

Piracy - A Modern Perspective

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It is not necessary that the thieves must raise the pirate flag and fire a shot across the victim's bows before they can be called pirates.

Athens Maritime Enterprises Corp v Hellenic Mutual War Risks Association (Bermuda) Limited "The Andreas Lemos" [1983] 1 All ER 590 at 600

The hijacking of the Malaysian registered vessel, Petro Ranger, during a three-day voyage from Singapore to Ho Chi Minh City in late April 1998 made news headlines in Australia.¹ The hijacking was a loud warning to the general public and the shipping industry that piracy is still prevalent on the high seas and in the territorial waters of South East Asia and other regions.

News reports stated that the Petro Ranger had already been painted and renamed by the time it was seized by the Chinese coastguard less than two weeks after the vessel was overpowered by modern day pirates.² It was also reported that diesel and kerosine valued at more than \$2.3 million had been siphoned off the Petro Ranger onto another vessel controlled by the pirates.³

It was originally alleged that rogue crew members were involved in the hijacking of the Petro Ranger. These allegations were quickly dismissed following formal inquiries.⁴ The issue of who actually attacked the vessel, rogue crew members or outsiders from another vessel, raises an interesting legal consideration - the definition of piracy. The question of what actually constitutes an act of piracy has been debated by jurists and argued in the courts for centuries.

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1 The story was covered by the *Australian*, *The Courier Mail*, Brisbane and most major television news programs.

2 *The Courier Mail*, Brisbane, Tuesday 5 May 1998.

3 *Ibid* and Wednesday 6 May 1998.

4 *The Courier Mail*, Brisbane, Tuesday 5 May 1998.

There are essentially three definitions of piracy. The definition of piracy at international law, the definition given to piracy in the domestic legislation of sovereign states and the definition of piracy adopted for the purposes of marine insurance.

This article considers the various definitions of piracy and how they inter-relate or complement each other. It also critically analyses the international law definition, particularly in its modern context. Finally, this article focuses on piracy in South East Asia, measures taken to control piracy in the region and suggests further action which can be taken to reduce the incidents of piracy in South East Asia and in other regions throughout the world where piracy is endemic.

1. International Law Definition

(a) Piracy Jure Gentium

“Piracy Jure Gentium” is the term used for the international law definition of piracy. The case of *In Re Piracy Jure Gentium*⁵ judicially considered this definition. The case acknowledges that the sources from which international law is derived include treaties between various States, State papers, municipal Acts of Parliament, the decisions of municipal Courts and the opinions of jurisconsults.⁶ That is, that international law cannot become a crystallised code but is a living and expanding branch of the law.⁷ Consequently, their Lordships would not “hazard a definition of piracy” in *In Re Piracy Jure Gentium*.⁸ They simply held that actual robbery is not an essential element in the crime of piracy jure gentium and that a frustrated attempt to commit piratical robbery is equally piracy jure gentium.⁹ Their Lordships approach is not unusual as the courts have generally been reluctant to attempt a comprehensive definition of piracy, as evidenced by their decisions. The judiciary’s reluctance is a result, in part, of international law’s inherent changeability which has been universally recognised.

Viscount Sankey LC alluded to the definition of piracy in his report delivered on behalf of their Lordships¹⁰ by reference to the position held by the League of Nations in 1926 when it appointed a sub-committee to facilitate the codification of piracy law called the League of Nations Sub-Committee of Experts for the Progressive Codification of International Law. At page 116 of the report prepared by the Sub-Committee, it was stated that “according to international law, piracy consists in sailing the seas for private ends without authorisation from the government of any State with the object of committing depredations upon property or act of violence

5 [1934] AC 586.

6 *Ibid* at 588.

7 *Ibid* at 597.

8 *Ibid* at 600.

9 *Ibid*.

10 Their Lordships delivered a “report” in lieu of a judgment as the case was a special reference to the Privy Council.

against other persons".¹¹ The Sub-Committee also expressed its opinion that "piracy has as its field of operation that vast domain which is termed the high seas ... The same acts committed in the territorial waters of a state do not come within the scope of international law, but fall within the competence of the local sovereign power".¹² This definition, although not conclusive, is obviously indicative of the international law position with respect to piracy at the time.

Evidently, as early as 1926 a number of States in the League of Nations recognised the possibility and desirability of an international convention on the question of piracy.¹³ Unfortunately it was not until some thirty years later that the Sub-Committee's definition was expanded upon by the *Geneva Convention on the High Seas* 1958 and the *United Nations Convention on the Law of the Sea* 1982. The common view is that these Conventions are declarations of international law with respect to piracy.¹⁴

(b) Geneva Convention on the High Seas 1958

In 1958, the *Geneva Convention on the High Seas*, to which Australia is a party, set out the first formal definition of piracy. The Convention came into force on 10 June 1964.

