

Jurisdiction over prosecution of criminal acts on cruise ships and regulation of the cruise ship industry.

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The newest cruise ships can carry in excess of 6000 passengers and crews of up to 2400.¹ With such a concentrated population, one might expect that cruise ships would suffer the same rate of crime per head of population as a town of equivalent size. However, industry statistics show that the rate of crime on cruise ships is very low indeed, even pegging the likelihood of being the victim of crime on a cruise ship as being the same as the risk of being hit by lightning.² This, of course, is good news for the cruise ship industry keen to promote cruising as a safe holiday.³

While crimes can happen on any ship, a cruise ship operator is exquisitely exposed to the risks of crimes at sea. There are far more people on board a cruise ship than any merchant ship, and the population aboard is transient. Passengers include vulnerable people such as children, the disabled and the elderly.. Alcohol flows freely and inhibitions can be low. Multiply these risk factors across the current fleet of approximately 200 cruise ships sailing internationally and it is impressive that crimes on board cruise ships are not more prevalent.

However, it is an unfortunate reality that where there are people, there is the potential for crime. And thus, this raises difficult legal questions as to which country has the right to investigate and prosecute crime on board a ship at sea. In this era of 24/7 news reporting, tweeting, blogging and facebook, any crime at sea will be big news.⁴ Press coverage leads to calls for perpetrators to be 'brought to justice' without comprehending that the legal position is complicated and the rights of individual countries to prosecute will be different, not only ship by ship, but for every individual crime. This is because location of the ship at the time of the crime, its previous and next port, its flag State, and the citizenship of the accused and victim will all need to be taken into account, and their respective domestic laws analysed to determine which countries may have jurisdiction over the crime.

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¹ As at time of writing, the largest cruise ships are Oasis Class cruise ships *Oasis of the Seas* and *Allure of the Seas*. The Oasis class can carry maximum of 6296 passengers and 2394 crew. <http://maritime-connector.com/worlds-largest-ships/> accessed 19 September 2012.

² Asia Wright 'High Seas Ship Crimes' (2009) 7 *Loyola Maritime Law Journal* 1, 7 (fn 27 citing US congressional hearing evidence (2006)).

³ Other commentators are not so sanguine, taking issue with the method of collecting those figures: Ross Klein, submissions to 2012 Senate Committee on Commerce, Science, and Transportation Senate Committee (US) on 'Oversight of Cruise Industry' delivered 1 March 2012 downloaded <http://www.cruisejunkie.com/Senate2012.pdf> (9 August 2012) From 4 onwards; see also appendix A collating crime statistics.

⁴ One only has to look at the enormous press generated by the death of Australian Dianne Brimble on board the *Pacific Sky* in 2002 – yet this was prior to the facebook and twitter era.)

A country (State) will only be entitled to prosecute a crime if it has recognised grounds to claim jurisdiction over the event in international law, and its domestic law expressly asserts that jurisdiction. Jurisdiction can be territorial in nature or based on internationally recognised grounds of extra-territorial application of law. This paper will outline how a claim of jurisdiction over a criminal act can be based on any one of a number of different grounds, each of which has its own limitations (whether legal or practical). For instance, the State in which the ship is registered, its flag State, has primary jurisdiction over events on board the ship; but the practice of flagging passenger ships in open registries makes prosecutions unlikely for reasons that will be discussed below. Another determinant is whether the ship is on the high seas⁵ or in territorial waters of a State at the time of the criminal act. Legal principles of territorial jurisdiction over the sea, derived from UNCLOS, are therefore pertinent, as is the domestic law of the State in question. UNCLOS distinguishes between those crimes committed closer to shore and those committed while the ship is on the high seas. If the ship is truly on the high seas, then other States can rely on still more grounds to claim what is, in effect, extra-territorial application of their domestic laws. The result, more often than not, is that there might be multiple States entitled to claim jurisdiction over a particular criminal act, based on the flag and location of the ship and the nationalities of the people involved. The outcome reached may well end up being a one negotiated through diplomatic channels, largely based on pragmatism.

The types of crime perpetrated at sea can extend across the entire spectrum of criminality. Piracy and terrorism are at the extreme end. The hijacking of the *Achille Lauro* and September 11 provoked international responses leading to conventions such as *SUA Convention* and *2005 Protocol*⁶ and the *ISPS Code*.⁷ This paper does not address those types of crimes, but rather crimes at the other end of the spectrum that will be unlikely to endanger the safe navigation of the ship⁸ – the ‘ordinary’ crimes such as murder, sexual assault and theft.

This paper has five parts. First it considers the internationally recognised heads of jurisdiction over crimes at sea. Secondly it considers the reliance on these heads of jurisdiction in the domestic law of four States, namely the USA, UK, Australia and New Zealand. Thirdly it considers the recent move in the United States to regulate the cruise ship industry to aid prevention and treatment of crimes, and the response of the Australian Federal Government to calls for similar regulation in Australia. Fourthly it considers how co-operation between States and industry could assist in achieving the desired outcome of prevention and management of criminal cases arising on cruise ships at sea, before concluding with some suggestions for reform in Australia.

⁵ Which, as we shall see, in this context is taken to mean waters outside the territorial sea of a State, rather than waters outside the EEZ or continental shelf. See 1.2 below.

⁶ *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* opened for signature 10 March 1988, 1678 UNTS 221 (entered into force 1 March 1992) (*SUA Convention*). See also its 1995 Protocol: *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, opened for signature 14 October 2005, IMO Doc LEG/CONF.15/21

⁷ *Amendments to the Annex to the International Convention for the Safety of Life at Sea*, opened for signature 12 December 2002, [2003] ATNIF 11, *Annex (International Code for the Security of Ships and of Port Facilities)* (entered into force 1 July 2004).

⁸ Being the crucial phrase that converts an ordinary crime into one that triggers the *SUA Convention*: see Article 3. It should be acknowledged that in a freakish circumstance (eg murder of an officer of the ship) an ordinary crime may affect the safe navigation of the ship and therefore, prima facie, require close scrutiny of the *SUA* provisions; however the clear intent of *SUA* is to deal with criminal acts done with a purpose of intimidation or placing duress on a particular government or international organisation.

1 When can a State claim a right to prosecute crimes on board a cruise ship?

Traditionally, jurisdiction over a criminal act is primarily that of the territorial State in which the crime occurred. However in certain cases, other States may claim jurisdiction over the same criminal act – through extra-territorial jurisdiction.⁹ ‘Jurisdiction is extra-territorial when asserted by a nation State over conduct occurring outside its borders.’¹⁰ The assertion of jurisdiction over an act committed in another’s State is almost always controversial, and while some assertions may be legitimate, others are overtly politicised.¹¹ ‘Generally speaking, extra-territorial laws of States are valid under international law to the extent they do not unduly infringe the sovereignty of another.’¹² Despite calls for restrictions to a ‘State’s power to punish extra-territorially’¹³ it is clear that there are increasing numbers of claims by States of extra-territorial jurisdiction.¹⁴

Crimes committed on board a ship, particularly when at sea, pose a more dynamic legal scenario than the same crime committed on land. A ship is subject to the laws of its flag State, but it can also find itself within the territory of any coastal State. While visiting the ports of a coastal state it is squarely within the operation of that State’s laws. Even when on the high seas, multiple States may assert jurisdiction. A criminal act committed on board will therefore inevitably lead to a potential overlap in jurisdictional claims.¹⁵

International law recognises various types of claims of jurisdiction over criminal acts on board ships at sea. Some jurisdictional claims are explicitly set out by treaty, namely the provisions of the *UN Convention on the Law of the Sea (UNCLOS)*.¹⁶ As we shall see, under UNCLOS the most prominent head of jurisdiction is flag State jurisdiction, although it also entitles port States (inland waters) and coastal States (territorial sea) to claim jurisdiction in certain circumstances. In addition to and beyond the provisions of UNCLOS, general principles of international law can be brought to bear to support assertion of jurisdiction by an interested State. Those assertions of jurisdiction can be found in the domestic legislation of a particular State, which is seeking to apply its laws to ships, or crimes at sea, outside its territorial waters.¹⁷

⁹ While acknowledging the conceptual distinctions between prescriptive, enforcement and adjudicative jurisdiction, a discussion of them falls outside the ambit of this paper. Discussions can however be found Bantekas at [15.1]; Ireland-Piper (below, fn 10),4 and Triggs at [7.3].

¹⁰ Danielle Ireland-Piper ‘Extra-territorial Criminal Jurisdiction: does the long arm of the law undermine the rule of law?’ (2012) *Melbourne Journal of International Law* 1,3.

¹¹ See Ireland-Piper, *ibid*, 4-5 and examples given throughout her paper.

¹² *Ibid*, 8.

¹³ Ireland-Piper *ibid*,6.

