Terror Australis - How Maritime Terrorism Affects Australia

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Introduction

In 1684 Esquemeling wrote of Piracy:

> ... without any other arms than a pistol in one of their hands and a sword in the other, they immediately climbed up the sides of the ship ... they found the Captain, with several of his companions, playing at cards. Here they set a pistol to his breast, commanding him to deliver up the ship unto their obedience.
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> That very day the Captain of the ship had been told by some seamen that the boat, which was in view cruizing, was a boat of Pirates. Unto whom the Captain, slighting their advice, made answer: *What then? Must I be afraid of such a pitiful thing as this is? No, nor though she were a ship as big and as strong as mine is*
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> ... the Captain was presently compelled to surrender.[1]

The same can be said of terrorism at sea. It is an increasing threat and one that needs to be taken seriously. In Australia there has never been a maritime terrorism incident. However, with this form of terrorism on the increase around the world and the Olympic Games coming to Sydney in 2000, the possibility of a maritime terrorism incident occurring in or near Australia in the near future is very real.

This paper will examine maritime terrorism and discuss its effects on Australia by an examination of:

- the growing threat of maritime terrorism;
- the characteristics of piracy and whether maritime terrorism fits within the current definition of piracy;

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1 Obtained from The Maritime Security Home Page: Counter-Piracy & Counter-Terrorism for the Maritime Transportation Industry at http://members.aol.com/coricorp2/tonly/tmarsec1.htm at 23 June 1999.

- the International Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and its Protocol;
- Australia's efforts in this legal arena including the adoption of the Convention and Protocol into domestic law;
- Australia's efforts to fight terrorism generally and at sea.

The Growing Threat of Maritime Terrorism

Maritime violence has always existed, ever since ships were able to sail on the high seas. Originally these acts were mostly categorised as piracy but in the latter half of the 20th century the crime of terrorism has made its way to the sea as certain terrorist groups further their political aims offshore. Some areas where maritime terrorism has been prevalent recently include Egypt[2], Somalia[3], the Philippines[4], Indonesia[5] and Sri Lanka.[6]

As the above shows, maritime terrorism is a very real threat, particularly in the areas listed above. On 24 November 1998 at the 68th meeting of the 53rd General Assembly of the United Nations, a number of countries spoke of the increase in number of the incidents of piracy and violence at sea as well as an increase in the level of violence. The representative of Indonesia said in 1997 there had been 47 attacks in and around his country. Many countries[7] urged all States and particularly those coastal states in affected regions to take all possible action.[8] The representative of the United States encouraged all States to become party to the Maritime Terrorism Convention and its related protocol[9] by the year 2000 and to support the International Maritime Organisation (IMO) to suppress these threats.[10]

Maritime terrorism is a threat, particularly in certain regions of the world. But how much of a threat is it to Australia? How seriously should the possibility of a maritime terrorism incident occurring in or near Australia be taken?

In 1996 a number of counter-terrorist experts from around the world attended a conference in Australia addressing the possible terrorist threats at the Olympic Games in Sydney in 2000. One of the experts in attendance was Bruce Hoffman, the head of the centre for the study of terrorism and political violence at St Andrews University in Scotland and consultant for the Soccer World Cup in the United States in 1994. Hoffman stated that Australia's tough immigration standards and geographical isolation made it much more difficult for potential adversaries to enter. However he went on to say that it was absolutely critical

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2 A Forster *Jane's Intelligence Review* (Jane's Information Group Limited) Vol 10 No 7 at 42, 1 July 1998.

3 *Ibid;* see also Vantage Systems Inc - World Piracy Update - <*http://www.vantage-security.com/piracya.htm*> at 23 June 1999.

4 *Supra* n 2.

5 *Ibid.*

6 R Gunaratna Lanka Outlook, 'Trends in Maritime Terrorism - The Sri Lankan case' <*http://www.is.lk/is/spot/spO316/clip8.html*> at 23 June 1999. Also *supra* n 3 and *supra* n 2.

7 Including Finland, Austria, European Union, Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Poland, Romania, Slovakia, Slovenia, Cyprus, United States of America and Uruguay.

8 <*http://www un.org/Depts/los/ga9513.txt*> at 23 June 1999.

9 See below.

10 <*http://www.un.org/Depts/los/ga9513.txt*> at 23 June 1999.

> that Australia shouldn't wrap itself in a fatally false blanket of security about its geographical isolation and its immigration procedures. Certainly those are advantages, but I think there's no way any country anywhere in the world can hermetically seal itself off from a terrorist threat'.[11]

Hoffman added that:

> [h]istorically terrorists shy away from engaging in maritime terrorism. But I don't think we should assume there's not a threat in Sydney because so much of Sydney's venue and so much of the movement of athletes will be facilitated by maritime transport. That in itself could provide an attraction for terrorists and change their previous patterns of operations. I think it will present new challenges for security officials, on the other hand it may present new opportunities for terrorists, as well.[12]

The threat of maritime terrorism was also in the news recently when it was stated by the Western Australian Governor, Major General Michael Jeffrey, at the annual RSL conference that "gaps in our surveillance capability might make us vulnerable to terrorist or SAS type forces targeting gas and oil type installations".[13]

The threat of maritime terrorism is a growing one and one that needs to be heeded in Australia, particularly with the approach of the 2000 Olympic Games.

Piracy and Maritime Terrorism

The 1985 hijacking of the *Achille Lauro* and the killing of one of its passengers provided the force behind which a number of countries gathered to draft a convention that would deal with maritime terrorism. The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation[14] (the 'Convention') was opened for signature in Rome on 10 March 1988.

A question discussed by many scholars[15] is whether the hijacking of the *Achille Lauro* was piracy under customary international law and also whether it was piracy as defined by the piracy provisions of the Geneva Convention on the High Seas 1958 ('the High Seas Convention') and the United Nations Convention on the Law of the Sea 1982 ('UNCLOS').

While the Convention has developed the law in respect to terrorism at sea, general international law relating to piracy, namely customary international law and the piracy

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11 S Macko 'Experts Look at Potential Threat at the 2000 Olympics...' EmergencyNet News Service 1996 at http://emernet.emergency.com/olym2000.htm at 23 June 1999.

