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Piracy

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This paper is a general overview of the history and nature of piracy with particular reference to the application of the laws of piracy to the waters adjacent to the State of Western Australia. Before discussing those matters, mention should be made of two separate but related concepts under maritime law that bear upon harm caused to vessels at sea, other than that done by armed forces of a State in a time of war.

Privateering and Barratry

The first is privateering. Privateering consists of acts in the nature of piracy carried out against vessels at sea by private parties licensed or authorised by a State so to act against vessels of another State. Although privateers act for private gain they are employed in the cause of a belligerency and captured privateers may expect to be treated as prisoners of war. A good example of the use of privateers was in the American War of Independence where the insurgent colonies, in effect, contracted a naval force by issuing licences to numerous privateers to attack British naval and merchant ships. 55,000 seamen served on the vessels of those privateers.¹ Acts by privateers against vessels that are not within the authority provided by the licensing State would remain acts of piracy.

The second concept is barratry. Barratry is unlawful or fraudulent conduct by a Master, or crew, against a vessel, or its cargo, (e.g. scuttling or theft of the vessel; theft or damage to cargo) causing injury to owners or users of the vessel. Barratry done to assist an act of piracy would be accessorial conduct

¹ *Privateers and Mariners in the Revolutionary War* (2001) American Merchant Marine at War <http://www.usmm.org/revolution.html> at 30 June 2011.

in an offence of piracy. Appropriation of vessel or cargo by the crew or part thereof by use of force or by revolt would be an act of piracy.

Piracy

Piracy has a long history. It probably began soon after the launch of the first coracle or dugout canoe. Piracy has been glamourised in our literature and rather picaresque synonyms have been used to describe persons engaged in acts of piracy – e.g. sea rovers, buccaneers, sea brigands, corsairs, picaroons and privateers. Tales such as *Peter Pan* and *Treasure Island* have stimulated the imaginary worlds of every child, given further impetus in more recent times by the screen franchise, *Pirates of the Caribbean*.

But the reality was always much more brutal. Pirates were true outlaws. They were treated as persons without nationality and beyond the protection of any State. Their crimes on the high seas were justiciable by any State anywhere. Until at least the late 18th century civil law jurisdictions recognised that summary extra-judicial punishment could be inflicted on pirates. For example, if a vessel overcame an assault by pirates and the captured pirates were delivered to port, the captain of the vessel retained a prerogative to deal with the pirates if a judge at the port declined to conduct a trial, or if the captain determined that loss or peril would occur if the vessel awaited the attendance of a judge. According to the civil law, events may take their course with regard to the pirates and 'justice may be done on them by the law of nature, and the same may be there executed by the captors'.²

Until the late 19th Century the universal penalty for most acts of piracy was death. Indeed, until repeal of the piracy provisions of the *Criminal Code* of Western Australia (s 76 - s 80) in 1988, death was the prescribed punishment in Western Australia for committing piracy with respect to a ship where, immediately before or immediately after that crime, a person on board or

² *In re Piracy Jure Gentium* [1934] AC 586, 590 - 591.

belonging to the ship was assaulted with intent to kill or a person on board or belonging to the ship was wounded (s 78).

It can be seen that in conducting their acts of piracy, pirates expected and gave no quarter.

History of piracy

For a number of centuries before the birth of Christ, sea trade across the Mediterranean, Adriatic and Aegean Seas was subject to piracy from people emanating from various ports of neighbouring areas.

In 75 BC, some 20 years before his invasion of Britain, Julius Caesar was captured by pirates in the Mediterranean and held for ransom for a sum of 20 gold talents. In conduct worthy of a modern politician, perhaps one who metaphorically suffered a political fate similar to that to befall Caesar in Rome some years later, he insisted that he was worth at least 50 talents. The pirates lifted their claim accordingly. It was paid and Caesar was released. He then returned with a naval force, captured the pirates, inflicting upon them the punishment of crucifixion.

Shortly after that Pompey, destined to battle and be defeated by Caesar on the other side of the Rubicon, was authorised by Rome to extirpate the curse of piracy in the Mediterranean. With a substantial naval force Pompey hunted pirates from every port of the Mediterranean, inflicting the ultimate penalty on most of them.