¹⁴ *Ibid*, at fn 31 referring to a statement by the International Court of Justice in the case of *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium) Judgment* [2002] ICJ Rep 3, 85.

¹⁵ Except in the rare event of the vessel being within the waters of its flag State at the time of the criminal act, with only nationals of the flag state involved in the crime.

¹⁶ *United Nations Convention on the Law of the Sea, Montego Bay opened for signature 10 December 1982*, [1994] ATS (entered into force 16 November 1994). Whilst it has not been signed by every State (and notably not by the USA) it is regarded as epitomising customary law and thus its provisions carry weight even amongst non signatories. For a discussion about the UNCLOS framework for jurisdiction, see Tim Stephens & Donald R. Rothwell ‘The LOSC Framework for Maritime Jurisdiction and Enforcement 30 years on’ (2012) *27 International Journal of Marine and Coastal Law* 1.

¹⁷ See below part 2 for examples. As to the history of UK and Australian criminal jurisdiction over ships at sea, see Sir Harry Gibbs ‘Criminal law on the High Seas’ (1989) *6 MLAANZ Journal* 3; also Australian Law Reform Commission *Criminal Admiralty Jurisdiction and Prize* (report 48)1990

1.1 UNCLOS: Flag State jurisdiction

UNCLOS provides that the flag State has ‘exclusive jurisdiction’ over crimes occurring on board.

‘Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas.’¹⁸

The phrase ‘exclusive jurisdiction’ is somewhat of a misnomer, as there are in fact other States that may also claim jurisdiction on internationally recognised grounds. Any other claim of jurisdiction is regarded as being concurrent with the flag State’s jurisdiction. This provision of an alternative jurisdiction is perhaps just as well. While the flag State has a clear onus to exercise that jurisdiction and control over its ships under UNCLOS,¹⁹ practically speaking, most cruise ships are registered in open registries which lack sufficient resources to investigate and prosecute all crimes on ships flying their flag. This is the subject of criticism by commentators.²⁰ Therefore it is desirable to have a concurrent jurisdiction in another State with the will and resources to prosecute. That other State must be able to support its claim for jurisdiction on internationally recognised grounds.²¹

1.2 UNCLOS: Territorial claim - Ship in territorial waters when the crime occurs.

There are 2 different scenarios here. One is a ship that will be visiting a port or internal waters of a particular State. The other is where the ship is simply passing through territorial waters without visiting a port, but is in those territorial waters when a criminal act occurs.²² Article 27(2) reveals that the rights of a coastal state over a criminal act on board a foreign ship whilst in territorial waters may depend on whether the vessel has been in *internal* waters. Where the ship has visited internal waters (invariably to visit a port), the coastal state may seek to exert an aspect of “port state jurisdiction”.

1.2.1 Jurisdiction of the port State

If the criminal act occurred when:

-the ship is in internal waters having visited a port or being about to visit a port, OR

¹⁸ Art 92.

¹⁹ Art 94 which says ‘every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. (2) in particular every State shall: ...(b) assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.’

²⁰ For example, Stuart Kaye writes: ‘while the jurisdiction of a flag state remains the paramount mechanism to determine the applicable law aboard a vessel, in the case of states with open registries, a vessel’s connection to its flag state may be so diffuse as to be meaningless. It is difficult to see how effective enforcement at sea can be undertaken by many of the states with substantial registries. Flag of convenience states have no capacity to enforce their laws on ships flying their flag and may have little incentive to co-operate with other states to remedy the deficiency.’ ‘Threats from the Global Commons: Problem of Jurisdiction and Enforcement’ (2007) 8 *Melbourne Journal of International Law* 185 at 197.

²¹ It may be that the ship was in the State’s territory at the time; or arrived at its port shortly thereafter. It may be that the accused is a citizen of that State. Or the victim is a citizen. As we shall see, each of these constitutes a recognised ground to assert jurisdiction.

²² Both are regarded as a ship exercising innocent passage but the rules are different as regards a crime.

-the ship has departed the port and is now in territorial sea (12nm) of a port State,

then that port State can claim jurisdiction to deal with the crime so long as the legislation is expressed to apply extra-territorially.²³ 'The State is entitled to enforce its laws against the ship and those on board',²⁴ subject to certain limited exceptions.²⁵ This is an exercise of sovereignty - it is the right of the State who has granted admission to the ship, to regard the ship as bound by its laws such as relate to the 'peace good order and government' of the State in question.²⁶ However, it is commonplace for the port State to leave the minor matters on board to the so called 'internal economy' of the ship.²⁷ (The ship is not, after all, a lawless place; as the laws of the flag State apply to it.)²⁸ Therefore the master can be left to deal with, for example, the theft of cigarettes by a crewmember from another. However where the 'interests' of the coastal State are engaged, the laws of the coastal State can and will apply. Thus if there is a criminal act aboard affecting the 'peace good order and government' of the port State - say the dumping of sewage, or indeed a serious criminal offence on board such as murder - then the interests of the coastal State will be engaged. The local authorities can claim a right to investigate and prosecute if necessary.²⁹ Further, they can intercede where a ship has left port but is within 12 nautical miles,³⁰ if the intercession concerns a crime that occurred in internal waters or territorial sea.

It is a common misconception that a ship in port constitutes a small island of its flag State; part of the now outdated 'contrived notion' of a ship as territory.³¹ While it is true that flag State law would be used to resolve matters relating to the 'internal economy' of the ship, any major incident will be subject to the laws of, and be enforced by, the law of the port State where the port State legislation is intended to apply.³²

1.2.2 Jurisdiction of the coastal State

If the ship is not visiting a port of a State but is travelling through its territorial sea, under UNCLOS a coastal State can only claim jurisdiction over a crime committed in that area in the limited circumstances as set out in Article 27.³³ Most particularly, the coastal State may do so if the 'consequences' of the crime extends to the coastal State, or is of a kind to disturb the peace of the State or the good order of the territorial sea.³⁴

²³ *CSL Pacific* [2003] 214 CLR 397, 416.

²⁴ Churchill & Lowe *The law of the Sea* 1999 (3ed) 67 as quoted in 'CSL Pacific' (2003) 214 CLR 397 at 418 (High Court).

²⁵ Sovereign and diplomatic immunities: *ibid*, 67.

²⁶ In *CSL Pacific* [2003] 214 CLR 397 the High Court held Australian laws will apply to foreign ships in port where legislation is expressed to apply to them.

²⁷ See *CSL Pacific* judgment, *ibid*, for discussion of this phrase; at 413.

²⁸ Churchill & Lowe, *The Law of the Sea* 1999 (3ed) 67.

²⁹ See for example *Mali v Keeper of the Common Jail* 120 US 1 (1887) where the US Supreme court exercised jurisdiction over an on board murder of one crew by another, on a Belgian flagged ship, whilst the ship was at dock in a US port, on the basis it had disturbed the peace of the US. (cited by Triggs, at [7.38])

³⁰ Article 27 UNCLOS..

³¹ Triggs, 349.

³² *CSL Pacific* [2003] 214 CLR 397.

³³ Which reads:

'Article 27 – Criminal jurisdiction on board a foreign ship

- 1) The criminal jurisdiction of the coastal state should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:

If a crime that occurs on a ship that is beyond 12 nautical miles, then there are no territorial grounds for a jurisdictional claim by the coastal State under UNCLOS unless the ship is headed for a port in that State.³⁵ A coastal state has very limited rights to assert jurisdiction over its contiguous zone, being the belt of water between 12 nm and 24 nm beyond the baseline. It may only exercise control necessary to prevent or punish infringement of its customs, fiscal immigration or sanitary laws and regulations within its territory or territorial sea.³⁶ While UNCLOS provides that the coastal State has jurisdiction over its Exclusive Economic Zone and Continental Shelf for purposes relating to economic exploitation and environmental protection, this does not extend to criminal matters. Therefore a coastal State will have to rely on some other recognised ground to claim jurisdiction over criminal acts on board ships in the seas beyond the territorial sea.³⁷ This paper will now consider those other grounds.

1.3 Where crime occurs on a ship is outside a State's territorial sea or in international waters

Beyond the scope of UNCLOS, a State may exercise one or more of various heads of extra-territorial jurisdiction accepted in international law.³⁸

1.3.1 'Next port' ('objective territoriality' jurisdiction)

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- a) If the consequences of the crime extend to the coastal state
 - b) If the crime is of a kind to disturb the peace of the country or the good order of the territorial sea
 - c) If the assistance of the local authorities has been requested by the master of the ship or by the diplomatic agent or consular officer of the flag state, or
 - d) If such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.
- 2) The above provisions do not affect the right of the coastal State to take any steps authorised by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters.
- 3) In the cases provided for in paragraphs 1 and 2, the coastal state shall, if the master so requests, notify a diplomatic agent or consular officer of the flag State before taking any steps, and shall facilitate contact between such agent or officer and the ship's crew.
- 4) In considering whether or in what manner an arrest should be made, the local authorities shall have due regard to the interests of navigation.
- 5) Except as provided in Part XII [protection of the marine environment] or with respect to violations of laws and regulations adopted in accordance with Part V [EEZ] the coastal State may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters.'

