**“The Untouchables”: Organised Crime in International Waters**

**Federal Court of Australia, Admiralty and Maritime Law Seminar.**

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# The evolution of jurisdiction over crimes at sea in Australian law

*Abstract:* This paper briefly traces the evolution of the admiralty criminal jurisdiction and its replacement in Australia by the Crimes at Sea Act, 2000 (Cth) and by various special enactments. It is still vital in present law to determine the ambit of the law and the establishment of venue. It is also vital to the exercise of enforcement powers to establish the limits of powers to stop, board, search and detain foreign vessels at sea. Powers of interference with foreign vessels at sea are governed by international law. The primary principle is enshrined in article 110 of the United Nations Convention on the Law of the Sea, 1982, which is regarded as binding customary law. Specific powers of interference may be granted by other provisions of the Convention and by other international treaties. Although powers of arrest in Australia’s fishing zone for violations of the laws applicable in that zone are recognised by the Law of the Sea Convention, and contained in the Fisheries Management Act, 1991 (Cth), much unlawful fishing is conducted outside the 200 mile limit of Australian fisheries jurisdiction by foreign vessels engaged in Illegal, Unlicensed and Unregulated (IUU) fishing to the detriment of stocks within the zone, contrary to the UN Fish Stocks Agreement, 1995. “The Untouchables” are those foreign vessels operating beyond the 200 mile limit which can be boarded only with the permission of their flag State. This permission may be difficult or slow to obtain, especially from flag-of-convenience States. A way forward is indicated by the International Tribunal for the Law of the Sea, which declared in an advisory opinion in April 2015 that flag States have a duty of due diligence under international law to ensure that its flag vessels abide by lawfully established international rules and regulations regarding IUU fishing. They may be held to account if they do not do so. Another way forward is for Australia to conclude a network of agreements with other States allowing for reciprocal waiver of immunity in boarding each other’s vessels upon reasonable suspicion of unlawful activity.

