THE LAW OF CONTEMPORARY SEA PIRACY

John Kavanagh*

INTRODUCTION

Although the word "pirate" sometimes elicits images of romanticism, the reality is quite different. As Professor Barry Dubner described:[1]

> The word piracy has been applied to acts of murder, robbery, plunder, rape and other villainous deeds and which have transpired over centuries of mankind's history.

The contemporary pirate is more likely to infringe copyright than attack ships. Piracy is now used to describe the illegal duplication of intellectual property such as music, books or software. This is in contrast to the sea pirate who had been "traditionally regarded as an enemy of the human race *(hostis humanis generis)*".[2] One reason for the new application of the term "pirate" is a widespread belief that the word is otherwise obsolete. The swashbuckling pirate has passed into legend and so when one refers to a contemporary act of "piracy", there is often little doubt that the reference is to copyright infringement.

But the sea pirate is not dead. In 1992 the International Maritime Bureau, a subsidiary of the International Chamber of Commerce, set up the Regional Piracy Centre ("RPC") in Kuala Lumpur to receive reports of pirate attacks on merchant shipping. This was in response to an increase in pirate attacks throughout South East Asia[3] where there were 506 attacks on its high seas in 1991-1996. A typical pirate attack was recently described as follows:

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* DAppSc (Nautical Science), LLB (Hons).

[1] Dubner BH, The Law of International Sea Piracy (1980, Martinus Nijhoff, The Hague) 1; Dubner, "The law of international sea piracy" (1978-1979) 11 New York University Journal of International Law and Politics 471.

[2] Dubner BH, The Law of International Sea Piracy (1980, Martinus Nijhoff, The Hague) 1 at 42.

[3] Chalk P, Grey Area Phenomena in South East Asia: Piracy, Drug Trafficking and Political Terrorism (1997, Australian National University, Canberra) 27. In this context, South East Asia means the region comprising Indonesia, Thailand, Malaysia, Philippines, Cambodia, Burma, Singapore, Hong Kong, the South China Sea, the Straits of Malacca and their adjoining waters.

> [A] small powerboat will speed up behind a merchant vessel in the middle of the night. The pirates will then board, using grappling irons. They tie up the captain, empty the safe, sweep the ship of portable valuables and are gone before an alarm can be raised.[4]

The focus of much of the writings on the law of piracy has been directed at expanding the law to counter the development of the terrorist attack against ships.[5] Implicit in these writings is the assumption that traditional piracy has become extinct and that for the law of piracy to remain meaningful, it needs to adapt to new forms of criminal and terrorist activity against ships. As Professor Dubner notes:

> The reader should be aware of the fact that the dated 1958 conventional articles [on piracy][6] may be considered as moot when applied to the conditions of today. Aside from the few legal publicists who discuss the possibility of updating the articles, most international jurists and states consider the matter of "traditional" piracy a dead issue. The only reason it is a dead issue is because nothing is being done to update the 1958 conventional articles to apply to incidents of alleged terrorism on the seas.[7]

But the statistics from the RPC indicate that traditional piracy is alive and well. In 1997, there were more than 229 pirate attacks on the high seas reported worldwide, with 51 seamen killed, 30 injured and 412 taken hostage.[8] South East Asia is reported as being the most "pirate-prone" region in the world.[9]

Whilst it is still true to say that "among the thousands of ships plying the sea-lanes every day, only a small percentage of them are actually attacked

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[4] "Those in peril on the sea", The Economist, 9 August 1997 at 40.

[5] For example see Dubner BH, The Law of International Sea Piracy (1980, Martinus Nijhoff, The Hague); Alexander, "Maritime terrorism and legal responses" (1991) 19 Denver Journal of International Law and Policy 529.

[6] They have been reproduced in the 1982 Convention on the Law of the Sea.

[7] Dubner BH, The Law of International Sea Piracy (1980, Martinus Nijhoff, The Hague) 69.

[8] Regional Piracy Centre, 1997 Piracy Annual Report (1997, International Maritime Bureau, Kuala Lumpur).

[9] Chalk P, Grey Area Phenomena in South East Asia: Piracy, Drug Trafficking and Political Terrorism (1997, Australian National University, Canberra) 28.

by pirates",[10] the threat of pirate attack cannot be idly dismissed. Although the Australian fleet is tiny by world standards with only 27 vessels making overseas voyages in 1996, five Australian ships have been attacked in the past decade.[11] As Australia becomes increasingly engaged with Asian trading partners, it is likely that many Australian ships will experience some act of piracy.

This article will examine the international law and Australian law with respect to piracy and assess its adequacy to deal with the traditional act of piracy that occurs today. The sources of the law and the relationship between municipal law and international law will be examined. Finally, recommendations will be made on the improvement of the existing law.

HISTORICAL BACKGROUND

The word "pirate" is derived from the Greek *"peirata"*[12] and the Latin *"pirata"*.[13] In the beginning, the word had a "good and honourable sense, and signified a maritime knight, and an admiral or commander at sea".[14] But over time, the word developed a darker meaning and came to refer to sea rovers or sea robbers. According to Lord Coke, the word is "fetched from...a transuendo mare, of roving upon the sea; and therefore in English a pirate is called a rover and robber on the sea".[15] It is this sense of the word that has survived to the present day.

The origin of piracy as a criminal offence in English law lies in the 1536 Acte for the Punysshement of Pyrotes and Robbers of the Sea. The act gave authority for those holding the King's commission to judge the following:[16]

> All treasons felonyes robberies murders and confederacies, here-after to be comytted in or uppon the see, or in any other havyn ryve creke or

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[10] Carpenter WM and anor, "Maritime piracy in Asia" in Carpenter WM and anor (eds), Asian Security Handbook: An Assessment of Political Security Issues in the Asia-Pacific Region (1996, East Gate, New York) 79.

[11] Lewis, "Yo ho ho...and a very big gun", The Sydney Morning Herald, 12 April 1996 at 11.

[12] Rubin, "The law of piracy" (1982) 15 Denver Journal of International Law and Policy 177.

[13] Ibid.

[14] Bonnet's Trial (1718) 5 George I AD 1234-1237, (1718) 15 How St Tr 1231.

[15] Ibid.

[16] (1536) 28 Hen VIII c 15.

> place where the admyrall or admyralls have or pretende to have power auctorities or jurisdiction.

These special commissioners initially tried pirates exclusively, but the jurisdiction over piracy was eventually transferred intact to the ordinary criminal courts.[17]

It was an Elizabethan proclamation in 1569 that granted wider jurisdiction to the English courts to hear the offence of piracy. By placing "all pyrates and rovers upon the seas...out of her protection",[18] the Queen permitted pirates captured anywhere upon the seas to be returned to England for trial. This assertion of jurisdiction beyond English territory was to become a distinctive feature of the criminal admiralty jurisdiction.

DEFINITIONS

The Macquarie Dictionary[19] defines a pirate as one who robs or commits illegal violence at sea or on the shores of the sea. This definition, although simplistic, addresses the core elements of piracy. It is a crime that takes place at sea, and which has the elements of theft and violence. At common law, piracy is "an act of robbery or violence on the seas, not being an act of war, which if committed on land would be a felony".[20] This definition excludes the sea-borne attack against land based targets and acts of war. This therefore excludes from the offence of piracy acts that are committed by people such as privateers or other officially licensed but non-military persons.