³⁴ UNCLOS Art 27.

³⁵ As we shall see shortly, the next port visited after the crime has occurred will have jurisdiction, on the basis of objective territory or 'effects' jurisdiction.

³⁶ UNCLOS Art 33.

³⁷ The coastal State may get jurisdiction based on 'effects' or citizenship grounds, as discussed next, or because it is the flag State of the ship, but not merely because a foreign ship was within its EEZ or continental shelf when the crime occurred. Contrast the claim of States to extend their criminal law out to the limits of the continental shelf; an example is the Australian *Crimes At Sea Act 2000*. This purports to apply the law to activities on the sea, but cannot entitle a State to apply its law on board a foreign ship itself unless there is some other jurisdictional ground to do so.

³⁸ As mentioned above, in order to rebut the presumption that its laws are only intended to apply within its territory, a State must expressly state in its domestic legislation that the laws are to apply extra-territorially. See part 3 for examples.

When a crime has occurred on board a ship on the high seas, it is common for the master to report the crime to the authorities in the next port. Some States make it a condition of the ship's visit to the port that any such events are notified prior to arrival.³⁹ Practically speaking, the consequence of this is that the authorities at the next port may well have to deal with the evidentiary and investigative elements of the crime scene as well as the detention of the accused. International law recognises that the 'next port' may claim jurisdiction on the basis that the 'effect' of the crime will be need to be dealt with in that State.⁴⁰ This is taken to be an example of the general principle of objective territory jurisdiction, namely where acts committed abroad give rise to an effect in the State claiming jurisdiction. The State may claim jurisdiction to prosecute the case, subject to consultation with the flag State.⁴¹

1.3.2 Claims for jurisdiction based on the nationality of the accused (active personality principle)

International law recognises a State's right to prosecute an accused who is its citizen according to that State's law, on the basis of the national allegiance.⁴² When a criminal act is committed by a citizen, the State has the power to prosecute that citizen, no matter where the crime took place. This is termed the 'active personality' principle of jurisdiction. It is commonly exercised in other contexts, such as child sex offences committed by citizens whilst overseas.⁴³ Nonetheless, this same principle can be used to justify the application of criminal law of one State to the acts of their citizens on board a foreign ship.⁴⁴ This is a common head of claim for extra-territorial jurisdiction in relation to crimes on board a ship.⁴⁵

1.3.3 Claims for jurisdiction based on the nationality of the victim (passive personality principle)

When a criminal act is committed against a citizen of the State, in some circumstances the victim's State claims a right to prosecute. This head of jurisdiction is the most controversial in international criminal law.⁴⁶ Some commentators doubt that this principle displays a sufficient, reasonable or genuine link between the State and the crime such as to justify prosecution away from the State with natural

³⁹ Eg Australian Maritime Identification System; seeks shipping notification up to 1000 nautical miles out, or 96 hours before arriving in port. Once within EEZ it becomes mandatory.

⁴⁰ It might be possible to argue the same over the embarkation port as well; certainly if the crime happens before the ship leaves the territorial waters then there is jurisdiction in that State. See 1.2.1.

⁴¹ See Australian *Crimes At Sea Act 2000* s6(3) which provides for Australian law to apply to a criminal act on a foreign ship if the first country at which the ship calls after that act is Australia or an external territory of Australia.

⁴² Bantekas, *International Criminal Law* (4 ed, 2010 Hart) at 15.3

⁴³ Such as inciting sexual offences against children. See for example *Sexual Offences (Conspiracy and Incitement) Act 1996* (UK) and *Criminal Code Act 1995 (Cth)* Division 272 and 273. For a good explanation of the shortfalls of the nationality principle, see Ireland-Piper above fn10, 10.

⁴⁴ Generally only if the citizens are not crew of the vessel. Again, see for example the Australian *Crimes at Sea Act 2000* at s6 (2).

⁴⁵ As will be discussed, Australia, UK, NZ and US all claim the right to prosecute their own citizens for criminal acts done on board a ship, whether registered in their country or foreign registered.

⁴⁶ Ilias Bantekas *International Criminal Law* (4 ed, 2010), 15.4.

jurisdiction in the matter (in a shipping context, the flag State).⁴⁷ Nonetheless, it has become accepted in conventions dealing with serious international crimes such as terrorism and hostage taking.

The US has led the way in claiming this jurisdiction in their domestic statutes, notably after the *Achille Lauro* incident.⁴⁸ Since the 2002 Bali bombings, the Australian Government followed suit, amending the *Criminal Code Act 1995*. It is now an offence to kill or seriously hurt an Australian citizen or resident whilst out of Australian territory.⁴⁹ The French have a similar provision in their Penal Code.⁵⁰

Where a crime occurs on a cruise ship, legislation that relies on passive personality principles to ground an assertion of jurisdiction over a particular crime might well be justified in circumstances where the flag State does not intend to prosecute. As already discussed, this is a realistic scenario given that most cruise ships are flagged in open registries. Therefore this head of jurisdiction may be useful for a State looking to ensure that the accused is required to face due process in their courts if the alternative is that the accused will not face justice at all.⁵¹

Those are the relevant⁵² recognised grounds for a State to claim jurisdiction over crimes on board ships in international law.

2 Examples of domestic law seeking extraterritorial application relevant to prosecution of crimes on ships

International law serves to prohibit particular – abusive, excessive and unreasonable – instances of criminal jurisdiction or provide rudimentary rules in the case of conflicts. Domestic law, on the other hand, provides the authorities within a state with the necessary tools with which to investigate crimes, seek extradition... and ultimately undertake prosecutions.⁵³

States that wish to reserve the right to claim jurisdiction beyond their territory are seeking to apply their laws extra-territorially. It is an accepted principle that the legislature must make explicit its intention to apply the laws beyond the domestic setting.⁵⁴ The legislative reach must be within the bounds of what is permitted internationally and not infringing on the sovereign authority of some other State.⁵⁵ If a domestic

⁴⁷ Ibid.

⁴⁸ Which led to the *SUA Convention*.

⁴⁹ Part 5.4, entitled 'Harming Australians'. Ireland-Piper is critical of claiming this jurisdiction over harm to residents as opposed to citizens; above fn 10, 10.

⁵⁰ Penal Code (France) [Legifrance trans, Penal Code (2005)

<http://www.legifrance.gouv.fr/content/download/1957/13715/version/4/file/Code_33.pdf>] art 113-7. As quoted in Ireland-Piper, fn10, 14.

⁵¹ See for example the case of *US v Roberts*, discussed below at 2.1.

⁵² One other which is applicable where the State sees a security risk – the so called 'protective principle' – but whilst it has a part to play in acts of maritime terrorism it is unlikely to be triggered by ordinary crimes on board ships.

⁵³ Ilias Bantekas *International Criminal Law* (4 ed, 2010), 331.

⁵⁴ Ibid. See also *CSL Pacific* [2003] 214 CLR 397, 416. For a recent example of a court finding that the legislature had failed to do so: see *R v ElvisTeddy* (unrep, Treston J District Court of New Zealand, judgment delivered 26 July 2012) This case did not concern a cruise ship but a protester's actions interfering with a seismic survey being undertaken in connection with exploration of the seabed resources. The judge was persuaded that the charge originated under an Act that did not apply outside New Zealand's territorial waters. However the judge did not seem to consider the effect of s7 of the *Continental Shelf Act (NZ)*. I am indebted to Associate Professor Paul Myburgh who highlighted this discrepancy.

⁵⁵ *CSL Pacific* [2003] 214 CLR 397, 416.

statute exceeds what is permissible in international law, a court can be asked to declare it beyond the legislative competence of the Parliament and seek an order for it to be read down accordingly.⁵⁶

A State may rely on several jurisdictional grounds at once; and as already noted these grounds are taken to be concurrent with the entitlement of the flag State.⁵⁷

Therefore when States claim, through their domestic law, the right to deal with crimes at sea, it must be explicit in the legislation that it applies beyond the low water mark. Further, the basis for claiming a right to apply its criminal law and ultimately prosecute an accused must be based on one or more of the jurisdictional ‘pegs’ set out above.

This paper now lays out, in brief, the domestic statutes of USA, Australia, the United Kingdom and New Zealand through which these States seek to claim jurisdiction over criminal acts beyond their territory.

2.1 United States of America

The US provides an example of a broad claim to jurisdiction over acts at sea.⁵⁸ Federal jurisdiction is outlined in 18 US Code § 7.

