007-08, out of 27,434 Australian port calls, the largest number were bulk carriers with 14,439, followed by containerships with 7161, then by general cargo vessels with 3633 and finally by other vessels with 2201. On the basis of forecasts of containerised imports and exports and non-containerised imports and exports, calls by containerships, bulk carriers, and general cargo vessels all expected to increase in 2012-13, and by 2029-30.<sup>37</sup>

## Types of cargo carried

In Australia, there are two primary types of cargo shipped: bulk cargo and container cargo. The major bulk cargoes in Australia are bauxite, iron ore, sugar, gypsum, cement, refined petroleum and steel products, which are mostly moved as part of a manufacturing supply chain. On the other hand, container cargo moves around the coast either on north-south or east-west routes or as a transshipment of international cargo across Australian ports.<sup>38</sup>

In 2008-09, Australian ports handled 938mt of cargo, of which 80.3 per cent was exports and 8.7 per cent was imports, valued at \$202.3 billion and \$166.0 billion, respectively.<sup>39</sup> Australia's leading exports and imports are listed in Table 1.

<b>Exports</b>	<b>Imports</b>
Coal, coke and briquettes	Machinery
Iron ore and concentrates	Road vehicles and transport equipment
'Confidential'	Unrefined petroleum
Liquefied natural gas	Miscellaneous manufactured articles
Unrefined petroleum	Refined petroleum products
Meat and meat preparations	'Confidential'
Cereals and cereal preparations	Chemicals
Aluminium ores and concentrates; alumina	Iron and steel
Aluminium and aluminium alloys	Manufactures of metal
Other metaliferous ores and metal scrap	Apparel and clothing accessories

*Table 1: Australia's top ten exports and imports 2008-09<sup>40</sup>*

The majority of Australia's non-containerised imports are fuels, specifically, petroleum products, which represented 53.7 per cent of non-containerised imports in 2007-08. In the same year, the other major commodities imported by Australia are:

- inorganic chemicals
- metal ores and metal scrap
- natural and manufactured gases
- manufactured fertilisers
- crude minerals
- including crude fertilisers
- other non-metallic manufactured minerals

- iron and steel
- road vehicles.<sup>41</sup>

Australia's regional ports handle the majority of Australia's non-containerised trade especially bulk exports. In 2007-08, approximately 247mt of coal and 314mt of iron ore were exported from regional ports. This represents over 80 per cent of all non-containerised exports in that year by mass. In 2007-08, the Australian ports with the highest total throughput as measured in tonnes are:

- Dampier, Western Australia (125.7mt, of which 82.3 per cent was iron ore)
- Port Hedland, Western Australian (106.8mt, of which 95.9 per cent was iron ore)
- Hay Point/Dalrymple Bay, Queensland (86.4mt, of which 84.2 per cent was coal)
- Newcastle, New South Wales (82.5mt, of which 77 per cent was coal).<sup>42</sup>

## Ports of Destination

There are five Australian ports that conduct significant international container trade with direct shipping calls to/from most major international markets: Melbourne, Sydney, Brisbane, Fremantle and Adelaide. In 2007-08, around 90 per cent of total container imports and exports were handled at these ports, and over 70 per cent of the containers shipped domestically in the same year originated from these ports.<sup>43</sup> In 2008-09, the port of Sydney continued to handle the largest volume of imports in terms of tonnage with 15.4mt while Melbourne handled the largest volume of imports by value with \$46.3 million. The largest volume of exports by both value and weight was handled in Dampier.<sup>44</sup>

In 2008-09, Australia's top ten maritime trading partners, in terms of imports, were: China, Japan, United States, Singapore, Germany, Thailand, Malaysia, New Zealand, Republic of Korea and Indonesia. For the same period, in terms of exports, Australia's top ten maritime trading partners were: Japan, China, Republic of Korea, India, Singapore, Thailand, United States, New Zealand, Indonesia and Malaysia.<sup>45</sup>

Substantial volumes of Australia's containerised exports are transported to all regions of the world except South America. However, the majority of Australia's containerised exports are to the Northeast and Southeast Asian regions. In 2008-09, the region with the largest value of loaded cargo bound for Australia was Southeast Asia, followed by East Asia, Europe and North Asia. For the same period, East Asia was the region with the highest volume weight of Australian cargo unloaded, while North Asia was the region with the highest value of Australian cargo unloaded. It is projected that the

majority of the growth forecast in the ten years to 2017-18 will be in the Northeast Asian market, in view of the assumed continued high GDP growth rate for China.<sup>46</sup>

The majority of Australia's non-containerised exports are to Northeast Asia with 82 per cent of total non-containerised exports in 2007-08. The next biggest is Europe (6.1 per cent), with the remaining 11.9 per cent exported to South and Southeast Asia. Similar to the containerised trade, the Northeast Asian market is projected to have the majority of the growth forecast over the initial ten-year period largely due to China's rapid economic growth during this period.<sup>47</sup>

In terms of the routes used by Australia's export trade, the most significant are those bulk exports to Northeast Asia. From the east coast of Australia, coal is the main export commodity, much of which passes through the Papua New Guinea archipelago and onward into the Pacific Ocean to points northward. Iron ore and other minerals from the west coast tend mostly to sail through the Lombok and Makassar straits system; and thence through the Celebes Sea to the Philippine Sea and Pacific Ocean to ports in northern China and elsewhere in Northeast Asia. Another route is through the Celebes Sea and the Sibu Passage, through the Sulu Sea and Mindoro Strait, into the northern part of the South China Sea destined for ports in southern China. Australia's liquefied natural gas exports to Guangdong province, for example, take the latter route. This potentially places ships at risk given that the southern Philippines continues to be unstable with the presence of a number of insurgent, terrorist and criminal groups, although it should be noted that no attacks have occurred against international shipping transiting through that region.

Historically, passenger arrivals and departures by sea have been highly variable. In fact, seaborne passengers do not constitute a substantial proportion of total passenger movements to and from Australia. However, this movement of people has implications on the Australian maritime industry both in terms of port utilisation and maritime safety and security. In 2008-09, there were over 28,000 temporary visitors to Australia who arrived and more than 18,000 Australian residents who departed by sea. This number is projected to increase to around 50,000 per annum in the period to 2029-30.<sup>48</sup>

## Coastal Shipping (Cabotage)

A viable coastal shipping industry in a competitive domestic transport sector is an outcome critical to Australia's economic future and long-term national security.<sup>49</sup> The Australian coastal shipping industry, according to a 2008 Parliament report, 'has been in decline for some time' and needs to be revived, expanded and reformed in order to enhance the competitiveness and sustainability of the sector.<sup>50</sup> A revitalised Australian coastal shipping sector through the enactment of the appropriate regulatory reforms will not only provide economic benefits and competitive pricing vis-à-vis land and rail transport; it will also alleviate infrastructure constraints and environmental impacts, create local employment and stimulate growth in the maritime services sector.<sup>51</sup>

Over the years, the number of ships involved in coastal or international voyages that made port calls in Australian ports has increased steadily. From the 1992-93 figure of 2591, it has climbed to 4199 in 2008-09. The same is true for the number of port calls made by ships involved in coastal or international voyages, which was 17,856 in 1992-93, reached a high of 26,709 in 2008-09.<sup>52</sup>

However, the Australian coastal shipping industry has changed in recent years. In 2008-09, Australian ports handled 103.2mt of coastal cargo, a decrease of 13.5 per cent from the previous year.<sup>53</sup> Over the past 15 years, the share of the domestic freight has fallen from around 40 to 28 per cent. The number of Australian-controlled but foreign-flagged vessels is increasing, the average number of crew per vessels have fallen by almost 50 per cent from over 30 in the 1980s to around 16. The number of seafarers has also decreased.<sup>54</sup>

## License Requirements

Under the *Navigation Act 1912*, a ship is deemed to be engaged in the coasting trade if it takes on board cargo or passengers at any port in a state or a territory, to be carried to or delivered at a port in the same or another state or territory, and delivers that cargo or those passengers in that state or territory. It is a requirement under the act that vessels trading interstate on the Australian coast to be licensed or have a permit. There are substantial penalties for ships that engage in the coasting trade without a licence or a permit. The *Navigation Act* allows vessels to be licensed to participate in Australia's coastal trade irrespective of flag and crew nationality. Licenses are issued on two conditions: first, that the vessel's crew are paid Australian wages while the vessel trades on the Australian coast; and second, that the vessel's crew have access to the vessel's library facilities.<sup>55</sup> A licence is renewable annually on 30 June. A permit to trade on the Australian coast may be granted to an unlicensed ship in the carriage of either cargo or passengers when the following three conditions are met:

- where there is no suitable licensed ship available for the shipping task
- the service carried out by licensed ships is inadequate
- it is considered to be desirable in the public interest that an unlicensed ship be allowed to undertake that shipping task.<sup>56</sup>

There are two kinds of permits issued under the *Navigation Act*:

- A Single Voyage Permit (SVP). Issued for a single voyage between designated ports for the carriage of a specified cargo or passengers.
- Continuing Voyage Permit (CVP). Issued for a period of up to three months and enables a vessel to carry specified cargo between specified ports for that period.<sup>57</sup>

In 2008-09, there were 3084 permits issued covering voyages of unlicensed vessels for the carriage of interstate domestic cargo, with 3073 voyages actually undertaken, of which 1974 voyages were SVPs and 1099 were CVPs.<sup>58</sup>

In terms of cargo, there are two ways cargo can be shipped around the Australian coast:

- By vessels so licensed under Part VI of the *Navigation Act*.
- By vessels operating under single voyage or continuous voyage permits, which are lawfully issued under Part VI of the *Navigation Act*.