According to Art 15 of the Convention, piracy consists of any of the following acts:

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

(c) United Nations Convention on the Law of the Sea 1982

The *Geneva Convention on the High Seas* definition of piracy is substantially similar to the definition of piracy in the *United Nations Convention on the Law of the Sea*

11 As cited in *In Re Piracy Jure Gentium* [1934] AC 586 at 599.

12 AD Weiner "Piracy: The Current Crime" (1979) *Lloyd's Maritime and Commercial Law Quarterly* 469 at 469.

13 *In Re Piracy Jure Gentium* [1934] AC 586 at 599.

14 The Preamble to the *Geneva Convention on the High Seas* 1958 states that the Convention is "generally declaratory of established principles of international law".

1982, commonly referred to as UNCLOS. UNCLOS has been signed and ratified by Australia and entered into force on 16 November 1994. This article concentrates on this definition as it is the most reliable statement of the current international law position with respect to piracy due to the number of countries which have signed and ratified the Convention.

Article 100 of UNCLOS requires all States to cooperate to the fullest possible extent in the repression of piracy on the high seas or in any place outside the jurisdiction of any State. Article 101 of UNCLOS states that piracy consists of any of the following acts:

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

Articles 105 and 107 of UNCLOS refer to seizure of pirate ships. Pursuant to Art 107, a seizure on account of piracy may be carried out only by warships or military aircraft, or other ship or aircraft clearly marked and identifiable as being on government service and authorised to that effect. For example, a seizure of a vessel may be carried out by the coast guard provided the coastguard vessel is clearly marked. Article 105 states that 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, 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. The nationality of the pirates and victims and flag state of the vessel are irrelevant.

2. Australian Domestic Legislation Definition

(a) Crimes Act 1914 (Cth)

Amendments made to the *Crimes Act* 1914 (Cth) in 1992 give effect to the piracy provisions of both the *Geneva Convention on the High Seas* 1958 and UNCLOS under Australian domestic legislation. Specifically, Pt IV of the *Crimes Act* deals with the crime of piracy in Australia.

Section 51, the interpretive clause for Pt IV, defines the following terms:

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

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

“coastal sea of Australia” means:

- (a) the territorial sea of Australia; and
 - (b) the sea on the landward side of the territorial sea of Australia and not within the limits of a State or Territory;
- and includes airspace over those seas.

“high seas” means seas that are beyond the territorial sea of Australia and of any foreign country and includes the airspace over those seas;

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

In the *Seas and Submerged Lands Act* 1973 (Cth) “territorial sea” is given the same meaning as in Arts 3 and 4 of the Convention where “the Convention” means the *United Nations Convention of the Law of the Sea* done at Montego Bay on 10 December 1982, UNCLOS, namely 12 nautical miles from Australia’s baselines.

Section 52 of the *Crimes Act* legislates that a person must not perform an act of piracy. The penalty is imprisonment for life. If a person voluntarily participates in the operation of a pirate-controlled ship or aircraft knowing that it is such a ship or aircraft, regardless of whether the act is performed on the high seas, in places beyond the jurisdiction of any country or in Australia, the penalty is imprisonment for 15 years.¹⁵

Section 54 of the *Crimes Act* relates to seizure of pirate controlled vessels and mirrors the provisions in UNCLOS. The section provides:

- (1) A member of the Defence Force or a member of the Federal Police may seize:
 - (a) a ship or aircraft that he or she reasonably believes to be a pirate-controlled ship or aircraft; or
 - (b) a thing on board such a ship or aircraft, being a thing that appears to be connected with the commission of an offence against this Part.

¹⁵ *Crimes Act* 1914 (Cth), s53.

- (2) A seizure may be effected:
- (a) in Australia;
 - (b) on the high seas; or
 - (c) in a place beyond the jurisdiction of any country.

The written consent of the Attorney General is required to prosecute a person for an offence against Pt IV of the *Crimes Act*. However, this does not prevent a person from being arrested, charged and remaindered in custody without the Attorney General's permission.¹⁶

(b) Criminal Code Act 1899 (Qld)

The *Criminal Code Act 1899* (Qld) makes an act of piracy committed within the territorial jurisdiction of Queensland a crime and liable to imprisonment for life.¹⁷ Chapter XI deals specifically with the crime of Piracy. Section 79 states that in Ch XI the term "pirate":

includes any person who on the high seas commits, otherwise than as an act of war and under the authority of some Foreign Prince or State, any act with respect to a ship, or any goods or merchandise belonging to a ship or laden upon it, which, if the act were committed on land, would constitute robbery as hereinafter defined, and any person, who, having on the high seas obtained possession of a ship by means of any such act, retains possession thereof and also includes any person who is declared by any statute to be a pirate.