In the early part of the Middle Ages, the Vikings conducted wide-ranging raids and plunder on the coasts of Europe by use of their long ships. At the same time, and for several centuries thereafter, Muslim and Arab pirates were operating on and about the Mediterranean and Indian, Chinese and Japanese pirates were to be found on the seas of Asia.³

Between the 16th and 19th Centuries, when the French, Spanish, British, Dutch and Portuguese engaged themselves in conflict with each other and

³ *Piracy*, Wikipedia < <http://en.wikipedia.org/wiki/Piracy> > at 30 June 2011.

established maritime strength and colonial wealth, they employed privateers to act as pirates and damage the maritime trade of their opponents. At the same time the Mediterranean area was dominated by the pirates of the Barbary Coast known as corsairs. In that time between 1 million and 1.25 million Europeans were taken captive by Barbary pirates and sold as slaves in North Africa. In 1575 Barbary pirates took the Spanish author Cervantes captive in a raid on a merchant vessel off the coast of Spain. Cervantes was taken to Algiers where he spent five years as a slave until able to be ransomed by his parents and returned to Spain. The Captive's Tale in *Don Quixote* results from that experience.

The West Australian coastal town of Cervantes gained its name from the Spaniard, albeit indirectly. An American whaler named after the author was grounded and abandoned at that point of the West Australian coast in July 1844.⁴

Another coastal town in Western Australia with a link to piracy is Dampier. Although a renowned seaman who circumnavigated the world on three occasions, William Dampier's earliest exploits involved a decade as a buccaneer/privateer operating from the Caribbean to the East Indies between 1679 and 1688.

Dampier took part in what has been described as the Golden Age of Piracy in the Caribbean, a period stretching from the 1650s to the 1730s, although piracy was still practised in the Caribbean until the 1830s. The targets for the buccaneers of the Caribbean were the valuable cargoes being carried between the New World and Europe by Spanish, Dutch, French and British vessels.⁵

After the navies of the colonial powers had ended the rein of piracy in the Caribbean, the pirate ships of the Barbary Coast continued their rule as the scourge of the Mediterranean. After the American War of Independence,

⁴ *Miguel de Cervantes*, Wikipedia < http://en.wikipedia.org/wiki/Miguel_de_Cervantes > at 30 June 2011.

⁵ *William Dampier*, Wikipedia < http://en.wikipedia.org/wiki/William_Dampier > at 30 June 2011.

American shipping began in earnest and the Barbary pirates found a new source of ransom for captured sailors from American merchant vessels.

Between 1785 and 1800 America paid Algiers up to \$1 million per year for the safe passage of American ships. By 1800 America had restored its naval fleet and at about the same time had established a new fighting force known as the Marines. When America refused to pay further tribute to Algiers in 1801, war commenced between America and the Barbary States of Morocco, Algiers and Tripoli. That was continued until 1805 when a peace treaty was signed which included the delivery up by the Barbary States of all American captive sailors for a sum of US\$60,000.

Pirate attacks on American vessels recommenced several years later leading to a second Barbary war in 1815 when American naval victories brought Barbary piracy to an end.⁶

Although piracy and its brutality may be considered a male preserve, it is to be noted that there were female participants throughout the foregoing periods supplied by Scandinavia, France, England, Ireland, Morocco, America, Canada and China.⁷

Ordinary definition of piracy

The definition of piracy is not a settled matter, straddling as it does the separate development of international and municipal law. The definition can be important according to context, for example, to determine the extent of insurance cover or whether justification exists for action by a State against pirates. It may also be important to determine whether acts in respect of vessels constitute terrorism or piracy.

Much debate has taken place on whether robbery was an essential element of piracy and whether the act of piracy must take place on the high seas.

⁶ *Barbary Wars*, Wikipedia < http://en.wikipedia.org/wiki/Barbary_War > at 30 June 2011.