Australian law allows licensed vessels to be registered in Australia or in a foreign registry but are required to pay Australian wages whilst operating in the Australian coasting trade. The payment of Australian rates of pay is not required for permit vessels, thus making international permit vessels more competitive compared to licensed vessels. This accounts for the decline in the number of number of licensed vessels operating on the Australian coast.<sup>59</sup>

## Crewing Requirements

The training and certification of seafarers in Australia follows the established international standards generally applicable to large trading ships under the STCW Convention, to which Australia is a party. The Australian certifying authority with respect to the competency requirements under the STCW Convention is the Australian Maritime Safety Authority (AMSA).<sup>60</sup>

A regulatory issue that needs to be addressed with respect to the training and certification of seafarers in Australia is the harmonisation of training structures and the integration of state and territory seafarer training systems with international training and certification standards. At present, in addition to international training and certification standards, states and the Northern Territory have their own standards for smaller vessels, which adhere to Part D of the *National Standard for Commercial Vessels*. This does not necessarily meet the full range of competencies required by AMSA under the STCW Convention.<sup>61</sup> Thus, a holder of state or territory qualifications who want to serve on larger vessels are required to undertake additional training in order to obtain an AMSA endorsement, which is also subject to the same conditions or limitations as the state or territory qualification.<sup>62</sup>

Another layer of complexity for training institutions and for people moving between states is the variance in standards set by the *National Standard for Commercial Vessels* from state to state, which have not been adopted by all states. In addition, the Transport and Logistics Industry Skills Council has also developed and endorsed a Maritime Industry Training Package, which was implemented in 2001 and has been approved by federal, state and territory authorities. It is a competency based system which sets

out the jobs ranked in complexity from level 1 to level 8, with level 1 as the lowest and level 8 is a degree.<sup>63</sup>

## Foreign Crews Employed in Coastal Trade

The global practice of employing foreign seafarers in international shipping is part of the general internationalisation and free movement of labour. In Australia, the employment of foreign seafarers on Australian controlled ships is meant to reduce or eliminate the competitive gap enjoyed by open registry vessels compared to a similar Australian flagged vessel. The main reason for this competitive gap is the high crewing costs of Australian shipping. Despite Australian crew levels being now close to the international average, the costs of Australian coastal shipping are more than foreign-flagged vessels mainly because the cost of crews is higher.<sup>64</sup> The *Navigation Act* provides that all foreign nationals engaged as crew on licensed vessels must comply fully with the immigration regime of Australia.

In 1999, the cost disadvantage was about \$3.5 million annually for a typical large trading vessel, comprised of \$1 million for capital costs, \$2 million for manning costs and about \$0.5 million for other operating costs. Since then, this gap has been reduced by exchange rate adjustments, reductions in capital premiums on the cost of Australian-specification ships, and improved efficiencies.<sup>65</sup> It has been argued that the employment of foreign seafarers on Australian-controlled ships could spur the expansion of the Australian international shipping industry.

The replacement of Australian seafarers, who are said to be among the most highly-trained and skilled in the world, with poorly-trained foreign workers has been criticised by the Australian Workers Union as ‘a national disgrace’ and ‘threat to our national security’. However, as noted by a 2007 review conducted by the Company of Master Mariners of Australia Limited, entitled, *Qualifications in the Australian and International Maritime Industry*, the decline in demand for Australian officers and ratings is due to the dramatic reduction in the number of Australian vessels – a situation which is not unique in the maritime field. For the Company of Master Mariners, the huge decline in the number of available jobs in the industry can be attributed to the virtual demise of the Australian coastal fleet, which has triggered a collapse in the recruiting and training of new entrants into sea-going careers and has, in turn, impacted on many onshore industry sectors.<sup>66</sup>

## Australian Seafarers

The shortage of skilled maritime workforce in Australia has reached such a critical point that it has been referred to as ‘undoubtedly the biggest issue facing the industry today’.<sup>67</sup> However, the severe shortage of seafarers is not just an isolated problem in Australia but a global concern.

According to the 2008 Parliament report on the coastal shipping industry, the problem does not necessarily lie in the scarcity of numbers, but in:

- the selection of the most suitable; the cost of training
- the lack of training berths; the time required to train
- training package structures; shortage of trainers
- the retention of trained maritime labour.

The same report summarised the issues regarding the shortage of maritime skills and associated training issues into three categories:

- Attracting and recruiting new seafarers.
- Training and certification of seafarers.
- Retention of qualified seafarers.<sup>68</sup>

The value of having a well-trained and experienced crew cannot be overemphasised. It is important that Australia maintains the level of initial and ongoing training provided to Australian seafarers to ensure both competency in normal vessel operation and capability to handle emergencies at sea which will minimise the risk to life, its vessel and the marine environment.

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## 2. Jurisdiction over Vessels in International Law

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Maritime jurisdiction over vessels may be asserted by a state in a number of contexts. These may be based on the location of the vessel, its state of registration or the attitude of that state, the activities the vessel is undertaking at the time, the vessel's next port of call or arguably the attitude of the vessel's master. Each of these bases of jurisdiction has a different and distinct derivation, and it is appropriate to consider each in turn.

### Coastal State Jurisdiction

The physical location of a vessel may determine if an adjacent coastal state can assert its jurisdiction over it. Coastal state jurisdiction is based on the proximity of a vessel to the territory of a coastal state. The LOSC provides for a regime of maritime zones, within which coastal states may assert rights to regulate activities, including, in certain circumstances, over international shipping. The rule of thumb with such jurisdiction is the closer a vessel is to the coast, the greater the potential scope for jurisdiction vested in the coastal state, while further from the coast, maritime jurisdiction begins to attenuate, and may be restricted to limited categories of subject matter.

Before considering the maritime zones supported by LOSC, and what jurisdiction they attract, it is worth noting that certain vessels do not ever fall under the jurisdiction of a coastal state without their flag state's consent. Warships and other government vessels on non-commercial service are treated as sovereign immune at international law. As such, they cannot be the subject of enforcement action by a coastal state, regardless of their location, and may not be boarded without permission. In the event such a vessel contravenes the laws of the coastal state, it may be asked to leave the territorial sea, but the only other recourse a coastal state has is to make a claim against the flag state.<sup>1</sup>

Waters most closely associated with a state, such as those within river estuaries, certain bays, deeply indented coastlines or coastal areas fringed by islands may in certain circumstances be treated as internal waters. Such waters are viewed as the equivalent of land, and there is no right of international navigation within such waters without the consent of the coastal state. With the exception of vessels that are sovereign immune, all vessels within internal waters are subject to the jurisdiction of the coastal state without reservation, although traditionally coastal states do not apply laws related to the internal economy and operation of the vessel.<sup>2</sup>

Measured from the coast or the baselines making the edge of internal waters is the territorial sea, which may extend to a maximum width of 12nm. The territorial sea is part of the sovereignty of a coastal state, but unlike internal waters, it is subject to a right of freedom of navigation for foreign vessels. As such, although the territorial

sea is part of the sovereignty of the coastal state, its jurisdiction over vessels passing through these waters is not always complete. If a foreign vessel is exercising a right of innocent passage, the jurisdiction of the coastal state over this vessel will be greatly restricted to particular subjects outlined in LOSC Article 21:

- (a) the safety of navigation and the regulation of maritime traffic;
- (b) the protection of navigational aids and facilities and other facilities or installations;
- (c) the protection of cables and pipelines;
- (d) the conservation of the living resources of the sea;
- (e) the prevention of infringement of the fisheries laws and regulations of the coastal State;
- (f) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof;
- (g) marine scientific research and hydrographic surveys;
- (h) the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.

In addition to the above subjects, criminal jurisdiction can be exercised by the coastal state over activities aboard vessels within the territorial sea, although the circumstances where this is possible are limited. LOSC Article 27 indicates when the criminal jurisdiction of the coastal state may be applied to a vessel exercising a right of innocent passage:

1. The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:

- (a) if the consequences of the crime extend to the coastal State;
- (b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;
- (c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or
- (d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.

In the context of a request by the master of the ship or the flag state, there is no obvious restriction in the subject matter of the criminal jurisdiction that may be asserted, unlike the other categories that appear to be anchored to the subject of the basis for the exercise of jurisdiction. By virtue of LOSC Article 27(2) a coastal state is also able to impose measures on vessels in its territorial sea that have been within its internal waters. This jurisdiction is restricted in LOSC to only being applied to offences that have occurred in the territorial sea, and not prior to entry in it, providing the ship is foreign and is proceeding from a foreign port without entering internal waters.<sup>3</sup>

It is important to remember that while criminal jurisdiction in the territorial sea is limited with respect to vessels whose passage is innocent, the same limitations do not immediately apply where a vessel's passage was never or has ceased to be innocent. As Ivan Shearer stated in 1986:

The coastal State always retains a 'right of protection' to prevent passage through its territorial sea that is not innocent, and to ensure vessels bound for its internal waters do not breach their conditions of entry. This right is dealt with under Article 25 of the Law of the Sea Convention, and it appears to legitimise efforts by a coastal State to remove vessels from its territorial sea if their passage is not innocent.<sup>4</sup>

Such a right is explicit in the context of sovereign immune vessels, including warships, which if failing to comply with the applicable law of the coastal state they can be required to leave the territorial sea of the coastal state.<sup>5</sup> For vessels that are not sovereign immune, the jurisdiction of the coastal state can be applied without the restrictions visited upon the coastal state by the regime of innocent passage.

Beyond the territorial sea, the coastal state may claim a contiguous zone, which may extend to a distance of 24nm. The contiguous zone has developed out of British and American 19th and 20th century practice to combat smuggling through the use of 'hovering acts'. The hovering acts applied national customs laws to vessels operating just outside the territorial sea, intending to briefly enter and leave the territorial sea of the coastal state to offload contraband.<sup>6</sup> In the modern iteration of this concept as accepted in international law, coastal states have jurisdiction over customs, fiscal, immigration and sanitary matters, within the contiguous zone. LOSC Article 33 provides:

1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:
  - (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
  - (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.

It is notable that Article 33 only gives a state jurisdiction to prevent infringement of customs, fiscal, immigration and sanitary law within its territory or territorial sea, and only gives jurisdiction to punish where a breach of law within the territorial sea or territory of the coastal state has occurred. As such, it may not be sufficient to permit a coastal state to take action against an infringing vessel, but might give a coastal state the right to give warnings or inspect an infringing vessel.<sup>7</sup> Whether prevention could be stretched to permit a boarding is a moot point, but it seems clear that such a boarding could not lead to the arrest of a vessel and its crew without the ship having entered the territorial sea at some point.

Beyond the territorial sea, coastal state jurisdiction is far more limited. In relation to foreign ships, coastal state jurisdiction beyond 12nm is largely limited to economic and associated matters. Jurisdiction is based on the concept of the exclusive economic zone (EEZ), which emerged in Latin America in the decade following World War II (WWII) and is today incorporated into LOSC and customary international law. The EEZ gives a coastal state jurisdiction over certain activities taking place beyond the territorial sea, to a maximum distance of 200nm from territorial sea baselines. The jurisdiction of the coastal state over the EEZ is described in LOSC Article 56:

- (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
- (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
  - (i) the establishment and use of artificial islands, installations and structures;
  - (ii) marine scientific research;
  - (iii) the protection and preservation of the marine environment.