The common law definition is designed to include criminal acts committed at sea by persons who are not authorised by a foreign state to so act. This definition includes the common law concept of intent. To commit a felony at common law, the accused must intend to commit the crime *(mens rea)* as well as perform the unlawful act *(actus reus).*[21] Thus, to be convicted of

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[17] Australian Law Reform Commission, Criminal Admiralty Jurisdiction and Prize (1990, Commonwealth of Australia, Canberra) 26.

[18] Marsden RG (ed), Documents Relating to Law and Custom of the Sea (1915, Spottiswood for the Navy Records Society, Colchester, Essex) Volume 49 at 224.

[19] 1981, Macquarie Library Pty Ltd, St Leonards, New South Wales.

[20] Rutherford L and anor (eds), Osborn's Concise Law Dictionary (1993, 8th edition, Sweet & Maxwell, London).

[21] Rush P, Criminal Law (1997, Butterworths, Sydney) 71.

piracy at common law, the pirate must have formed the intention to rob at sea as well as commit the act of robbing at sea. Further, both elements must be proven beyond reasonable doubt, which is the relevant criminal standard required at common law.

Besides the above, there is another instance which involves the take-over of a ship at sea by its passengers and/or crew. The Australian Law Reform Commission refers to this as "internal seizure",[22] more commonly labelled as "hijacking".[23] This kind of act may or may not fit the commonly accepted concept of piracy depending upon the purpose for which the vessel was seized. For example, if the purpose is to steal the ship and its cargo, or to appropriate the vessel for further piratical activities, there is little doubt that most people would consider the seizure as piracy. But if the purpose is a political statement as was the intention in the *Achille Lauro* hijacking,[24] the boundaries of piracy are less clear.

Then there is the case of escape by prisoners who are being transported by ship. Would this be an act of piracy if the prisoners take control of the ship and escape in it? This was in issue in *R v Walton et al*[25] *and R v Flanagan et al*[26] that involved the same incident of escape by 66 convicts. They were being transferred from Sydney to Norfolk Island on board the brig Wellington when they seized control of the vessel only 40 leagues from their destination. The convicts changed course and set sail for New Zealand where they were eventually recaptured. Throughout the hijacking, the convicts were careful not to harm the soldiers and seamen who became their captives and they also expressed their intention to return the brig and its cargo once they achieved liberty.

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[22] Australian Law Reform Commission, Criminal Admiralty Jurisdiction and Prize (1990, Commonwealth of Australia, Canberra) 46.

[23] For a discussion of the Achille Lauro hijacking incident and its context within the international law of piracy, see Alexander, "Maritime terrorism and legal responses", (1991) 19 Denver Journal of International Law and Policy 529. See also Hooke N, Maritime Casualties 1963-1996 (1997, second edition, Lloyds Publishing, London) 4; Shaw MN, International Law (1991, third edition, Cambridge University Press, Cambridge) 409, 418.

[24] Ibid.

[25] [1827] New South Wales Supreme Court 7. Such early 19th century cases were never published in a consolidated hard copy volume. They may be located at http://www.austlii.edu.au/au/special//nswsc/pre1900/index.html.

[26] [1827] New South Wales Supreme Court 8.

At the trial, the defence argued that the accused were being illegally transferred to the worst penal settlement in the country without having fresh convictions recorded against them. The court was unsympathetic and rejected this argument. As a result, most of the hijackers were convicted of the offence of piracy and five of them were sentenced to death by hanging. This occurred despite irregularities in their transfer and the recognition that at least one of them could have exercised his legal and indefeasible right to obtain release from an unlawful imprisonment on board the ship. The cases therefore suggest that at common law, piracy may occur even when the taking is to escape unlawful custody.

Despite its breadth, the common law was found to be insufficient to combat piracy. In order to control more effectively the pirate menace, English statute law expanded considerably the acts that might be considered to be piratical. During the seventeenth and eighteenth centuries, several activities were outlawed as piracy. They included:

1. surrendering too easily to Turkish ships or any other pirates;[27]
2. trading with pirates;[28]
3. sending seducing messages or corrupting a mariner into yielding their ship or cargo;[29]
4. boarding a ship from another ship and destroying cargo or throwing it overboard;[30] and
5. carrying, importing or confining slaves on board ship.[31]

The legislation confined the law on piracy to the "jurisdiction of the Admiral". This was the authority formerly exercised by the ancient English Court of Admiralty[32] which had jurisdiction over offences committed by anyone on British ships, to British subjects, anywhere on the high seas.[33] At the time, the high seas regime was uncomplicated by the concept of territorial waters. In fact, it extended from the low water mark of British territory to wherever the tide still flowed along the coast of a foreign

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[27] 1670 Piracy Act (UK) 22 and 23 Car II c 11.
[28] 1721 Piracy Act (UK) 8 Geo II c 30.
[29] 1698 Piracy Act (UK) ii Wm III c 7.
[30] 1721 Piracy Act (UK) 8 Geo II c 30.
[31] 1824 Slave Trade Act (UK) 5 Geo IV c 113 section 9.
[32] Australian Law Reform Commission, Criminal Admiralty Jurisdiction and Prize (1990, Commonwealth of Australia, Canberra) 7.
[33] The Queen v Bull (1974) 131 Commonwealth Law Reports 203.

country.[34] Thus, the reach of English law extended to British ships and British subjects in foreign waters, up navigable rivers to the first bridge, and wherever "great ships" sailed.[35]

At the time, a British ship was considered to be a "floating island" that belonged to Britain, where British law prevailed and the ship was akin to the "Isle of Wight".[36] This provided the basis for the state's jurisdictional claim over the matter. However, the following is a more acceptable basis:[37]

> At common law a British ship fell under the protection of the sovereign; those on board her were within the King's peace and subject to the criminal law by which the King's peace was preserved.

The admiralty jurisdiction was therefore geographically wide and extended to foreign nationals on British ships.

In *R v Anderson,*[38] the accused, an American seaman, served on board a Canadian vessel with registration in London. He was charged with man-slaughter that occurred during a voyage to Bordeaux, on the River Garonne some 90 miles from the open sea. The court held that admiralty jurisdiction extended to this place, despite French territorial jurisdiction and the foreign nationality of the accused. Bovill CJ stated:[39]

> The place where the vessel was lying was in a navigable river, in a broad part of it below all bridges, and at a point where the tide ebbs and flows and where great ships lie and hover. What difference is there between such a place and the high seas?

But did admiralty jurisdiction extend to foreign ships? Prior to the enactment of the 1878 Territorial Waters Jurisdiction Act (UK), the answer was in the negative. In *The Franconia,*[40] a German national was indicted

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[34] The Tolten [1946] Probate 135, 154 per Scott LJ.
[35] R v Allen 1 Mood CC 494.
[36] R v Anderson (1868) LR 1 CCR 161.
[37] Oteri v R (1976) 51 Australian Law Journal Reports 122, 124.
[38] (1868) LR 1 CCR 161.
[39] Ibid at 167 per Bovill CJ.
[40] R v Keyn "The Franconia" (1876) 2 Exchequer Division 63.

for manslaughter. The accused was the master of a foreign ship involved in a collision with a British ship within three miles of England's shore.[41] The British ship sank and a woman passenger drowned. It was held by a bare majority (7-6) that the Central Criminal Court had no jurisdiction because the offence did not occur on a British ship and the criminal law did not extend below the low water mark. Responding to this decision, the Parliament at Westminster enacted the 1878 Territorial Waters Jurisdiction Act. This extended the jurisdiction of the Admiral to include indictable offences committed on board foreign ships within the territorial sea.