12 *Ibid.*

13 ABC Television News 12 June 1999.

14 Vol II, Doc 9.9; 27 ILM (1988) 668-90.

15 See for example M Halberstam 'Terrorism on the high seas: the Achille Lauro, piracy and the IMO convention on maritime safety' (1988) 82(2) *American Journal of International Law* 269; D C Alexander 'Maritime Terrorism and Legal Responses' (1991) 19 *Transportation Law Journal* 453; G R Constantinople ' Towards a new definition of piracy: The Achille Lauro incident' (1986) 26(3) *Virginia Journal of International Law* 723 and E D Brown *The International Law of the Sea* (Sydney 1994) Volume 1 at 299-306.

provisions of the High Seas Convention and UNCLOS , is still highly relevant for two reasons. Firstly the Convention only applies to countries that ratify it. This does not mean a terrorist from a non-ratified country would not be caught under the convention but rather that if a state has not ratified the convention it could not make use of the provisions of the convention to, for example, establish jurisdiction in the event of an incident, as jurisdiction under the convention is a lot wider than under general international law.[16]

Secondly, the Convention is not an all encompassing document. The second last paragraph of the preamble affirms "that matters not regulated by this Convention continue to be governed by the rules and principles of general international law".[17]

General international law in this case is the law of piracy firstly under customary international law and then pursuant to the piracy provisions of the High Seas Convention and UNCLOS.

Customary International Law

Traditionally pirates have been known as enemies of the human race *(hostes humani generis).* They have received this rather conspicuous title as they are regarded as posing a threat to all forms of maritime shipping and commerce of all states indiscriminately. For this reason it is possibly the only crime over which universal jurisdiction exists without restriction in customary international law.[18] Therefore all states may exercise jurisdiction over pirate vessels, no matter what the flag of the pirate or state exercising the jurisdiction. Such a state can arrest a pirate vessel and deal with the perpetrators under their own laws.

Although piracy is an ancient crime, it is one that has never had an exact definition.[19] When an act of maritime violence occurs the media tends to label the act as one of piracy. This was the case with the capture of the *Santa Maria* in 1961 by a Portuguese dissident,[20] the bombing of the *Torrey Canyon* by the British Government,[21] the seizure by Cambodian Government forces of the United States merchant ship *Mayaguez* in 1975[22] and the hijacking of the *Achille Lauro* in 1985.[23] None of these cases fall within the definition of piracy in the High Seas Convention and UNCLOS.[24] Piracy does not have a definitive definition in customary international law because of arguments over certain components of the crime, namely:

- Whether an intent to rob is a necessary element;
- Whether acts by unrecognised insurgents seeking to overthrow their government should be exempt as are acts of state vessels and recognised belligerents; and

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16 See below.
17 *Supra* n 14 preamble.
18 Halberstam *supra* n 15 at 272.
19 *Ibid* at 272-3; see also Alexander *supra* n 15 at 461.
20 Brown *supra* n 15 at 299.
21 *Ibid* referring to E D Brown, *The Legal Regime of Hydrospace (*Stevens, London, 1971) at 141-2.
22 *Ibid* quoting *The Times* (London) 13-16 May 1975.
23 The United States arrest warrant for the terrorists contained a charge of "piracy on the high seas".
24 See below.

- Whether the act is to be carried out by one ship against another or could be on the same ship.[25]

Intent to rob

In the case of *In re Piracy Iure Gentium,*[26] the Privy Council said the definition of piracy should not be expanded too broadly,[27] but it did support an expansion to include any acts of violence committed in time of peace on the high seas.[28]

Unrecognised insurgents

An example of an unrecognised insurgent is a group fighting for independence or trying to overthrow a government.

> 'Hall ... argued that it was improper to treat insurgents fighting for political independence as pirates. Attacking the state's ships at sea was one of the ways they might gain such independence; the essence of piracy was that it was private, as contrasted with public, ends; and insurgents attempting to overthrow their government were not a threat to all nations *(hostis humani generis),* as their attacks were limited to ships of the state from which they were seeking independence. He said:
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> > ... Primarily the pirate is a man who satisfies his personal greed or his personal vengeance by robbery or murder in places beyond the jurisdiction of a state. The man who acts with a public object may do like acts to a certain extent, but his moral attitude is different, and the acts themselves will be kept within well-marked bounds. He is not only not the enemy of the human race, but he is the enemy solely of a particular state.'[29]

Therefore, insurgents that are attempting to overthrow or gain independence from their own government would be excluded from the definition of piracy. What of the case where unrecognised insurgents commit acts against other states? In the case of *The Magellan Pirates*[30] Dr Lushington "reasoned that they were insurgents when they acted against the legitimate government, but pirates when they acted against third States neutral to the conflict".[31]

A British court applied this theme in the subsequent case of *Republic of Bolivia v Indemnity Mutual Marine Assurance Co.*[32] where the court held that rebels were not pirates when they acted only against the government they were opposing. Brazilian insurrectionists in a Bolivian territory stopped a Bolivian supply vessel and took all the

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25 Halberstam *supra* n 15 at 273; see also Alexander *supra* n 15 at 461.

26 49 Lloyd's List LR 411 (1934).

27 Constantinople *supra* n 15 at 731 referring to *In re Piracy Iure Gentium* (1934) 49 Lloyd's :List LR 411 at 416-7.

28 *Ibid.*

29 Halberstam *supra* n 15 at 275 citing F Wharton *International Law Digest* (2nd edn, 1887) at 471-72 (quoting W Hall *International Law* (1st edn, 1884) 233-34).

30 (1853) 164 Eng Rep 47.

31 Constantinople *supra* n 15 at 739 referring to *The Magellan Pirates* (1853) 164 Eng Rep 47, 48.

32 [1909] 1 KB 785.

goods. The insurance coverage was for piracy but not for "civil commotions, hostilities, or warlike operations."[33] The court held that the insurrectionists did not come under the common definition of piracy as ordinary men understood it.[34] The court also noted the difference between insurrectionists and pirates was

> that there was an organised expedition for the purpose of establishing a government in a particular territory, and ... that interference with property was only intended, and only effected, so far as was necessary for that object, and not for the plundering of everyone indifferently.[35]

While there is no definitive definition of piracy at customary international law, based on the above authorities, it could be reasonably argued that acts of insurgents directed at a particular state would be exempt. This would mean their acts would not be subject to universal jurisdiction and only the particular state could take action against them.