In terms of enforcement jurisdiction, a coastal state can assert jurisdiction with respect to economic activities in the water column and on the seabed, environmental protection and any activities taking place on its installations and artificial islands.<sup>8</sup> In the context of fisheries, LOSC indicates the possible range of enforcement measures. The coastal state has a right to board, inspect and arrest vessels to ensure compliance with its laws, although there are limitations on the scope of the operation of these laws, including guarantees that vessels and crews arrested should be able to be released on the posting of a reasonable bond, and that crews, in the absence of an agreement with the flag state, ought not be liable to imprisonment.<sup>9</sup>

Jurisdiction over environmental matters is also dealt with explicitly in LOSC. In addition to a specific provision in Article 216 supporting of coastal state efforts to deal with ocean dumping in the territorial sea and EEZ, there is a more general and extensive environmental protection provision for the EEZ. Article 220 provides in part:

3. Where there are clear grounds for believing that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed a violation of applicable international rules and standards for the prevention, reduction and control of pollution from vessels or laws and regulations of that State conforming and giving effect to such rules and standards, that State may require the vessel to give information regarding its identity and port of registry, its last and its next port of call and other relevant information required to establish whether a violation has occurred.

4. States shall adopt laws and regulations and take other measures so that vessels flying their flag comply with requests for information pursuant to paragraph 3.

5. Where there are clear grounds for believing that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed a violation referred to in paragraph 3 resulting in a substantial discharge causing or threatening significant pollution of the marine environment, that State may undertake physical inspection of the vessel for matters relating to the violation if the vessel has refused to give information or if the information supplied by the vessel is manifestly at variance with the evident factual situation and if the circumstances of the case justify such inspection.

6. Where there is clear objective evidence that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed a violation referred to in paragraph 3 resulting in a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal State, or to any resources of its territorial sea or exclusive economic zone, that State may, subject to section 7, provided that the evidence so warrants, institute proceedings, including detention of the vessel, in accordance with its laws.

7. Notwithstanding the provisions of paragraph 6, whenever appropriate procedures have been established, either through the competent international organization or as otherwise agreed, whereby compliance with requirements for bonding or other appropriate financial security

has been assured, the coastal State if bound by such procedures shall allow the vessel to proceed.

Enforcement action with respect to a pollution incident is therefore informed by the severity of that incident. If a violation that is rated as causing or threatening significant pollution, a coastal state may undertake a physical inspection of a vessel, if the vessel has failed to provide adequate information in the circumstances. Major damage or a major pollution threat will entitle the coastal state to detain a polluting vessel. Given it is the coastal state that effectively makes this assessment, the impact of the restriction is limited. Nor does it displace other international law obligations with respect to marine pollution, such as MARPOL 73/78, dealing with pollution from ships or the *International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969*, dealing with imminent severe pollution risk off a coastal state.

Beyond the EEZ, a coastal state may have jurisdiction in certain circumstances over areas of continental shelf. The jurisdiction over these areas of shelf beyond 200nm is limited only to the seabed and its subsoil, and not to the super-adjacent water column. As such, continental shelf jurisdiction will not typically apply to ships sailing in these areas, unless they are engaged in mining exploration or exploitation. As is the case with the EEZ, the coastal state also has jurisdiction over artificial islands and installations.

## Flag State Jurisdiction

The regime of flag state jurisdiction has been a feature of international law from the earliest times. It provides, regardless of a ship's location, that a state of registration will have jurisdiction over that ship. This will be the case on the high seas, when the ship is beyond coastal state jurisdiction, but will also be the case even when the ship is within the EEZ, territorial sea or even docked alongside in a port in a coastal state. When a ship is within another state's territorial or internal waters, the flag state would retain a prescriptive jurisdiction, but would not possess an enforcement jurisdiction to take action against the ship without either the ship leaving waters subject to the sovereignty of another state or the concurrence of the coastal state to permit its exercise of jurisdiction.

While the mechanics of ship registration is left to each state, LOSC Article 92 sets out the basic principles under which nationality may be assigned to a ship:

1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.

2. A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.

It is clear from this provision that a ship may only possess one nationality at a time, and may not change its nationality during the course of a voyage. Jurisdiction over the ship on the high seas, that is beyond the jurisdiction of a coastal state, is exclusive, meaning that in the ordinary course of events a ship in waters beyond national jurisdiction can only be boarded by or under the consent of its flag state.

If a vessel has lost its nationality, or is not registered with any one state, it is regarded as stateless. Stateless vessels are not committing an offence at international law merely by lacking registration, but their position is a precarious one. Stateless vessels are subject to the jurisdiction of all states and may be boarded by authorised ships of any state.<sup>10</sup>

A flag state may authorise another state to exercise its jurisdiction on its behalf. This is usually done because the ship is geographically remote from the flag state, or the flag state lacks the capacity to enforce its law. LOSC does not explicitly contemplate enforcement under the authority of another state against vessels flying its flag but there is no prohibition on such an arrangement. While examples are relatively rare, there are instances of flag states authorising other states to enforce flag state law, including on an ad hoc basis such as:

- Belize's authorisation to Australia in respect of IUU fishing by a Belizean vessel on the South Tasman Rise
- standing arrangements such as the United States' ship boarding agreements with a number of flag states, including Liberia and Panama, to allow ships to be stopped and searched for weapons of mass destruction (WMD), or related materials, in certain circumstances.<sup>11</sup>

Similarly, there is a more limited ability of states to board ships flagged in other states where both are parties to the *United Nations Straddling and Highly Migratory Fish Stocks Agreement 1995* (UNFSA) and both are participating in a common RFMO.<sup>12</sup> However, under the UNFSA the right to stop and board a third state vessel is very limited, and does not equate to the powers a warship or government vessel would have over a vessel flagged in its own state.

In the context of the efforts to prevent the proliferation of WMD, the United States has concluded a series of ship boarding agreements with a number of flag states. These agreements vary slightly in application and operation, but essentially permit the United States to board flag state registered vessels in circumstances where a vessel is suspected of carrying WMD or their precursors with the consent of the flag state.<sup>13</sup>

## Nationality Jurisdiction

Another basis for jurisdiction at international law is nationality - although in this context, it is the nationality of persons and corporate entities rather than ships which is in issue. An individual is always subject to the jurisdiction of their state of nationality regardless of where in the world they might be, although their state of nationality will only have the ability to enforce its law when circumstances permit. That is to say, a state only possesses enforcement jurisdiction over its nationals when they are in its territory, or aboard a ship in circumstances where the state has a right to enforce its law on some other basis. As such, an individual's presence aboard a ship will not alone provide a basis for the assertion of an enforcement jurisdiction by the state of nationality of the individual.

This limitation does not prevent a state from applying its law to its nationals abroad, whether in the territory of, or aboard a ship or aircraft registered in, another state. The state of nationality retains a prescriptive jurisdiction, but cannot enforce its law until it possesses an enforcement jurisdiction.

Nationality jurisdiction has been used by a number of states in the context of marine environmental protection. Under Section 229 of the *Environment Protection and Biodiversity Conservation Act 1999*, the Australian Parliament has made it an offence for any Australian national to participate in whaling activities in waters beyond Australian jurisdiction, even aboard vessels registered in other states.<sup>14</sup>

Since an individual may have more than one nationality, potentially more than one state may be able to assert jurisdiction over individuals in this eventuality. However at sea, enforcement jurisdiction will be clear as under LOSC Article 92, ships can only possess one state of registration or be stateless.

## Universal Jurisdiction

Although flag-based jurisdiction is the primary basis for high seas law enforcement, international law does permit the exercise of jurisdiction by states over foreign vessels beyond national jurisdiction in limited circumstances. Known as universal jurisdiction, this form of jurisdiction is outlined in LOSC Article 110:

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;
  - (b) the ship is engaged in the slave trade;

- (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;
- (d) the ship is without nationality; or
- (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

Ships engaged in the slave trade, unauthorised broadcasting and piracy in waters beyond the territorial sea of another state may be the subject of enforcement action by a state's warships or other appropriately marked government vessels. The international community has recognised that piracy and the slave trade, both regarded as crimes against humanity, should be suppressed by all states wherever it occurred. This argument is less persuasive when applied to unauthorised broadcasting, but strong British pressure during the negotiation of LOSC was ultimately successful.<sup>15</sup> Stateless vessels possess no nationality, and therefore may be able to be regulated by all, and vessels of the flag state seeking to disguise their identity should also be logically under their true flag's jurisdiction.

In recent times, the United Nations Security Council has sought to permit a limited extension of universal jurisdiction with respect to piracy off the Horn of Africa. In certain limited circumstances, the Security Council has authorised states to enter Somalia's territorial sea to undertake counter-piracy operations.

## Right of Visit

In the absence of any other basis of jurisdiction, international law does permit a limited right of visit to vessels outside of the territorial sea, in order to ascertain their status. As is evident from LOSC Article 110(2), such a right of visit is extremely limited. It is essentially restricted to ascertaining identity to determine if the vessel might be one over which jurisdiction under Article 110 might be available. Certainly, in the orderly course of events, if the vessel in question provides its identity to an inquiring warship, and there is no basis to suspect it of engaging in piracy, the slave trade or unauthorised broadcasting, then the right to visit would be unenforced.

## Notes

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1. *United Nations Convention on the Law of the Sea* Articles 30 and 31.
2. *Patterson v The Eudora* (1903) 190 US 169.
3. *United Nations Convention on the Law of the Sea* Article 27(5).
4. See IA Shearer, 'Problems of Jurisdiction and Law Enforcement against Delinquent Vessels' *International and Comparative Law Quarterly*, vol. 35, 1986, p. 325.
5. *United Nations Convention on the Law of the Sea* Article 30.
6. See Constantin John Colombos, *The International Law of the Sea*, Longman, London, 1968, pp. 136-140; Myres S McDougall and William T Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea*, New Haven Press, New Haven, 1987, pp. 585-603.
7. Shearer, 'Problems of Jurisdiction and Law Enforcement against Delinquent Vessels', p. 437.
8. *United Nations Convention on the Law of the Sea* Article 73.
9. *United Nations Convention on the Law of the Sea* Articles 73(2) and 73(3).
10. Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea*, Cambridge University Press, Cambridge, 2009, pp. 16-18.
11. US Department of State, *Ship Boarding Agreements*, see <[www.state.gov/t/isn/c27733.htm](http://www.state.gov/t/isn/c27733.htm)> (30 March 2011).
12. For example see Article 20, *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 1995* 33 ILM 968.
13. At the time of writing the United States had concluded ship boarding agreements with Antigua and Barbuda, Bahamas, Belize, Croatia, Cyprus, Liberia, Malta, Marshall Islands, Mongolia, Panama, and St Vincent and the Grenadines: see US Department of State, *Ship Boarding Agreements*.
14. See definitions in *Environment Protection and Biodiversity Conservation Act 1999*, s. 224.
15. Myron H Nordquist (ed), *United Nations Convention on the Law of the Sea, 1982: A Commentary*, vol. 3, Martinus Nijhoff, Dordrecht, 1995, p. 233.