⁷ *Women in Piracy*, Wikipedia < http://en.wikipedia.org/wiki/Women_in_piracy > at 30 June 2011; ABC Radio National, *Rear Vision - Somali Pirates* (27 April 2011); David Cordingly, *Spanish Gold: Captain Woodes Rogers and the Pirates of the Caribbean* (2011, Bloomsbury Publishing).

It was asserted, for example, that an attempt to commit piracy was not an offence of piracy.

Various examples of the definition put forward by learned international jurists and set out in decided cases were considered in an advice provided by the Judicial Committee of the Privy Council on a special reference on the issue in the matter of *In Re Piracy Jure Gentium* [1934] AC 586. The Judicial Committee advised that in its opinion the most accurate definition was that provided by Kenny in *Outlines of Criminal Law* 'Piracy is any armed violence at sea which is not a lawful act of war'.⁸ Their Lordships noted that the definition should not be taken to extend to a shooting affray between two passengers, but it would include an attempt by the crew or passengers to seize a vessel from the captain or officers by armed force and piracy was not confined by the element of robbery.⁹

Piracy, as the term is now generally understood, involves unlawful violent attack by private parties upon a vessel at sea for the purpose of theft of the vessel and/or its cargo, or for robbery of, or inflicting harm upon, crew or passengers. Historically piracy has had a wider meaning and included the pillage or plunder of property or people in ports and littoral villages, and the detaining of persons for sale as slaves or for ransom. Indeed it may be noted that s 9 of the *Slave Trade Act 1824* (UK) which operated until recent times, stipulated, inter alia, that any subject of the Crown engaged in facilitating the passage of slaves on the high seas, or anywhere within the Admiralty jurisdiction, was deemed to have engaged in piracy and was liable to the punishment of death.

Section 9 was repealed by *Statute Law (Repeals) Act 1998* (UK) (s 1(1), Sch 1) and the operation of the Act as part of the law of Australia was repealed by the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth) (s 3, Sch 2). By Article 99 of the *United Nations Convention on the Law*

⁸ *In Re Piracy Jure Gentium* [1934] AC 586, at 598.

⁹ See also: *Cameron v HM Advocate (Mary Craig)* [1971] JC 50.

of the Sea 1982 (the Convention) (which came into operation on 16 November 1994) each contracting State has undertaken to prevent and punish the transport of slaves in ships flying the State's flag. That Article is followed immediately in the Convention by the Articles applicable to piracy.

The definition of piracy to be applied where that term is used in a policy of insurance was considered in *Bayswater Carriers Pte Ltd v QBE Insurance (International) Pte Ltd* [2006] 1 SLR (R) 69. Under a marine hull policy subject to Institute Time Clauses Hulls, a vessel (a tug) was insured against loss by piracy. The tug was at anchor within port limits when armed intruders boarded the vessel, imprisoned the crew on board, cut the mooring ropes and took control of the tug. It was held that the tug had been taken by force for personal gain rather than political ends, so to that extent the ordinary meaning of piracy, rather than the meaning at international law as used in the Convention, had been satisfied, being the appropriate meaning to apply for the insurance policy concerned.

It was also held in *Republic of Bolivia v Indemnity Mutual Marine Assurance Co Ltd* [1909] 1 KB 785 that the term 'piracy' used in a policy of insurance had a popular or business meaning rather than the meaning confined to that used in international law. It was held that insurgents committing acts of violence on political grounds against a particular government could not be regarded as pirates in the sense used in the policy, notwithstanding that they may be pirates under international law. The essence of piracy in its popular meaning is said to be the pursuit of private rather than public ends.

In *Athens Maritime Enterprises Corporation v Hellenic Mutual All Risks Association (Bermuda) Ltd* [1983] 1 QB 647, where the vessel was also anchored within port limits, it was held that for insurance purposes the ordinary business meaning of piracy was appropriate and that the meaning not be restricted by regard to international law. It was further held that the location of the vessel at anchor was sufficient for the offence alleged to be a maritime

offence and, therefore, within the meaning of piracy as used in the policy, a Standard Form of English Marine Policy with Institute Time Clauses Hulls attached.