Attacks against another ship

It is not clear at customary international law whether an act by a passenger or crew member of a vessel against another passenger or crew member of the same vessel comes within the definition of piracy.[36] Hall seemed to think that acts that occurred on board the one vessel did not displace the authority of the flag state and its laws could assert themselves. In such circumstances no universal jurisdiction is required and such an act would not be piracy.[37] If however the vessel scours the ocean for plunder, no one nation has any more right of control over the vessel than any other. Universal jurisdiction would apply in this case as it would be piracy.[38]

Looking at the case of the *Achille Lauro*, the hijackers could be pirates under customary international law as they were unrecognised insurgents committing acts against other states such as *inter alia* Italy and the United States. However as there was no second ship and all incidents occurred on the one vessel it would not have been piracy under customary international law. Therefore a terrorism incident such as that of the *Achille Lauro* would not attract universal jurisdiction and the only State that could pursue action against the terrorists, under customary international law, would have been the flag state of the vessel, namely Italy. The United States would have no action in that case.

Under customary international law certain acts of maritime terrorism, namely those that do not involve two ships, would not come within the scope of the definition of piracy. As a result of this, such acts would not attract universal jurisdiction.

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33 *Ibid* at 786.
34 *Ibid* at 790.
35 *Ibid.*
36 Halberstam *supra* n 15 at 284.
37 *Ibid.*
38 *Ibid* at 285.

Piracy definition under marine insurance

Before leaving customary international law, the differing definition of piracy in marine insurance should be considered.

The case of *Republic of Bolivia v Indemnity Mutual Marine Assurance Co*[39] is authority for the view that piracy is defined differently when it is contained in a marine insurance document, that is, as ordinary men understand it.[40]

This case was followed in the *Andrea Lemos*[41] case. Theft of goods occurred during the night and was completed before the thieves were discovered. Force and the threat of force were only used to escape. It was held that piracy is not committed by stealth[42] and therefore such clandestine theft did not constitute piracy for the purposes of the insurance policy. Force or a threat of force was required. It should be noted in the case that the fact the vessel had been within Bangladesh's territorial sea when the theft occurred did not instantly preclude it from being piracy. The court said piracy could be committed if the ship is "at sea" in the ordinary meaning of the phrase.[43]

This then shows that in the realm of marine insurance piracy needs to be construed according to its ordinary meaning, force or threat of force is required (not stealth), and it may be committed within the territorial sea.

This view differs considerably from the law of piracy today. As will be seen below, piracy is not construed by its ordinary meaning but is defined specifically.[44] Under this definition, piracy can be committed by means of stealth[45] and can not be committed in the territorial sea of a state.[46]

Provisions on Piracy under the High Seas Convention and UNCLOS

The relevant conventions today containing the definition of piracy are the 1958 High Seas Convention and 1982 UNCLOS. The elements of piracy as they existed at the end of the nineteenth century in customary international law were incorporated or codified in Art 3 of the Harvard Research Draft.[47] The International Law Commission (ILC) in drafting the piracy provision for the 1958 High Seas Convention relied heavily upon the Harvard Research Draft. The ILC retained the two limitations in the Harvard Research Draft namely that the act is committed "for private ends" and the act is "against another ship".

This provision with only a few changes was adopted as Art 15 of the High Seas Convention which states:

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39 [1909] 1 KB 785. Discussed above, *supra* n 32-34 and accompanying text.

40 *Ibid* at 790.

41 *Athens Maritime Enterprises Corporation v Hellenic Mutual War Risks Association (Bermuda) Ltd* [1983] QB 647.

42 *Ibid* at 661.

43 See Brown *supra* n 15 at 300.

44 High Seas Convention Art 15 and UNCLOS Art 101.

45 *Ibid* at para (a).

46 *Ibid* at subpara (a)(i).

47 26 Am J Int'l L 768 (Supp IV 1932) cited in Constantinople *supra* n 15 at 724, n 2.

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

The drafters of Art 101 of UNCLOS decided to preserve the piracy provision of the High Seas Convention, as it is identical to Art 15 of the High Seas Convention. Therefore the provisos that the act be done for private ends and that there be two ships involved still exist.

It seems very clear that the actions of the terrorists in the course of the hijacking of the *Achille Lauro* were not piratical at international law for the simple reason that all the acts were committed aboard the one ship. Whether their actions were considered piratical or otherwise is of no consequence where there is only one ship involved.

Article 105 of UNCLOS states "every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board". Every state can then penalise the pirates in a way they see fit.

Article 105 has retained the notion of universal jurisdiction in codified form. However as, for example, the hijackers of the *Achille Lauro* were not pirates under UNCLOS, Art 105 would have no application and the flag state, Italy, would have been the only State with jurisdiction. Therefore under international conventions maritime terrorism still does not fit within the definition of piracy. This is mainly due to the fact that the conventions are mostly a codification of the customary international law.

Action was required in order for states, such as the United States in the *Achille Lauro* incident, to obtain jurisdiction over an act of terrorism that was outside the definition of piracy at international law. One suggestion was to expand the definition of piracy in Art 101 UNCLOS.[48] Another suggestion was that bilateral or regional agreements between states be entered into.[49] A third suggestion was a convention of global scope as proposed by a resolution of the United Nations General Assembly as the events of the *Achille Lauro* were taking place.[50]

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48 See Constantinople *supra* n 15 at 748-51.

49 See Brown *supra* n 15 at 305-6.

50 UNGA Res 40/61, 9 December 1985; see below.

The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation

As the *Achille Lauro* saga unfolded the United Nations General Assembly was actually discussing terrorism. A resolution by consensus was then adopted[51] which included a paragraph requesting the International Maritime Organisation ('IMO') to recommend appropriate action. Italy put forward a proposal that was later sponsored by Austria and Egypt. Negotiations based on the drafts then proceeded under the auspices of the IMO. The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation was adopted and opened for signature in Rome on 10 March 1988 together with an optional protocol, the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (the 'Protocol').