# 3. International Legal Framework for Protection of Shipping and Interdiction at Sea

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## Use of Force at Sea

While a state may have enforcement jurisdiction over a ship at sea, it does not follow that an offending ship will necessarily comply with instructions it receives in respect of enforcement action. Often enforcement action will require a boarding to obtain particulars and possibly secure evidence of an alleged offence. If the ship refuses to comply, or if the boarding is resisted, the question needs to be posed as to what level of force may be used in order to compel compliance.

By and large, LOSC does not provide much assistance in determining the appropriate level of force to be used to enforce a coastal state's jurisdiction at sea. Where references to enforcement are made, LOSC indicates the vessel or aircraft undertaking the enforcement action must be a warship or appropriately marked vessel or aircraft on government service.<sup>1</sup> What force might be applied, and in what circumstances is simply not addressed. Although noting that fisheries offences committed by foreign vessels in a coastal state's EEZ cannot attract a custodial penalty in the absence of agreement between the coastal state and flag state would suggest that the use of significant force in such enforcement would be inappropriate.<sup>2</sup> As such, it is necessary to look at relevant international law beyond LOSC.<sup>3</sup>

The use of force in maritime enforcement has been the subject of a number of cases, both before and since the advent of LOSC. In the case concerning the British ship *I'm Alone*, a joint commission was established to deal with matters surrounding the pursuit and destruction of a Canadian vessel suspected of smuggling alcohol into the United States by the US Coast Guard. The commission, which also dealt with an lengthy hot pursuit of *I'm Alone*, held that the sinking of a smuggling vessel, which itself had posed no threat to the pursuing Coast Guard vessels was excessive and contrary to international law. Importantly, the commission did not prohibit the use of reasonable and necessary force in enforcing the law of the coastal state. On this basis, it is possible to envisage situations where the firing into a vessel to cause it to sink might occur. However, deliberately sinking an unarmed vessel in the absence of any overt threat was contrary to international law.<sup>4</sup>

Similarly, in the *Red Crusader Case*, an international Commission of Enquiry was convened by the United Kingdom and Denmark in relation to an incident between *Red Crusader*, a Scottish trawler, and a Danish fisheries patrol vessel in the waters off the Faroe Islands. In that case *Red Crusader* was stopped by the Danish fisheries patrol vessel *Niels Ebbesen* on suspicion of fishing. After the Danes embarked a boarding party, which took control of the trawler, *Red Crusader's* crew overpowered the boarding

party and attempted to flee. *Niels Ebbesen* gave chase, and ultimately fired into *Red Crusader* with a 40mm gun in an attempt to get the trawler to stop. When this proved ineffective, *Niels Ebbesen* fired a 127mm solid shot into *Red Crusader*, and was only prevented from continuing by HMS *Troubridge*, a Royal Navy frigate, interposing herself between the pursuer and pursued. The Commission of Enquiry held that the force employed by *Niels Ebbesen* against *Red Crusader* was contrary to international law. It considered the firing of a solid shot into *Red Crusader* without warning, and firing in such a way as to endanger human life exceeded the legitimate use of force.<sup>5</sup>

Use of force was also in issue in the MV *Saiga (No. 2)* Case before the International Tribunal for the Law of the Sea (ITLOS). *Saiga* was a St Vincent and the Grenadines registered tanker engaged in fuelling fishing vessels off the coast of Guinea. A Guinean government patrol vessel pursued *Saiga* and fired into it, although it was disputed before the ITLOS what calibre of weapon was used. Among other things, ITLOS considered whether the level of force used in relation to *Saiga* was appropriate:

155. In considering the force used by Guinea in the arrest of the *Saiga*, the Tribunal must take into account the circumstances of the arrest in the context of the applicable rules of international law. Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.

156. These principles have been followed over the years in law enforcement operations at sea. The normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop, using internationally recognized signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship. It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force.<sup>6</sup>

This modern formulation of the use of force in maritime enforcement makes it clear that recourse to force while possible is restricted to very limited circumstances. The use of force will only be permissible after a variety of other measures have been attempted, including signalling and the firing of warning shots across the bow of the fleeing vessel. Even in such circumstances, it would seem unlikely that the use of deadly force would be sanctioned.

A similar approach is reflected in Article 8bis(9) of the 2005 Protocol to the SUA Convention, which is directed at the interdiction of terrorists:

9. When carrying out the authorized actions under this article, the use of force shall be avoided except when necessary to ensure the safety of its officials and persons on board, or where the officials are obstructed in the execution of the authorized actions. Any use of force pursuant to this article shall not exceed the minimum degree of force which is necessary and reasonable in the circumstances.

The similarity between the text of Article 8*bis*(9) and paragraph 155 of the ITLOS judgment in the *MV Saiga (No. 2)* Case is not coincidental. Rather it reflects the contemporary international legal position for the use of force at sea, and indicates that even where action against terrorists is in play, there are substantial impediments on the use of force in support of coastal state or flag state jurisdiction. This is made explicit in Article 8*bis*(10) of the 2005 SUA Protocol:

#### 10 Safeguards

(a) Where a State Party takes measures against a ship in accordance with this article, it shall:

- (i) take due account of the need not to endanger the safety of life at sea;
- (ii) ensure that all persons on board are treated in a manner which preserves their basic human dignity, and in compliance with the applicable provisions of international law, including international human rights law;
- (iii) ensure that a boarding and search pursuant to this article shall be conducted in accordance with applicable international law;
- (iv) take due account of the safety and security of the ship and its cargo;
- (v) take due account of the need not to prejudice the commercial or legal interests of the flag State;
- (vi) ensure, within available means, that any measure taken with regard to the ship or its cargo is environmentally sound under the circumstances;
- (vii) ensure that persons on board against whom proceedings may be commenced in connection with any of the offences set forth in article 3, 3*bis*, 3*ter* or 3*quater* are afforded the protections of paragraph 2 of article 10, regardless of location;

- (viii) ensure that the master of a ship is advised of its intention to board, and is, or has been, afforded the opportunity to contact the ship's owner and the flag State at the earliest opportunity; and
- (ix) take reasonable efforts to avoid a ship being unduly detained or delayed.

While these provisions reinforce the basic position in respect of the use of force, they also provide greater detail on how a vessel and its crew must be dealt with. The level of detail would seem to go well beyond the previously discussed cases.

Australian domestic law explicitly reflects this international standard, presently incorporating international law as the benchmark for the use of force in respect of Australian offshore enforcement.<sup>7</sup>

## Interdiction at Sea Post-11 September 2001

Although the 11 September 2001 terrorist attacks on the United States were conducted with hijacked aircraft, the aftermath of the attacks saw much international effort towards the prevention of terrorist attacks at or from the sea. As already noted above, some of these measures directly impact upon the use of force at sea. The implications of each of these measures will be considered in turn.

### *International Ship and Port Facility Security Code*

The most extensive and wide-ranging of the new anti-terrorism measures dealing with ships, ports and related infrastructure is the ISPS Code.<sup>8</sup> The ISPS Code operates within the framework of SOLAS under the umbrella of the IMO, and is designed to improve the security of ships, offshore facilities, ports and related infrastructure. It provides for security plans for each of these elements, and establishes internationally recognised identification for those working throughout ships, shipping and related industries.

While the ISPS Code has important implications for ship and port security, it does not provide an independent basis of jurisdiction for the boarding of ships at sea. As such, the ISPS Code does not increase the opportunities for a coastal state to enforce its jurisdiction at sea.

### *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988*

The SUA Convention was negotiated in the wake of the 1985 hijacking of the Italian cruise liner *Achille Lauro* and provides a framework for dealing with terrorist and like acts against ships at sea.<sup>9</sup> Part of the motivation for its negotiation was because of difficulties in the application of the traditional definition of piracy to terrorist activities.

Under LOSC Article 101, acts of piracy must have been committed for private ends, and be committed from a second vessel, rendering the application of Articles 101 and 110 problematic to terrorist acts which might have been motivated in support of a political cause.

The SUA Convention requires states to criminalise a range of offences against ships including seizing a ship, performing acts of violence against individuals on a ship, or damaging a ship or its cargo to endanger its safe navigation. While jurisdiction to make laws to create offences for these activities is widely construed, being based on flag or the physical presence of a vessel in the territorial sea, or even attempted coercion of the state concerned or its nationals, the SUA Convention does not authorise boarding of a ship at sea by any state other than the flag state. In addition, the Preamble of the SUA Convention provides 'matters not regulated by this Convention continue to be governed by the rules and principles of general international law'. This would seem to indicate that jurisdiction under the SUA Convention is essentially restricted to the traditional position in international law, with the possible exception of Article 8 which allows the master of a vessel to hand over a suspect to a 'receiving state' which may be a state other than the flag state:

1. The master of a ship of a State Party (the 'flag State') may deliver to the authorities of any other State Party (the 'receiving State') any person who he has reasonable grounds to believe has committed one of the offences set forth in article 3.
2. The flag State shall ensure that the master of its ship is obliged, whenever practicable, and if possible before entering the territorial sea of the receiving State carrying on board any person whom the master intends to deliver in accordance with paragraph 1, to give notification to the authorities of the receiving State of his intention to deliver such person and the reasons therefore.
3. The receiving State shall accept the delivery, except where it has grounds to consider that the Convention is not applicable to the acts giving rise to the delivery, and shall proceed in accordance with the provisions of article 7. Any refusal to accept a delivery shall be accompanied by a statement of the reasons for refusal.