International law definition of piracy

The definition of piracy under international law as applied by treaty is to be found in Article 101 of the Convention,¹⁰ where piracy is defined as follows:

Piracy consists of any of the following acts:

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

The reference to piracy directed against an aircraft on the high seas, or in a place outside the jurisdiction of any State, is to be taken to include the airspace above the high seas or above such a place.

Article 103 of the Convention defines a pirate ship or aircraft as one intended by the persons in dominant control to be used for the purpose of committing an act of piracy.

In Article 100 of the Convention each contracting State undertakes to cooperate to the fullest possible extent in the repression of piracy on the high seas. The Convention contemplates, of course, that municipal laws of a State addressing acts of piracy that take place within the jurisdiction of a State assist the purpose of repressing piracy on the high seas and that those laws may address the accessorial conduct to an act of piracy described in Article 101(b)

¹⁰ Which drew upon the definition contained in the *United Nations Convention on the Law of the High Seas 1958*.

and (c) of the Convention being accessorial conduct that may have occurred within the jurisdiction of the State.

Article 105 provides that on the high seas, or in any other place outside the jurisdiction of any State, a State has the right to seize a pirate ship or aircraft, or ship or aircraft taken by and under the control of pirates, and arrest persons and seize property on board and the State is authorised, through its courts, to determine the penalties to be imposed. Article 107 restricts the effectuation of such seizure to the use of warships or military aircraft, or ships or aircraft marked and identifiable as on government service. Article 106 states that a seizing State is liable to the State of nationality possessed by the vessel seized for any loss or damage caused by the seizure where it has been effected without adequate grounds.

Although the Convention definition extends piracy to aircraft, it is nonetheless a restrictive definition for the purpose of establishing the parameters that authorise seizure of a vessel or aircraft and prosecution of pirates by a signatory State in an area outside its ordinary jurisdiction. Two elements are required to be met to permit a State so to act:

1. There must be acts by the crew or passengers of a private vessel or aircraft against another vessel or aircraft; and
2. The place of the acts must be on the high seas, or in a place outside the jurisdiction of any State (understood to be land unclaimed by any State).

Under international law, assault against a vessel authorised by a State is not an act of piracy even if not done as a lawful act of war. For that reason, the survivors of the USS Liberty, a naval vessel of the United States attacked in international waters in 1967 by unmarked aircraft attempting to sink it, could not succeed in claiming that the act authorised by the State of Israel constituted an act of piracy. That position is confirmed in Article 102 of the Convention where it is provided that piracy would only arise from the use of a State warship or

aircraft where the crew thereof has mutinied and taken control of the ship or aircraft.

Commonwealth laws on piracy

The municipal legislative provisions of the Commonwealth with respect to piracy are contained in Part IV - Piracy (s 51 - s 56) of the *Crimes Act 1914* (Cth) (Crimes Act), inserted in 1992.

By s 3A of the *Crimes Act* all provisions of the Act apply throughout and beyond the Commonwealth, subject, of course, to any limitations contained in a particular provision.

Section 52 of the Act provides that a person must not perform an act of piracy and the penalty imposed for breach of that provision is imprisonment for life. Section 51 defines 'act of piracy' as follows:

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

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

Section 51 defines 'coastal sea of Australia' in these terms:

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.

It follows that for the *Crimes Act* provisions on piracy to apply, the act of piracy (or attempted act) has to take place outside the limits of a State or Territory. The seaward 'limits of a State' end at the low water mark.¹¹ The

¹¹ *New South Wales v Commonwealth* (1975) 135 CLR 337.

Crimes Act, therefore, does not apply to piracy that occurs within a port¹² or in internal waters of the State. The difficulties in defining 'internal waters' are discussed by Stephen J in *Raptis v South Australia* (1977) 138 CLR 346, 375 - 378.¹³ At common law Admiralty jurisdiction over vessels at sea has been asserted to run where the tide flows, up 'to the first bridge'.¹⁴

Of course, the limitation in s 51 would not exclude accessorial conduct that occurs within the limits of a State in respect of an act of piracy to which the *Crimes Act* applies.