The Convention and Protocol both entered into force generally on 1 March 1992. As of 1 May 1999, 39 countries[52] have accepted the Convention[53] and 35[54] have accepted the Protocol.[55]

The Convention was closely modelled on the three conventions dealing with unlawful acts against aircraft and the safety of civil aviation. They are the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft 1963,[56] the Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970,[57] and the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971.[58]

This approach was taken rather than attempting to broaden the current definition of piracy in UNCLOS to include certain acts of terrorism.[59] 'Terrorism' was not defined in the Convention. Instead, particular activities of terrorists were identified and these activities were made into several specific offences in the Convention.[60]

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51 *Ibid.*

52 <*http://www.imo.org/imo/convent/summary.htm*> at 23 June 1999. This represents 43.64% of the world's tonnage.

53 <*http://www.imo.org/imo/convent/status.htm*> at 23 June 1999. The countries are Algeria, Argentina, Australia, Austria, Canada, Chile, China, Denmark, Egypt, Finland, France, Gambia, Germany, Greece, Hungary, Italy, Japan, Lebanon, Liberia, Marshall Islands, Mexico, Netherlands, Norway, Oman, Poland, Portugal, Romania, Seychelles, Spain, Sweden, Switzerland, Trinidad and Tobago, Tunisia, Turkey, Ukraine, United Kingdom, United States of America and Vanuatu.

54 <*http://www.imo.org/imo/convent/summary.htm*> at 23 June 1999. This represents 43.05% of the world tonnage.

55 <*http://www.imo.org/imo/convent/status.htm*> at 23 June 1999. The same countries as in n 53 except Algeria, Argentina, Finalnd and Gambia.

56 (1963) 2 ILM 1042.

57 (1971) 10 ILM 133.

58 (1971) 10 ILM 1151.

59 See T Treves 'The Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation in Ronzitti' in *Maritime Terrorism and International Law* (Kluwer Academic Publishers, Netherlands, 1990) at 69, 71. See also Constantinople *supra* n 15, 745, 749-50 where a new definition was proposed.

60 Treves *supra* n 59 at 71-2.

The Preamble

The majority of the paragraphs in the preamble were derived from the precedents. However, some of the paragraphs were added to accommodate compromises concerning certain political issues. The first issue was whether there should be an exception for acts carried out for political motives such as those of national liberation movements. The second issue was whether the convention covered persons acting on behalf of states (state-sponsored terrorism). In respect of the second issue it was ultimately held the words "any person" in Art 3 (the offences article) was broad enough to cover this.[61]

Paragraphs 7 and 8 of the preamble were added to assist with both issues. They state:

> **RECALLING** resolution 40/61 of the General Assembly of the United Nations of 9 December 1985 which, *inter alia,* "urges all States unilaterally and in co-operation with other States, as well as relevant United Nations organs, to contribute to the progressive elimination of causes underlying international terrorism and to pay special attention to all situations, including colonialism, racism and situations involving mass and flagrant violations of human rights and fundamental freedoms and those involving alien occupation, that may give rise to international terrorism and may endanger international peace and security",
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> **RECALLING FURTHER** that resolution 40/61 "unequivocally condemns, as criminal, all acts, methods and practices of terrorism wherever and by whomever committed, including those which jeopardize friendly relations among States and their security".

There is no suggestion of an exemption for national liberation movements. Therefore the Convention will apply to them equally.

Ships covered

Article l defines a ship as a "vessel of any type whatsoever not permanently attached to the sea-bed, including dynamically supported craft, submersibles, or any other floating craft".

Article 2(1) defines what is excluded from the convention namely:

(a) a warship; or
(b) a ship owned or operated by a State when being used as a naval auxiliary or for customs or police purposes; or
(c) a ship which has been withdrawn from navigation or laid up.

Article 2(2) is the savings clause in respect of immunities of warships and other government ships operated for non-commercial purposes.

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61 See G Plant 'The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation' (1990) 39 *International and Comparative Law Quarterly* 27, 33 and Treves *supra* n 59 at 84.

Geographical scope

The geographical scope of the convention is stated in Art 4(1) of the convention. It rather obscurely states:

> This Convention applies if the ship is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States.

By way of explanation

> the obligations of State A ('a single State') under the Convention would arise if a listed offence is committed in relation to a ship which is: (i) navigating in a sea area outside State A's territorial sea; or (ii) navigating in State A's territorial sea in the course of a scheduled voyage from outside the territorial sea; or (iii) navigating in State A's territorial sea but scheduled to navigate into or through a sea area outside State A's territorial sea. In other words, the Convention applies when the ship's voyage takes place entirely or in part outside State A's territorial sea.[62]

Article 4(2) states:

> In cases where the Convention does not apply pursuant to paragraph 1, it nevertheless applies when the offender or the alleged offender is found in the territory of a State Party other than the State referred to in paragraph 1.

Where the offence is committed in the territorial sea of State A and the offender is found in State B, the convention applies even if the entire voyage had been in the territorial sea of State A by virtue of this paragraph.

The Offences Covered by the Convention

The offences covered by the convention are listed in Article 3. Paragraph 1 lists the principal offences and paragraph 2 lists the secondary offences consisting in threatening, attempting or being an accomplice or an abettor to the principal offences in paragraph 1.

Principal Offences

Article 3(1) states:

> Any person commits an offence if that person unlawfully and intentionally:
> (a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
> (b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or
> (c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or

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62 Brown *supra* n 15 at 307.

(d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or
(e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or
(f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or
(g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).

The person must act "unlawfully and intentionally". Therefore the convention does not apply if the person is acting lawfully, for example, exercising police powers.[63] It could be argued the term "intentionally" is superfluous but it is conceivable that some of the offences may be committed without criminal intent.[64] The word also "presumably refers to intention as to the commission of the acts constituting the offence but not necessarily as to the results of those acts".[65] This is particularly relevant as the Australian adoption of the convention omitted intention from the offences generally but included it in other areas where the convention did not.[66]

Subparagraph (f) requires the acts to actually endanger the navigation of the ship whereas subparagraphs (b) to (e) to constitute an offence, the act must be 'likely to endanger' the safe navigation of the ship. Subparagraph (g) fits the situation of the *Achille Lauro* incident and is the only offence to not come from the aviation precedents. It was retained mainly at the insistence of the United States delegation.[67] The injury suffered under the subparagraph need not be severe.[68]

Secondary Offences

Article 3(2) states:

Any person also commits an offence if that person:
(a) attempts to commit any of the offences set forth in paragraph 1; or
(b) abets the commission of any of the offences set forth in paragraph 1 perpetrated by any person or is otherwise an accomplice of a person who commits such an offence; or
(c) threatens, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraph 1, subparagraphs (b), (c) and (e), if that threat is likely to endanger the safe navigation of the ship in question.