While international take-up of the SUA Convention was initially slow, it increased after the 11 September 2001 terrorist attacks. In excess of 150 states are now parties to the SUA Convention, including most coastal states and larger tonnage flag states.

The SUA Convention did little to alter the traditional limitations of maritime jurisdiction, and in the years since 2001, significant diplomatic effort went into extending it to address these perceived limitations. By late 2005, these diplomatic efforts bore fruit, with the adoption of a protocol.<sup>10</sup> While with a somewhat different focus to its parent

convention, the 2005 SUA Protocol provides a more robust response to the exercise of enforcement jurisdiction.

The 2005 SUA Protocol extends the reach of the SUA Convention through a concentration on WMD and their non-proliferation, while also incorporating additional offences including using a ship as a platform for terrorist activities, and the transportation of an individual who has committed an offence under the SUA Convention, or any of another nine listed anti-terrorism conventions.<sup>11</sup> In the context of interdiction, Article 8bis(5) also potentially widens the scope for third party boarding of vessels:

5. Whenever law enforcement or other authorized officials of a State Party ('the requesting Party') encounter a ship flying the flag or displaying marks of registry of another State Party ('the first Party') located seaward of any State's territorial sea, and the requesting Party has reasonable grounds to suspect that the ship or a person on board the ship has been, is or is about to be involved in the commission of an offence set forth in article 3, *3bis*, *3ter* or *3quater*, and the requesting Party desires to board,

(a) it shall request, in accordance with paragraphs 1 and 2 that the first Party confirm the claim of nationality, and

(b) if nationality is confirmed, the requesting Party shall ask the first Party (hereinafter referred to as 'the flag State') for authorization to board and to take appropriate measures with regard to that ship which may include stopping, boarding and searching the ship, its cargo and persons on board, and questioning the persons on board in order to determine if an offence set forth in article 3, *3bis*, *3ter* or *3quater* has been, is being or is about to be committed, and

(c) the flag State shall either:

(i) authorize the requesting Party to board and to take appropriate measures set out in subparagraph (b), subject to any conditions it may impose in accordance with paragraph 7; or

(ii) conduct the boarding and search with its own law enforcement or other officials; or

(iii) conduct the boarding and search together with the requesting Party, subject to any conditions it may impose in accordance with paragraph 7; or

(iv) decline to authorize a boarding and search.

The requesting Party shall not board the ship or take measures set out in subparagraph (b) without the express authorization of the flag State.

This provision provides that a third state may board after ascertaining the nationality of a vessel suspected of committing an offence under Article 3 or its related amendments, notifying the flag state and obtaining its consent. In this respect, the provision does not differ greatly from general principles in international law, as even apart from the SUA Convention, a flag state can authorise any other state to board its vessels on the high seas. However, Article 8*bis* does attempt to facilitate flag state cooperation through the lodgement of a declaration granting a right to board four hours after request to board, or a declaration permitting boarding by other state parties. The 2005 SUA Protocol entered into force in July 2010, and at the time of writing, with only 19 state parties, it is still unclear as to how many states might be willing to lodge such declarations. However, outside the context of the SUA Convention, the United States has had some success at the creation of bilateral ship boarding agreements, so there may be more scope for such declarations than might first appear.

Authority to board by a flag state may entitle a third state to stop and board a vessel, but will not of itself be sufficient to give the third state jurisdiction for all purposes. If evidence of a past, current or imminent offence against the SUA Convention or Protocol is discovered in the course of a boarding, the flag state still retains jurisdiction, but it may authorise the boarding state to detain the vessel, its cargo and crew pending further instructions. The paramountcy of the flag state is not displaced, but the boarding state can potentially advance matters further. However, the boarding and subsequent discovery of an offence does not act as a basis for the boarding state to take over the matter without the concurrence of the flag state. Article 8*bis* in part provides:

7. The flag State, consistent with the other provisions of this Convention, may subject its authorization under paragraph 5 or 6 to conditions, including obtaining additional information from the requesting Party, and conditions relating to responsibility for and the extent of measures to be taken. No additional measures may be taken without the express authorization of the flag State, except when necessary to relieve imminent danger to the lives of persons or where those measures derive from relevant bilateral or multilateral agreements.

8. For all boardings pursuant to this article, the flag State has the right to exercise jurisdiction over a detained ship, cargo or other items and persons on board, including seizure, forfeiture, arrest and prosecution. However, the flag State may, subject to its constitution and laws, consent to the exercise of jurisdiction by another State having jurisdiction under article 6.

As such, the 2005 SUA Protocol has the potential to facilitate third party boardings at sea, while encouraging cooperation between state parties in boardings. Although at heart, it does not alter the basic international position of the flag state still being the ultimate authority in respect of its vessels on the high seas.<sup>12</sup>

## Proliferation Security Initiative

Another mechanism to emerge in the wake of the 11 September 2001 terrorist attacks was the Proliferation Security Initiative (PSI). Unlike the 2005 SUA Protocol, the PSI is not a binding international instrument, but rather a statement of intention indicated by states, stating how they plan to cooperate and what steps might be taken to intercept a ship suspected of carrying WMD or related equipment to non-state actors. Lacking a formal instrument means that identifying participating states presents some challenges, but certainly in addition to a solid core of supporters, up to around 100 states have had some engagement with PSI discussions or exercises over the past decade.<sup>13</sup>

The core of the PSI is the Statement of Interdiction Principles and a portion of this statement is directly relevant to the boarding and interdiction of vessels at sea:

Take specific actions in support of interdiction efforts regarding cargoes of WMD, their delivery systems, or related materials, to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks, to include:

- a. Not to transport or assist in the transport of any such cargoes to or from states or non-state actors of proliferation concern, and not to allow any persons subject to their jurisdiction to do so.
- b. At their own initiative, or at the request and good cause shown by another state, to take action to board and search any vessel flying their flag in their internal waters or territorial seas or areas beyond the territorial seas of any other state that is reasonably suspected of transporting such cargoes to or from states or non-state actors of proliferation concerns, and to seize such cargoes that are identified.
- c. To seriously consider providing consent under the appropriate circumstances to the boarding and searching of its own flag vessels by other states and to the seizure of such WMD-related cargoes in such vessels that may be identified by such states.
- d. To take appropriate actions to (1) stop and/or search in their internal waters, territorial seas, or contiguous zones (when declared) vessels that are reasonably suspected of carrying such cargoes to or from states or non-state actors of proliferation concern and to seize such cargoes that are identified; and (2) to enforce conditions on vessels entering or leaving their ports, internal waters or territorial seas that are reasonably suspected of carrying such cargoes, such as requiring that such vessels be subject to boarding, search, and seizure of such cargoes prior to entry.<sup>14</sup>

The statement provides for two distinct bases for jurisdiction to board a vessel. The first is based on territorial jurisdiction, where the flag state of the vessel concerned is not relevant. Jurisdiction is based on the subject vessel's presence in the PSI partner's territorial sea, without relying upon the consent of the flag state. As the carriage of WMD or other material is not, of itself, necessarily inconsistent with the right of innocent passage, the jurisdiction of a coastal state to stop a transiting vessel has been subject to some academic debate over the legality of this territorial basis for stopping and boarding ships, and seizing cargoes.

While the PSI partners have not articulated the legal basis to exercise territorial jurisdiction in this context, a number of supporting arguments for this aspect of the PSI have been made by publicists. One basis suggested has been the right of individual or collective self-defence. Certainly the 11 September 2001 terrorist attacks against the United States were viewed as the basis for it exercising a right of self-defence in initiating the war in Afghanistan, and for the United States' allies, including Australia, invoking a right of collective self-defence in support of that conflict. However, given the movement of WMD would not always amount to an attack, the use of the doctrine of self-defence would raise issues of collective self-defence, which would be problematic.

The difficulties of the PSI and territorial jurisdiction could be remedied with a resolution of the United Nations Security Council, which could empower states to intercept WMD at sea in support of international peace and security pursuant to Chapter VII of the United Nations Charter.<sup>15</sup> To date, the Security Council has stopped short of authorising the boarding of vessels suspected of carrying WMD. Security Council Resolution 1540 urges states to prohibit the WMD transit to non-state actors, but it does not create any positive duty upon states to undertake interdiction of such vessels. The resolution only authorises such action as is 'consistent with international law', and therefore boarding a suspect vessel in the territorial sea may not be legitimate.<sup>16</sup>

The other basis for jurisdiction under the PSI is on a firmer footing. Flag state jurisdiction can provide a basis for boarding in any part of the oceans save those areas subject to the sovereignty of another state. Under the PSI, a flag state undertakes to board and search vessels flying its flag reasonably suspected of carrying WMD or related material and to seize such cargo if found.

As with the SUA Convention, flag state jurisdiction can also provide a basis for third state boarding. Under the PSI Statement of Principles, the flag state undertakes to 'seriously consider' providing consent to the boarding states to board, search and, if necessary, seize suspect cargo. It is significant that while the possibility of third state action is clearly contemplated, states supporting the statement are only obliged to 'seriously consider' rather than to acquiesce to a third state boarding.

With this measure in mind, the United States has sought to strengthen the legality of any potential boarding through the conclusion of ship boarding agreements between

itself and a number of flag states with open registries. These agreements are designed to permit the United States to stop and board vessels flagged in the participating states, often with short-term notice and permission periods, in order to search and seize WMD or associated delivery systems. The agreements are reciprocal, so in theory participating states could exercise identical powers over suspect US-flagged vessels, but practically speaking the prospect of this occurring is remote. At the time of writing 11 such agreements had been concluded, with states such as Panama, Liberia, the Marshall Islands, Croatia, Belize, Cyprus and Malta.<sup>17</sup>

## Notes

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1. For example see *United Nations Convention on the Law of the Sea 1982* articles 107, 110 and 111.
2. *United Nations Convention on the Law of the Sea 1982* Article 73.
3. Such an approach is certainly consistent with *United Nations Convention on the Law of the Sea 1982*; Article 292 provides: 1. A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.
4. *Claim of the British Ship 'I'm Alone' v United States*, Joint Interim and Final Reports of the Commissioners, 1933 and 1935, *American Journal of International Law*, vol. 29, 1935, p. 330
5. *Red Crusader* (1962) 35 *International Law Reports* pp. 497-499.
6. International Tribunal for the Law of the Sea, *The M/V Saiga (No. 2) Case: Judgement*, 1 July 1999 <[www.itlos.org/case\\_documents/2001/document\\_en\\_68.pdf](http://www.itlos.org/case_documents/2001/document_en_68.pdf)> (30 March 2011).
7. For example see *Customs Act 1901*, s. 184B.
8. *International Ship and Port Facility Security Code*.
9. *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988*.
10. *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*.
11. *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, Article 3bis, Article 3ter, and Annex.
12. *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, Article 8bis(12).
13. See Sharon Squassoni, *Proliferation Security Initiative*, Congressional Research Service, RS21881, Washington DC, 7 June 2005 <<http://fpc.state.gov/documents/organization/48624.pdf>> (30 March 2011).
14. Department of Foreign Affairs and Trade, 'Proliferation Security Initiative: London, 9-10 October 2003', <[www.dfat.gov.au/globalissues/psi/psi\\_statement.html](http://www.dfat.gov.au/globalissues/psi/psi_statement.html)> (30 March 2011).