The act of any such person is called piracy. It is interesting to note that the Statement of Offence, an annotation following the definition, acknowledges that there can be a distinction between piracy *jure gentium* and the forms of piracy created by statute.

The *Criminal Code* also offers further definitions of piracy relating to British subjects who, for example, give aid to Her Majesty's enemies at any place within the jurisdiction of the Admiralty, during any war.¹⁸

It is difficult to apprehend how an act of piracy committed within the territorial jurisdiction of Queensland as required by s81 of the *Criminal Code* can be committed by a person on the "high seas" as required by the definition of piracy set out in s79. The extent to which the *Criminal Code* applies generally to waters off the coast of Queensland is not settled. The *Criminal Code* does not, on its face, apply beyond Queensland's border, the low water mark.¹⁹ Although s5 of the *Coastal Waters (State Powers) Act 1980* (Cth) allows states to legislate for coastal waters which extend to three nautical miles off the coast, the section does not automatically apply

16 *Ibid*, s55.

17 *Criminal Code* (Qld), s81.

18 *Ibid*, s80.

19 *New South Wales v Commonwealth* (1975) 135 CLR 337.

to all legislation already in force. State legislation must specifically invoke the extraterritorial powers given by the *Coastal Waters (State Powers) Act*. The *Criminal Code* does not purport to do this and there is no general legislation applying Queensland legislation to offshore waters.²⁰ Therefore, in the absence of specific legislation, the *Criminal Code* can only be invoked for crimes committed in internal waters.

Fortunately, s14A of the *Criminal Code* extends the application of the Code to offences committed on the high seas within 200 miles of Queensland where a person is connected with Queensland. A person connected with Queensland includes a person who is normally resident or domiciled in Queensland or a person on a vessel operating under Queensland law.²¹ For example, if a person who lives permanently in Queensland commits an act of piracy within 200 miles of Queensland he or she is guilty of the crime of piracy under the *Criminal Code*. The position is not as clear with respect to an act of piracy committed by a person on one vessel against another vessel if the person is not normally resident or domiciled in Queensland. One must ask if the words "on or operating from a vessel" in s14A(2)(b) include both the pirate vessel and the vessel being attacked in incidents of piracy where two ships are involved.²² In this situation, the incident of piracy would be captured by the *Crimes Act 1914* (Cth) and therefore it is not necessary to labour over the possible interpretations of s14A(2)(b). Further, the state and territory courts have jurisdiction to hear the offence regardless of whether the act of piracy is committed under state or commonwealth legislation pursuant to s68 of the *Judiciary Act 1903* (Cth).

In summary, in Australia it is ultimately inconsequential as to which Act of Parliament a person is convicted under - Commonwealth or State. The person will be tried in a State court of criminal jurisdiction and the penalty is the same across the jurisdictions - imprisonment for life. For all practical purposes, it is most likely that the pirates would be arrested by naval officers aboard a navy vessel or the coast guard on the high seas or in territorial waters. In these circumstances, the consent of the attorney general would be obtained and the pirates convicted under the *Crimes Act* and tried in the most convenient State court.

3. Marine Insurance Definition

Judicial decisions indicate that the international law and applicable domestic law definitions of piracy do not apply to marine insurance. Two popular marine insurance cases are illustrative of this point. The first case is *Republic of Bolivia v Indemnity Mutual Marine Assurance Company Limited*.²³ This case was applied in the second, more recent case, *Athens Maritime Enterprises Corp v Hellenic Mutual War Risks Association (Bermuda) Limited* or the *Andreas Lemos*.²⁴

20 See RJ Sibley "Maritime Crime and the Extra Territorial Jurisdiction of the Queensland Courts" [1988] QUTLJ 161 at 165.

21 *Criminal Code* (Qld), s14A(2).

22 The "two ship" rule does not apply to the *Criminal Code* definition of piracy.

23 [1909] 1 KB 785.

24 [1983] 1 All ER 590.