In international law, the law of piracy occupies a special place. It is one of those rare occasions when states set aside the normal rules on state jurisdiction, to allow a pirate to be punished by domestic law when piracy is committed on the high seas, regardless of the nationality of the pirate or the victim. This is because under international law, piracy is an international crime and a pirate is an enemy of the entire human race. And being the enemy of all, the pirate may be punished by all.[42]

It is this "common enemy" idea which underpins the universality principle of jurisdiction, giving every state the right to prosecute an offender who commits an "international crime". The nationality of the offender is not important. Only two requirements need to be met, namely, (1) that the offence fell within the universality principle; and (2) the offender is found in the territory of the prosecuting state.[43]

SOURCES OF THE LAW

In order to appreciate the international law that applies to piracy, it is necessary to look at the sources of the law, both modern and ancient, including the role the pirate has played throughout history. It is an oft-repeated basis for the international law of piracy that the pirate is *hostis humanis generis,* or an enemy of the human race. It has been explained as:

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[41] Three miles was the commonly accepted limit for the territorial sea prior to the adoption of the 12-mile limit in the 1982 Law of the Sea Convention. For discussion on the history of the territorial sea and its development in international law, see Shearer IA, Starke's International Law (1994, 11th edition, Butterworths, London) 247 et seq.

[42] United States v Smith (1820) 5 Wheat (US) 153, 7-8.

[43] Generally see Bassiouni A, Treatise on International Criminal Law (1973, Charles C Thomas, Springfield Illinois); Dubner BH, The Law of International Sea Piracy (1980, Martinus Nijhoff, The Hague) 34.

> [a]n ancient verbal condemnation of the conduct of a pirate and a figurative epitome of the common war against him. Its origin was not an attempt to delimit the offence.[44]

This appears to be an over-simplification and the origin of the universality principle may be more recent than first thought.

The phrase *hostis humanis generis* is credited to the Roman lawyer Cicero who used the concept to deny the existence of any legal obligation to keep an oath made to "pirates". This was based on the ground that by being the enemies of all communities, the pirate was not subject to the law of the universal society that made oaths binding.[45] Whilst the validity of this opinion has been criticised, later scholars have seized upon the notion of the "common enemy" to found the extension of jurisdiction considered necessary to combat piracy.

But the concept of the "pirate as the enemy of mankind" as the basis for the universality principle may be erroneous. In Roman law, the sea-robber *(padrones)* whose way of life revolved around raiding ships at sea was punished as a common criminal. The sea-robber was distinguished from a society that pursued the following path *(pirata)*, namely:[46]

> an economic and political course which accepted the legitimacy of seizing the goods and persons of strangers without the religious and formal ceremonies the Romans felt were legally and religiously necessary to begin a just war. Nonetheless, the Romans treated them as capable of going to "war" – indeed as in a permanent state of "war" with all people except those with whom they had concluded an alliance.

The willingness of these societies to attack without warning was an obstacle to trade and breached the world order under Roman "hegemony". Hence, in Cicero's opinion, one did not have to keep one's word to these societies, nor did property taken by these pirates change title from its original owners if later re-captured or sold. Thus, it was the "piratical" society, not the sea-robber, that attracted the condemnation of permanent war against it and that was considered the enemy of mankind.

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[44] Ibid at 65.
[45] Rubin, "The Law of Piracy" (1982) 15 Denver Journal of International Law and Policy 185.
[46] Ibid at 187.

The distinction between the sea-robber and the society of pirates survived until the Renaissance. It was Hugo Grotius, the acknowledged father of modern international law, who finally transferred the label of piracy from the raiding community to the outlaw.[47] Grotius asserted as follows:[48]

> [T]he term [pirate] properly fits only those who are banded together for wrongdoing but does not include societies formed for other reasons even if also committing unjust acts.

The transfer became complete with Cicero's concept of the pirate as the enemy of human kind, and this enabled a contemporary of Grotius to state the following:[49]

> To Pirates and wild beasts no territory offers safety because Pirates are the enemies of all men.

However, this confused the earlier distinction between the raiding society and the outlaw. Thus, the modern belief that the individual pirate has always been considered as humanity's common enemy is erroneous, despite its intuitive appeal.

Rubin argues that the universality principle as it applies to piracy has English law as its foundation, not Roman law or international practice.[50] In 1569, Queen Elizabeth had issued the following proclamation:[51]

> The Queen's Majesty...hath declared and denounced all pyrates and rovers upon the seas to be out of her protection, and lawfully to be by any person taken, punished, and suppressed with extremity.

Prior to this, ships suspected of piracy could only be arrested in English ports and strict attention had to be paid to the legal formalities. The Queen's declaration was the first assertion by a state that its municipal law would apply to all pirates, regardless of the nationality of the pirate and of the victim, or the location of the offence. It is likely that English law was

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[47] Ibid at 204.
[48] Ibid.
[49] Ibid at 201.
[50] Ibid at 221.
[51] Marsden RG (ed), Documents Relating to Law and Custom of the Sea (1915, Spottiswood for the Navy Records Society, Colchester, Essex) Volume 49 at 224.

the foundation from which the universality principle developed with respect to piracy, not Cicero's *hostis humanis generis* concept.

The 1982 Convention on the Law of the Sea provides the latest position on piracy in international law and adopts the definition of piracy that is found in the 1958 Geneva Convention on the High Seas.[52] It is a narrow definition, which causes one to ponder if its acceptance was to facilitate expediency and consensus among the states party to the Convention.

Article 101 of the 1982 Convention states that any of the following acts may be an act of piracy:

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

A number of observations may be made about this definition. These will be dealt with separately below.

First, the definition limits piracy to acts committed for "private ends" as noted in Article 101(a). It does not include the concept of "intent", as in the common law requirement for the offence[53] and excludes acts that are not motivated for personal satisfaction. As a result, robbery, kidnap, murder or destruction of property for monetary gain, revenge or other personal

[52] At the Conference that adopted this Convention, one of the main difficulties faced by the delegates was agreement on an acceptable definition of piracy when there were in existence a variety of municipal legal traditions on the law of piracy.
[53] Alexander, "Maritime terrorism and legal responses" (1991) 19 Denver Journal of International Law and Policy 529, 538.

reasons would be piracy. But an act claimed by a non-military belligerent, such as a privateer, or an act of political terrorism, such as the *Achille Lauro* incident,[54] would not.

This limitation has been heavily criticised by writers concerned to meet the threat posed by terrorist activity. Professor Dubner wrote:[55]

> There is no question that acts of terrorism under modern conditions would constitute piracy under traditional and conventional law if the [private ends] limitation were not present.