1. The historical evolution of jurisdiction over coastal waters and waters beyond must be understood both in the common law and in statute law. The impact of international law on this evolution must also be understood. The first part of what follows may be thought to be of only antiquarian interest. But it is important still as confirming two essential planks in our understanding of the current law: the particularity of establishing jurisdiction, i.e that jurisdiction must be proved and not merely assumed to exist; and the range of current international law and treaties respecting crimes at sea as a source of modern bases of jurisdiction at sea under Australian law.
2. Criminal jurisdiction generally. Criminal jurisdiction in England was historically linked to the place in which the offence was committed. Juries, both of presentment (grand juries) and of trial (petty juries) were drawn from the community in which the offence was committed. Both ambit of the law and venue were required.[[1]](#footnote-1) Hence the need for “hue and cry” where an alleged offender had escaped into another county, in order that the offender could be brought back to the place where trial could take place (the venue). This is essentially the situation today. With only minor statutory exceptions (e.g. under section 45 of the Extradition Act, 1988 (Cth)) English and Australian law do not recognise a jurisdiction to try persons for crimes committed in foreign countries. For example, when the Channel Tunnel was constructed, the UK Parliament had to pass a statute declaring that the whole of the tunnel (part of which lay beneath French waters) was deemed to be part of the County of Kent for criminal jurisdiction purposes.
3. Admiralty Criminal Jurisdiction. From early times England, as a seafaring nation, had to fill a gap in the general jurisdiction posed by the absence of a territorial connection with crime. Consolidated in the reign of Henry VIII, the Offences at Sea Act was passed in 1536 to provide for trial of offences committed anywhere at sea before a mixed commission including the Judge of Admiralty. This remained the situation until the reforms of 1834 and 1844 in which the Admiralty criminal jurisdiction became vested in the Central Criminal Court and in Her Majesty’s Justices and Commissioners of Assize. These jurisdictions were conferred on Australian courts by the Admiralty Offences (Colonial) Act, 1849 (Imp).
4. It is important to note that the admiralty criminal jurisdiction was confined to (a) acts committed aboard English ships, and (b) by English subjects aboard foreign ships anywhere in the world. It did not extend to acts committed by foreign subjects aboard foreign ships. This point was reaffirmed in the case of Reg. v. Keyn[[2]](#footnote-2) in 1876. A collision occurred in the English Channel between a British and a German vessel, allegedly by reason of the negligent navigation by the captain of the latter vessel (“The Franconia”). The German captain was charged with manslaughter before the Central Criminal Court. The Court for Crown Cases Reserved divided 7 to 6 in holding against jurisdiction. The majority held that the criminal courts had no jurisdiction beyond the low water mark except in cases of admiralty jurisdiction. That jurisdiction, however, did not apply in respect of acts committed by a foreign subject aboard a foreign vessel. The minority, by contrast, held that, by reason of the fact that international law by this time recognised that states had jurisdiction over a belt of territorial waters extending up to 3 nautical miles from shore, that belt should be equated to land territory.
5. Keyn’s case illustrates a general principle of the interaction of national and international law, recognised by English and Australian courts as “the adoption principle”. This is that international law does not automatically apply as part of national law unless it has been received into that law either by judicial recognition or by enactment. The latter would be especially so, where the matter concerned the criminal law. Moreover, if jurisdiction were to have been assumed, based upon the concession by customary international law of a territorial sea of 3 nautical miles, which courts would have had jurisdiction under the restrictive rules of ambit and venue? Bringing Keyn to trial before the Central Criminal Court was a mere guess, based on the analogy of admiralty criminal law.
6. Clearly clarification was needed. The British Parliament responded by passing the Territorial Waters Jurisdiction Act, 1878, which declared that the term “territorial waters of Her Majesty’s Dominions” meant such part of the of the sea adjacent to the coast of the United Kingdom or the coast of some other part of Her Majesty’s dominions as is deemed by international law to be within the territorial sovereignty of Her Majesty; and for the purpose of any offence declared by the Act to be within the jurisdiction of the Admiral “any part of the open sea within one marine league [3 nautical miles] of the coast measured from low-water mark shall be deemed to be open sea within the jurisdiction of Her Majesty’s dominions.”