In *Republic of Bolivia v Indemnity Mutual Marine Assurance Company Limited*, goods were being shipped from a place at the mouth of the Amazon to a place far inland upon a tributary of a tributary of the Amazon in a remote territory belonging to Bolivia, on the boundary of Bolivia and Brazil. The goods were insured by a marine policy against hurt, detriment or damage caused by, amongst other risks, "pirates". The goods consisted of provisions and stores which belonged to the Bolivian Government and were intended for Bolivian troops. Brazilian malcontents, who did not want a Bolivian government, fitted out an expedition consisting of armed vessels to resist the Bolivian troops. They attacked the Bolivian government's vessel and seized the goods.²⁵

It was held that the word "pirates" used in the policy must be construed in the popular sense and in a way in which businessmen would generally understand it.²⁶ In that context, it meant persons who plunder indiscriminately for their private gain and not persons who simply operate against the property of a particular State for a public political end.²⁷ Piracy is also a maritime offence and it was considered that the "distant place was not the theatre on which piracy could be committed".²⁸ Therefore, there had not been a loss through pirates within the meaning of the policy. This case also reinforces that piracy is capable of having "various shades of meaning" depending upon whether it is considered from the point of view of international or municipal lawyers.²⁹

The *Andreas Lemos* was also insured for, amongst other things, loss of materials, machinery and equipment occurring as a result of piracy and riots. On 22 June 1977, the vessel was anchored within port limits and within the territorial waters of the Republic of Bangladesh. Thieves armed with knives boarded the vessel and began to steal equipment. They were discovered by the crew who, after a clash involving knives and other weapons, forced the thieves to flee. The total value of equipment lost was only \$US5,754.³⁰

It was held that the insurer was not required to indemnify the vessel's owner for the loss because the incident did not amount to piracy or a riot. Specifically, for the purposes of the construction of a marine insurance policy a vessel did not have to be outside territorial waters for an act committed against it to constitute piracy. It was enough that the vessel was at sea at the time of the act, or that the act could be described as a maritime offence. However, piracy in the context of a policy of marine insurance meant theft at sea involving force, or threat of force, to commit the theft. Since, the incident involving the vessel had been a clandestine theft in which force, or the threat of force, had only been used by the thieves when discovered in order to make good their escape, it did not amount to piracy. That is, theft without

25 *Republic of Bolivia v Indemnity Mutual Marine Assurance Company Limited* [1909] 1 KB 785 at 785.

26 *Ibid* at 808.

27 *Ibid* at 786.

28 *Ibid* at 799.

29 *Ibid* at 797, 799 and 802.

30 *Andreas Lemos* [1983] 1 All ER 590 at 590.

force or threat of force cannot be piracy.³¹ The case also emphasises that considerations taken into account for piracy in public international law by no means point to the same definition of piracy for domestic purposes, and in particular for the interpretation of a contract of insurance.³²

These two cases illustrate the general principles to apply when determining if an act constitutes piracy for the purposes of a policy of marine insurance. Essentially, piracy must be construed in its popular or business sense; it must be a maritime offence but not necessarily committed on the high seas; the act of piracy must be committed for private ends; and the theft must be committed with force or threat of force.

4. Focus on International Law Definition

International incidents involving seizure of vessels by “pirates” have highlighted possible deficiencies in the current international law definition enunciated by UNCLOS. Three weaknesses are apparent - the “two ship” rule, the “private ends” rule, and the “gap” between the high seas and the territorial waters of sovereign states.

(a) ‘Two Ships’ Rule and ‘Private Ends’ Rule

The first and second weaknesses can be examined together. The “two ship” rule requires an act of piracy to be committed by the crew or passengers of a private ship against *another* ship. The “private ends” rule requires the act of piracy to be committed for private ends and not in the interests of a State.³³

It is curious to observe that the “two ship” rule has not always been a requirement of piracy at international law. In 1925 it was being asked – “Are those who engage in so-called ‘hijacking’ upon the seas regarded as pirates?”³⁴ At that point hijackers were considered to be “no less pirates than the pirates of old”.³⁵ A number of reported cases from the late 1800s support this proposition.³⁶ This position has obviously altered as Art 101 of UNCLOS and recent international incidents leave no doubt that hijacking does not constitute piracy for the purposes of international law today.

The case of the *Achille Lauro* is illustrative of both the “two ship” rule and the “private ends” rule. The controversial *Achille Lauro* hijacking in the Mediterranean in October 1985 involved an internal seizure by the ship’s passengers. The terrorists were members of the Palestinian Liberation Army seeking the release of

31 *Ibid.*

32 *Ibid* at 595.

33 UNCLOS, Art 101.

34 ED Dickenson “Is the Crime of Piracy Obsolete?” (1925) 38 *Howard Law Review* 334.

35 *Ibid* at 358.