However, part of the criticism of this definition stems from the widely held belief that excluding political acts from the international law of piracy would render the law redundant. As stated by Professor Dubner:[56]

> The problem, of course, is that although traditional methods of piracy have long since died on the high seas (as opposed to territorial waters), new methods and reasons for committing piratical and terrorist activities have taken place of the old.

This statement is erroneous in light of the reported incidents of piracy, and the better approach to terrorism and other political acts would be to formulate a new offence, rather than modifying the law of piracy. In fact, this was the approach that was adopted with regard to the hijacking of aircraft. The 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft directly addresses this issue. The maritime world eventually followed suit and in 1988, a Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation was adopted under the auspices of the International Maritime Organisation.[57] This convention addresses the issues of maritime hijacking and other crimes that place the safe navigation of a ship in danger. Thus, the "private ends" limitation may not prove an obstacle to addressing "traditional" piracy, such as that which occurs in South East Asia.

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[54] Refer note 22.

[55] Dubner BH, The Law of International Sea Piracy (1980, Martinus Nijhoff, The Hague) 62.

[56] Ibid at 85.

[57] Australian Law Reform Commission, Criminal Admiralty Jurisdiction and Prize (1990, Australian Law Reform Commission, Canberra) 55.

The second observation is that piracy in international law is committed only on the "high seas" as found in Article 101(a), and not in territorial waters. Article 3 of the 1982 Convention sets a uniform 12 mile territorial sea limit and Article 1 of the 1958 Convention on the High Seas defines the "high seas" as all parts of the sea that are not included in the territorial sea. Thus, if piracy occurs within the 12 mile territorial limit, the act is subject to the state's municipal law, akin to any other crime that is committed in that state. This places a serious limitation on the effectiveness of the international law of piracy because a state may not have the legislation that is required to deal with piracy; or if the state has such legislation, the state may be unable or unwilling to enforce it.[58]

This was the case in the piracy incident involving the *Erria Inge*.[59] The *Erria Inge* was an Australian-owned ship that was registered in Cyprus. It was commandeered by pirates in 1991 from the Indian port of Bombay and later broken up for scrap in China. Despite convincing evidence that the original theft, subsequent control of the vessel and sale to the scrap-yard was masterminded from Singapore, the Singaporean authorities had no jurisdiction under the international law of piracy. The original piracy had occurred in territorial waters but the special jurisdiction only covered piracy on the high seas. The ship never returned to India, so the Indian authorities could do little and Cyprus, as the flag state, could not prosecute, as the pirates were never caught.

WHO IS A PIRATE?

Under Article 101(a), only the occupants of one ship who commit an act of piracy against the occupants of another may be labelled a pirate. This element precludes the acts of passengers or crew against their own vessel. With respect to terrorist acts as noted above, this deficiency has been partly addressed in the 1988 Convention on the Safety of Maritime Navigation. But the seizure of a vessel by persons already on board, such as in the *Achille Lauro* incident, or on the brig *Wellington,*[60] was "hijacking" and not piracy within the definition of international law.

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[58] Dubner BH, The Law of International Sea Piracy (1980, Martinus Nijhoff, The Hague) 151.

[59] Russell, "Piracy and murder: the facts of plunder" 30 October 1993, The Sydney Morning Herald at 1A, 4A.

[60] R v Walton et al [1827] New South Wales Supreme Court 7; R v Flanagan et al [1827] New South Wales Supreme Court 8.

Article 101(a)(ii) was included as a residual provision, to grant special jurisdiction for acts of piracy committed in areas outside the jurisdiction of all states but which does not form part of the high seas. This refers to territory that is "terra nullius" or territory over which no state has sovereignty. Although the practical usefulness of such a provision was recognised in 1958 as diminishing,[61] it is interesting to note in that it retains the ancient concept of marauders descending from the sea in the international law of piracy.

A final observation is that some concession has been made for modern intercourse between states, and this specifically refers to the recognition of air piracy in international law. But most aerial hijacking have been for political purposes, which means that the "private ends" limitation in the definition would preclude such political acts from falling within its scope. Furthermore, the threat of pirates using aircraft to board ships or other aircraft has not transferred itself to reality to date.

THE PIRACY PROVISIONS

The framework of the law of piracy is contained in Articles 100-107 of the 1982 Convention on the Law of the Sea. These articles replicate Articles 14-21 of the 1958 Convention, with minor amendments.

Article 100 is entitled "Duty to co-operate in the repression of piracy" and states the following:

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

Prima facie, this article expresses a positive duty on all states to suppress piracy actively, but appearances may be misleading. It is apparent from the deliberations of the delegates at the 1982 United Nations Conference on the Law of the Sea that Article 100 (including its predecessor, Article 13 of the 1958 Convention) lays down a principle only. As a statement of intent only, a state's non-compliance with the provision would not constitute a

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[61] See Dubner, "The law of international law piracy" (1978-1979) 11 New York University Journal of International Law and Politics 471.

breach of international law.[62] In other words, a state could avoid the prosecution of a pirate who is within its jurisdiction or avoid the enactment of legislation to provide for prosecution.

As a result, China is not in breach of the Convention in spite of not fulfilling the spirit of Article 100 in a number of well-reported cases. Pirates in international waters off Thailand's coast captured for example, the *"Anna Sierra"*, a Cypriot registered ship, in 1995.[63] The crew was unceremoniously pitched overboard, the ship renamed the Artic Sea [sic] and sailed to the Chinese port of Behai. At the request of Cyprus, the Chinese authorities detained the vessel and the "crew", but no prosecution of the pirates ever occurred. After 18 months of uncertainty, the pirates were repatriated to Indonesia, with the Chinese authorities asserting that the responsibility for prosecution lay with the flag state, Cyprus.

Similarly, in the more recent *"Petro Ranger"* incident, although the pirates had held the crew hostage and stole the tanker's cargo of kerosene worth $1.5 million, the Chinese authorities had released the pirates before the crew (including their Australian Captain, Kenneth Blythe) was allowed to return home.[64] This was despite the clear wording in Article 102, which states:

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

Consequently, "piratical" conduct emanating from a government vessel can never amount to piracy in international law, unless there is a mutiny on board the vessel. An example is the alleged piracy in the *"Hye Mieko"* incident in 1995. This ship, bound for Manila with a cargo of cigarettes worth US$2 million, was intercepted by what appeared to be a Chinese

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[62] Dubner BH, The Law of International Sea Piracy (1980, Martinus Nijhoff, The Hague) 108.

[63] See Redmond, "Catching modern pirates: International Maritime Bureau leads the fight against this growing menace" (1997) 45 Law and Order 55; Grissim, "Sea Wolves Feasting: The hijacking of the Anna Sierra" May 1997, The World Paper.

[64] "Captain Won't Leave Ship", 10 May 1998, The Sydney Morning Herald at 41.

customs cutter. It then sailed for more than 1,600 miles through international waters to the Chinese port of Shanwei.[65] Although the Chinese government denied any knowledge of the cutter's activities, the *Hye Mieko* was impounded for "smuggling", and the cargo sold.

An interesting issue arises here. If some states are actively involved in piracy, as is suggested by this incident,[66] can a private enterprise recover any loss from the government concerned? If an Australian interest is involved, it is unlikely to happen. Section 9 of the 1985 (Cth) Foreign States Immunities Act provides a general immunity from civil jurisdiction to foreign governments. Although there are exceptions, such as actions *in rem* in the admiralty jurisdiction under section 18, no provision applies to piracy on the high seas or in foreign territorial waters.