7. The Imperial Act of 1878 applied to Australia until supplanted by the Crimes At Sea Act, 1979 (Cth) (superseded by the Crimes at Sea Act, 2000). The need for amending Australian legislation was first perceived as a result of a case in Western Australia, *Oteri v. Reg*. in which an information was laid in respect of larceny of lobster pots in an area 22miles off the coast. What was the applicable law? The Imperial Act of 1878 specified “English law” but the information had been laid under the WA Criminal Code. The case went all the way up to the Privy Council, which – while recognising the anomaly – held that the charge should have been laid under the Theft Act (UK) 1968, which otherwise had no application in Australia.[[3]](#footnote-3)
8. It was also noted at this time that there was no separate Australian registry for ships. Soon afterwards, the designation of Australian ships as British ships, on which the admiralty jurisdiction had in large part depended, was replaced by the establishment of a separate Australian nationality for ships by the Shipping Registration Act 1981 (Cth).
9. The Scheme established by the Crimes At Sea Act, 2000. Although the Federal Parliament may legislate to create specific offences (and has done so, including those committed at sea) the generality of the criminal law resides within the powers of the States. It was therefore necessary to provide for the extension of State criminal law beyond the limits of land territory. The Act incorporates a cooperative scheme devised by the federal and State governments. The Act establishes three distinct zones:
10. An inner adjacent area for each State, which extends from low water mark to 12 nautical miles;
11. An outer adjacent area for each State which extends from the 12 nautical mile limit to 200 nautical miles or beyond to the limit of the extent of the continental shelf;
12. Outside the adjacent area.
13. The inner adjacent areas for each State (and for the Northern Territory) are defined in detail in clause 14 of the Cooperative Scheme scheduled to the Act. The Act recognises that the application of State laws to these areas derives from State powers.
14. The application of State laws to the outer adjacent areas is declared by the Act to derive by force of the law of the Commonwealth. An indicative map is set out in Appendix 1 to the Act showing the extent of these areas. The choice of outer limits of 200 nautical miles or the outer margin of the continental shelf was in a sense arbitrary, because neither customary international law nor the United Nations Convention on the Law of the Sea, 1982 (to which Australia is a party) establish these limits as zones of general jurisdiction; they are recognised only as zones in which coastal States have certain rights and jurisdictions over natural resources (exclusive economic zone and continental shelf). Nevertheless for the purposes of the Act they constitute convenient limits, even if the exercise of jurisdiction within them in respect of foreign ships or persons needs to be restrained in order not to conflict with rules of international law, especially the freedom of navigation on the high seas, and the right of innocent passage in territorial seas.
15. Outside the adjacent area there is no application of State laws. In that area the applicable criminal law is that of the Jervis Bay Territory, a convenient point of reference since that Territory (unlike the ACT) is entirely controlled by the Commonwealth.[[4]](#footnote-4) Reminiscent of the rules governing the old admiralty criminal jurisdiction, the Act applies in the area outside the adjacent area only to acts committed (a) on an Australian ship, or (b) in the course of activities controlled by an Australian ship, or (c) by a person who has abandoned, or temporarily left, an Australian ship and has not returned to land. The Act further applies to acts committed by (a) an Australian citizen, other than a member of the crew) on a foreign ship, (b) by an Australian citizen (other than a member of the crew) in the course of activities controlled from a foreign ship, or (c) by an Australian citizen who has abandoned, or temporarily left a foreign ship and has not returned to land. From the point of view of international law, these applications are not controversial, since international law concedes the right of states to exercise jurisdiction over their own nationals wherever they might have committed offences (the personality principle of jurisdiction).