36 See *In Re Tivnan* (1864) 5 Best & S 645 and *Attorney-General of Hong Kong v Kwok-a-Sing* (1873)LR 5 PC 179.

Palestinian prisoners. The hijacking was not considered an act of piracy because the "pirates" were passengers who seized the vessel from within, a second vessel was not involved and the "pirates" were politically motivated. Both the "two ship" rule and the "private ends" rule were not satisfied. The act constituted marine terrorism and not piracy.

A similar conclusion was reached in the Santa Maria incident, which occurred almost 25 years earlier. The Santa Maria was a Portuguese ship hijacked by Portuguese and Spanish insurgents on 22 January 1961 as it sailed from the West Indies to Florida.

There was some uncertainty at the time as to whether the hijacking constituted an act of piracy, not because it was an internal seizure, but because of the hijackers' motives for the attack. The spokesman for the group described the hijacking as a step towards usurping the then President of Portugal intimating that the seizure was not being affected for private ends. The Portuguese authorities held a different view and described the insurgents as pirates. The Director of the Operations Division of the Admiralty was quoted in *The Times* on 25 January 1961 as stating "any warship may take such action as it can to bring pirates to book; the only point is that the chap in charge is answerable to the government whose flag the ship is flying if he cannot substantiate the charge of piracy".³⁷ The United States, whose navy located the Santa Maria, ultimately decided that the hijacking may not be an act of piracy as the insurgents appeared to be politically motivated. As a result, the Americans did not arrest the vessel as it was flying the Portuguese flag and was not an American vessel. The insurgents sought asylum in Brazil.

The Achille Lauro and Santa Maria incidents are difficult to reconcile with the Mabeco Case.³⁸ In this case, Greenpeace activists were found to be pirates. The Belgium Court of Cassation held that the activists' acts were committed in "support of a personal point of view concerning a particular problem"³⁹ and therefore the activists were acting for private ends. This means that the green movement and the environmental lobby cannot seek refuge in "self proclaimed public ends"⁴⁰ if they perform any illegal acts of violence or detention or acts of depredation against another vessel on the high seas. Any activists engaging in such activities risk prosecution as a pirate and, if convicted, imprisonment for life.

The factual backgrounds to the Achille Lauro and Santa Maria incidents and the Mabeco case illustrate a fine line between terrorist activities and piracy. The view which has been followed by the courts and in practice is that insurgents can only gain recognition of belligerency sufficient to establish public ends by "achieving a

37 LC Green "The Santa Maria: Rebels or Pirates" (1961) 37 *The British Yearbook of International Law* 496 at 496.

38 *Castle John and the Nederlandse Stichting Sirius v NV Mabeco and NV Parfin* (1986) 77 *International Law Reports* 537.

39 *Ibid* at 540.

40 ED Brown *The International Law of the Sea* vol 1, Introductory Manual, Dartmouth Publishing, Sydney, 1994, p302.

certain amount or measure of success in fighting”.⁴¹ The result is that a particular incident’s status as either an act of piracy or an act of marine terrorism is much more difficult to determine when an incident involves civil unrest in its infancy and lacking recognition from foreign governments⁴² or rebellion which is religiously motivated.

A major practical consequence of an incident being classified as an act of piracy as opposed to marine terrorism, is that in piracy cases the vessel in question can be arrested by a ship of any flag.⁴³ Only certain states can intervene in cases of marine terrorism. This is illustrated by the Santa Maria incident. The United States’ Navy would not arrest the vessel as they considered the seizure to be an act of terrorism and the vessel was Portuguese.

As a result of the Achille Lauro incident and initiatives taken by Canada, Austria, Egypt and Italy, the United Nations General Assembly requested the International Maritime Organisation to “study the problem of terrorism about or against ships with a view to making recommendations on appropriate measures”.⁴⁴ An ad hoc Preparatory Committee was formed and drafted a Convention which covered, amongst other things, incidents of marine terrorism and a Protocol on the safety of fixed platforms. The *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* and the *Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf* were consequently adopted by consensus at an International Maritime Organisation conference in Rome on 9 March 1988 (*Rome Convention*).⁴⁵ The next day 23 States signed the Convention and all but two land-locked States signed the Protocol.

The *Rome Convention* provides for the following offences:

- Any seizure of a ship;
- Any act of violence against any persons on a ship;
- Destruction of a ship or any act which may endanger its safe operation;
- The placing of any device which is likely to endanger the ship or endanger its safe operation; and
- Death or injury to any persons whilst committing any of the above offences.⁴⁶

The *Rome Convention* does not extend the *Geneva Convention on the High Seas* or UNCLOS provisions relating to piracy or redefine the definition of piracy at international law. The *Rome Convention* also fails to confer universal jurisdiction with

41 “The Nyon Arrangements: Piracy by Treaty” (1938) 19 *The British Yearbook of International Law* 198 at 203.