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63 Plant *supra* n 61 at 41.
64 Treves *supra* n 59 at 77.
65 *Supra* n 63.
66 See discussion below.
67 Plant *supra* n 61 at 42.
68 *Ibid.*

The above Article is self-explanatory. Note however that Art 3(2)(b) does not make it an offence to be an accomplice of the person who *attempts* to commit an offence in paragraph 1.[69]

The words in subparagraph (c) "with or without a condition, as is provided for under national law" were included to leave up to the State whether they thought it was necessary or not for any threat to be made with a condition or not for it to be an offence.

Punishment

Article 5 states:

> Each State Party shall make the offences set forth in article 3 punishable by appropriate penalties which take into account the grave nature of those offences.

Jurisdiction

Two types of jurisdiction are established under Article 6, obligatory, where the State must take measures to establish jurisdiction and discretionary, where the State may do so. Article 6 states:

> (1) Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in Article 3 when the offence is committed:
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> (a) against or on board a ship flying the flag of the State at the time the offence is committed; or
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> (b) in the territory of that State, including its territorial sea; or
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> (c) by a national of that State.
>
> (2) A State Party may also establish its jurisdiction over any such offence when:
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> (a) it is committed by a stateless person whose habitual residence is in that State; or
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> (b) during its commission a national of that State is seized, threatened, injured or killed; or
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> (c) it is committed in an attempt to compel that State to do or abstain from doing any act.

Article 6 concerns only the establishment and not the exercise of jurisdiction.[70] Article 6(4) requires that the State take all measures to establish jurisdiction where the offender is within that State and the State does not extradite the offender to another State that has established jurisdiction. Article 10(1) then follows this by requiring that if the State does not extradite the offender it be required to prosecute under its national laws. Article 11 (1) supports this by stating that all the offences under Art 3 are extraditable offences.

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69 See Treves *supra* n 59 at 78 and Plant *supra* n 61 at 42.

70 Plant *supra* n 61 at 45. Note Art 9 was inserted to make it clear that nothing affected the normal rules of international law on investigative and enforcement jurisdiction.

This resolves the situation where a state is reluctant to prosecute and states the offence was not an extraditable offence.

Power of delivery

Article 8(1) allows the master of a ship of a flag state to deliver to another state, a person he reasonably believes has committed an offence. The receiving state is to accept delivery unless it thinks the convention is not applicable in which case it must give a statement of reasons.[71] If the receiving state accepts delivery it may in turn request the flag state to take delivery.[72] If the flag state declines it must provide a statement of reasons.[73]

The Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf

In the Protocol 'fixed platform' is defined as "an artificial island, installation or structure permanently attached to the sea-bed for the purpose of exploration or exploitation of resources or for other economic purposes".[74] This definition is complementary to that of 'ship' in the Convention therefore anything that is not a 'ship' should be a 'fixed platform'.

The Protocol is very similar to the Convention in all respects and to that end, Art 1(1) applies the Convention Arts 5, 7 and 10 to 16 to the offences in Art 2 which closely mirror Art 3 of the Convention when they take place on board or against a platform located on the continental shelf of a state.[75]

Article 2 establishes jurisdiction and is identical to Art 6 of the Convention except that the separate grounds for establishing obligatory jurisdiction based on the registry of the ship and location within a State's territory are replaced with a single ground for such jurisdiction based on the location of a platform on a State's continental shelf.[76]

Australian Domestic Legislation

The *Crimes Act* 1914 (Cth) was amended in 1992 to give effect to the piracy provisions of UNCLOS. Section 51 defines such terms as 'act of piracy', 'Coastal Sea of Australia', 'High seas' and 'Place beyond the jurisdiction of any country'. Section 52 sets out the offence of piracy and s 53 describes as an offence the act of voluntary participating in the operation of a pirate ship or aircraft. Section 54 details who can seize a pirate ship and this includes a member of the Defence Force or a member of the Federal Police.

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71 Article 8(3).
72 Article 8(5).
73 *Ibid.*
74 Article 1(3).
75 See Plant *supra* n 61 at 52.
76 *Ibid.*

The Crimes (Ships and Fixed Platforms) Act 1992 (Cth)

The Crimes (Ships and Fixed Platforms) Act 1992 (Cth) (the 'Act') is the adoption into Australian domestic legislation of the Convention and Protocol. The Convention and Protocol came in to force internationally on 1 March 1992. The Act was proclaimed into force on 20 May 1993.

Ships covered

The ships covered and the exemptions are identical to those in the Convention.

'Ship' is defined in s 3 to mean "a vessel of any type not permanently attached to the sea-bed, and includes any dynamically supported craft, submersible, or any other floating craft, other than a vessel that has been withdrawn from navigation or is laid up".

This incorporates the definition in Art 1 along with the exemption in Art 2(3). The other two exemptions (Art 2(1) and (2)) are contained in a definition of 'private ship' also in s 3 which means "a ship that is not a warship or other ship operated for naval, military, customs or law enforcement purposes by Australia or by a foreign state".

Geographical scope

Unlike the Convention the geographical scope of the Act is not in a separate provision. Rather the scope is outlined at the beginning of the section dealing with commencement of proceedings, s 18. It states:

> (1)Proceedings must not be commenced against a person for an offence against this Division unless, when the alleged offence was committed:
> (a) the ship concerned was:
> (i) on, or scheduled to engage in, an international voyage; or
> (ii) in the territorial sea or internal waters of a foreign country ...

'International voyage' is defined in s 3 to mean "a voyage that passes, or is scheduled to pass:
(a) through seas beyond the territorial sea of any state; or
(b) through the territorial seas of more than one state".

This section is drafted very differently than Art 4 of the Convention but seems to say the same thing, namely that the voyage is to be entirely, or in part, outside the territorial sea. One concern however, is s 18(1)(a)(ii) which says proceedings can commence if the alleged offence was committed in the territorial sea or internal waters of a foreign country. What if the voyage of that particular ship had been entirely within that foreign country's territorial sea or internal waters? The Convention does not apply in this situation and it is hard to see how the provision is justified. Admittedly the rest of the section details the establishment of jurisdiction but if the entire voyage was inside another country's territorial sea, it would be the only country that would have jurisdiction and such jurisdiction would not be under the Convention.