Section 54 of the Act authorises a member of the Defence Force or a member of the Australian Federal Police to seize a ship or aircraft reasonably believed to be a pirate-controlled ship or aircraft and anything aboard such a ship or aircraft that appears to be connected to the commission of an offence against Part IV of the Act. 'Pirate-controlled ship or aircraft' is defined in s 51 as a private ship or aircraft which is under the control of persons who have used or intend using the ship or aircraft in the commission of acts of piracy or have seized control of the ship or aircraft by an act of piracy. There is nothing in Part IV that would prevent seizure under s 54 of a ship or aircraft within the limits of a State.

Western Australian laws on piracy

Until 1988 the *Criminal Code 1913* (WA) (the Code) in Ch XI - Piracy (s 76 - s 80) defined the act of piracy to be applied wherever the Code ran. Those provisions were repealed by the *Criminal Law Amendment Act 1988* (WA), s 8. The only provisions which remain in the Code dealing with offences against vessels or navigation aids are those contained in s 449 (Casting away ships) and s 457 (Interfering with marine signals). The State appears to be satisfied that other provisions of the Code and of its substantive criminal law are

¹² See also: *United Nations Convention on the Law of the Sea 1982*, Article 11.

¹³ See also: *United Nations Convention on the Law of the Sea 1982*, Articles 8, 9 and 10.

¹⁴ *Athens Maritime Enterprises Corporation v Hellenic Mutual All Risks Association (Bermuda) Ltd* [1983] 1 QB 647, per Staughton J at 656 - 657.

sufficient to cover conduct in waters off Western Australia that would otherwise constitute acts of piracy and no other provisions relating to piracy have been re-enacted by the State Legislature. If there is any State criminal jurisdiction in respect of an offence of piracy, it must be found under the common law Admiralty jurisdiction. There is doubt whether that jurisdiction has survived the exercise of the legislative power of the Commonwealth in the implementation of the *Australia Acts 1986* (Cth) and the *Admiralty Act 1988* (Cth). Sections 44 and 45 of the *Admiralty Act 1988* (Cth) repealed Imperial legislation including the *Colonial Courts of Admiralty Act 1890* and *Admiralty Act 1690* 'so far as [they were] part of the law of the Commonwealth or of an external Territory'.

The question whether any criminal jurisdiction in Admiralty has continued as part of the jurisdiction of the Supreme Court of the State requires further examination.¹⁵

If it were necessary to have laws relating to piracy for ports or inland waters of this State the terms of Part IV of the *Crimes Act* could be applied by the Commonwealth to give effect to Australia's obligations under the Convention and to make appropriate provision for protection of trade and commerce and the operation of navigation and shipping in trade and commerce, pursuant to the legislative powers contained in s 51(xxix) (External affairs); s 51(i) (Trade and commerce) and s 98 (Navigation and shipping in trade and commerce) of the *Commonwealth Constitution*.¹⁶

At the moment it seems to be assumed that the laws of the State of Western Australia contain provisions with respect to the crime of piracy.

Crimes at Sea Acts

In 2000, the Commonwealth and the States enacted complementary legislation to give effect to a Cooperative Scheme (the Scheme) to apply the criminal law of a State extra-territorially in the areas adjacent to the coast of

¹⁵ Michael White, *Australian Maritime Law* (2nd ed, 2000) 24 - 25; Blair Ussher, *Maritime Piracy - The Australian Jurisdiction* (Vol 4), Goorangai No. 5 (May 2010).

¹⁶ See also: *Maritime Transport & Offshore Facilities Security Act 2003* (Cth).

Australia. The Commonwealth gave effect to the Scheme in the *Crimes at Sea Act 2000* (Cth) and the State of Western Australia enacted the Scheme by the *Crimes at Sea Act 2000* (WA).

Under the Scheme, the criminal law of each State applies in the 'adjacent area for the State' and does so by force of State law for the 'inner adjacent area' and by force of Commonwealth law for the 'outer adjacent area'.

The criminal laws of the Commonwealth, of course, including the piracy provisions of the *Crimes Act* continue to apply throughout.