15. *United Nations Charter 1945*, Article 42.
16. Operative paragraph 10 provides: Further to counter that threat, calls upon all states, in accordance with their national legal authorities and legislation and consistent with international law, to take cooperative action to prevent illicit trafficking in nuclear, chemical or biological weapons, their means of delivery, and related materials.
17. US Department of State, *Ship Boarding Agreements*, see <[www.state.gov/t/isn/c27733.htm](http://www.state.gov/t/isn/c27733.htm)> (30 March 2011).



## 4. Australian Domestic Legislative Framework for Enforcement Action Against and Interdiction of Vessels

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In the context of Australian law, before considering what domestic measures exist for dealing with shipping interdiction, it is appropriate to consider the administrative structures in place dealing with offshore law enforcement. These structures have been the source of some tension internationally, and so they are doubly relevant to any consideration of Australia and the interdiction of shipping.

### Border Protection Command

In December 2004, then Prime Minister John Howard announced the creation of the Joint Offshore Protection Command as the agency with principal responsibility for the enforcement of Australian law in areas subject to Australian jurisdiction. The agency, which was subsequently renamed the Border Protection Command (BPC) is drawn jointly from the Australian Customs Service (which itself has been renamed Customs and Border Protection Service) and the Department of Defence, headed by a RAN rear admiral. BPC has operational control over Australia's principal offshore enforcement assets, including RAN *Armidale* class patrol boats and Customs *Bay* class patrol boats, as well as range of other vessels and aircraft. In addition, Commander BPC can request the transfer of other Australian Defence Force (ADF) ships and aircraft as required. In addition to maritime enforcement, BPC has also been designated the lead agency for the coordination of the national response to terrorist acts in offshore areas outside internal waters and the first 3nm of the territorial sea under the National Counter-Terrorism Plan.<sup>1</sup>

A fundamental enabler for BPC involved the establishment of the Australian Maritime Identification System (AMIS) for the purposes of improving maritime domain awareness. Legislation to give effect to the AMIS is essentially restricted to a requirement that vessels intending to visit an Australian port provide certain particulars in relation to their ship and its voyage before they arrive. The legislation also permits similar information being sought from vessels merely passing through Australian waters, although the practicality of enforcing such a requirement is questionable.<sup>2</sup> Nevertheless, for vessels that intend to visit Australia at some time in the future, there is an incentive to comply in order that their subsequent compliance is trouble-free.

BPC has principal responsibility for maritime enforcement of Australian law outside waters under state jurisdiction. This covers an extraordinary range of acts including the *Fisheries Management Act 1991*, the *Customs Act 1901*, the *Migration Act 1958* and the *Environment Protection and Biodiversity Conservation Act 1999*, with the each act's

enforcement powers differing slightly. At the time of writing the government had announced it was intending to introduce a Maritime Enforcement Bill 2011, which would consolidate all offshore enforcement powers into a single coherent piece of legislation.

## International Measures for the Implementation of Protection of Maritime Transportation and Offshore Facilities

As a participating state within the IMO, Australia has moved to implement the changes required to give effect to the ISPS Code. The principal maritime security legislation is the *Maritime Transportation and Offshore Facility Security Act 2003* (MTOFSA). The legislation was designed to meet Australia's obligations in respect of the implementation of the ISPS Code, but was subsequently extended to ensure its provisions would also be applicable to offshore oil and gas facilities.<sup>3</sup>

Closely reflecting the ISPS Code, MTOFSA creates an offence of 'unlawful interference' with maritime transport or offshore facilities. MTOFSA Section 11 states:

(1) Any of the following done without lawful authority is an *unlawful interference with maritime transport or offshore facilities*:

- (a) committing an act, or causing any interference or damage, that puts the safe operation of a port, or the safety of any person or property at the port, at risk;
- (aa) committing an act, or causing any interference or damage, that puts the safe operation of an offshore facility, or the safety of any person or property at the offshore facility, at risk;
- (b) taking control of a ship or offshore facility by force, or threat of force, or any other form of intimidation;
- (c) destroying a ship that is being used for maritime transport;
- (ca) destroying an offshore facility;
- (d) causing damage to a ship that is being used for maritime transport that puts the safety of the ship, or any person or property on board or off the ship, at risk;
- (e) doing anything on board a ship that is being used for maritime transport that puts the safety of the ship, or any person or property on board or off the ship, at risk;
- (f) placing, or causing to be placed, on board a ship that is being used for maritime transport anything that puts the safety of the ship, or any person or property on board or off the ship, at risk;

- (g) putting the safety of ships at risk by interfering with, damaging or destroying navigational aids, communication systems or security systems;
- (h) putting the safety of ships at risk by communicating false information.

(2) However, *unlawful interference with maritime transport or offshore facilities* does not include lawful advocacy, protest, dissent or industrial action that does not result in, or contribute to, an action of a kind mentioned in paragraphs (1)(a) to (h).

MTOFSA does not provide a regime for the interdiction of vessels, but rather establishes an extensive regulatory regime designed to address ship, port and offshore facility security based closely on the ISPS Code. This requires the preparation of security plans to be prepared for all Australian ports, ships and offshore facilities. The plans are designed to indicate protective measures to be taken in response to different levels of threat, ranging from normal operations through to imminent or actual terrorist attack, rather than create an independent basis of maritime enforcement to interdict foreign ships at sea.<sup>4</sup>

## Anti-terror Legislation at Sea

More directly relevant to the interdiction of vessels at sea are the amendments to the *Defence Act 1903* designed to combat maritime terrorism. Part IIIAAA of the act encompasses a very wide range of powers designed not merely to permit the arrest of suspected terrorists, but ultimately to provide for deadly force to be used. These powers apply to the ‘Australian offshore area’, which includes all waters over which Australia asserts jurisdiction, and the super-adjacent airspace. This includes the air and water of Australia’s EEZ extending up to 200nm from the coast. Extensive powers are provided in section 51SE:

- (1) Subject to this section, a member of the Defence Force who is being utilised in accordance with section 51D may, under the command of the Chief of the Defence Force, do any one or more of the following:
  - (a) take any one or more of the following actions:
    - (i) take measures (including the use of force) against a vessel or an aircraft, up to and including destroying the vessel or aircraft;
    - (ii) give an order relating to the taking of such measures;
    - (iii) capture a vessel or aircraft;
    - (iv) board a facility, vessel or aircraft;

- (v) recapture a facility, vessel or aircraft;
  - (vi) prevent, or put an end to, acts of violence;
  - (vii) protect persons from acts of violence;
- (b) in connection with taking any such action, do any one or more of the following:
- (i) free any hostage from a facility, vessel or aircraft;
  - (ii) if the member finds a person whom the member believes on reasonable grounds to have committed an offence against a law of the Commonwealth, a State or Territory—detain the person for the purpose of placing the person in the custody of a member of a police force at the earliest practicable time;
  - (iii) control the movement of persons, vessels or aircraft;
  - (iv) evacuate persons to a place of safety;
  - (v) search persons, facilities, vessels or aircraft for dangerous things or other things related to the threat concerned;
  - (vi) seize any dangerous thing or other thing related to the threat concerned found in such a search;
- (c) do anything incidental to anything in paragraph (a) or (b).

A number of other measures may also be instituted, including:

- detaining individuals suspect of committing offences
- controlling movements of vessels, aircraft or persons
- freeing hostages
- evacuating persons
- searching
- seizing dangerous things found during a search.<sup>5</sup>

It is also possible for the Minister for Defence to proclaim an ‘offshore general security area’ under section 51SF of the *Defence Act*. Such a proclamation would grant members of the ADF extensive powers to clear ships and aircraft from a designated area, as well as authority to search of ships, aircraft and facilities in the area, supported by the right to use reasonable force to gain compliance with such powers.<sup>6</sup> Given the application of the *Defence Act* to waters under Australian jurisdiction, including the EEZ, where there is freedom of maritime and aerial navigation, the consistency of these measures with international law is doubtful, unless Australia were to take the

view that a terrorist attack at sea would actuate its right to self-defence. Given the 11 September 2001 attacks provided a basis for the United States claiming a right to use force in self-defence, the argument is not without merit, but would have to be made out in any particular case. However, it is worth noting that an Australian court would only consider the legitimacy of the legislation under the Constitution, which, in this case, seems to be valid under to sections 51(v) and 51(xxix).<sup>7</sup>

## Ships, Fixed Platforms and Related Infrastructure

Australia also meets specific obligations under the SUA Convention in legislation dealing with the protection of ships at sea, and oil and gas platforms, giving effect to international obligations. Australian obligations under the SUA Convention and its 1988 Protocol applying to fixed platforms out at sea are implemented by the *Crimes (Ships and Fixed Platforms) Act 1992*.<sup>8</sup> It is likely upon Australian ratification of the 2005 SUA Protocols, the *Crimes (Ships and Fixed Platforms) Act* will simply be amended to reflect the additional offences in those instruments.