The purpose behind the enactment of this statute.... was to combine in one place all of the difference bases for exercising US jurisdiction for penal statutes covering acts within the admiralty and maritime jurisdiction so as to avoid having to set forth the basis of such jurisdiction in each criminal statute. Over the years, Congress has expanded US criminal jurisdiction to provide greater coverage by enacting additional sections to the statute, continually reaching new situations and legal relationships.⁵⁹

Section 7 claims ‘special maritime and territorial jurisdiction’ as follows:

7. The term “special maritime and territorial jurisdiction of the United States”, as used in this title, includes

(1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and to any vessel belonging in whole or in part to the United States or any citizen thereof or any corporation created by or

⁵⁶ For example, in Australia s15A *Acts Interpretation Act 1901* (Cth).

⁵⁷ Gillian Triggs *International Law: Contemporary Principles and Practices* (2006) (LexisNexis Butterworths Australia) at [7.37].

⁵⁸ For a detailed summary of the US claim to jurisdiction over crimes aboard vessels at sea, see Robert Peltz & Lawrence Kaye ‘The Long Reach of US Law over Crimes Occurring on the High Seas’ (2007 – 2008) 20 *University of San Francisco Maritime Law Journal* 199. State jurisdiction may also be relevant: see for example *State v Jack* 67 P.3d 673 (Alaska Ct App 2003) involving prosecution for rape allegedly occurring on an Alaskan State ferry while it was outside Alaskan waters and within Canadian territorial waters. The accused was arrested on the vessel by an off duty Alaskan State Trooper. The Court of Appeal found (2:1) that Alaska had jurisdiction to prosecute the accused because Alaskan laws granted offshore jurisdiction to the State to the extent that the US has jurisdiction, and the US had jurisdiction in this case. A key finding was that the ‘high seas’ should be broadly interpreted (at III.A), and the definition was held to encompass all ocean waters beyond the boundary of the low water mark’ (at B.1; Justice Carpeneti dissenting). Later caselaw about the reach of US jurisdiction show that this interpretation may well be doubtful. However, the court also relied on the ‘effects’ doctrine to justify jurisdiction in this case, stating that as neither a foreign jurisdiction nor the federal authorities had chosen to prosecute the crime it was free to exercise extraterritorial jurisdiction in order to do so (at C.1.)

⁵⁹ Robert D Peltz & Lawrence W Kaye ‘The Long Reach of US law over Crimes Occurring on the High Seas’ (2007-2008) 20 *University of San Francisco Maritime Law Journal* 199, 207.

under the laws of the United States,.... when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

.....

(7) Any place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States.

(8) To the extent permitted by international law, any foreign vessel during a voyage having a scheduled departure from or arrival in the United States with respect to an offense committed by or against a national of the United States.

...

Nothing in this paragraph shall be deemed to supersede any treaty or international agreement with which this paragraph conflicts...

Historically, subparagraph 1 was regarded as somewhat controversial in its breadth, and there were conflicting decisions of the courts as to its application.⁶⁰ However the addition of subparagraphs 7 and 8, expanding as they did the reach of the US extra-territorial jurisdiction by reliance on active and passive personality principles, 'largely rendered irrelevant prior judicial disputes'.⁶¹

Subparagraph 7 relies upon passive personality and active personality principles to operate to grant jurisdiction to the US when a crime occurs beyond the territorial waters of any State, involving a US citizen.

Subparagraph 8 is a significant extension. The US seeks to apply its criminal law not only on the high seas but even in foreign territorial waters and on board foreign ships, where some other nexus with the US exists and the ship as has a US port on its itinerary. The claim for jurisdiction contains elements of effects jurisdiction, as well as active personality and passive personality principles. However it only applies if the ship has departed from or is sailing to a US port.⁶²

An example of the operation of § 7 (7) and (8) is the 1998 case of *US v Roberts*.⁶³ A crewmember was charged with engaging in a sexual act with a minor. The accused was a citizen of St Vincent & the Grenadines. The cruise ship was registered in Liberia and owned by a Panamanian company although the owner had a significant presence in the US. The crime occurred in international waters off the coast of Mexico, and the child in question was an American citizen. The defendant disputed that the US had jurisdiction to prosecute the crime. The court disagreed, relying upon the fact that the child was a US citizen, the ship had a US port as embarkation and disembarkation ports, and that the crime had had an effect in the US.⁶⁴ In particular Judge Vance found that international law did not prohibit Congress from incorporating passive personality principle into its legislation. The exercise of jurisdiction under § 7(8)

⁶⁰ There is conflicting authority in US courts as to whether to give this section its ordinary meaning or to read it down to mean US vessels on the high seas: see *US v Roberts* 1 Fed Supp 2d 601 at [2] and authorities cited therein. Ultimately in that case the court did not rely on §7(1).

⁶¹ Robert D Peltz & Lawrence W Kaye 'The Long Reach of US law over Crimes Occurring on the High Seas' (2007-2008) 20 *University of San Francisco Maritime Law Journal* 199, 208.

⁶² Robert D Peltz & Lawrence W Kaye 'The Long Reach of US law over Crimes Occurring on the High Seas' (2007-2008) 20 *University of San Francisco Maritime Law Journal* 199, 201.

⁶³ *US v Roberts*, 1 F.Supp.2d 601 (E.D.La. 1998)

⁶⁴ Because the US authorities had investigated the crime and the US would be obliged to provide counselling to the victim. *Ibid*, 607.

displayed 'concern for US nationals but limits jurisdiction to ships most likely to have a connection with America.⁶⁵ Importantly, it was noted that the flag State had 'little or no interest in the alleged offense' as neither the victim nor defendant were Liberian.⁶⁶ This allowed the court to rely on passive personality to find that the US had jurisdiction over this case.

However, there are some circumstances where the US will not have jurisdiction under this Statute. It will not have jurisdiction if a crime occurs in the territorial waters of another State, where the cruise does not call at a US port. For example if a US citizen is on a cruise on a foreign owned ship wholly in the waters of a foreign state, such as a river cruise in Europe, a crime by or against him would not be caught by the US special maritime jurisdiction. It would not fall within § 7(7) because the ship is not outside the waters of a State. It would not fall within § 7(8) because the ship is not visiting a US port.⁶⁷

While the US has enacted laws making it an offence to kill or hurt a US national outside the US, those laws only apply where the offence was committed as a terrorist act.⁶⁸

In 2010 the USA enacted *Cruise Vessel Security and Safety Act* which will be considered shortly. As we will see, it applies to any overnight international voyage where passengers embark or disembark in the USA, therefore bringing itself within the special maritime jurisdiction envisaged by 18 US Code § 7.⁶⁹

2.2 Australia

There are two Australian statutes of relevance.⁷⁰

2.2.1 *Crimes At Sea Act 2000*

Under the *Crimes at Sea Act 2000*, (CSA) Australia seeks to apply its criminal law at sea in several different ways.

First there is the territorial basis. The CSA applies out to Australia's maritime territorial limits, being either 200 nm from the baselines or the limit of the continental shelf, whichever is the further. This is termed the 'adjacent area' and Australian criminal law applies to criminal acts in this area. The new *Maritime Powers Bill 2012* will, once passed, support the enforcement of the *Crimes at Sea Act 2000*.

However it is important to distinguish criminal acts in that zone, from criminal acts on a ship in that zone. The ability of a coastal State to deal the crimes on board a ship is, as we have seen, constrained by the rules regarding territory in UNCLOS. Therefore once a ship enters the adjacent area, Australian law will apply to its activities, although not necessarily to crimes committed on board the ship unless it enters the territorial sea (12 nm). Therefore, whilst criminal law may apply to the activities of ships in the adjacent area (eg deliberate ramming of one ship by another) it is not the case that Australian criminal law will apply automatically on board ships outside the territorial sea.

⁶⁵ Ibid, 607.

⁶⁶ Ibid, 607.

⁶⁷ That is not to say that criminal jurisdiction would not otherwise lie under some other US statute, although the writer has not found it.

⁶⁸ '...intended to coerce, intimidate or retaliate against a government or civilian population.' See 18 USC § 2332 (a) and (d).

⁶⁹ See below where the jurisdictional provisions of that Act are discussed.

⁷⁰ As explained above, criminal acts that endanger the navigation of the ship, which fall within statutes enacting the SUA Convention and 2005 Protocol are not strictly relevant to this paper. For such offences see *Crimes (Ships and Fixed Platforms) Act 1992 (Australia)*. Further, State law may also be relevant where it seeks to apply extraterritorially. This paper concentrates on the Commonwealth legislation.

Once within the territorial sea, it will have a stronger basis to claim that Australian criminal law can apply to what happens on board the ship, if the crime in question affects the peace order and good government of our State. This is particularly so if it is heading to or from a port.⁷¹ One would expect that serious crimes such as murder would be taken to affect the peace, order and good government.