The terms of the Scheme are attached as a Schedule to each Act. The term 'baseline for a State' is defined in cl 15 of the Scheme as 'a part of the baseline of Australia's territorial sea from which the part of the territorial sea that is within the adjacent area for a State is measured'. Pursuant to cl 13 of the Scheme, the terms 'baseline of Australia's territorial sea', 'continental shelf' and 'territorial sea' are given the respective meanings on which the *Seas and Submerged Lands Act 1973* (Cth) operates, s 3 of which provides that 'continental shelf' has the same meaning as in Article 76(1) of the Convention, and 'territorial sea' has the same meaning as in Articles 3 and 4 of the Convention. Together those provisions provide the foundation for the definitions of 'inner adjacent area' and 'outer adjacent area' contained in the Scheme.

The terms 'adjacent area to a State', 'inner adjacent area' and 'outer adjacent area' are defined in cl 1 and cl 14 of the Scheme.

The 'adjacent area for Western Australia' is:

... so much of the area described in Schedule 1 to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Commonwealth) in relation to Western Australia as:

- (a) is within the outer limits of the continental shelf; and
 - (b) is not within the Joint Petroleum Development Area;
- and includes the space above and below that area.

Article 76(1) of the Convention defines the continental shelf as the sea-bed and sub-soil that extends beyond the territorial sea to the outer edge of the 'continental margin' or to a distance of 200 nautical miles from the baseline if the 'continental margin' does not extend that far. The 'continental margin' is defined in Article 76(3) as, inter alia, the submerged prolongation of the coastal State.

The 'inner adjacent area for Western Australia' consists of the parts of the adjacent area that are on the landward side of the baseline and that are on the seaward side up to 12 nautical miles from the baseline.

The reference to 'landward side of the baseline' is to waters between the baseline and the low water mark on the coast being part of the internal waters of the Commonwealth but not of the State.¹⁷

The 'outer adjacent area for Western Australia' is the remainder of the adjacent area that is outside the 'inner adjacent area'.

Section 55 of the *Crimes Act* requires the consent of the Commonwealth Attorney General to be obtained for prosecution of any offence under Part IV of that Act. That is a broader requirement than that contained in cl 7 of the Scheme which only requires the consent of the Commonwealth Attorney General to be obtained before prosecution of a 'maritime offence' can proceed where the offence is alleged to have been committed from or on a foreign ship (being a ship other than an Australian registered ship).

Modern piracy

When I gave a paper on maritime security five years ago, the principal problem areas for piracy were the South China Sea and the Malacca Strait which appeared to have a certain loose interrelationship. That situation has been dramatically improved, part of the reason for that improvement being the will to deal with the difficult situation displayed by the littoral governments of

¹⁷ See: *United Nations Convention on the Law of the Sea 1982*, Article 8.

Singapore, Malaysia, Indonesia and Thailand and their cooperative use of aerial surveillance and naval patrols.

In 2006 I referred to a commentator's speculation that pirates operating out of Indonesia, and a principal cause of the harassment of shipping in the area, could be attributed to decades of repression and a degraded economy in that country. Improvement in maritime conditions in the past five years in that area may mirror improvements on shore in Indonesia.

The counterpart to that is the situation in Somalia. In 2006 it barely qualified for mention although I noted that there had been a marked increase in piratical attacks off Yemen and Somalia in preceding years.

Since then, piracy in that area has exploded with attacks reported to the International Maritime Bureau (IMB) increasing year on year. Violent outcomes have occurred in several recent instances which introduces a dangerous element to piracy in this area. The most recent event was several months ago when two hostages were killed by Somali pirates when an attack on the pirates by military forces was imminent. In April 2009 three Somali pirates were killed by US Seals marksmen to gain the release of the captain of the United States' flagged vessel *Maersk Alabama* taken hostage by four pirates. The surviving fourth pirate was taken to New York for trial.

It was said to be the first piracy charge brought in the US for more than a century. A postscript to that event is that the *Maersk Alabama* has been subject to no less than four attempted boardings by Somali pirates since April 2009, the latest last month. On each occasion, a security force on board the vessel has fired shots to repel the attackers.