42 Brown *supra*, n41 at 301.

43 Article 19 of the *Geneva Convention on the High Seas* and Art 105 of UNCLOS permit every state to seize a pirate ship, arrest the persons and seize the property on board.

44 P Kirsch “The 1988 ICAO and IMO Conferences: An International Consensus Against Terrorism” (1988) 6 *Dalhousie Law Journal* 5 at 9.

45 (1988) 27 ILM 668.

46 *Rome Convention*, Art 3.

respect to enforcement of acts committed against the Convention. Articles 6-8 of the *Rome Convention* provide that the following parties may punish offenders:

- The flag state of the ship on which the offence occurred;
- The State in whose territorial sea the offence occurred;
- The State of citizenship of the offender;
- The State of the persons seized, killed, injured or threatened during the incident.

The result is that under the *Rome Convention* jurisdiction connects with the State concerned by flag, territory, and nationality whereas prior to the adoption of the *Rome Convention* the power to seize a hijacked vessel was vested in the flag state alone. For example, if the Santa Maria incident occurred today, the United States' Navy would not hesitate to intervene by invoking the powers of the *Rome Convention* as there were American citizens on board.

The issue of universal jurisdiction and the relationship between terrorism and national liberation movements are the issues which have directly impacted on the development of the law relating to marine terrorism, particularly the drafting and implementation of formal legal instruments such as Conventions and Protocols. It is acknowledged that one of the main deterrents to redefining the definition of piracy under UNCLOS and the *Geneva Convention of the High Seas* to encompass acts of terrorism involves the States' reluctance to limit their exclusive jurisdiction on the high seas over their flag ships.⁴⁷ The principle being that it is in the nation's interests for its government to retain the right to deal exclusively with its flag ships.⁴⁸ This is particularly the case where sensitive political issues are involved such as a coup d'etat. Countries prone to civil unrest and political instability such as African, Arab and Asian nations, are more likely to resist intervention from other states. Conversely, a number of Western States have resisted any suggestion that acts of terrorism might be considered lawful "merely because they are committed by members of national liberation movements".⁴⁹ This stance may be strongly influenced by the fact that incidents of marine terrorism often involve citizens of European and North American countries with no direct connection to the insurgents' nation or cause.⁵⁰

The only exception to the "two ship" rule is with respect to acts of piracy committed in a place outside the jurisdiction of any state.⁵¹ For example, any illegal act of violence, detention or any act of depredation committed for private ends against

47 Brown *supra*, n41 at 304.

48 This position has altered slightly since the *Rome Convention* broadened the jurisdiction in cases of marine terrorism. It is worth noting that the *Rome Convention* did not confer universal jurisdiction.

49 Kirsch *supra*, n45 at 24.

50 For example, the Achille Lauro and Santa Maria incidents.

51 UNCLOS, Art 101(a)(ii).

a person in an area of Antarctica which does not belong to a State would constitute an act of piracy. Islands and other areas of Antarctica which do not belong to any sovereign state are the most obvious examples of places “outside the jurisdiction of any state”. Following the decision in *US v Escamilla*⁵² floating ice-bergs may also fall into this category. The Court found that the United States had jurisdiction to try Escamilla for alleged manslaughter on a floating ice-berg known as T3 in the high seas of the Arctic Ocean notwithstanding it did not give reasons for its decision. Although the Court’s findings are inconclusive, the case successfully raises the question of sovereignty over the Arctic Ocean and ice-bergs in it and generally highlights the basic problem of lack of legal regime for such areas.⁵³

(b) High Seas/Territorial Sea Gap

The provisions of Pt VII of UNCLOS relating to the High Seas apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.⁵⁴

As domestic legislation relating to piracy usually covers incidents of piracy committed in internal and territorial waters and on the high seas there appears to be, on its face, a gap where piracy is not outlawed in the exclusive economic zones, the area beyond and adjacent to the territorial sea. Fortunately, this gap is filled by Art 58(2) of UNCLOS. It states that Arts 88 - 115, which include the provisions relating to piracy, and other pertinent rules of international law apply to the exclusive economic zone insofar as they are not incompatible with Pt V of UNCLOS. Pt V of UNCLOS deals specifically with the exclusive economic zone and the exploitation and management of natural resources in that area. Prevention of piracy is clearly compatible with the objectives of this Part.