Article 103 defines a ship or aircraft as a pirate ship or aircraft if:

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

Article 103 is interesting. Under this provision, a ship may be considered a pirate vessel without having committed piracy; all that is required is the intention to act. This is important when considering when a pirate vessel may be lawfully seized under Article 105. The commentary to Article 103 specifies that a ship remains a pirate ship when the persons in control have the intention to commit piracy or have committed the acts of piracy.[67]

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[65] Gibson, "Modern buccaneers with machine guns instead of cutlasses are once again the scourge of the oceans" The Times (London), 18 August 1997 in Volume 150 Number 7.

[66] See Chalk P, Grey Area Phenomena in South East Asia: Piracy, Drug Trafficking and Political Terrorism (1997, Australian National University, Canberra); Carpenter and anor, "Maritime piracy in Asia" in Carpenter WM and anor (eds), Asian Security Handbook: An Assessment of Political Security Issues in the Asia-Pacific Region (1996, East Gate, New York).

[67] (1956) 2 Yearbook International Law Commission 283; Dubner BH, The Law of International Sea Piracy (1980, Martinus Nijhoff, The Hague) 118.

Article 104 deals with the nationality of the pirate ship as follows:

> A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The law of the state from which such nationality was derived determines the retention or loss of nationality.

As has already been seen, the ship's or the pirate's nationality is of little consequence to the exercise of universal jurisdiction. As stated by the Harvard Working Group:[68]

> A pirate ship may have a nationality and keep it even after it has committed acts of piracy, but this nationality would make no difference, and would not affect the exercise of measures of suppression.

Article 105 specifies when a pirate vessel may be seized and states:

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

This article forms the operative element of the universal jurisdiction. It empowers a state to seize pirates on the high seas and subjects them to that state's municipal law. However, it should be noted that the article does not empower a state to seize pirates in the territorial waters of another state.

Article 106 imposes a liability on a seizing state to the flag state if the seizure is unwarranted. It provides:

> Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall

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[68] Harvard Research in International Law, Draft Convention on Piracy with Comments (1932) 26 American Journal of International Law 749, 830; Dubner BH, The Law of International Sea Piracy (1980, Martinus Nijhoff, The Hague) 76.

> be liable to the State the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure.

The International Law Commission noted in a commentary to the draft article that this penalty was appropriate in order to prevent the right of seizure in article 105 from being abused.[69]

The test of whether a seizure is warranted appears to be objective and a difficult one to satisfy. Whether there were "adequate grounds" could only be determined after the event and in light of whether the vessel seized was actually a pirate vessel or not. In contrast, a subjective test would depend on whether the seizure was prompted by a "reasonable belief" that the vessel was a pirate vessel. The liability for wrongful seizure is to the state and not to the commercial interests concerned. However, such a penalty may no longer be appropriate today when national flag shipping is declining and flags of convenience such as Liberia, Cyprus and Honduras have become more common.

Finally, Article 107 deals with the vessels that are authorised to seize pirates. It provides:

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

This article is self-explanatory, but the commentary by the International Law Commission draws attention to the possibility of the capture of pirates by the crew of a merchant ship in the exercise of their right of self-defence. The article clearly does not apply to this situation. However, if the capture is lawful in nature, it would be a seizure that falls outside the meaning of Article 107.[70]

Generally speaking, the 1982 Convention sets out admirably the relevant rights and liabilities of coastal states on the subject of pirates. The articles specify when, where and how pirates may be seized and the liability to

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[69] (1956) 2 Yearbook International Law Commission 283; Dubner BH, The Law of International Sea Piracy (1980, Martinus Nijhoff, The Hague) 120.
[70] Ibid at 119.

other states when seizure is unwarranted. However, the whole orientation of the articles is focussed on state rights and is not primarily concerned with the pirate's capture and prosecution. This is because at the negotiation and drafting stages of the convention, the main concern of the delegates to the international conference was to protect their state's interests.

Indeed, it has often been argued that the rights and liabilities of states are the only subjects with which international law is concerned.[71] But this construction of international law is strained when dealing with the subject of piracy. The 1982 Convention clearly defines a criminal act that is to apply directly to the individual.[72] To claim that the articles with respect to piracy cast a duty on states is erroneous because a state cannot commit piracy (Article 102), nor is a state bound to punish a pirate (Article 101).

It should also be observed that the piracy articles in the 1982 Convention do not create a new international offence. The international law of piracy only defines the circumstances in which the extraordinary jurisdiction to seize and punish pirates may be exercised. There is no penalty provided for the offence, nor is there a tribunal empowered to hear a charge of piracy *jure gentium.* As the Harvard Research Group concluded:[73]

> The effect of the convention would be like the effect of the traditional law of nations – the draft convention defines only the jurisdiction (the powers and rights) and the duties of the several states *inter se,* leaving to each state the decision how and how far through its own law it will exercise its powers and rights.

Thus, the limits of the international law of piracy have been neatly outlined and the acts of piracy defined in the 1982 Convention permit a state to apply its municipal law to the offenders by virtue of the universality principle. But this does not mean that a coastal state can or will apply its municipal law to an act of piracy. This has been amply demonstrated in the *Anna Sierra* and *Petro Ranger* incidents.

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[71] For a more detailed discussion of the individual as a subject of international law, see Shearer IA, Starke's International Law (1994, 11th edition, Butterworths, London) 51 et seq.

[72] Ibid.

[73] Harvard Research in International Law, Draft Convention on Piracy with Comments (1932) 26 American Journal of International Law 749, 760; Dubner BH, The Law of International Sea Piracy (1980, Martinus Nijhoff, The Hague) 44.

HOT PURSUIT

Article 111 of the 1982 Convention permits a state to pursue a fugitive on its own territorial waters and on the high seas, so long as the pursuit is continuous and up to the limits of another state's territorial waters.[74] At that point, unless there is permission from the other state, the pursuit must cease.[75] This means that a state's law enforcement agency may pursue a pirate, but the pursuit must stop once the pirate enters the territory of another state. This is a serious impediment in the enforcement of the piracy jurisdiction granted by the 1982 Convention. Chalk records an instance of a pirate craft that had been preying on vessels in the vicinity of Sabah, Malaysia, in 1992.[76] The Malaysian marine police gave chase, but had to withdraw the pursuit when the suspect vessel entered Philippine waters as there was no prior agreement between Malaysia and the Philippines for hot pursuit to continue.

INTERNATIONAL TREATIES

The international law of piracy does not operate in isolation. It operates alongside many other bilateral and multilateral international treaties that have an impact on how the law operates. Examples are the agreements between states on hot pursuit in territorial waters. The subject of such treaties may also be entirely removed from piracy, such as oil exploration or extradition. Australia has entered into many such treaties and their effect on the law of piracy is examined below.

In December 1989, Australia and Indonesia signed a bilateral treaty to form a zone of cooperation between East Timor and Northern Australia.[77] The main purpose of the agreement was to facilitate the joint exploration for oil and gas reserves in the area. The treaty created a joint authority to oversee petroleum exploration and exploitation, and dealt with other issues such as

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[74] For a comprehensive discussion of hot pursuit, see Poulantzas NM, The Right to Hot Pursuit in International Law (1969, AW Sijthoff, Leyden).