Principal offences

Sections 8 to 16 basically mirror the Convention but there are a number of differences that need to be pointed out.

Section 8 refers to seizing of a ship and states:

> A person must not, without lawful excuse, take possession of, or take or exercise control over, a private ship by the threat or use of force or by any other kind of intimidation.
> Penalty: Life imprisonment.

This section is derived from Art 3(1)(a) of the Convention with one exception. The act is not required to be intentional. It is difficult to envisage how a ship could be seized unintentionally but the difference and thus the possibility remains.

Section 9 refers to acts of violence and states:

> A person must not perform an act of violence against a person on board a private ship knowing that the act is likely to endanger the safe navigation of the ship.
> Penalty: 15 years imprisonment.

This section derives from Art 3(1)(b) of the Convention and differs from it in three ways. Again the act of violence need not be intentional. An unintentional act of violence is sufficient to bring the section into operation. The word 'knowing' is in the section but that refers to the consequence of the act of violence and not the act itself.[77] This is another major difference from the Convention. The person who committed the act of violence must actually know that what he is doing is likely to endanger the safe navigation of the ship.

This is a much narrower provision in this respect and probably changes what would have been an objective test - would a reasonable person think the act was likely to endanger the safe navigation of the ship - to a subjective test - did the person think his or her act was likely to endanger the safe navigation of the ship.

Note that it would be very difficult to argue that a person could commit an unintentional act of violence at the same time as knowing that that act was likely to endanger the safe navigation of the ship. However, by requiring that the consequence of the action be intended rather than the action itself, the scope of the provision is considerably narrower.

The other difference is that the act of violence need not be unlawful. Could it then be argued that in an attempt by a lawful authority to retake the ship, an act of violence occurred that the authority knew was likely to endanger the safe navigation of the ship, would be an offence under this section?

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77 See *supra* n 65 and accompanying text.

Section 10 refers to destroying or damaging a ship and states:

(1) A person must not, without lawful excuse, destroy a private ship.
Penalty: Life imprisonment.
(2) A person must not cause damage to a private ship or its cargo knowing that it is likely to endanger the safe navigation of the ship.
Penalty: Life imprisonment.

This section is derived from Art 3(1)(c) of the Convention and is quite different. The acts of destroying or damaging the ship need not be intended. If the ship is destroyed lawfully there is no problem but if it or its cargo is damaged lawfully, there may be one (if the rest of the section is proved).

Similar to s 9 the person need not intend to cause the damage but, unlike the Convention, they need to know that doing so is likely to endanger the safe navigation of the ship. This narrows the scope of the section.[78]

Section 11 refers to placing destructive devices on a ship and states:

(1) A person must not, without lawful excuse, place or cause to be placed on a private ship, by any means, a device or substance that is likely to destroy the ship.
(2) A person must not place or cause to be placed on a private ship, by any means, a device or substance that is likely to cause damage to the ship or its cargo knowing that it is likely to endanger the safe navigation of the ship.
Penalty: 15 years imprisonment.

This section is derived from Article 3(1)(d) of the Convention. The differences from the Convention are identical to those identified in relation to section 10 above.

Section 12 refers to destroying or damaging navigational facilities and states:

A person must not destroy or seriously damage maritime navigational facilities or seriously interfere with their operation if that act is likely to endanger the safe navigation of a private ship.
Penalty: 15 years imprisonment.

Derived from Art 3(1)(e), this section differs from the Convention in that the act need not be unlawful or intentional.

Section 13 refers to the giving of false information and states:

A person must not knowingly endanger the safe navigation of a private ship by communicating false information.
Penalty: 15 years imprisonment.

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78 See argument relating to s 9 above.

Article 3(1)(f) is the relevant provision of the Convention and again there are differences. The act need not be intentional or unlawful and the section requires the person to know that he or she is endangering the ship. The Convention also requires the person to know the information is false but the section does not require this.

Article 3(1)(g) of the Convention was adopted by splitting the words 'injures or kills' into three separate offences: killing, causing grievous bodily harm and injuring. Note that it was thought the injury suffered under the article need not be severe.[79]

> 14. A person who kills a person in connection with the commission or attempted commission of an offence against any of sections 8 to 13 is guilty of an offence.
> Penalty: Life imprisonment.
>
> 15. A person who causes grievous bodily harm to a person in connection with the commission or attempted commission of an offence against any of sections 8 to 13 is guilty of an offence.
> Penalty: 15 years imprisonment.
>
> 16. A person who injures a person in connection with the commission or attempted commission of an offence against any of sections 8 to 13 is guilty of an offence.
> Penalty: 10 years imprisonment.

Again with these three sections the offence can occur whether or not the act was unlawful and/or intentional.

As can be seen above, Australia has made a number of variations from the text of Art 3. In most cases the act need not be intentional or unlawful and in some cases the consequences of the act that causes the offence have been narrowed by the requirement that the offender *know* the act would be likely to endanger the safe navigation of the ship.

For example, if a terrorist placed a device on a ship that was likely to cause damage to the ship but the terrorist did not know the device was likely to endanger the safe navigation of the ship, it may be an offence under another country's legislation that adopted Article 3(1)(d) exactly, but it would not be an offence under s 11. Australia would have to hope in that case that another state that was able to prosecute could establish jurisdiction over the incident so that the terrorist would be properly punished.

Secondary offences

There are no equivalent provisions to Arts 3(2)(a) and (b) of the Convention in the Act, that is, attempts and aiding and abetting. Instead, ss 5 and 7 of the *Crimes Act* 1914 (Cth) have been relied upon to provide the offences. This is confirmed by s 18(5) of the Act, the commencement of proceedings section, which states:

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79 *Supra* n 66 and accompanying text above.

> In this section:
>
> "offence against this Division" includes an offence arising under section 5 of the *Crimes Act* 1914 (aiders and abettors) or section 7 of that Act (attempts) in relation to an offence against any of sections 8 to 16.