5. Piracy in South East Asia

Australia, Brunei Darussalam, China, Indonesia, Japan, Malaysia, Myanmar, Papua New Guinea, the Philippines, the Republic of Korea, Singapore and Vietnam have all ratified UNCLOS. The Philippines and Indonesia were the first South East Asian countries to ratify UNCLOS on 8 May 1984 and 3 February 1986 respectively, possibly because of UNCLOS’ generous territorial water baselines for archipelagic states.⁵⁵ The balance of the countries did not ratify UNCLOS until 1994 onwards with Papua New Guinea ratifying UNCLOS as recently as 14 January 1997. Notably, Thailand has not signed or ratified UNCLOS.

52 US Ct of Appeals Appeal No71-1575 1972.

53 FM Auburn “International Law and Sea-Ice Jurisdiction in the Arctic Ocean” (1973) 22 *International and Comparative Law Quarterly* 552 at 557.

54 UNCLOS, Art 86.

55 *Ibid*, Art 7.

The International Maritime Bureau has set up a Piracy Centre in Kuala Lumpur to monitor the fight against piracy in the region. The Centre also collates data from other regions where piracy is prevalent.⁵⁶ The International Maritime Bureau's *Piracy and Armed Robbery Against Ships Report* for 1997⁵⁷ shows that 35% of all reported attacks (229) occurred off the coast or in the ports of Indonesia (47), Thailand (17) and the Philippines (15).⁵⁸

South East Asia is a popular target for pirates for a number of reasons. First, there are thousands of tiny uninhabited islands in the region which make perfect hideaways for pirates. This is supported by the fact that the most popular and third most popular hot spots for pirates are Indonesia and the Philippines, two recognised archipelagic states. Both countries have thousands of miles of coast line and outlying islands. Secondly, whilst vessels must reduce speed to navigate the narrow passages and channels, making them easier to pursue and board and easy pirate targets. Thirdly, the South East Asian region consists predominantly of impoverished nations lacking resources and the will to pursue pirates within their own territorial waters and on the high seas adjacent to their territorial waters. This problem has possibly been exacerbated by the recent financial crisis in the region.

The International Maritime Bureau's Report also indicates that although there has not been a marked increase in incidents of piracy and armed robbery against ships there has been an increase in violence. Table 1 sets out a comparison of the number of attacks involving murders and hostages for 1996 and 1997.⁵⁹

Table 1

Year	Attacks	Murders	Hostages
1996	228	26	194
1997	229	51	412

Predictably, the International Maritime Bureau's Chief Executive Eric Ellen states in the Report that "the 1997 Annual Report once again highlights that modern piracy is violent bloody and ruthless".⁶⁰ According to the Report guns were used on 68 occasions in 1997, knives were carried in a further 26 instances and ships were fired on 26 times.⁶¹

In addition to well publicised violence associated with piracy, there are collateral risks and dangers including collision and grounding. It is not unusual for pirates to leave a vessel under way and not under command for lengthy periods of time

56 International Maritime Bureau <<http://www.iccwbo.org.iccimbhp.htm>>.

57 Note that the report includes attacks involving armed robbery in addition to acts of piracy. The piracy statistics do not necessarily refer to the incidents complying with the UNCLOS definition of piracy.

58 Seafarer "Diplomacy, Vigilance Needed as Piracy Gets More Violent" 28 January 1998.

59 *Ibid.*

60 *Ibid.*

61 "Pirate Attacks Becoming More Violent: IMB Report" 22 January 1998.

increasing the potential for the vessel to run aground or collide with another vessel. A collision or grounding could result in an environmental catastrophe if it occurs in an environmentally sensitive area.

The possibility of collision or grounding and the gravity of their consequences are perhaps greater in South East Asia than in other regions where piracy is problematic. The navigation channels in South East Asia are narrow and shallow and the traffic is heavy. For example, up to 240 ships pass through the Phillip Channel and the Strait of Malacca per day - that is, one ship every six minutes. Rear Admiral Richard Lim, head of Singapore's Navy, confirms that "the concern in busy shipping lanes is that [vessels under way and not under command] could cause very serious damage".⁶² Not only are the shipping lanes congested, but the area also has many reefs and other natural resources including high levels of fish stocks. Consequently, if there was an oil spill as a result of a collision or grounding, many people would be affected because of their reliance upon the fishing industry for their livelihood.