[75] Article 111(3).

[76] Chalk P, Grey Area Phenomena in South East Asia: Piracy, Drug Trafficking and Political Terrorism (1997, Australian National University, Canberra) 37-8.

[77] Treaty between Australia and the Republic of Indonesia on the Zone of Co-operation in an area between the Indonesian Province of East Timor and Northern Australia, Timor Sea, 11 December 1989, 1991 Australian Treaty Series No 9. This treaty entered into force on 9 February 1991.

surveillance, security, search and rescue, hydrographic surveys, scientific research and marine pollution. A secondary part of the treaty referred to the criminal jurisdiction that applied in the zone.

Article 27 provided for the jurisdiction of criminal law in the zone, for acts "connected with or arising out of petroleum exploration and exploitation". Jurisdiction was to depend on the permanent residency of the offender, unless the offender was a national of the other state. For example, if the offender was resident in Indonesia but had Australian nationality, Australian law would apply in such a case. However, if the offender was a resident or national of neither state, then both states had jurisdiction and the law to apply would be resolved by consultation between them, with reference to victim's nationality and the interests of the states. Article 27 also provided that the law of the flag state applied to vessels in the zone (including seismic and exploration vessels) and to aircraft overflying the zone.

The Timor Gap Treaty became part of Australian law by the enactment of the 1990 Petroleum (Australia-Indonesia Zone Of Cooperation) Act (Cth). Section 11 specifies that the law to apply in the zone is that of the Northern Territory. The validity of the Treaty and the act was challenged in *Horta v Commonwealth,*[78] on the ground that the Treaty had ignored the rights of the East Timorese people. But the High Court of Australia, in a unanimous ruling, found that the act was a valid exercise of the external affairs power under section 51(xxix) of the Australian Constitution. As a result, the court considered it unnecessary and inappropriate to decide whether the treaty itself was invalid.

In order to fully implement this offshore jurisdiction, section 9A and 17A were inserted in the 1979 Crimes at Sea Act 1979 (Cth). Section 9A(1) provided that the criminal law of the Northern Territory applied in the zone to acts committed in connection with the petroleum industry. However, section 9A(2) provided that the section did not apply to acts committed on or from ships. Section 17A provided that prisoners who were subject to Indonesian jurisdiction by operation of the 1990 Petroleum (Australia-Indonesia Zone Of Cooperation) Act (Cth) could be transported through Australian territory and Australia had to provide assistance to facilitate the transfer.

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[78] (1994) 181 Commonwealth Law Reports 183.

The effect of this Treaty in relation to piracy is untested. The international law of piracy grants jurisdiction to both Australia and Indonesia for an act of piracy that occurs on the high seas between the two states, regardless of the nationality of the offenders or that of the victims. However, if the piratical act is committed against a vessel involved in the petroleum industry in the zone covered by the Treaty, the jurisdiction of each country would be determined by the nationality or residence of the perpetrators in accordance with Article 27. But section 9A(2) of the (1979) Crimes at Sea act 1979 (Cth) specifically exempts acts committed on or from ships from the effects of the zone treaty jurisdiction. On balance, it is unlikely that the Treaty would affect the "special jurisdiction" that is given to a state in international law to act if piracy is committed on the high seas.

In *Barton v Commonwealth,*[79] the High Court discussed the effect of the 1966 Extradition (Foreign States) Act (Cth) on an extradition request regarding two Australian citizens in Brazil. The court held that such requests under the act could only be made to a state with which Australia had an extradition treaty. In addition, the executive could make extradition requests to those states with which Australia had no treaty, but the request would be assessed according to the requested state's law. Accordingly, the court found that the request to Brazil was lawful despite the lack of a treaty, but that extradition could only proceed according to Brazilian law.

Australia is a party to 28 bilateral extradition treaties and today, extradition is mainly governed by the 1988 Extradition Act (Cth). Australia has also entered into international treaties with the Philippines and Indonesia[80] with respect to mutual assistance on criminal matters. These treaties provide for the states to assist each other in combating certain criminal activities and piracy is expressly included.

The assistance that may be provided includes the provision of documents, location of persons, execution of requests for search and seizure, location and forfeiture of the proceeds of crime, and any other assistance that may be rendered consistent with the treaty and the laws of the state concerned. Excluded from the treaties are requests for extradition, the execution of a criminal sentence and the transfer of a convict.

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[79] (1974) 131 Commonwealth Law Reports 471.

[80] See Treaty between Australia and The Republic of Indonesia on Mutual Assistance in Criminal Matters signed in Jakarta on 27 October 1995.

These treaties on mutual assistance on criminal matters are useful models for international cooperation in the fight against piracy. They encourage law enforcement agencies to cooperate and share information with each other especially when the crime is international in character. Like in international commerce where the criminals and their victims are spread over the globe, for example, cooperation would be ideal for the capture of pirates who could end up anywhere, thousands of miles away from the scene of the crime. Although Article 105 of the 1982 Convention on the Law of the Sea provides that law enforcement agencies and the courts of the seizing state have responsibility for dealing with piracy, most piracy today occurs in territorial waters.[81] But as Article 101 of the 1982 Convention makes clear, piracy is not an international offence when committed in the waters of a coastal state and in such a case, the municipal law of that state will apply. As stated succinctly by Oppenheim:[82]

> Piracy as an "international crime" can be committed in the open sea only. Piracy in territorial coastal waters has as little to do with international law and is characterised as any other robbery within the territory of a state.

It is worth noting that Professor Dubner had argued that the expansion of territorial seas claimed by coastal states, especially when combined with new sea regimes like the exclusive economic zone, would greatly reduce the area of ocean that is properly called the high seas.[83]

AUSTRALIAN MARITIME JURISDICTION

It was an accepted fiction that before British settlement, Australia "had no civilised inhabitants or settled law".[84] This fiction enabled the passage of the 1828 Australian Courts Act (UK), "which provided that all laws in force in England on 25 July 1828 were to apply in New South Wales and Van Diemen's Land."[85] Section 4 conferred jurisdiction over all "treasons, piracies, felonies, robberies, murders, conspiracies, and other offences"

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[81] See for example Vagg, "Rough seas: contemporary piracy in South East Asia" (1995) 35 British Journal of Criminology 63.
[82] Oppenheim LFL, International Law (1905, 2nd edition, Longmans, London) section 277; Dubner BH, The Law of International Sea Piracy (1980, Martinus Nijhoff, The Hague) 58.
[83] Generally see note 1.
[84] Coe v Commonwealth (1979) 24 Australian Law Reports 118.
[85] Hanks P, Constitutional Law in Australia (1991, Butterworths, Sydney) 1.

committed where the Admiral had jurisdiction (see above). Thus, the substantive law of piracy under English law could be tried in the Supreme Courts of New South Wales and Tasmania.

This jurisdiction was expanded with the passage of the 1849 Admiralty Offences (Colonial) Act (UK) which conferred admiralty jurisdiction on the criminal courts of the other states and Northern Territory. Australian courts also benefited from the expanded jurisdiction over foreign ships in territorial waters created by the 1878 Territorial Waters Jurisdiction Act (UK) in the wake of the decision in *The Franconia.*[86] The net effect was to empower Australian courts to try and convict criminals for the common law crime of piracy.