The Somali pirates operate well out to sea and have been using 'mother ships', themselves hijacked vessels, from which to launch fast moving skiffs with pirates armed with AK47 machine guns and rocket propelled grenade launchers.

The onset of Somali piracy, however, is not solely the consequence of the collapse of the former government of the Somali society. Commentators have stated that the absence of coast guard control following that collapse led to the entry of foreign fishing trawlers into Somali waters that not only cleaned out the fish but devastated the seabed with bottom trawling nets. In addition, it is alleged that the opportunity was taken by foreign vessels to dump toxic waste in those waters which further damaged the fishing industry. Somalia is a subsistence economy heavily dependent on fish for sustenance and for monetary support.

So what at first was a defensive step by fisherman to attack foreign vessels, principally trawlers, became offensive piracy for financial gain by the payment of ransom in which the participants became not just fishermen but elements of the militias and armed forces.

In 2008 the United Nations Security Council in four resolutions authorised nation States to enter territorial waters of Somalia to repress piracy and to deploy naval vessels and military aircraft but attacks on vessels have continued and they now include cruise vessels.

In April 2008 the cruise yacht *Le Ponant*, on which there was a crew of 30 but no passengers, was boarded by pirates and held until a ransom was paid, reputedly in the region of \$2 million.

In November 2008 the *MV Nautica* was fired upon by pirates in the Gulf of Aden. It was carrying 690 passengers, 50 of them Australian, and 386 crew but was able to outrun the pirates' skiffs. In 2008 the *MV Athena* was attacked by multiple skiffs with the pirates making three attempts to board the ship. Defensive measures by the attacked vessel, which included the use of fire hoses, prevented a boarding. *MV Athena* was carrying 641 passengers, of whom 389 were Australian.

In March 2009 the *MV Balmoral* was attacked off the Somali coast by pirates firing weapons upon the ship. The vessel used defensive measures which

included speed and aggressive manoeuvres to evade the pirates. It had on board 1,200 British passengers.

In April 2009 the *MV MSC Melody* was attacked off Somalia. It evaded boarding by pirates by use of defensive measures which included water cannon and the firing of weapons by the security guards on board. The vessel carried 991 passengers including 69 Australians and 536 crew, of whom five were Australian.

These are disturbing trends and present potential for the occurrence of a major incident.

Cost of piracy on maritime industry

In February 2009 the Commonwealth Minister for Transport commissioned the Inspector of Transport Security to undertake a comprehensive inquiry into maritime piracy and armed robbery at sea as it affected Australia. The principal point of that inquiry was to assess the impact of piracy off the Horn of Africa.

That report was released in April 2010. The report pointed out that piracy had moved beyond opportunistic robbery and now included the on-selling of stolen items such as passports, credit cards, ship equipment and cargo which attracted organised criminal groups of an international nature.¹⁸

In addition, it was evident that Somali pirates now had access to a full range of modern communication and navigation equipment to carry out their attacks by monitoring shipping radio frequencies and determining if any naval forces were in the area. They were able to coordinate attacks amongst their own vessels and to communicate with shore bases. They were obtaining the identity of vessels moving through the area, their schedules, details of the course and speed of the vessel, the type of vessel and its layout and the cargo manifests.

¹⁸ Office of the Inspector of Transport Security, *International Piracy and Armed Robbery at Sea - Security Inquiry Report* (April 2010).

From this information, they were able to determine the vessels to be selected as targets.

The chapter of the report on the impact on shipping makes sobering reading. The cost of diverting a vessel around the Cape of Good Hope to avoid Somali pirates is an enormous impost on operators' vessels on an annual basis and the alternative of insurance taken out on a per voyage basis to travel through the Gulf of Aden has thrown an extra \$400 million per annum on vessels transiting the area.

A further cost is now added by premiums for Hijack and Ransom policies which again are a per voyage cost. The inspector states in the report that if full insurance cover were taken out, premium costs for the average bulk carrier would equate to most of the likely voyage profit.