If it is unclear that there is a territorial basis to claim jurisdiction, whether within the adjacent area or beyond, Australia may still claim jurisdiction under the other provisions of the CSA which envisage that it can apply other than on a territorial basis. Section 6 provides that the CSA will also apply to criminal acts:

- On an Australian ship or on course of activities controlled from an Australian ship, or persons from such a ship (*flag State jurisdiction*).
- Of an Australian citizen (not crew) on a foreign ship.⁷² (*citizen as accused/ nationality jurisdiction*)⁷³
- On a foreign ship, or activities controlled or persons temporarily left the ship, if the first country at which the ship calls, or the person lands, after the criminal act is Australia or the external territory of Australia.⁷⁴ (*effects jurisdiction*)

In the latter two instances the right to prosecute is subject to the consent of the Attorney General, requiring to consultation with flag State. Prior to giving that consent, the AG must 'take into account any views' expressed by the government of the country of registration. This provides a diplomatic route to negotiate who will prosecute a crime committed on board that ship. One would expect that one way that might happen, however, is if the flag State 'requests' that the Australian authorities take charge of the prosecution; once a request is made, then it would be within power under the *Crimes at Sea Act*.⁷⁵ However, the AG need not obtain the permission of the flag State before giving consent.

Further, whilst the political and diplomatic wranglings are taking place, authorities need not wait for the Attorney General's consent - they may proceed to arrest, charge and extradite the suspected offender. If the AG subsequently declines consent then the proceedings instituted in Australia must be permanently stayed.⁷⁶

Australia therefore claims jurisdiction as a flag State, as well as jurisdiction based on the international principles of active personality principle and objective territorial jurisdiction.

In essence, under CSA, once the ship is out of territorial waters, Australian authorities have a limited right to apply Australian criminal law and prosecute a criminal act occurring on a foreign registered ship. Nor is the CSA explicit about the extent of its claimed application on board foreign ships within the adjacent zone.

The CSA is both narrower and broader than the US special maritime jurisdiction we have just seen. It is broader because it claims jurisdiction over the criminal acts of the Australian citizen regardless of where

⁷¹ As it has visited internal waters so been subject to sovereignty. Because the CSA applies outside the adjacent area where the next country at which the ship calls is Australia: s6(3).

⁷² S6(2) *Crimes at Sea Act 2000*.

⁷³ Also called 'active personality principle': see Ilias Bantekas *International Criminal Law* (4 ed, 2010) at [15.3].

⁷⁴ S6(3) *Crimes at Sea Act 2000*. However the legitimacy of this ground of jurisdiction, without prescriptive jurisdiction, is discussed by Timothy Smith 'Fighting on the Ocean Blue: New Zealand's Extra-Territorial Jurisdiction and Maritime Protest' (2001) 32 (2) *Victoria University of Wellington Law Review* 499 at text accompanying fn [32].

⁷⁵ Because Clause 7, Schedule 1 (the Co-operative Scheme) has been satisfied.

⁷⁶ Clause 7, Schedule 1 (the Co-operative Scheme).

the ship was situated. It is narrower because it does not claim jurisdiction where an Australian citizen is the victim of crime.

2.2.2 2002 Amendments to *Criminal Code Act 1995 (Cth)*

There is no claim of extra territorial jurisdiction based on the controversial ‘passive personality’ principle in the *Crimes at Sea Act 2000*. However, another Australian statute may well be called in aid should an Australian victim be killed or seriously harmed whilst on board a ship. In a 2002 amendment to the *Criminal Code Act 1995 (Cth)* (CCA), intentionally harming or committing manslaughter or murder of an Australian citizen or resident is an offence, no matter where that crime occurs.⁷⁷ As with the CSA, prosecutions cannot be brought without the consent of the Attorney General.⁷⁸ The statute is explicitly extra-territorial in application.⁷⁹ If it does apply to criminal acts on ships then it represents a significant broadening of Australian jurisdiction, arguably broader than the US extraterritorial jurisdiction over crimes on board ships.

The wording of the CCA is simple and blunt:

115.1 Murder of an Australian citizen or a resident of Australia

(1) A person is guilty of an offence if:

- (a) the person engages in conduct outside Australia; and
- (b) the conduct causes the death of another person; and
- (c) the other person is an Australian citizen or a resident of Australia; and
- (d) the first-mentioned person intends to cause, or is reckless as to causing, the death of the Australian citizen or resident of Australia or any other person by the conduct.

Penalty: Imprisonment for life.

The significant unknown is whether this provision could be called upon to support a prosecution of a crime committed against an Australian on a ship. No mention is made of the provision by either the Coroner in the Brimble Inquest,⁸⁰ nor in the Federal Government response to the Coroner’s Recommendations.⁸¹ It is possible that the provision was overlooked, or that it was regarded as irrelevant. Perhaps it is. However the words of themselves are not ambiguous. The provision clearly applies to unlawful death or serious injury occurring to Australians outside Australia. Nonetheless, there may well be an issue about intended coverage. There is certainly an live argument that the CSA is intended to ‘cover the field’ for crimes at sea (dealing as it does with issues of UNCLOS and the paradigm of jurisdiction over ships), and that, conversely,

⁷⁷ *Criminal Code Amendment (Offences against Australians) Bill 2002*. The Bill was introduced a matter of weeks after the Bali Bombing, which killed 88 Australians, on 12 October 2002. The Bill was introduced into the House of Representatives on 12 November 2002 and had passed the Senate by 14 November 2002. The legislation was made retrospective to 1 October 2002.

⁷⁸ 115.6 *Criminal Code Act 1995 (Cth)*.

⁷⁹ See the Explanatory Memorandum to the Bill, *ibid*, discussing proposed section 104.1 that subsequently became 115.1: ‘The Division creates new offences which will only apply extra-territorially.’

⁸⁰ Findings at: http://www.coroners.lawlink.nsw.gov.au/agdbasev7wr/assets/coroners/m4016013/17_brimble.dianne-findings-only.pdf Recommendations at

http://www.coroners.lawlink.nsw.gov.au/agdbasev7wr/assets/coroners/m4016013/18_brimblerecs2.pdf.

⁸¹ The Response can be found at <http://www.ag.gov.au/Organisationalstructure/Pages/21-June-2012---Government-Response-to-the-recommendations-of-the-NSW-Coroner-following-the-inquest-into-the-death-of-Ms-Dia.aspx> (accessed 19 September 2012) (‘Response’)

the CCA provisions are intended to apply to 'other' crimes, particularly, given the policy objectives to support terrorism legislation.⁸² It should be noted though, that the legislation was not intended to be applicable only to terrorism offences.⁸³ In particular, the provisions may be cast with such a wide net as to make them internationally unpalatable for general crimes at least. If the CSA provision applies on board a ship, the extra-territorial jurisdiction over crime would be of greater reach than the US law we have just seen in §7(7). While the CSA provisions contain many qualifications carefully drafted so as to remain within the bounds of internationally accepted principles over ships at sea, there are no such inhibitions with the CCA.

On the other hand, one may also argue these CCA provisions are very broadly drawn, giving power to allow Australian prosecution where harm is caused to Australians whilst outside Australia. Designed to have extra-territorial effect, the provisions were expressly intended to provide Australia with jurisdiction over serious crimes squarely within the territory of another State. Surely it is no less intrusive to extend this jurisdiction to a ship.⁸⁴ Indeed it would be ironic if the provision operated to allow prosecution for acts committed in another State, but not on a ship flagged in that State. Faced with an unlawful killing of an Australian on board a ship (cruise ship or not), public pressure may move the Federal Government to rely upon this provision if no other claim to jurisdiction can be made, particularly if the flag State has chosen not to prosecute.

A clarifying amendment to the CSA and CCA would be ideal..

2.2.3 Summary – Australian position

The situation is not straightforward but can perhaps be summarised as follows:

Under Australian law, a crime on a foreign registered ship:

Under CSA:

- **Inside 'adjacent zone'** will be subject to UNCLOS limits imposed on States exercising jurisdiction over ships and in any event require AG permission/consultation with flag State before any prosecution and arrest;

⁸² The Explanatory Memorandum to the 2002 amendment states (at p1) that 'The offences will provide coverage for overseas attacks on Australian citizens and residents, and in appropriate circumstances enable the perpetrators of those attacks to be prosecuted in Australia. The new offences will complement the existing terrorism legislation, and will provide a prosecution option where perpetrators are unable to be prosecuted under the terrorism legislation.' However the CCA itself is not only about terrorism; it also covers mundane crimes such as theft and fraud. This distinguishes it from similar provisions in other countries couched in specific anti terrorism legislation.

⁸³ The Explanatory Memorandum says (at p6) 'This provision makes it clear that the offences in Division 104 will not limit the operation of any other offences which may apply to the same conduct. For example, in some circumstances the existing terrorism laws (which also have extraterritorial application) may apply to the same conduct to which these offences would apply.' This terminology envisages that the sections can operate without there having been an act of terrorism.