Admiralty jurisdiction was exercised in *R v Maddocks.*[87] In this case, Maddocks was the Master of a British ship, the *"Jessie"*, who "at a place situate in the Pacific Ocean" betrayed his trust as Master and "did turn pirate, and piratically and feloniously did run away with the said ship".[88] The jury convicted him. On appeal, the NSW Supreme Court also rejected his submission that the act took place outside the Admiral's jurisdiction. The law that was applied was English criminal law where the 1799 Offences at Sea Act (UK) provided that English criminal law applied to acts committed in the Admiral's jurisdiction. In the words of Barwick CJ in the *Bonser v La Macchia:*[89]

> The territorial waters [of the colonies] were thus the territorial waters of the Imperial Crown...Jurisdiction in and over them was never transferred or vested in the colonial governments. Indeed, as I have indicated, the Colonial Courts of Admiralty Act emphasized that it was not. The rights in the territorial waters were those of the Imperial Crown and the jurisdiction exercised in respect of those waters as such and by whomsoever exercised was the jurisdiction of the Admiral.

This led to the rather extraordinary position that a crime committed just off the Australian coast (in the jurisdiction of the Admiral) by an Australian citizen would be tried in an Australian Court under English criminal law. In

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[86] R v Keyn "The Franconia" (1876) 2 Exchequer Division 63.
[87] (1886) 2 Weekly Notes (New South Wales) 71.
[88] Ibid per Windeyer J.
[89] (1969) 122 Commonwealth Law Reports 177.

Oteri v R[90] the accused were fishermen who had stolen crayfish pots and tackle some 22 miles off the West Australian Coast. The accused disputed the West Australian court's admiralty jurisdiction but the Privy Council held that since their ship was a British ship, the court had jurisdiction by virtue of the 1849 Admiralty Offences (Colonial) Act (UK).

The case confirmed that the 1799 Offences at Sea Act (UK) was "ambulatory in effect". This meant that amendments to the criminal law made by the United Kingdom parliament would be included in the admiralty jurisdiction as exercised by Australian courts. Further, the Privy Council held that the court could impose sentences according to the 1874 Courts Colonial (Jurisdiction) Act (UK) as applied to Western Australia. As a result, if *Oteri v R*[91] were to be extended to the law of piracy, and if the piracy was committed in the admiralty jurisdiction, the English offence of piracy, as modified from time to time by the United Kingdom parliament, would be used in a prosecution in an Australian court.

The decision in *Oteri v R*[92] therefore called for law reform. It led to a review of Australian offshore criminal jurisdiction in cooperation with the Australian states and the Northern Territory. Their criminal law was consequently extended and applied to acts occurring at sea in certain circumstances under the 1979 Crimes at Sea Act (Cth) and the uniform Crimes (Offences at Sea) Acts of the Australian states and Northern Territory.[93] Australia retained responsibility for acts committed outside Australian territorial waters while the Australian states and the Northern Territory assumed responsibility for acts committed inside territorial waters and on intra-state voyages. As a federal statute that fell within Australia's external affairs power pursuant to section 51(xxix) of the Constitution, the

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[90] (1976) 51 Australian Law Journal Reports 122.
[91] Ibid.
[92] Ibid.
[93] They are the 1978 Crimes (Offences at Sea) Act (Vic); 1980 Crimes (Offences at Sea) Act (of NSW, WA and SA); 1978 Criminal Law (Offences at Sea) Act (NT); 1985 Offshore Waters (Application of Territory Laws) Act (NT); and 1985 Offshore Waters (Application of Territory Laws) (NT). Queensland has not enacted a similar act, preferring to rely upon section 14A of the 1899 Criminal Code (Qld) which extends Queensland's criminal jurisdiction to 200 miles offshore. The effectiveness of this provision was affirmed in R v Fritz (No 1), unreported, Queensland Supreme Court, 22 November 1984 per Ambrose J.

1979 statute repealed imperial enactments that were inconsistent with Australian legislation.[94]

Consequently, the 1979 Crimes at Sea Act (Cth), when read with the 1903 Judiciary Act (Cth), permits a state or territory court to exercise jurisdiction and apply its criminal law in circumstances that hitherto would have required the application of English criminal law. Jurisdiction is exercised in the following prescribed circumstances:

1. acts committed on Australian ships, not on an intra-state voyage, or in foreign waters;[95]
2. acts on board foreign ships outside any nations territorial waters, when the ship is bound for and enters an Australian port;[96] and
3. acts committed by Australian citizens on foreign ships outside Australian Territorial waters.[97]

Other prescribed circumstances include offences committed on foreign fishing vessels in Australia's declared Fishing Zone and other offences connected with exploration of the seabed outside territorial waters but within the "adjacent area".

The 1979 legislation goes beyond the limits of admiralty jurisdiction with respect to acts committed on foreign vessels. Where admiralty jurisdiction has been restricted to acts committed on foreign ships within territorial waters,[98] the legislation extends Australian jurisdiction over such ships beyond the territorial seas when they are bound for Australia. However, the legislation does not displace entirely the old imperial jurisdiction. For example, a crime committed on a British ship bound for New Zealand would be within admiralty jurisdiction and fall outside the legislation's ambit.[99] Such a case would be conducted according to English law if tried in an Australian court.

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[94] See 1931 Statute of Westminster (UK).
[95] 1979 Crimes at Sea Act (Cth) section 6.
[96] Ibid section 7. Note that a prosecution under this section requires the consent of the state that also has jurisdiction, unless the offence is piracy.
[97] Ibid section 8.
[98] 1878 Territorial Waters Jurisdiction Act (UK).
[99] Australian Law Reform Commission, Criminal Admiralty Jurisdiction and Prize (1990, Commonwealth of Australia, Canberra) 12.

The uniform legislation[100] of the Australian states and Northern Territory apply their own state criminal law to offences committed within the territorial sea adjacent to them and to Australian ships on intra-state voyages outside the coastal sea.[101] Jurisdiction over these offences is expressly granted to the relevant state and territory criminal courts by Section 9 of the uniform legislation. The reason is that the federal and state enactments acting together were intended to replace admiralty jurisdiction in Australia. They achieved this by granting jurisdiction to the state and territory courts to hear offences according to the relevant state or territory law in the prescribed circumstances.

In relation to piracy, the Australian states and territories (except Tasmania) have enacted their own laws.[102] Their laws re-create to a certain extent the common law of piracy as modified by various United Kingdom statutory amendments. For example, in Victoria the offence is extensive. It prohibits the common law offence of piracy[103] and statutory amendments provide for the offence of the yielding up of a ship to pirates,[104] bringing seducing messages[105] and trading with pirates.[106]

By the combined operation of the uniform Crimes at Sea and Crimes (Offences at Sea) legislation, acts of piracy committed on Australian ships, and by Australian citizens or otherwise have become covered.