16. More delicate (since it has no basis in earlier admiralty criminal law) is the extension by the Act of jurisdiction outside the adjacent area to criminal acts committed (a) on a foreign ship, or (b) in the course of activities controlled from a foreign ship, or (c) by a person who has abandoned, or temporarily left, a foreign ship and has not returned to land. A territorial nexus is established for this extension by the proviso that “if the first country at which the ship calls, or the person lands, after the criminal act is Australia or an external territory of Australia.” Moreover, the Act provides that any charge may not be laid in respect of acts committed outside the adjacent area without the consent in writing of the federal Attorney-General, who “must take into account any views expressed by the government of a country other than Australia whose jurisdiction over the alleged offence is recognised under principles of international law.”
17. Pausing to take a snapshot of offshore criminal jurisdiction as at 1979, we can see that the historic admiralty jurisdiction was replaced in Australia by extending State (and Northern Territory) criminal laws out to 200 nautical miles or to the outer limit of the continental shelf, and beyond those limits by applying the criminal laws of the Jervis Bay Territory. However, the further one travels beyond territorial limits the more one has to take into account any limitations imposed by international law. Ambit and venue may be established unilaterally, but powers of boarding, inspection and arrest have to be considered in the light of international law rules. Breaches of international law engage the responsibility of the Australian government. Hence the need to seek the consent of the federal Attorney-General in certain cases.
18. The relevance of international law. In 1878 there was only one area of national waters recognised by international law. This was the territorial sea, recognised by most countries as extending three nautical miles from the coast. Within bays and other inlets of the sea international law recognised these waters as internal waters and assimilable to land territory (e.g. Sydney Harbour).[[5]](#footnote-5) For the rest, there were only the high seas. In 1878 no country could lay claim for any purpose to any area of the high seas, which were free for the commerce and navigation of all nations. Any act of interference with such navigation, such as by way of stopping, boarding, searching, or arrest was strictly prohibited, except in the special case of piracy. Even in the territorial seas, ships of other nations had a right of innocent passage, i.e. if the foreign vessel was only transiting those waters without stopping or engaging in any activity affecting the coastal state there could be no interference.
19. By 1978 international law had changed in some important respects, but the sensitivity of the exercise of powers at sea against vessels of foreign flags remained constant. Customary law had evolved to the extent that the permitted breadth of the territorial sea was now 12 nautical miles. In addition, it was recognised that coastal states had a need to exercise enforcement powers in a belt of waters adjacent to their territorial seas called the contiguous zone. In this zone, states could exercise powers of enforcement over their fiscal, immigration, customs and sanitary laws in respect of outgoing foreign vessels (relating to such offences committed on land or within the territorial seas) and in respect of incoming vessels (relating to suspicion that the foreign vessel is intending to commit such offences within the territorial sea or on land.) From 1945 it had become increasing state practice to recognise coastal state rights over the continental shelf adjacent to their territories. Moreover, by 1978 there was a developing trend to recognise preferential coastal state fishing rights in an area beyond the territorial sea to 200 nautical miles from land.
20. The UN Third Conference on the Law of the Sea took place between 1974 and 1982. The resulting Convention (to which Australia is a party) clarified the following permitted maritime zones:
21. A territorial sea of 12 nm., but preserving the right of foreign innocent passage.
22. A contiguous zone of a further 12 nm.
23. An exclusive economic zone of 200 nm, allowing for coastal state regulation of the natural resources of that zone.
24. A continental shelf extending to its natural geographical limits.
25. Archipelagic waters in respect of those island territories entitled to claim them.
26. In respect of all these zones, the Convention takes into account the need to avoid, so far as possible, undue interference with the freedom of navigation. Of fundamental importance to the present seminar topic is the following provision of the Convention:

“Article 110. Right of Visit.

“1. Except where powers of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96 [foreign warships and certain other State-owned vessels], is not justified in boarding it unless there is reasonable ground for suspecting that:

1. The ship is engaged in piracy[[6]](#footnote-6);
2. The ship is engaged in the slave trade;
3. The ship is engaged in unauthorised broadcasting and the flag State of the warship has jurisdiction under article 109;
4. The ship is without nationality; or
5. Though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

“2. In the case provided for in paragraph 1, the warship may proceed to verify the ship’s right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

“3.If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

“4. These provisions apply *mutatis mutandis* to military aircraft.

“5. These provisions also apply to any other duly authorized ships or aircraft clearly marked and identifiable as being on government service.”

1. It is important to understand this article fully:
2. Although stated to apply to “the high seas” article 110 applies also in the exclusive economic zone, since residual high seas freedoms apply in this zone by reason of article 58(2). Since the exclusive economic zone overlaps with the contiguous zone, it applies there also, except that article 33 allows for the coastal State to “exercise the control necessary to” enforce its customs, fiscal, immigration and sanitary laws.
3. The words “except where acts of interference derive from powers conferred by treaty” are vital, since a number of multilateral conventions have been concluded in recent years allowing for such enforcement measures, as well as some bilateral agreements in many parts of the world for cooperation in enforcement of fishing and immigration laws. Moreover, the UN Convention on the Law of the Sea itself constitutes a “treaty” for the purposes of article 110, and contains powers of stopping boarding and arrest in respect of violations of coastal state laws applicable in the territorial sea, the contiguous zone, in respect of the natural resources of the EEZ, and in relation to protection of the marine environment.[[7]](#footnote-7)
4. The point to be emphasised is that any attempt to stop, board, inspect, or carry out any powers of arrest must be strictly warranted by reason of reasonable suspicion that the foreign ship has violated any of the specified provisions of article 110, any other provisions of the Law of the Sea Convention and its associated instruments, or the provisions of any other treaty or convention to which both Australia and the flag state of the foreign vessel are parties.
5. It must be remembered that none of the above applies to Australian-flagged vessels, since any action against such vessels by Australia does not attract international responsibility. It is also to be noted that what are popularly called “flags of convenience” do not permit of interference merely because the vessels are registered in places where taxes are low and supervision is lax. They are nonetheless valid flags. A more restricted meaning of “flags of convenience” is given in article 92, paragraph 2 of which provides: “A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.” In other words, where the use of multiple flags is fraudulent. This thus engages the application of article 110 (1)(d) above.
6. Special conventions allowing for enforcement of laws at sea. Apart from the UN Convention on the Law of the Sea, as discussed above, and such associated instruments as the Fish Stocks Agreement, there are a number of others, too many to discuss in detail. One that should be mentioned is the UN Convention Against Organized Crime, 2000, a Protocol to which deals with People Smuggling by land, air and sea.
7. Another important example for present purposes is the UN Convention on Traffic in Narcotic Drugs and Psychotropic Substances, 1988, which was given effect in Australian law by the Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act, 1990. Article 17 of that Convention requires that the consent of a flag State of a vessel “exercising freedom of navigation in accordance with international law” must be obtained before another State boards and searches the vessel. Note that “freedom of navigation in accordance with international law “ applies not only on the high seas, as such, but in the EEZ, and also in the territorial sea where the vessel is exercising the right of innocent passage. The Act consequently requires, under section 16, that the consent of the Attorney-General to prosecution is obtained, since the permission of the flag State must first be secured. Another is the Protocol on People Smuggling to the UN Convention Against Transnational Organised Crime, 2000, which has similar provisions requiring the consent of the flag State to stopping, searching and arrest at sea.
8. Australia has entered into a number of international conventions concerning crimes having an international aspect. Their incorporation into Australian law has been effected by the Criminal Code Act, 1995 (Cth). The offences under the Act most relevant to the present topic are: people smuggling; terrorism; crimes against humanity, war crimes, and grave breaches of the Geneva Conventions; slavery; and trafficking in persons.
9. The Criminal Code Act provides for four categories of “extended geographical jurisdiction” in respect of offences covered by the Code. These are listed and defined as follows:

Category A. This is where the conduct occurs wholly or partly in Australia, or if outside Australia has effects within Australia; or committed by an Australian citizen.

Category B. Jurisdiction extends outside Australia but is limited in application to Australian citizens.

Category C. Jurisdiction applies whether or not the conduct occurs in Australia or the results thereof. It is a defence if the conduct is that of a foreign citizen (other than a foreign citizen aboard an Australian ship.

Category D is the widest of the four. It applies whether or not the conduct occurs in Australia, and whether or not a result of the conduct occurs in Australia.

In these provisions “Australia” means the land territory of Australia – s.16.3. “Result of conduct” is a reference to a result that is a physical element of the offence – s.16.4.

1. Of the crimes mentioned above, Category D extended geographical jurisdiction applies, except for people smuggling and trafficking in persons. No extended jurisdiction applies to the former unless the perpetrators are Australian citizens or Australian residents. As to the latter special jurisdictional provisions apply under ss. 271.10 and 271.11. Also to be taken into account in relation to these offences is the Customs Act, 1901.
2. Of special interest in the context of the present paper is enforcement of fisheries laws. The relevant jurisdiction and powers of enforcement are contained in the Fisheries Management Act, 1991 (Cth). The application of the Act to foreign unlicensed fishing within the Australian Fishing Zone (which is the statutory equivalent of the Exclusive Economic Zone for fisheries purposes) is not controversial. The United Nations Convention on the Law of the Sea, 1982, provides for the enforcement by the coastal State of its laws relating to the natural resources of the zone in article 73. That article provides also that arrested vessels and their crews shall be promptly released upon the posting of reasonable bond, and that penalties may not include imprisonment or corporal punishment. The government of the foreign flag State must be informed.
3. Beyond the 200 mile limit of the EEZ, however, the restrictive provisions of article 100 of the Convention become applicable. Illegal fishing is not one of the offences for which vessels may be boarded on the high seas by the authorities of another State. It was only after the conclusion of the UN Third Conference on the Law of the Sea that the impact of illegal, unlicensed and unregulated (IUU) fishing on the high seas became increasingly felt. This led to the conclusion under UN auspices of a supplementary Agreement on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 1995 (“The Fish Stocks Agreement”), which provided for international cooperation in regulating national fishing vessels on the high seas, and to the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, 1993 (“the Compliance Agreement”) , promoted by the Food and Agricultural Organisation of the UN (FAO). Neither of these two instruments allows for boarding or arrest on the high seas, but the latter allows for detention for investigation if the suspected vessels enters a foreign port. The flag State may then be called upon to take action. These instruments are scheduled to the Fisheries Management Act (AFMA) 1991. Section 105 establishes ambit and venue, but without powers of arrest other than in Australia itself.[[8]](#footnote-8)
4. It thus appears that there are indeed “untouchables” who engage in unlawful activities in offshore areas where no powers of arrest are provided. This is especially so in relation to IUU fishing on the high seas. Precedents exist for States to waive by agreement the immunity of their flag vessels on the high seas. Such is already possible in relation to narcotic drugs, as noted above. The United States has such agreements with a number of Caribbean countries in respect of illegal migration. The members States of the Forum Fisheries Agency in the Pacific have an agreement for the mutual enforcement of fisheries laws. The term “treaty” in article 110 of the Law of the Sea Convention is not limited to a formal treaty but can extend to any kind of agreement, including an oral agreement. A way forward in this matter may be for the Australian government to seek to conclude enforcement agreements with other States, including with so-called flags of convenience States, allowing for the boarding, inspection, and if justified, arrest of their flag vessels by Australia on the high seas. Such agreements might not go so far as to give carte blanche, but be in the form of giving Australia the right to request, by telephone or email, a waiver of immunity ad hoc in particular cases.
5. Another avenue of approach is indicated by the recent advisory opinion of the International Tribunal for the Law of the Sea (ITLOS) rendered in response to the request of the Subregional Fisheries Commission of West Africa, which has similarly been plagued by the presence of IUU fishing. The Tribunal held that flag states are not directly liable for the illegal actions of their flag vessels, but that they do bear international responsibility for exercising “due diligence” in relation to the conduct of their vessels. In other words, they must adopt and enforce regulations requiring their flag vessels to comply with lawfully established fishing regulations adopted by coastal States and regional organisations. A report of IUU fishing sent to a flag state would put that state on notice and require it to take action in order to discharge its duty of due diligence.[[9]](#footnote-9) Failure to discharge such a duty could lead to international responsibility and possible action before an international tribunal. These tribunals include the International Court of Justice, the International tribunal for the Law of the Sea, and an arbitral tribunal established under Annex VII of the UN Convention on the Law of the Sea. If no other tribunal is mutually agreed, an arbitral tribunal under Annex VII is compulsory for all parties to the Convention (166 parties at present).

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1. The historical background is well explained by Professor Glanville Williams in his three-part article “Venue and the Ambit of Criminal Law” (1965) 81 Law Quarterly Review 276-88, 395-421, 518-38. [↑](#footnote-ref-1)
2. [1876] 2 Exch.D.63 [↑](#footnote-ref-2)
3. (1976) 11 ALR 142 (JC). An earlier case in Tasmania, Holyman v. Eyles [1947] Tas SR 11 had anticipated this difficulty and had laid a charge under the English Cruelty to Animals Act rather than under Tasmanian law in respect of the negligent carriage of horses across Bass Strait. [↑](#footnote-ref-3)
4. The Criminal law of the Jervis Bay Territory is based on the criminal laws of NSW. [↑](#footnote-ref-4)
5. By reason of the peculiar wording of the Letters Patent establishing South Australia, the extensive waters of Spencer Gulf and Gulf St Vincent were made part of the Province and are thus internal waters. [↑](#footnote-ref-5)
6. Crimes Act, 1914 (Cth), Part IV. Even though jurisdiction over piracy is universal by international law, the consent of the Attorney-General to prosecution is required, where suspected beyond the territorial sea. [↑](#footnote-ref-6)
7. Part XII, Section 6 of the UN Convention on the Law of the Sea, 1982. [↑](#footnote-ref-7)
8. S. 105Q incorporating Schedule 1A. [↑](#footnote-ref-8)
9. International Tribunal for the Law of the Sea, request for an Advisory Opinion Submitted by the Subregional Fisheries Commission, 2 April 2015, paras. 109-150 ([www.itlos.org](http://www.itlos.org)). [↑](#footnote-ref-9)