⁸⁴ Note that in 1986 Congress enacted a general criminal provision that made it a crime to kill attempt to kill or seriously injure a US National outside the territory of the United States where the intent is to intimidate, coerce, or retaliate against any government or its people: *Omnibus Diplomatic Security and Antiterrorism Act* 18 U.S.C. § 2332 (2000) as referred to in Robert D Peltz & Lawrence W Kaye 'The Long Reach of US law over Crimes Occurring on the High Seas' (2007-2008) 20 *University of San Francisco Maritime Law Journal* 199, 206 and Ilias Bantekas *International Criminal Law* (4 ed, 2010) 341. In Australia the extra-territorial maritime jurisdiction over crime (ie the CSA) is not as extensive as the general extra-territorial criminal jurisdiction (CCA).

- **outside ‘adjacent zone’** will fall within our jurisdiction if the accused is Australian (under CSA)
- **on a cruise bound for Australian port** will fall within Australian jurisdiction regardless of citizenship, subject again to AG permission/consultation with flag State, but
- **on a cruise bound from an Australian port** to a foreign port will not attract jurisdiction, unless the crime occurred before the ship passed beyond 24 nm of the Australian coast, or the accused is an Australian citizen or it can be said that the crime will create ‘effects’ in Australia.

Under CCA:

- anywhere outside Australian territory, where the victim of the offence is killed or is caused serious harm (under CCA); subject to the reservations expressed above.

2.3 New Zealand – *Crimes Act 1961*

The relevant statute in New Zealand is the *Crimes Act 1961*.⁸⁵ Section s8 of the *Crimes Act 1961* (NZ) applies to any act done or omitted beyond New Zealand by any person:

- on board a Commonwealth ship, or
- being a British subject (not a crew), on board any foreign ship on the high seas or within the territorial waters of any Commonwealth country; or
- the offender arrives in New Zealand in the course of or at the end of a journey.

That criminal act is then capable of prosecution within New Zealand.⁸⁶ The Attorney General has to obtain the ‘consent’ of the flag State to the institution of proceedings in New Zealand, although steps can be taken to arrest a suspect while consent is being obtained.⁸⁷

The obvious points of difference are the expansion of jurisdiction to all Commonwealth ships and British subjects, not just those of New Zealand. This gave effect to a 1931 Commonwealth agreement from which New Zealand has since withdrawn, and it has been argued that this extension is no longer appropriate.⁸⁸

⁸⁵ As explained above, criminal acts that endanger the navigation of the ship, which fall within statutes enacting the SUA Convention and 2005 Protocol, do not fall within the ambit of this paper. New Zealand has enacted statutes enforcing the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (10 March 1988) and the Protocol for the Suppression of Unlawful Acts against the Safety to Fixed Platforms Located on the Continental Shelf (10 March 1988) in *Maritime Crimes Act 1999* (NZ). As at date of writing New Zealand has not enacted the *2005 Convention* and *2005 Protocol*. Also, note the *Continental Shelf Act 1964* (NZ) which applies the law of New Zealand to any installation or device being used in the exploitation of or exploration for natural resources in the seabed. Such a provision clearly does not apply to passenger ships traversing the sea.

⁸⁶ And says if those events would have been a crime had they occurred in NZ then are taken to be a crime. It is not uncommon for domestic legislation seeking to operate extra-territorially to state that criminal acts are deemed to be committed in the State in question, and then jurisdiction to deal with breaches of those laws. See s279 *Merchant Shipping Act 1995* (UK) for another example.

⁸⁷ s8(2) *Crimes Act 1961*.

⁸⁸ Timothy Smith ‘Fighting on the Ocean Blue: New Zealand’s Extra-Territorial Jurisdiction and Maritime Protest’ [2001] *Victoria University of Wellington Law Review* 499, at text accomp [23].

Also, note the contrast here with the Australian CSA, which requires ‘consultation’ rather than consent. The New Zealand bar is set somewhat higher.⁸⁹

New Zealand does not does not claim extraterritorial jurisdiction over ordinary criminal acts on board a foreign ship when its citizen has been the victim of the crime.

2.4 United Kingdom – *Merchant Shipping Act 1995*

Under the *Merchant Shipping Act 1995* (UK) the United Kingdom claims jurisdiction for criminal acts:

- On ships lying ‘off their coast’ – s280
- Committed on British ships on the ‘high seas’⁹⁰
- Committed by a British citizen, be that citizen on board a UK ship, a foreign ship to which he does not belong⁹¹, or in a foreign port or harbour.⁹²

There is UK caselaw recognising that this jurisdiction may be concurrent with another State, for example if the offence took place in the territory of another country.⁹³

The UK does not claim extraterritorial jurisdiction over ordinary criminal acts on board a foreign ship when its citizen has been the victim of the crime. However, the UK has used that ground in other contexts.⁹⁴

2.5 Summary

These four countries rely on a series of different jurisdictional grounds to claim a right to pursue particular crimes occurring extra territorially which are of interest to them. There is real overlap between the various grounds of claim of a range of States that might be entitled to seek jurisdiction in relation to a crime, but there is also significant scope for confusion.

Apart from the US, none of the other 3 countries relied on the passive personality principle to justify jurisdiction (although Australia relies on it in the *CCA*).⁹⁵ While a jurisdictional claim based on the ‘passive personality principle’ is regarded as dubious by some commentators,⁹⁶ it is submitted that it would be a useful means to establish jurisdiction over a criminal act on a ship in the circumstances where the flag State is unlikely to pursue a prosecution. Further, one cannot rule out that the ‘next port’ visited after a crime may be ambivalent about prosecuting a case not involving its nationals and which occurred outside its

⁸⁹ In both Australian and NZ Acts, the authorities may proceed to arrest/investigate while awaiting flag state response.

⁹⁰ S281(b). (Here, ‘high seas’ means non sovereign waters).

⁹¹ See *R v Kelly (The ‘Winston Churchill’)* [1981] 2 Lloyd’s Law Reports 384 where court held that passengers did not ‘belong’ to the ship.

⁹² S281 (a)(ii).

⁹³ See authorities referred to in Fogerty *Merchant Shipping Legislation 2004 2nd ed.*, 17.28.

⁹⁴ *Taking of Hostages Act 1982*(UK) as referred to in Ilias Bantekas *International Criminal Law* (4ed, 2010), [15.4].

⁹⁵ (Australia has a broad provision relying on passive personality principle in its general Commonwealth *Criminal Code Act 1995*, but, as described above, its interaction with the *Crimes at Sea Act 2000* is unclear.

⁹⁶ See for example Ilias Bantekas *International Criminal Law* (4ed, 2010) at [15.4] who finds it particularly objectionable if the territorial State (flag State for our purposes) is able and willing to prosecute the accused. In a shipping context, with FOC vessels, it is perhaps more justifiable because it would be unusual for the flag State to prosecute and indeed if the flag State were to decline to prosecute, it is feasible that a crime may go unpunished.

territory; or indeed may not have the domestic legislation granting its courts the requisite jurisdiction to deal with extraterritorial crimes on the basis of 'next port' or 'effects' jurisdiction.

3 Regulatory measures for crime prevention and law enforcement on board cruise ships – taking a domestic regulatory approach

Whilst the provisions outlined above are of academic interest, one should pause to place them in context of the people likely to be affected by them. These nuances of jurisdiction are something about which most cruise ship passengers would be completely oblivious. A cruise ship passenger, intent on a memorable vacation, would not give a thought to applicable criminal law aboard, unless and until they were either a victim or an accused. It is in an attempt to protect cruise ship passengers from crimes aboard, as well as the vagaries of international law relating to criminal acts, that has led the USA to introduce regulations over its cruise ship industry. As one-third of all cruises in the world are based in the US, the regulations are significant for the industry.

3.1 *The Cruise Vessel Security and Safety Act of 2010 (USA) 'The Kerry Act'*

The Cruise Vessel Security and Safety Act of 2010 (CVSSA) prescribes a series of practical measures to ensure that crime on cruise ships is less likely, that the operators are more proactive in preventing crime, and there is more transparency about crime that does occur.

It represents a significant reform of passenger ship safety laws. The CVSSA applies to any ship that:

- is authorised to carry at least 250 passengers
- has onboard sleeping facilities for each passenger⁹⁷
- is on a voyage that embarks or disembarks passengers in the USA, and
- is not engaged in a coastwise voyage.⁹⁸ (emphasis added)

The focus of the CVSSA falls into 3 main areas:

Prevention: of crime and overboard incidences by shipboard measures such as peeholes for cabins, more CCTV, higher ship rails;

Harm minimisation: Training of medical staff in treatment of sexual assault victims, and crime scene preservation training, and information sheets for passengers outlining how to report a crime;

Transparency: mandatory reporting to US authorities of crimes on board (until this Act there was no requirement for reporting of crimes at sea, even US port to US port, if the vessel was not a US flagged vessel, although the practice was to do so). The CVSSA also requires cruise ship crime statistics to be made

⁹⁷ Although it does not require that the voyage be an overnight one.