The *Crimes (Ships and Fixed Platforms) Act* creates a number of offences with respect to activities onboard ships, providing the offences are committed by an Australian national or onboard an Australian-registered ship. In addition, the act also applies to offences committed by the national of a state, or onboard a ship whose flag state is, party to the SUA Convention. Offences include seizing control of a ship, acts of violence against a person onboard a ship knowing the act may endanger the ship's safety, destroying or damaging a platform in such a way as to endanger its safety, and placing a destructive device on a ship so as it endangers its safety. Equivalent offences exist in respect of fixed platforms in Australian waters. Additional offences are created for causing death, grievous bodily harm or injury in the course of committing the offences against a ship, as well as threatening to endanger a ship or platform.<sup>9</sup>

The *Crimes (Ships and Fixed Platforms) Act* operates outside the Australian territorial sea, reflecting the geographical operation of the SUA Convention, however, it is not restricted to the Australian EEZ or continental shelf. Providing there is an Australian element, or if the offence takes place on the installation under the jurisdiction of another state party to the SUA Protocol, or if the victim or offender were a national of such a state, or otherwise affected such a state, the location of the incident is irrelevant.<sup>10</sup>

Also consistent with LOSC Article 60, Australian law provides for safety zones around offshore platforms. Section 329 of the *Offshore Petroleum Act 2006* provides for the proclamation of 500m safety zones around structures, wells or equipment. It is an offence for a vessel of any nationality to enter or remain in the safety zone. Penalties can be applied to the owner or the master of the vessel or to both. The offence is one of strict liability.<sup>11</sup>

The *Offshore Petroleum Act* also provides for the declaration of a state of emergency in safety zones or an 'area to be avoided'. Division 3 of Part 4.5 provides for more specific powers in respect of safety zones and 'areas to be avoided'. Section 327 provides that where the minister is satisfied that a terrorist attack is likely to occur that would cause damage or injury to any equipment or person in the area to be avoided or safety zone, then a state of emergency can be proclaimed and may continue for up to 14 days from the issue of the notice. The minister can extend the period for a further 14 days, after consultation with the Designated Authority. A broad definition of 'terrorist activity' is adopted which explicitly includes activities involving extortion.<sup>12</sup>

## *Crimes at Sea Act 2000*

Australian domestic law also provides a regime for the application of criminal law in offshore areas and aboard Australian registered ships. This scheme also applies the criminal law to Australian nationals at sea, regardless of the vessel they are on, or its location in the world, and to foreign ships, when their next port of call is Australia.

The legislative basis for this regime is the *Crimes at Sea Act 2000*, which provides for a cooperative scheme between the Commonwealth and the Australian states to extend state criminal law into offshore areas. It provides that the criminal law of the various states and territories can be applied in the oceans around Australia. It does so by dividing the oceans around Australia into separate areas of jurisdiction, and allocating criminal legislation to acts taking place in those waters. This is accomplished through the use of 'adjacent areas', which were themselves first used in the offshore petroleum settlement in 1967.<sup>13</sup> Each state, the Northern Territory, and the Ashmore and Cartier Islands Territory have a large area designated to them. Outside the adjacent area, acts taking place on Australian ships, by Australian nationals or on a ship whose next port of call is Australia, the applicable criminal law is that of the Jervis Bay Territory by virtue of Section 6 of the act.

Interestingly, Clause 3(2) of Schedule 1 of the *Crimes at Sea Act* also provides that laws of criminal investigation, procedure and evidence of the Commonwealth and states apply to 'maritime offences' in accordance with the jurisdiction of the arresting officer. That is, the relevant law for investigations, procedures and evidence, where actions by Commonwealth authorities are subject to Commonwealth law and actions by state authorities are subject to relevant state law. This ensures that officers are applying rules that they utilise regularly, rather than attempting to apply unfamiliar laws of another jurisdiction. That said, clause 5 of the Intergovernmental Agreement under the *Crimes at Sea Act* states that an 'Adjacent State shall have primary responsibility for taking investigation and prosecution action under its applied law where the alleged offence occurs in its adjacent area'. However, none of this would alter Commonwealth primacy in dealing with offences at sea other than those under the *Crimes at Sea Act*.

## Notes

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1. See the Border Protection Command website for more information, <[www.bpc.gov.au](http://www.bpc.gov.au)> (30 March 2011).
2. *Maritime Transportation and Offshore Facilities Security Act 2003*, s. 92.
3. Amendments to the Annex to the *International Convention for the Safety of Life at Sea 1974* contained in resolutions 1, 2, 6 and 7 of the Conference of the Contracting Governments and Including the *International Ship and Port Facility Security Code 2002*. The act was originally passed as the *Maritime Security Act 2003* but was amended in 2005 to incorporate protection in respect of offshore facilities.
4. See Department of Infrastructure, Transport, Regional Development and Local Government, *Strengthening Maritime Security: Understanding our Security Responsibilities*, Canberra, 2008 <[www.infrastructure.gov.au/transport/security/maritime/pdf/Strengthening\\_MarSec\\_Guide\\_2008.pdf](http://www.infrastructure.gov.au/transport/security/maritime/pdf/Strengthening_MarSec_Guide_2008.pdf)> (30 March 2011).
5. *Defence Act 1903* s51SE(1)(b).
6. *Defence Act 1903* Pt IIIAAA, Div 3A, Sub-div C.
7. See *Horta v Commonwealth* (1994) 181 CLR 183.
8. *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988*; *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf 1988*.
9. *Crimes (Ships and Fixed Platforms) Act 1992* ss. 8-10, 18, 21-28.
10. *Crimes (Ships and Fixed Platforms) Act 1992* ss. 29(3) and 29(4).
11. *Offshore Petroleum Act 2006* s. 329.
12. At present, the only 'area to be avoided' designated is in Schedule 2 of the *Offshore Petroleum Act 2006*, and is a defined area surrounding the Bass Strait oilfields. *Offshore Petroleum Act 2006* ss. 326-327.
13. *Crimes at Sea Act 2000* s. 6, Sch 1; and see SB Kaye, 'The Offshore Jurisdiction of the Australian States', *Australian Journal of Maritime and Ocean Affairs*, vol. 1 no. 2, 2009, p. 37.



# 5. International Legal Framework for Protection of Shipping and Interdiction at Sea in Wartime

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## Introduction

During wartime, the rules with respect to the interdiction of shipping undergo a substantial change. While many of the jurisdictional principles discussed earlier remain essentially intact, the options for belligerent states to take action against each other's shipping substantially increase. However, as full blown maritime armed conflict is a relatively rare occurrence, the rules governing the protection of shipping and interdiction during wartime are of great age and have not been the subject of active consideration by the international community for many decades. Fortunately in 1995, the International Institute of Humanitarian Law published the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*. This was the work of a large group of international lawyers and naval experts designed to codify and update the plethora of international instruments applicable to armed conflict at sea.

The discussion here is not intended to encompass the whole of the law of naval warfare and all the rules applicable to an armed conflict at sea. Rather it will briefly consider what was known as the law of prize, that is to say, the rules applicable to action against merchant vessels, be they enemy or neutral, available to a belligerent state during time of war. As such, it will not consider the relevant law with respect to enemy warships and vessels with special protected status, such as hospital ships or vessels engaged in humanitarian assistance.

## Right of Visit, Search and Capture

The starting point for any consideration of interdiction of shipping during an armed conflict, as was the case with rules during peacetime, is the flag of the relevant vessel remains of crucial importance. If a merchant vessel is flagged in an enemy state, that is conclusive evidence of its character as an enemy vessel.<sup>1</sup> At international law, enemy merchant shipping is, subject to some restrictions, a legitimate target for action against the enemy. Unlike private property of enemy nationals on land, enemy shipping is liable to be seized.<sup>2</sup>

Belligerent warships during an armed conflict at sea have a right of visit, search and capture of enemy merchant vessels found outside the territorial waters of a neutral state. Australian practice has made use of this right in a number of conflicts, the most recent being the 2003 Iraq War. Enemy merchant vessels are typically exempted from direct attack in most circumstances, but this does not prevent their boarding and capture

during an armed conflict. Reflecting at least in part the *Hague Convention (XI) Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War 1907*, paragraph 60 of the *San Remo Manual* neatly summaries the exceptions from attack, which are derived from the identification of such a vessel as a military objective:

60. The following activities may render enemy merchant vessels military objectives:

- (a) engaging in belligerent acts on behalf of the enemy, e.g., laying mines, minesweeping, cutting undersea cables and pipelines, engaging in visit and search of neutral merchant vessels or attacking other merchant vessels;
- (b) acting as an auxiliary to an enemy's armed forces, e.g., carrying troops or replenishing warships;
- (c) being incorporated into or assisting the enemy's intelligence gathering system, e.g., engaging in reconnaissance, early warning, surveillance, or command, control and communications missions;
- (d) sailing under convoy of enemy warships or military aircraft;
- (e) refusing an order to stop or actively resisting visit, search or capture;
- (f) being armed to an extent that they could inflict damage to a warship; this excludes light individual weapons for the defence of personnel, e.g., against pirates, and purely deflective systems such as chaff; or
- (g) otherwise making an effective contribution to military action, e.g., carrying military materials.

In the absence of the vessel being able to be directly attacked, a belligerent warship may still seek to stop the vessel to ascertain its character. If the vessel is registered in an enemy state it may be seized and sold as a prize. Cargo aboard, if owned by an enemy or if part of the contraband of war may also be seized, but other cargo belonging to nationals of a neutral state may not be seized, and must ultimately be restored to its rightful owner.<sup>3</sup>

A belligerent warship's right to visit and search a vessel outside the territorial sea of a neutral state is not restricted to enemy flagged vessels. In order to ascertain its character or whether it has contraband onboard, a neutral merchant vessel may also be stopped and boarded. If the vessel is found to be of enemy character, it may be liable to seizure as a prize, even though it is neutral. The circumstances in which this might occur are neatly summarised in the *San Remo Manual*:

146. Neutral merchant vessels are subject to capture outside neutral waters if they are engaged in any of the activities referred to in paragraph 67 or if it is determined as a result of visit and search or by other means, that they:

- (a) are carrying contraband;
- (b) are on a voyage especially undertaken with a view to the transport of individual passengers who are embodied in the armed forces of the enemy;
- (c) are operating directly under enemy control, orders, charter, employment or direction;
- (d) present irregular or fraudulent documents, lack necessary documents, or destroy, deface or conceal documents;
- (e) are violating regulations established by a belligerent within the immediate area of naval operations; or
- (f) are breaching or attempting to breach a blockade.

Capture of a neutral merchant vessel is exercised by taking such vessel as prize for adjudication.<sup>4</sup>

Even if the neutral merchant vessel is not engaged in actions that may render it liable to seizure, its cargo may be seized as contraband. This would be destined for territory under enemy control and susceptible for use in an armed conflict. In order to take advantage of the right to seize such materiel, a belligerent state must publish lists of contraband. State practice would indicate that although such cargo might be seized on the high seas, the nature and size of contraband might require the direction of the neutral vessel into a port for inspection.