In addition to those costs are the costs of providing defensive measures and counter-piracy means, as well as having adequate procedures to fulfil the duty to protect the safety of life at sea. Those steps involve extra expenses and modifications.

Not the least of the additional cost incurred is the need to pay higher wages to crew to have them enter Somali waters and to have management practices in place to deal with the health consequences of piracy attacks.

Ship owners or operators often decide not to report incidents of piracy and cover their losses out of their own resources rather than pay increased insurance costs or suffer delay whilst any official investigation takes place. It is accepted that the occurrence of piracy in the area is significantly under-reported.

Although measured against worldwide shipping costs the cost impact of Somali pirate activities may not be huge, it is a significant cost for that part of the shipping industry that has to use that route.

International control of piracy

The International Maritime Organisation (IMO) is an agency of the United Nations Organisation with the responsibility for the safety and security

of shipping. It is the vehicle through which nations arrange consultations leading to treaties in this area. Examples of the work of the IMO are the *Convention for the Safety of Life at Sea 1974*, *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988*, and the ISPS Code (International Ship and Port Facilities Security Code 2002). IMO has not been required to take further steps with regard to piracy than is provided for in the Law of the Sea Convention, but it has undertaken initiatives aimed at fostering agreements between governments in piracy infested areas and a range of measures to counteract piracy.¹⁹

The international body that provides the centre for the reporting of incidents of piracy is the International Maritime Bureau, a division of the International Chamber of Commerce. The object of the IMB is to protect international trade from crime, fraud and malpractice. The IMB Piracy Reporting Centre commenced in 1992. The Centre is based in Kuala Lumpur and refers reports of piracy attacks to law enforcement agencies and issues warnings to shipping on areas of high risk of piracy. For IMB reporting purposes, it has been determined that the meaning of piracy as defined in the Convention is not sufficient for the industry which includes insurers and insured parties. The definition used by IMB is an 'act of boarding or attempting to board any ship with intent to commit theft or any other crime and with the attempt or capability to use force in the furtherance of that act'. It is not restricted to an act that occurs on the high seas.

There are difficulties in States taking proceedings to prosecute the pirates they apprehend. Prosecutions are costly and difficult to mount logistically. There have been several trials in the United States, one in Holland and a number in Kenya, a neighbouring State to Somalia, and there is concern

¹⁹ John Knott and Toby Stephens, *Piracy and Terrorism at Sea* (2008) Holman Fenwick Willan <<http://www.hfw.com/publications/client-briefings/piracy-and-terrorism-at-sea>> at 30 June 2011; Stephanie Hanson, *Combating Maritime Piracy* (7 January 2010) Council on Foreign Relations <<http://www.cfr.org/france/combating-maritime-piracy>> at 30 June 2011; *Somali Piracy Exposes Weakness in UN Law of the Sea* <www.voanews.com/English/news/a-13-2009-04-08-voa67-68785907.html> at 30 June 2011.

that the prosecutions are only picking up 'foot soldiers' and not the organisers and principal beneficiaries on shore.

It is recognised that to reduce the incidence of piracy in the Gulf of Aden a principal task for the international community will be the rebuilding of the collapsed Somali society.

Piracy and terrorism

In the paper on maritime security I delivered in 2006, I drew attention to the significant risk that would follow if pirate groups became allied with a terrorist organisation and referred to the fact that there had already been attempted attacks by terrorist groups on coastal targets.

I set out a number of possibilities in that paper which justified the legislative provisions relating to maritime security that were considered in that paper.

The defeated Tamil Tigers, an organisation that was conducting piracy and terrorism on a major scale, has been eliminated.

But the threat of cooperative effort between pirates and terrorists remains and must be regarded as a continuing threat.

With regard to the operations of pirates in the waters off Somalia, it has been speculated that there are links between some pirate groups and the terrorist group Al-Shabaab. To this point no evidence of a link has been forthcoming.²⁰

²⁰ K. Hamilton, *The Piracy and Terrorism Nexus: Real or Imagined?* (30 November 2010) Edith Cowan University Research Online < <http://ro.ecu.edu.au/act/3> > at 30 June 2011.