⁹⁸ 46 USC Sec. 10501 defines coastwise voyage. In summary it is a voyage from one State to another in the US, not being an adjoining State, and not by a foreign ship.

available to the public; however an amendment made to the Bill has significantly watered down this requirement.⁹⁹

The CVSSA sets out penalties for non compliance –a fine (usually reasonably modest 5 figure sum) or more persuasively, denial of entry to the US by that ship.

One can see then that the US has again proven to be proactive in the maritime space.¹⁰⁰ It seeks to minimise the likelihood of crimes using better ship design and onboard monitoring. When crimes occur, they are to be logged, victims supported, and the scene/evidence preserved professionally. To its credit, the cruise industry was in favour of the reforms.¹⁰¹ The EU is also keen to adopt elements of the CVSSA which again, the cruise ship industry has publicly supported.¹⁰²

3.2 Will Australia also regulate? The Brimble Inquest Recommendations and Government Response

In Australia, the Coroner's report in the Brimble inquest recommended, amongst other things,¹⁰³ that Australia adopt a similar law to the CVSSA.¹⁰⁴ The Australian Federal Government response¹⁰⁵ (the Response) to this suggestion has been lukewarm.¹⁰⁶ There are several points in the Response that beg to be discussed.

First, the Response argues against the CVSSA on the basis that it may be inconsistent with the right of innocent passage through the territorial sea.¹⁰⁷ With respect, this is wrong. The US argument would be that it seeks to regulate not ships travelling in its territorial sea, but rather ships visiting its ports to embark and disembark passengers. Regulating ships that visiting inland waters (ports) is a matter within the sovereign

⁹⁹ See fn 3 where Ross Klein says that the statistics collected under the CVSSA are in fact more flawed than those that were provided under FOI before the CVSSA came into force. The amendment required that the crime data to be released was only in relation to the missing person and alleged crimes no longer under investigation by the FBI.

¹⁰⁰ Not unlike introducing double hull requirements for oil tankers; and California's recent laws regarding clean fuel for ships.

¹⁰¹ Cruise Line International Association Inc Website <http://www.cruising.org/regulatory/issues-facts/safety-and-security> accessed 13 August 2012.

¹⁰² Keynote speech by Siim Kallas, Vice-President of the European Commission responsible for Mobility and Transport at 5th European Cruise Council Conference held at Brussels, 15 June 2011. http://www.europeancruisecouncil.com/content/Keynote%20speech%20by%20Siim%20Kallas%20at%20ECC%20Conference_15%20June%202011.pdf

¹⁰³ It has to be said that several of the coronial recommendations displayed a lack of appreciation of the legal complexities. Eg recommending the disregarding flag State jurisdiction if the State is not equipped to undertake the rigour of a thorough and competent investigation; ensuring the prosecutors of offenders are firmly within the jurisdiction of Australian authorities. As mentioned above in [2.2.2] there is no comment about the CCA.

¹⁰⁴ Findings at: http://www.coroners.lawlink.nsw.gov.au/agdbasev7wr/assets/coroners/m40160113/17_brimble,dianne-findings-only.pdf Recommendations at http://www.coroners.lawlink.nsw.gov.au/agdbasev7wr/assets/coroners/m40160113/18_brimblerecs2.pdf. The coroner found that Ms Brimble died on 24 September 2002 on the vessel 'Pacific Sky' 100 nautical miles off the coast of Crescent Head, New South Wales.

¹⁰⁵ The Response can be found at <http://www.ag.gov.au/Organisationalstructure/Pages/21-June-2012---Government-Response-to-the-recommendations-of-the-NSW-Coroner-following-the-inquest-into-the-death-of-Ms-Dia.aspx> (accessed 19 September 2012) ('Response')

¹⁰⁶ It agreed to refer certain matters to a parliamentary committee; in particular cross jurisdictional issues to do with coronial and investigative issues: (p 5) but no further action recommended in relation to the bringing in of regulation similar to the Kerry Act.

¹⁰⁷ Response, p7.

right of a State, and therefore quite different to the limitations placed on a coastal State as regards ships seeking only to traverse the territorial sea.¹⁰⁸ A ship that chooses not to comply can still sail through the US territorial sea without limitation as Stated in Article 21 of UNCLOS. As the US is the largest single cruise ship market in the world, the industry must have access to US ports and therein lies the compulsion to comply.

In a related point, the Federal Government response States that 'Australia regulates matters similar to those covered by the Kerry Act, although most are limited in their application to Australian flagged vessels, which do not include any large passenger vessels.' In effect, this is stating that it is only the flag State that can dictate matters of ship design and safety. Under UNCLOS the flag State clearly has responsibilities, and for those ships exercising innocent passage UNCLOS does provide that the law of the coastal State, relating to innocent passage through the territorial sea, shall not impose laws and regulations applying to the 'design, construction, manning or equipment of the foreign ship unless they are giving effect to generally accepted international rules or standards'.¹⁰⁹ However, Article 25 envisages that the port State can impose conditions on ships seeking admission to internal waters, as the ship is entering the State's own territory and therefore requires compliance with its laws. It seems unlikely that a ship could argue it would not be subject to port regulation, particularly if it is a cruise ship homeported at an Australian port and carrying mainly Australian passengers. While Australia might consider it unpalatable to demand ship design or infrastructure changes such as heightened ship rails, it could nonetheless introduce a version of CVSSA dealing with, for example, on board CCTV monitoring, formal reporting standards for criminal acts aboard, and requiring evidence of training in medical treatment for sexual assault, and crime scene management.¹¹⁰

In regards to reporting of crimes, the Response says such measures are already provided by Australian legislation¹¹¹ but currently most of those reporting requirements relate to 'accidents' and define 'accident' in terms of workplace safety.¹¹² It may be somewhat of a long bow to call sexual assault of a minor on a cruise ship a 'maritime accident'. The *Navigation Act 2012* (Cth), once in force, will require reporting of such a crime as a 'marine incident'. A marine incident is defined as an event resulting in a death or serious injury on board or the loss of a person from a ship (s185).¹¹³ The reporting requirement will apply to both Australian and foreign ships, but there is a geographical restriction for foreign ships found in s9.¹¹⁴ Section 9 says:

¹⁰⁸ We have seen the US use this, with good effect, time and again with issues such as double hulled oil tankers and California's legislation to regulate fuel use in their waters.

¹⁰⁹ Article 21 UNCLOS.

¹¹⁰ This may be done under section 112 of the *Navigation Act 2012* (which received Royal Assent on 13 September 2012) which gives the power to make regulations in relation to the carriage of passengers. That section applies to both regulated Australian vessels and foreign vessels.

¹¹¹ Response, page 8.

¹¹² The *Transport Safety Investigation (TSI) Act 2003* (Cth) s3 defines 'accident' as 'an investigable matter involving a transport vehicle where: (a) a person dies or suffers a serious injury as a result of a serious occurrence associated with the operation of the vehicle'... The *Occupational Health and Safety (Maritime Industry) Act 1993* (Cth) requires reporting of an accident that has occurred 'at a workplace'. It is unlikely to be intended to apply to cruise ship crime. However the *Navigation Act 2012* provides for reporting of 'marine incidents' which are events resulting in a death or serious injury on board or the loss of a person from a ship (s185).

¹¹³ That definition would not encompass theft on board, no matter how large the heist.

¹¹⁴ Section 180 *Navigation Act 2012* (Cth). The exact form and timing of the report will presumably be set out in the Navigation Regulations or AMSA Orders. Draft regulations are expected to be available for comment in early November 2012.

Despite sections 6 and 8, the master or owner of a foreign vessel, or a recreational vessel that does not have Australian nationality, does not:

- (a) commit an offence against this Act that relates to the vessel; or
- (b) contravene a civil penalty provision of this Act that relates to the vessel;

unless, at the time of the act or omission constituting the alleged offence, the vessel is:

- (c) in an Australian port; or
- (d) entering or leaving an Australian port; or
- (e) in the internal waters of Australia; or
- (f) in the territorial sea of Australia.

Paragraphs (c) – (f), when read together, seem to impose the reporting obligation only for voyage transiting territorial waters and the port. If that is the case, then the reporting obligation will end at the limits of the territorial sea. It would be preferable for the reporting obligation to be enunciated more broadly; for example to report a crime occurring en route to an Australian port, or en route from an Australian port. In order to protect Australian citizens and those visiting our shores to embark on a cruise, it is also desirable for a foreign cruise ship to be obliged to report deaths, serious injuries and other possibly criminal acts on board to a central authority in Australia, even if they did not occur as a result of an ‘event’. This may well already be the practice of some cruise lines, but it ought to be required.

