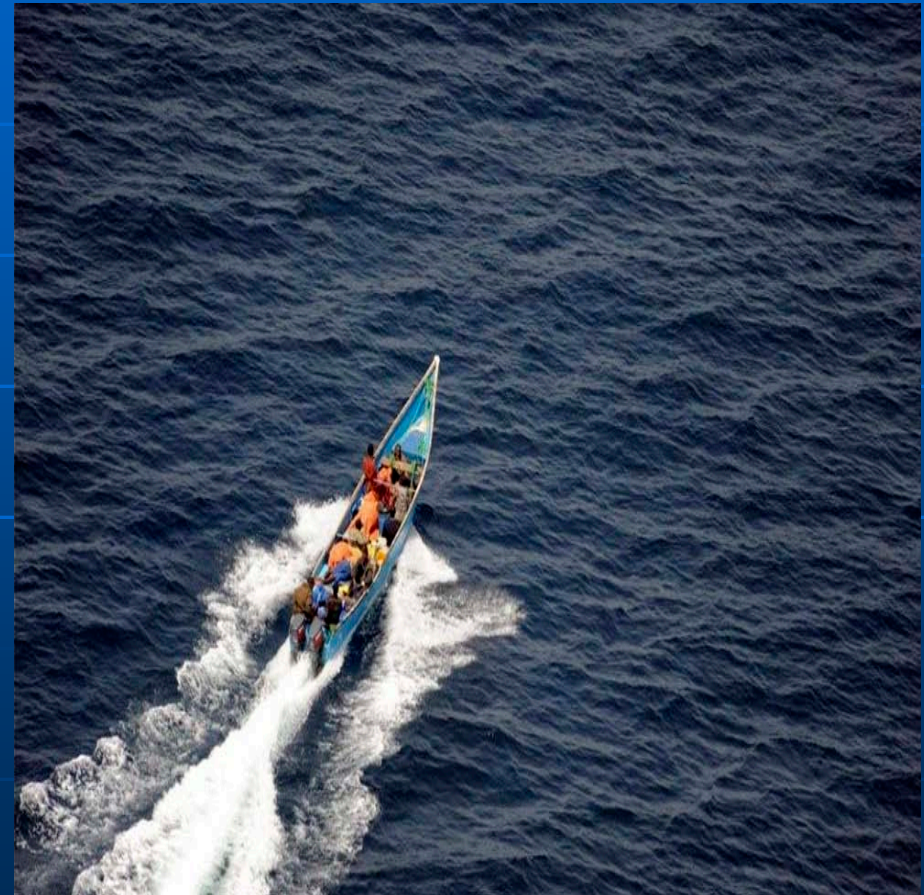


Piracy off the Horn of Africa



Outline

- Background
- Legal Framework
 - International
 - Domestic
 - Main concepts
- Prosecute – take home?
- Prosecute – Third State?
- Evidence



Background - incidence ?

Piracy and Armed Robbery at Sea rates:

- Using the IMB definition
 - “Any act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in the furtherance of that act”

- Compare reported incidents of actual and attempted in the HOA area:
 - January – June 2004: 7 (of 182 worldwide)
 - January – June 2009: 153 (of 240 worldwide)
 - 148 of these carried out by suspected Somali pirates
(Area = Gulf of Aden / Red Sea, Kenya, Somalia, Tanzania, Arabian Sea, Indian Ocean, Oman)
 - Year to Oct 2009 174 of 324

Who?



How?



Why?



When they can take something this
big...



Legal Framework

- International law on piracy
 - Universal jurisdiction and CIL
 - LOSC 1982
 - UNSC Resolutions
 - Situationally relevant, but not law creating
 - Conclusion: law enforcement, not armed conflict
- Domestic law
 - Varieties of incorporation

What is the International Law authority for warships deal with piracy?

- Right of Visit – Art 110 LOSC: no Flag State consent
 - Warships cannot visit either:
 - Another warship (defined in LOSC 1982 Article 29), or
 - A ship owned or operated by a State and used only on government non-commercial service.
 - These ships enjoy complete immunity from the jurisdiction of any State other than the Flag State
- Warships may board other ships on the high seas if there are reasonable grounds for suspecting that:
 - ship is engaged in piracy
 - ship is engaged in the slave trade
 - ship is engaged in unauthorised broadcasting (limitations)
 - ship is without nationality
 - flag visit

UNSCRs – critical elements

- Some States needed UNSCRs before they could engage in counter-piracy ops – eg Germany
- Explicit recognition of authority to
 - Board and search
 - Detain
 - Seize and dispose of vessels, arms, related equipment
- Broadened geographical scope to include the Territorial Sea of Somalia.
 - Enter into the TS of Somalia for the purpose of repressing acts of piracy and armed robbery at sea
 - Use, within the TS of Somalia, “all necessary means” to repress acts of piracy and armed robbery at sea
- All in accordance with LOSC 1982
- Other authorisations related to territory of Somalia – not relevant for the issue of counter-piracy on the High Seas

Counter-Piracy off the HOA – the Area of Operations



Now what...?



Prosecute – take home?

- Detention / custody lawful ab initio?
 - Power of arrest?
- Criminalised in AUS domestic law?
 - Caveats?
- Collecting evidence?
 - Navy? AFP? Other navies?
- Getting suspects to AUS for prosecution?
 - Through where? How? Who? Other requirements?
- What if it does not succeed?

Prosecute – Third State? (eg Kenya)

- Lawfulness of detention ab initio?
 - 24 hr requirement
- How to collect evidence?
 - Who will need to collect? How? Who will need to appear?
- Can we hand over?
 - Extradition issues?
 - Human rights issues?
 - MOU or Arrangement required?
 - Fair trial?
 - Death penalty
 - Prisons conditions?
 - Documentation?

Some Difficulties: Evidence

- A prosecution does not automatically lead to a conviction
 - Need to prove each element of the offence of piracy
 - as defined in the relevant domestic law
 - to criminal standard of proof required in that domestic law
 - against each defendant
- Obtaining evidence (translators required)
- Keeping physical evidence (unstable ammunition, weapons etc...)
- Unwillingness of witnesses to attend court (no power to compel)
- Requirement to take ship off station
- Requirement for ship's company to attend court

Aides to Implementation: Transfer Guidance

- Aims to sensitize Naval units to Kenyan legal requirements. Eg:
 - If you provide a witness statement, you will be required to appear
 - If a photograph is used, the person who took it will need to appear to verify
 - Need to communicate with Kenyan DPP immediately if is prospect of transfer to Kenya for prosecution
 - If KDPP can't get a judicial extension to the detention within 24 hrs of it commencing, prosecution likely to be fatally flawed ab initio

Aides to Implementation - Disruption ?

- Take details of individuals
- Destroy weapons, equipment (ladders, grappling hooks)...
(UNSCRs permit this)
- Destroy skiffs? – but has attendant problems (eg
navigational hazards)
- PMSCs?

Questions?