Sections 5 and 7 of the *Crimes Act* 1914 (Cth) suitably cover the offences proposed in Arts 3(2)(a) and (b), in fact, they may have even a larger scope as s 5(1) of the Act refers to any person who "is in any way directly or indirectly knowingly concerned in" an offence comes within s 5. Since it is an offence to attempt to commit an offence under s 7, an accomplice of a person who attempts to commit an offence could be caught within s 5 by being directly or indirectly knowingly concerned.[80]

Note also that the person's conduct must be more than merely preparatory to the commission of the offence for it to be an attempt.[81]

Section 17 of the Act covers threats and is more or less an exact adoption of Art 3(2)(c) of the Convention. A condition to the threat is not required (as was the option provided by Art 3(2)(c)) and s 17(2) defines a threat to be where a person makes a statement or does anything else indicating, or from which it could reasonably be inferred, that it is his or her intention to do that act. 'Threat' was not defined in the Convention.

Overall the secondary offences are covered in as much detail, if not more, than the Convention. Note, however, that they are still secondary offences to the narrower principal offences as set out in the Act.

Jurisdiction

Jurisdiction is covered by s 18 of the Act, the section that covers commencement of proceedings. Under s 18 proceedings can be commenced where the geographical scope is established[82] and the offence had either an Australian element or a Convention State element. Section 18(3) defines an Australian element that appears to be Australia's obligatory jurisdiction:

> (3) For the purposes of this section, an offence against this Division had an Australian element if:
> (a) the ship concerned was an Australian ship; or
> (b) the alleged offender was a national of Australia

This subsection omits the obligation on Australia to establish jurisdiction where the offence is committed in the territory of Australia including Australia's territorial sea.[83] There is no reference anywhere else in the Act to the establishment of jurisdiction in this area nor is there any reference that suggests any other legislation assists in this matter. It quite simply appears to have been omitted.

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80 See *supra* n 69 where it was thought under the Convention an accomplice of a person who attempts was not within the article.

81 *Crimes Act* 1914 (Cth), s 7(2).

82 Section 18(1).

83 As required by Art 6(1)(b).

Section 18(4) goes on to define a Convention State element as follows:

> (4) For the purposes of this section, an offence against this Division had a Convention State element if one of the following circumstances applied:
> (a) the ship concerned was a ship flying the flag of a Convention State;
> (b) the ship concerned was in the territorial sea or internal waters of a Convention State;
> (c) the alleged offender was a national of a Convention State;
> (d) the alleged offender was stateless and was habitually resident in a Convention State that had extended its jurisdiction under Article 6(2)(a) of the Convention;
> (e) during the commission of the alleged offence, a national of a Convention State was seized, threatened, injured or killed and the Convention State had extended its jurisdiction under Article 6(2)(b) of the Convention;
> (f) the alleged offence was committed in an attempt to compel a Convention State to do or abstain from doing any act and the Convention State had extended its jurisdiction under Article 6(2)(c) of the Convention.

This subsection reproduces the three obligatory and three discretionary grounds for establishing jurisdiction from Art 6(1) and (2) but only in relation to all States except Australia.[84] It would seem this has been done to allow a ship's master to deliver an alleged offender to the relevant State that would have established jurisdiction pursuant to s 18(4).

Power of delivery

Section 20 of the Act contains a faithful adoption of Art 8 of the Convention as it applies to the master of a ship and his or her ability to deliver to the authorities of another State Party a person he believes on reasonable grounds has committed an offence. Duties of the receiving state[85] are not referred to in the Act.

Under s 20, as well as any evidence, there is an additional requirement that the master furnish statements relating to the alleged offence as the authorities may require.[86] There is also another requirement that where the master does not notify the other State Party of the intention to deliver the alleged offender or fails to provide any statements or evidence, the master is guilty of an offence.[87] There is also a provision that provides the master with a power of arrest and detention of an alleged offender.[88]

The Protocol

The adoption of the Protocol into the Act was done in the same way as the Convention was adopted with the same changes made to the text of the originating document. Therefore the definitions, geographical scope, principal offences, secondary offences

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84 As 'Convention State' includes all State Parties to the Convention except Australia – s 3.
85 Articles 8(3) and (5).
86 Section 20(4)(b).
87 Section 20(5).
88 Section 19.

and jurisdiction of the Protocol was adopted in the same way as the Convention was adopted with the same issues arising.

Concerns with Australia's adoption of the Convention

Overall the Act has faithfully adopted the provisions of the Convention and the Protocol. However a number of provisions do vary to some extent and some of those variations could have a significant effect.

Sections 8 to 16, by not requiring the act that causes the offence to be intentional, broaden the offence. While this is not an adverse change, it may create an offence in Australian law where there is none for another country that may have jurisdiction and that exactly adopted the Convention.

Of more concern are ss 9, 10(2) and 11(2) by their requirement that the offender *know* that the act he or she is doing (be it violence or damaging a ship or placing a device that is likely to cause damage) is likely to endanger the safe navigation of the ship. If the offender was unaware that what he or she was doing would so endanger the safe navigation of the ship, then no offence would be committed. This provision is much narrower than that of the Convention and is too narrow for the purposes of national law. Immediate thought needs to be given to removing this requirement and replacing it with the more encompassing provision provided by the Convention.

A further concern of ss 9, 10(2) and 11(2) is that an offence can be committed under these sections by a lawful act. Therefore if a lawful authority committed an act of violence, damaged a ship or placed a device likely to damage a ship knowing that any of these acts was likely to endanger the safe navigation of the ship, an offence under these sections would have occurred. For example, if during an assault on a hijacked Australian ship off the coast of England by Britain's Special Boat Squadron (SBS), shots were fired in the wheelhouse that were known to be likely to endanger the safe navigation of the ship, Australia would have an action against the SBS under s 9. Further, if an Australian passenger was killed or injured during the assault an action would arise under ss 14, 15 or 16 if there was an offence under s 9.

It could be argued that an assault on a ship would not go ahead where it was known it was likely to endanger the safe navigation of the ship. But what if there was no alternative? These provisions may restrict another state's counter-terrorist force from operating effectively if there is a possibility they may be liable in any way. To avoid all this concern over the possible liability of counter-terrorist forces, the proviso 'without lawful excuse' should be included in ss 9, 10(2) and 11(2).