Governments have been urged to encourage their flagships to take appropriate precautionary measures when entering pirate waters and give prompt information to coastal authorities about any attacks. Evidence suggests that the incidents reported to the International Maritime Bureau's Piracy Centre in Kuala Lumpur, which is the most reliable source of piracy statistics, are only the tip of the iceberg. Apparently there is some reluctance to report attacks because there is no real benefit to the person making the report. In fact, the person may be unnecessarily detained because of the "red tape" involved in reporting incidents in some countries. There is also a pre-conceived notion that a report may reflect badly on the Captain's seamanship and imply that a particular vessel is not safe. In some instances, filing a report has resulted in personal reprisals.⁶³

Precautionary measures include increasing speed, turning on every external light, posting obvious anti-pirate watches especially on the stern and between midnight and dawn, making sure fire hoses are fully charged and checking registration documents of vessels for authenticity to assist in identifying phantom ships.⁶⁴

Phantom ships are vessels with false registration papers used to obtain legitimate cargoes. For example, the Suci disappeared in 1996 east of Singapore Strait while it was transporting a cargo of diesel oil from Singapore to Sandakan in Malaysia. The Suci has not been seen since and has most likely been repainted, renamed and re-registered. Another example is the Chrysanthi. The Chrysanthi was seized near Singapore in 1994. The pirates forced the crew to sail the vessel to Belhai, China, where it was unloaded. The vessel's name was then changed to Nam II and sailed to Indonesia where it became Winsor III. As Winsor III, the vessel sailed to Penang, Malaysia where it took on a cargo of rubber. Apparently, the cargo's owner thought the cargo was bound for Vietnam but the pirates off loaded the cargo in

62 "Hotbed for Shipping Pirates" *Singapore Shipping Times* 12 November 1997.

63 A Farnham "Pirates" *Fortune* 15 July 1991, 112 at p113.

64 *Ibid* at p118. A disproportionate number of phantom vessels are registered in Panama and Honduras.

Belhai where the vessel was identified as the Asoke II. The cargo was recovered but the pirates fled with the vessel. The Asoke II has not been sighted since.⁶⁵

The governments of South East Asian countries can also take steps to assist in combating the problems of piracy by increasing police and naval surveillance in territorial waters; passing legislation which requires ships to take effective security measures, including, for example, the installation of black boxes; and making information available to ships on incidents and the methods used by attackers. These measures can be implemented most effectively by regional countries working together and adopting uniform strategies. This approach is supported by the Safe Navigation Committee of the Asian Shipowner's Forum which met in Thailand in December 1997. At the Committee Meeting in Thailand it was agreed that there should be greater cooperation and harmonisation among flag states to eliminate substandard shipping, promote safety at sea and protect the marine environment.⁶⁶

Conclusion

On an international level, despite criticism directed at the piracy provisions of UNCLOS because of their failure to take into account incidents of marine terrorism, UNCLOS has undoubtedly been widely accepted by the international community. When given an opportunity to address any deficiencies in the UNCLOS definition following the Achille Lauro incident, the governing authorities chose to draft a separate Convention and Protocol covering marine terrorism in lieu of an agreement amending UNCLOS.⁶⁷ On this basis, there is no reason to question the adequacy of the piracy provisions in UNCLOS or the current definition of piracy at international law.

In Australia, piracy is a crime at both Commonwealth and State levels. The extent to which certain state legislation applies outside internal waters is unclear due to deficiencies or unenforceability of provisions in those pieces of legislation, including the failure of some states to pass legislation pursuant to the *Coastal Waters (State Powers) Act*. The crime of piracy is nonetheless caught by commonwealth legislation which adopts the requirements of UNCLOS and covers acts of piracy committed in Australia's territorial waters and on the high seas. Therefore, even though jurisdiction may sometimes be difficult to determine (for example, if an act of piracy is committed within three nautical miles of the coast) the end result will be the same - the pirate, if convicted, may be imprisoned for life in a State gaol.

Finally, in South East Asia, the suppression of piracy is in the hands of the various governments and their regulatory authorities. There are no recently reported incidents of piracy in Australian territorial waters notwithstanding our geography is similar to South East Asia - our coastline is expansive, navigation channels are

65 "Hotbed for Shipping Pirates" *supra*, n63.

66 M Hand "Governments Urged to Step up Action Against Piracy" 10 December 1997.

67 An amending Agreement was the procedure adopted to alter UNCLOS with respect to deep-sea mining rights and rules - Pt XI Agreement.

narrow and hazardous and there are many islands situated off the coast. Australia's impressive record is due to our effective coastal surveillance system and our legal regime. Most South East Asian countries, with the exception of Thailand, have a responsibility to implement UNCLOS as parties to the Convention. This necessarily involves passing appropriate domestic legislation and implementing strategies and measures through government agencies to assist in the prevention of piracy. Countries such as Indonesia and the Philippines, who are hindered by economic restraints, lack of resources and political unrest, are simply not proactive enough in this area. In the circumstances, the key to the prevention of piracy in South East Asia is clearly a joint plan of action on a regional basis and neighbouring states coordinating their activities and pooling their resources. Australia is in the best position to guide this process.