On another point, one must agree with the Response about the Coroner’s recommendation to attach Federal Police Officers to travel with cruise ships.¹¹⁵ This would appear unworkable for many reasons, some of which are set out in the Response. In particular, there would seem no legal basis for requiring a cruise ship to take on board the officers, except for ships visiting port and only while the ship remains in the territorial sea.¹¹⁶

Finally, the Response says ‘the *Crimes at Sea Act* establishes the jurisdiction of Australian authorities to prosecute offenders to the fullest extent permissible under international law’. The CSA does not claim jurisdiction over crimes committed against its citizens on board a ship wherever that ship may be. Therefore it could not be said it establishes jurisdiction to the ‘fullest extent permissible’. As discussed above, there is no mention of the CCA provisions in the Response. If the CCA provisions do apply to foreign flagged ships outside Australian territorial waters, then Australia would have claimed to the very limits of its available extraterritorial jurisdiction. As the application of the CCA provisions to ships at sea is uncertain, Australia should legislate more explicitly to provide a right to prosecute crimes committed against Australian citizens. Australia could also explicitly claim a right to apply its laws to a voyage where the ship is due to call at an Australian port or has departed an Australian port. That would give the Australian authorities a larger but still defensible claim for extraterritorial jurisdiction over crime at sea.

The limitations of the current arrangement can be shown by this example. Let us assume an unlawful killing of an Australian citizen occurs on an international voyage departing Sydney, well beyond 24 nautical miles

¹¹⁵ Response, page 12.

¹¹⁶ See Wright, above fn 2, 36.

of the coast and outside the territorial waters of any other State. Under the CSA as it stands, Australia would have no explicit claim to concurrent jurisdiction with the flag State, unless the perpetrator was also Australian.¹¹⁷ While the authorities would fare significantly better using the CCA provisions, whether they apply alongside the CSA is yet to be determined. Further, the 'next port' state may or may not be either interested in/legislatively entitled to enforce its criminal laws outside its territory and on board a foreign ship. It is submitted that this same example would net the same result if it occurred in England or New Zealand. Of the four States considered, it would seem only the USA has a clear jurisdictional mandate to prosecute.

4 Developing guidelines with industry and protocols with flag states?

In order to best deal with crimes occurring at sea, ideally a State will have developed legislation which exercises legal jurisdiction over crimes aboard a ship. Regulating the cruise ship industry via domestic law creates clear and enforceable expectations about standards of preventative steps, the treatment of crime scene and victim, and requisite reporting to authorities.

There is another possibility, which can in some respects overlap and in other respects, complement legislation and regulation. A State may collaborate with key flag States and the cruise ship industry itself to identify and anticipate potential jurisdictional conflicts and agree a co-operative approach to crimes.

First, States may set up bilateral treaties, protocols, or memoranda of understanding¹¹⁸ with flag States so as to agree on investigation and prosecution protocols for crimes reported on cruise ships. There is no reason (save political will) that States could not agree with those key flag States that, for example, Australia be responsible for investigating serious crime where a crime occurs in its adjacent area, or on ships departing or bound for Australia, or where the victim or accused is Australian. Such an agreement would sort out most¹¹⁹ jurisdictional issues at the outset. There may be some merit in entering more enduring, rather than ad hoc, arrangements. Thankfully, the need to rely on such agreements would be rare, but taking these steps now could create a smooth path for investigation and enforcement of crimes on cruise ships that would give protection to the nationals of that State and comfort to the relatives of those affected.¹²⁰

Secondly, there is a welcome push towards collaborative development of guidelines for the cruise ship industry. The Cruise Lines International Association (CLIA) worked with US authorities to agree a mechanism for reporting all allegations of crimes in US waters, on a ship to or from a US port, or reporting alleged crimes involving US citizens at sea, regardless of ship registration and even if the US may not have

¹¹⁷ It might be argued that there is ground to prosecute because the crime had an 'effect' in the Australian jurisdiction, but this is rather a long bow.

¹¹⁸ See Ilias Bantekas, *International Criminal Law* (4 ed, 2010 Hart) 318, who suggests that informal and confidential MOAs are used because 'in this way the agreement need not be made public and the developing State saves itself from the embarrassment of being seen to delegate its sovereign rights to third nations.'

¹¹⁹ Not all – for example, what if the accused was from USA and the victim was from Australia? Both those countries, as well as the flag State, and potentially a territorial State depending on where the ship was at the time of the crime, would appear to have jurisdiction.

¹²⁰ Note that Australia may assist in the collection of evidence etc for an investigation by a foreign State under the *Maritime Powers Bill 2012*.

had legal jurisdiction to prosecute.¹²¹ There is no reason why such a mechanism could not be agreed between international cruise ship lines and authorities in other States. At the IMO meeting on 18 April 2012, the IMO and the CLIA agreed to develop guidelines for the cruise industry dealing with serious crimes and persons missing at sea. Those guidelines are under development,¹²² and if widely adopted would constitute another arrow in the quiver of prevention and management of crimes aboard cruise ships at sea.¹²³

5 Conclusion

This paper has considered formal legislative and regulatory approaches to providing appropriate treatment of crimes on board cruise ships, as well as outlining the usefulness of additional co-operative measures. It is encouraging that the Federal Government's parliamentary inquiry into crimes at sea has now been struck, as promised in the Response.¹²⁴ This paper suggests that:

- Australia should reconsider how it might clarify its legislation concerning criminal jurisdiction over acts on board ships.
- The practical issues posed by concurrent jurisdiction could well be the subject of negotiation with flag States with a view to entering an enduring agreement.
- It would be appropriate to regulate over the activities of those ships visiting Australian shores, embarking and disembarking passengers for reward. The Parliament has power to set down regulations over passenger ships pursuant to s112 of the *Navigation Act 2012* (Cth). As discussed, Australia would be within its sovereign rights to require such reporting and standards as a condition for entry to port. The regulations could cover such matters as as on board CCTV monitoring systems, management of a reported crime by the ship personnel, and reporting of serious crimes on board to Australian authorities. The cruise ship industry has displayed a positive attitude to similar reforms in other countries.¹²⁵

¹²¹ <http://www.cruising.org/regulatory/issues-facts/passenger-safety-security/security> accessed 13 August 2012. However Ross A Klein (fn 3 above) has disputed the helpfulness of the data, given that a late amendment to the statute ensures only investigated and completed cases are counted. On the other hand, Peltz & Kaye have disputed the veracity of statistics collected in the past, pointing out differing definitions for land based and sea based offences: Robert Peltz & Lawrence Kaye 'The Long Reach of US Law over Crimes Occurring on the High Seas' (2007 – 2008) 20 *University of San Francisco Maritime Law Journal* 199, 232 (at fn 197).

¹²² Press release issued by CLIA at http://www.cruising.org/regulatory/news/press_releases/2012/04/new-proposals-address-crimes-sea (accessed 13/08/2012)

¹²³ While these developments are welcome and to be encouraged, they do not speak to the right of one State to prosecute an accused in relation to a crime at sea. In that respect, international principles of extraterritorial jurisdiction, and the need for domestic laws of the involved States to exercise the right to apply extra territorially, are the key.

¹²⁴ The inquiry will be conducted by the Standing Committee on Social Policy and Legal Affairs (House of Representatives). The terms of reference can be found at: http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=spla/crimes%20at%20s ea/index.htm (accessed 16 October 2012).

¹²⁵ And indeed it is notable that, as a result of the death of Dianne Brimble, P&O at least has already taken many measures that would usefully be included in such regulations: <http://www.pocruses.com.au/AboutUs/Pages/SafetyandSecurity.aspx> (accessed 22 October 2012).

As an aside, the author is hopeful that any reform or regulation of the cruising industry can also include enacting passenger liability scheme enshrined in the *Athens Convention 1974*.¹²⁶ The need for this reform has been into sharp relief by the *Costa Concordia* tragedy earlier this year, which exposed the very small but nonetheless real risk of tragedy when one cruise ship carries many thousands of people.

¹²⁶ *Athens Convention on the Carriage of Passengers and their Luggage by Sea 1974 (Athens Convention)*. Calls for Australia to consider protecting cruise ship passengers by implementing either the 1990 or 2002 Protocol to the *Athens Convention 1974* have thus far not led to any targeted legislative response. In the event of a *Costa Concordia* -type tragedy, an Australian passenger may well be bound to claim no more than approximately AUD \$80,000 for death or injury (no matter how serious the injuries), and be bound to sue overseas even if the voyage started or ended in Australia. See Kate Lewins 'Australian Cruise Passengers travel in legal equivalent of steerage – considering the merits of a passenger liability regime for Australia' (2010) 38 *Australian Business Law Review* 127.