PIRACY WITHIN AUSTRALIA

In theory, Australian state and territory laws are still relevant because it covers the incidence of piracy in inland waterways such as rivers and harbours. For example, section 70B(1)(a) of the 1958 Crimes Act (Vic) prohibits the committing of a piratical act and refers to the common law for the definition of "piracy". Section 70B(1)(b) incorporates many of the

[100] See note 93.
[101] 1979 Crimes at Sea Act (Cth) section 6.
[102] 1899 Criminal Code (Qld) sections 79-83; 1913 Criminal Code (WA) sections 76-80; 1958 Crimes Act (Vic) section 70A-D; 1935 Criminal Law Consolidation Act (SA) sections 206-211; 1902 Piracy Punishment Act (NSW); 1986 New South Wales Acts Ordinance (ACT) section 4 Schedule 1, Schedule 2 Part 3; 1983 Criminal Code Act (NT) sections 72-75.
[103] 1958 Crimes Act (Vic) section 70B(1)(a).
[104] Ibid section 70B(1)(b)(ii).
[105] Ibid section 70B(1)(b)(iii).
[106] Ibid section 70C.

imperial offences of piracy repealed by the 1992 Crimes Legislation Amendment Act (Cth), such as bringing seducing messages from or voluntarily yielding up a ship to pirates. State and territory law would therefore cover incidents such as a ship being seized as it leaves port or robbery of a ship lying at anchor. In practice, however, state and territory laws have been superseded by federal legislation.

LAW REFORM IN AUSTRALIA

Prompted by the Gibbs Review on federal criminal legislation and the failure of a previous report[107] to address the criminal admiralty jurisdiction, the Australian Law Reform Commission has conducted a new review. In the 1990 Report that followed, the Commission recommended that the existing laws with respect to piracy be repealed and replaced by a new Australian offence of piracy.[108]

The Commission felt that the new offence should be drafted along the lines of the international law of piracy so that Australia may properly fulfil its obligations under the 1958 Convention on the High Seas.[109] In response, Australia enacted the 1992 Crimes Legislation Amendment Act. This statute added a new Part IV entitled "Piracy" into the 1914 Crimes Act (Cth), *inter alia.* Section 53 of the amendment statute repealed more than two centuries of imperial legislation as it applied to Australia, a total of ten separate acts of parliament. This included the 1849 Admiralty Offences (Colonial) Act (UK) that granted Australian courts admiralty jurisdiction.

Part IV of the 1914 Crimes Act (Cth) adopts in section 51 the 1982 Law of the Sea Convention definition of piracy.

The definition includes the "private ends" limitation and the omission of "hijacking" from the offence of piracy.[110] It further provides that piracy is an act against Australian law, whether committed on the high seas or in Australian territorial waters. Section 52 is the operative section, providing

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[107] See Australian Law Reform Commission, Report No 33, Civil Admiralty Jurisdiction (1986, Commonwealth of Australia, Canberra) at para 7.

[108] Australian Law Reform Commission, Criminal Admiralty Jurisdiction and Prize (1990, Commonwealth of Australia, Canberra) 37.

[109] Ibid.

[110] The offence of hijacking a ship is covered separately by the 1992 Crimes (Ships and Platforms) Act (Cth).

life imprisonment for piracy. Section 53 prohibits knowing participation in the operation of a pirate vessel and carries a penalty of 15 years imprisonment. Section 54 reiterates Articles 105 and 107 of the 1982 Convention, specifying where and by whom the seizure of a pirate vessel may take place. Part IV provides for the return of a vessel or property to its rightful owners upon application, or alternatively, for forfeiture to the Australian government.[111]

The net effect of these provisions is to mirror the international law of piracy in Australian territorial waters. If an act of piracy at international law is committed in Australian territorial waters, a pirate may be seized and prosecuted by Australian authorities, with the consent of the Attorney-General[112] The pirate may also be captured in Australia, in territorial waters or on the high seas.[113] In addition, a person captured by the Australian authorities for the crime of piracy *jure gentium* may be prosecuted under Part IV of the 1914 Crimes Act (Cth), bearing in mind that the definition of piracy under Australian domestic law coincides with that under international law.[114] Therefore, whether the crime of piracy is committed on the high seas or in Australian territorial waters is of little legal importance as the Australian offence for both is the same.

The benefits of the new Part IV extend to the simplification and replacement of the existing law. In particular, the uniform Offences at Sea Acts so far as they apply to piracy and the state laws on piracy, are no longer relevant. In Australia, where conduct is an offence against both state and federal law, the state law cannot be used if it is inconsistent with the federal law.[115] If there is inconsistency, the state law is rendered invalid by section 109 of the Australian Constitution, at least to the extent of the inconsistency.[116]

Further, since the imperial piracy and admiralty offences legislation have been repealed and no longer form part of Australian law, the English law of piracy has become obsolete for the prosecution of piracy in Australia, even

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[111] 1914 Crimes Act (Cth) section 54(3).
[112] Ibid section 55.
[113] Ibid section 54.
[114] Note Australia's obligations under international treaties.
[115] Miller v Miller (1978) 141 Commonwealth Law Reports 269.
[116] Ex Parte McLean (1930) 43 Commonwealth Law Reports 472.

if it occurs on the high seas. The offence will now be covered by the new Part IV, and domestic courts of criminal jurisdiction will be able to try the offence by operation of sections 68(2), (5) and (5C) of the 1903 Judiciary Act (Cth).

On the other hand, the 1979 Crimes at Sea Act 1979 (Cth) remains in force and extends state criminal law to Australian ships and Australian citizens on foreign ships in foreign territorial waters. But with the repeal of imperial piracy provisions and the likely invalidity of state laws on piracy beyond inland waterways, it has become a matter of conjecture as to the substantive law that would apply in such a prosecution, namely, would state law or English law apply? Or both of them?

CONCLUSION

The lack of universal jurisdiction for acts of piracy committed in territorial waters needs to be addressed. This jurisdiction in international law could be extended to territorial waters so that capturing states may prosecute pirates no matter where the offence takes place. This could be achieved by removing the "high seas" requirement from Article 101 of the 1982 Law of the Sea Convention and replacing it with "anywhere on the seas". Such a requirement would more closely resemble the geographic limits of admiralty jurisdiction and remove the artificial boundary that separates the territorial sea from the high seas for the purposes of international law. To protect the interest of the coastal state, perhaps priority of jurisdiction could be given to that state when a ship is within its internal waterways, such as a harbour or river.

Another way of overcoming the jurisdictional issue is for states to enter into extradition agreements with one another. This would enable pirates to be extradited from a requested state that does not have jurisdiction to deal with the case, to the state where the crime was committed. In the *Erria Inge* incident, if the pirates had been captured and there existed an extradition treaty between India (where the crime was committed) and the capturing state, the pirates could have been returned to India to stand trial.

Further, coastal states could enter into treaties that are similar to the Timor Gap Treaty, but with piracy being the main subject instead of oil exploration. Zones of cooperation could be delineated in waters between neighbouring states that express the circumstances in which jurisdiction

should be exercised by each of them. Doubts could be removed if the states clarified when and where such jurisdiction could be exercised. The agreements could specify strategies for the prevention of piracy, like patrolling by law enforcement agencies, the right to "extended" hot pursuit and extradition.

Finally, networks of mutual assistance treaties on criminal matters could help fill the gaps left by the lack of universal jurisdiction in territorial waters. These treaties would aid law enforcement by providing for information sharing, investigative assistance and the detention of suspects.