It should be noted that rights in respect of visit, search and seizure are only available to the warships of a belligerent state. The *Paris Declaration Respecting Maritime Law 1856* indicated that the issue of letters of marque to privateers was no longer regarded as consistent with international law. Although the United States famously refused to adopt the Paris Declaration and reserved the right to authorise privateers to support it as late as the Spanish-American War at the end of the 19th century, there has been no state practice of any note in the past century to support a view that the Paris Declaration on this point does not represent customary international law.<sup>5</sup>

Ships or goods seized as prizes must be brought before a prize court. The function of a prize court is to ascertain that the ship or goods have been validly seized, and to permit their disposal. The owner of the seized cargo or vessel has the right to have the validity of the capture tested before the prize court. There is an extensive corpus of state practice in this context and for there to be expansive and detailed rules prepared

in support of the operation of a prize court. Michael White notes that specific legislation in Australia supporting the operation of a prize court does not exist, and references to the *Naval Prize Act 1864* (UK) in the *Colonial Courts of Admiralty Act 1890* (Imp) were repealed in 1988 with the passage of the *Admiralty Act 1988*. This does not appear to have repealed the application of *Naval Prize Act* and subsequent prize acts, but has removed the relevant jurisdiction from any extant Australian court. To remedy these deficiencies, White notes the Australian Law Reform Commission recommended the adoption of an Australian Prize Act, but this does not appear to have taken place.<sup>6</sup>

## Blockade

International law has also traditionally permitted the blockade of an enemy coast during an armed conflict. A blockade will permit, in certain circumstances, the interception of any vessel bound for an enemy port along the blockaded coast. As a significant interference with the rights of neutral ships, there are significant threshold requirements for a state to validly assert a blockade.

First, a blockade must be formally declared. Such a declaration must have a commencement date, indicate a duration, a location and an extent. The declaration must also indicate the items that will be treated as contraband under the blockade. Goods on a contraband list are those which might be susceptible for use by an enemy in the armed conflict, yet cannot include items of a humanitarian nature such as essential foodstuffs, clothing, bedding, medical supplies, religious objects and the means of shelter for the civilian population.<sup>7</sup>

Second, there must be notification of the blockade to the affected international community by the belligerent state. This includes belligerents and neutral states. In addition, the blockade must be effective. That is to say, cannot be asserted in a partial or haphazard fashion, but must be an effective measure to prevent the flow of contraband to the enemy.<sup>8</sup>

Third, the application of the blockade must be impartial and measures to enforce it must be applied to all neutral merchant vessels. However, blockade is not a complete bar of access to an enemy port by neutral shipping, but rather restricts their access if carrying contraband. Ships carrying goods for humanitarian purposes may pass through. Importantly, blockade cannot be used for the starving of the enemy's population.<sup>9</sup>

Examples of traditional blockade in modern warfare are relatively rare. The advent of jet aircraft and anti-ship missiles have meant the application of a blockade by a naval surface force close to an enemy coast would be at great risk of attack. However, the tactic has not completely disappeared from international practice as Israel sought to use blockade as the basis for boarding a fleet of merchant vessels bound for the Gaza Strip in May 2010. Although a commission set up by Israel found that conditions for

the application of a blockade did exist, the matter was the subject of dispute by the Palestinian Authority and some international publicists.<sup>10</sup>

More common is the application of United Nations Security Council resolutions that provide for the restriction of certain goods into particular states in situations essentially analogous to blockade. The maritime interception operations in the Arabian Gulf prior to the 2003 Iraq War are an example of these.<sup>11</sup> It is important to note that they are not dependent upon the requirements of the law of blockade, but rather draw their authority from a Security Council resolution, which is binding upon all states. A number of other naval 'blockade-like' operations have been undertaken in the post-WWII period without a Security Council resolution.<sup>12</sup> None, however, fulfilled the strict legal requirements of blockade.

## Convoys

One tactic adopted by states during wartime to protect their shipping at sea is the institution of a convoy. A convoy is essentially a group of merchant vessels travelling in company with warships for protection. Given that an enemy merchant vessel is a legitimate target for capture by a belligerent state, it is equally valid to provide warships to protect merchant vessels from such capture.

The use of a convoy does impact upon the range of actions that can be taken against a merchant vessel. Whatever legal protection a lone enemy merchant vessel possessed is essentially lost when it is travelling in convoy with enemy warships or military aircraft. The rationale for this was that action to stop, visit and capture merchant vessels was essentially impossible without coming under attack from the accompanying warships, therefore a belligerent should have the option to simply launch an attack against such vessels.

It is also worth noting that this rule extends to neutral vessels accompanying a convoy protected by the warships of a belligerent state. As such, a neutral flagged vessel could render itself open to direct attack by a belligerent warship in spite of its flag by travelling in company with an enemy convoy.

Neutral vessels travelling in a convoy protected by neutral warships cannot be attacked, nor can they be subject to visit and search, in certain conditions. These were contained in the *Declaration concerning the Laws of Naval Warfare 1909*, which was formally renounced by the United Kingdom during World War I.<sup>13</sup> Subsequent practice from a number of states suggests the restrictions may have some support, and this is reflected in paragraph 120 of the *San Remo Manual*:

120. A neutral merchant vessel is exempt from the exercise of the right of visit and search if it meets the following conditions:

- (a) it is bound for a neutral port;

(b) it is under the convoy of an accompanying neutral warship of the same nationality or a neutral warship of a State with which the flag State of the merchant vessel has concluded an agreement providing for such convoy;

(c) the flag State of the neutral warship warrants that the neutral merchant vessel is not carrying contraband or otherwise engaged in activities inconsistent with its neutral status; and

(d) the commander of the neutral warship provides, if requested by the commander of an intercepting belligerent warship or military aircraft, all information as to the character of the merchant vessel and its cargo as could otherwise be obtained by visit and search.

## United Nations Operations

The United Nations Security Council has periodically authorised warships to undertake visit and search of vessels with respect to situations with which it is seized. It can do so pursuant to its authority under Chapter VII of the United Nations Charter to implement resolutions. Over time, it has periodically passed resolutions that permitted a right of search and visit, such as in respect of Rhodesia and Iraq. Such measures, while analogous in their effect to the law of blockade, are supported by the United Nations Charter.

## Notes

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1. *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Cambridge University Press, Cambridge, 1995, para. 112.
2. Daniel Patrick O'Connell (Ivan A Shearer (ed)), *The International Law of the Sea*, vol. 2, Clarendon Press, Oxford, 1984, p. 1112.
3. *Paris Declaration Respecting Maritime Law 1856*, Article 3; and *Hague Convention (XI) Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War 1907*, Chapter VI (it should be noted Australia is not a party to the latter declaration).
4. *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Para 146.
5. Constantin John Colombos, *The International Law of the Sea*, Longman, London, 1962, p. 472
6. Michael White, *Australian Maritime Law*, Federation Press, Sydney, 2000, pp. 340-351.
7. Colombos, *The International Law of the Sea*, pp. 672-710

8. O'Connell, *The International Law of the Sea*, pp. 1150-1158.
9. *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Para 102.
10. See discussion in Jonathan Ferziger and Gwen Ackerman, 'Gaza Flotilla Raid Was Legal Under International Law, Israeli Panel Says', *Bloomberg*, 24 January 2011, <[www.bloomberg.com/news/2011-01-23/gaza-flotilla-raid-was-legal-under-international-law-israeli-panel-says.html](http://www.bloomberg.com/news/2011-01-23/gaza-flotilla-raid-was-legal-under-international-law-israeli-panel-says.html)> (30 March 2011).
11. For example see UN Security Council resolutions 661 and 665.
12. For examples, see Bruce A Elleman and SCM Paine (eds), *Naval Blockades and Seapower: Strategies and Counter-strategies, 1805-2005*, Routledge, London, 2006, Part III.
13. Colombos, *The International Law of the Sea*, p. 720.



## Conclusion

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Given the character of its seaborne trade - that is, carried overwhelmingly by foreign flags - Australia and its enforcement agencies are severely constrained by international law in responding to attacks against Australian seagoing trade in peacetime by criminals or unconventional forces such as terrorist groups; unless universal jurisdiction applies in the case of piracy. There seem to exist two basic options to overcome this state of affairs: encouraging ship owners engaged in Australian trade to re-flag their vessels to Australia or cooperation with the flag state.

The first option is a highly unlikely scenario. Ship owners register their vessels with flags of convenience states primarily for commercial reasons. There seems to be no obvious advantage for them to consider re-flagging to Australia, unless constant protection was deemed necessary in a wartime scenario, such as occurred with Kuwait oil tankers during the so-called 'tanker war' period of the Iran-Iraq War. Also, in any such scenario, it is more likely that ship owners would re-flag to their own states or to a major sea power such as the United States. This is especially the case with Australia's large Northeast Asian trading partners, where nationalist sentiments would likely require greater national control over their respective shipping interests. It should be noted that Chinese policy already exists to increase the proportion of their trade carried in Chinese-flagged vessels, especially their oil import trade.

The second option seems more feasible. Cooperation with flag states can occur either on an *ad hoc* basis or by formal agreement, such as in the American examples cited in Chapter 2. Because third party cooperation with flag states is already permissible under international law, the case has yet to be made that Australia needs dedicated bilateral ship boarding arrangements with specific flag states. Most major flags are likely to be cooperative in the case of a major threat to a ship flying their flag. There seems to be no compelling case for Australia to pursue formal agreements unless the threat environment changes significantly for the worse. The question also needs to be posed as to whether Australia would necessarily welcome the responsibility of wider jurisdiction over larger numbers of vessels, and the potential additional attendant costs that this might impose.

A final point worth making is that it is important not to overstate the threat to international shipping or more specifically, to Australia's seaborne trade. It is difficult to envisage peacetime scenarios that would significantly alter this situation. It should also be noted that hypothetical attacks against shipping in the sea lanes to Australia's north, insofar as such attacks might occur within the archipelagic waters of either Indonesia or the Philippines, also would require the state in question to agree to any outside assistance; as archipelagic waters lie within the sovereignty of the coastal state. More plausible threats such as a Chinese blockade of Taiwan or an Iranian attempt to block the Strait of Hormuz obviously involve the actions of state actors, and raise an entirely different set of political and strategic considerations; and potentially in such situations the laws of war at sea would apply.



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