The other major concern in the adoption of the Convention lies in the failure of the requirement that Australia establish jurisdiction where the offence is committed in the territory of Australia including the territorial sea. Australia is obliged to do this pursuant to Art 6(1)(b) of the Convention and has simply not done so. An amendment to correct this omission is required immediately.

Australia's Oceans Policy

1998 was the International Year of the Ocean. In recognition of this, the Australian government under the title of *Australia's Oceans Policy* demonstrated its commitment to the "development of a comprehensive and integrated oceans policy. The oceans policy is intended to provide the strategic framework for, *inter alia*, the planning, management and ecologically sustainable development of Australia's fisheries, shipping, petroleum, gas and seabed resources while ensuring the conservation and protection of the marine environment".[89]

The Convention and Protocol are specifically referred to in the Oceans Policy.[90] The adoption of the Convention and Protocol in the *Crimes (Ships and Fixed Platforms) Act* 1992 (Cth) satisfied the legislative requirements of Australia's acceptance of the documents. The implication of the Convention and Protocol for Australian oceans policy will be a "need to ensure that adequate arrangements, both institutional and resource-related, are in place to satisfy the treaty requirements".[91]

Australia's Efforts to Suppress Terrorism

Unlike countries such as the United States[92], Great Britain[93], Germany[94], France[95], Japan[96], Greece[97] and Sri Lanka[98], Australia has no maritime specific anti-terrorist force. This is probably because Australia has never had a maritime terrorism incident. The government maintains a specialist counter terrorist force within the Australian Defence Force (ADF) which provides a higher level of capability than is generally achievable in police services.[99] This force is know as the Tactical Assault Group (TAG) and is comprised of elements of the Special Air Service (SAS). This force would respond to a maritime terrorism incident. It even appears the force has trained for a possible maritime terrorism incident as an exercise took place on a container vessel, the *Australian Enterprise,* in Fremantle on 15 January 1998 involving SAS members.[100] The exercise was conducted as part of training in the leadup to the Sydney Olympics and involved the hijacking of the *Australian Enterprise* by a "rather heavily armed extremist group with the potential to cause significant damage to some aspect of national interest".[101]

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89 *Australia's Ocean Policy* International Agreements Background Paper 2, Commonwealth of Australia, 1997, at 8.

90 *Ibid* at 32-3.

91 *Ibid.*

92 The Terrorism Research Center: SEAL Team 6 <*http://www.terrorism.com/terrorism/SEAL6.html*> at 23 June 1999.

93 *Ibid.*

94 *Ibid.*

95 *Ibid.*

96 'Japan has anti-terror coast guard unit' United Press International, 5 January 1998.

97 Greece's MYK <*http://www.blarg.net/~whitet/myk.htm*> at 23 June 1999.

98 R Gunaratna Lanka Outlook 'Trends in Maritime Terrorism – The Sri Lankan case' <*http://www.is.lk/is/spot/sp0316/clip8.html*> at 23 June 1999.

99 *Countering Terrorism in Australia – Preventive and Response Arrangements* Protective Security Coordination Centre, Attorney General's Department, Canberra at 21.

100 *The Age* (Melbourne Online) <*wysiwyg://123/http://www.theage.com.au/daily/980120/news/news6.html*> at 4 June 1999.

101 *Ibid.*

Therefore, it appears that even though Australia has not had a maritime terrorism incident, preparations are being made to deal with any such incident which may arise.

Australia's general national counter terrorism arrangements were established after the terrorist bombing of the Sydney Hilton in February 1978.[102] Shortly after this the Standing Advisory Committee on Commonwealth/State Cooperation for Protection Against Violence (SAC-PAV) was established to provide advice and coordinate the development of national capabilities to counter terrorism.[103]

An early priority of SAC-PAV was the development of the National Anti Terrorist Plan (NATP) and this has been in place since 1979. The NATP is divided into three parts, namely:

- Part 1 - Prevention. Measures necessary to prevent terrorism and other forms of political motivated violence including ongoing co-operation and liaison arrangements which operate on a 24 hour basis.
- Part 2 - Response. Arrangements which come into effect when an incident or threat requires a joint response.
- Part 3 - Investigation. Arrangements necessary to support the investigation of a politically motivated crime particularly where the Commonwealth Government and its resources have become involved.[104]

Another early and ongoing priority of SAC-PAV was the establishment of a process for the call out of the ADF and its use of the SAS to resolve the incident.[105] Note however in the response arrangements under the NATP it is generally assumed the state police will be first on the scene.[106] This would generally be the case during an incident on land but not where one is at sea. The TAG is used to assist State authorities in the resolution of high risk terrorist incidents. If the incident was at sea however, state police would probably not be involved due to the difficulties of accessing the location of the incident and it must be assumed that the ADF's response may be the first response to the incident by navy ship or other element of the armed forces.

There appears to be nothing in the NATP that covers this specific situation but again this is possibly because of the previous extremely low risk of a maritime terrorism incident. It should be considered seriously now by including a reference to maritime incidents and by setting up a separate framework for dealing with terrorist incidents off the coast of Australia. It appears Australia has been preparing itself for a maritime terrorism incident but it needs to update the NATP to include such a possibility, particularly in the area of response arrangements.

Conclusion

Maritime terrorism is a recognisable threat to Australia, particularly in the context of the Sydney Olympics. The legal framework is now in place to prosecute any offender even

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102 *Supra* n 99 at 1.
103 *Ibid.*
104 *Ibid* at 7.
105 See Report of 1993 SAC-PAV Review, Commonwealth Government at 2-3.
106 *Supra* n 99 at 23.

though the narrowing of the scope of some of the offences may reduce the chance of a successful prosecution. *The Crimes (Ships and Fixed Platforms) Act* 1992 (Cth) needs to be amended to broaden certain offences to make them properly viable. An amendment also needs to be made to require jurisdiction to be established where an act occurs in Australia or its territorial sea as is obligated by the Convention.

At a practical level Australia is probably not in a situation where a maritime specific counter terrorist force is required. The SAS appears to be exercising for the possibility of a maritime terrorist incident. If not already doing so, the SAS should consider exercises with maritime specific counter-terrorist forces. SAC-PAV should consider a maritime terrorist act as a threat and update the NATP accordingly. A framework for response to a maritime terrorist incident needs to be included, as the current response procedures for incidents on land are not sufficient for dealing with a maritime incident.