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## ARTICLES



# DANGEROUS WATERS: COMBATING MARITIME PIRACY IN ASIA

Scott Davidson\*

## 1. INTRODUCTION

Piracy *iure gentium* is arguably the first of all international crimes.<sup>1</sup> As early as the eighteenth century the English and American courts considered pirates *hostes humani generis* – enemies of all humankind – and it was accepted that universal jurisdiction could be exercised over any pirate who was captured.<sup>2</sup> This meant that, regardless of a pirate's nationality, any state could apprehend, try and punish him or her.<sup>3</sup> The reasons for this are not hard to fathom. Not only did pirates interfere with national interests by attacking seaborne trade, they also showed scant respect for human life, with both crew and passengers frequently robbed and terrorised, and often murdered.<sup>4</sup> The major sea powers, although having sanctioned the privateers who subsequently gave rise to the pirates of the so-called 'Golden Age', eventually deployed their navies against them, with considerable success.<sup>5</sup>

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<sup>1</sup> Sunga, Lyal S., *The Emerging System of International Criminal Law* (1997) at 3, 253 and 338. See also Dubner, Barry Hart, *The Law of International Sea Piracy* (1980) at 42-4.

<sup>2</sup> See the dissenting opinion of Judge Moore in the *Lotus* case (France v Turkey), PCIJ, Ser. A, No. 10 (1927), at 70. See also O'Connell, D. P., *The International Law of the Sea* (1984), Vol. II, at 966-70 and Rubin, Alfred P., "The Law of Piracy", (1987) *Denver Journal of International Law and Policy* 173.

<sup>3</sup> Dissenting opinion of Judge Moore in the *Lotus* case, n. 2, at 70.

<sup>4</sup> Konstam, Angus, *The History of Pirates* (1999); Johnson, Charles, *A General History of the Robberies and Murders of the Most Notorious Pirates* (with an introduction and commentary by David Cordingly) (1998); Cordingly, David, *Life Among The Pirates: The Romance and The Reality* (1995); Gottschalk, Jack A. and Flanagan, Brian P., *Jolly Roger with an Uzi: The Rise and Threat of Modern Piracy* (2000), 1-20.

<sup>5</sup> See generally, Starkey, David J., van Eyck van Heslinga, E.S., de Moor, J. A. (eds.), *Pirates and Privateers: New Perspectives on the War on Trade in the Eighteenth and Nineteenth Centuries* (1997).

By the end of the nineteenth century, large-scale piracy had almost been eradicated from the high seas. Other factors also led to the diminution of piratical activity during this period, most particularly the increase in the size, speed and sophistication of vessels, which left the pirates ill-equipped to tackle this new kind of shipping.

Although references to piracy were included in the 1958 Geneva Convention on the High Seas,<sup>6</sup> the delegates at the UNCLOS III negotiations considered the provisions on piracy to be obsolescent,<sup>7</sup> if not obsolete. Little attention, therefore, was paid to their negotiation and the 1958 provisions were included without amendment into the 1982 United Nations Convention on the Law of the Sea (UNCLOS).

In recent years, however, there has been a massive increase in the incidence of piracy, especially in Asia. There are numerous reasons for this, but the most compelling explanations are the prevailing economic conditions, the diminution in naval presence, particularly in South East Asia, since the end of the Cold War and the pirates' access to more sophisticated craft and weaponry. It is fair to say that during the 1990s, piracy and armed robbery at sea has reached almost epidemic proportions in Asian waters, and it is only now that the governments of the region are beginning to tackle it in a serious and concerted way. It is the purpose of this paper to investigate a number of issues associated with modern piracy and to chart what progress, if any, has been made by States in the region in combating the pirate menace.

## 2. THE RISE AND FALL AND RISE OF PIRACY

The traditional image of the pirate is that which has been perpetuated in fiction and film; it is of the Caribbean buccaneer or freebooter of piracy's so-called 'Golden Age'. It is the image evoked by Stephenson's *Treasure Island* or Errol Flynn's *Captain Blood*. Neither of these pictures is accurate for, even during this period, the reputation of pirates was particularly un-savoury. Often using smaller but faster vessels with which to out-sail their merchantmen quarry, pirates would not hesitate to resort to brutality if they were resisted. The hoisting of a red flag by pirates during an engagement signified that no quarter would be given.<sup>8</sup> Nor is it true that pirates were interested only in heavily laden treasure ships. This image belonged to the age of the early privateers such as Drake and Morgan. Eighteenth-century pirates would take most vessels and cargoes, although, of course, coin and treasure was always highly desirable.

The pirate threat began, for a number of reasons, to recede during the nineteenth century. One of these has already been mentioned: the techno-

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<sup>6</sup> Articles 14-22. On the evolution of these provisions see Dubner, n. 1.

<sup>7</sup> Dubner, n. 1, at 3.

<sup>8</sup> Gottschalk and Flanagan, n. 4, at 9.

logical developments which gave rise to bigger and faster merchant vessels that left the pirates at a considerable disadvantage. The age of steam and the iron ship proved to be too much for pirates to withstand. The second reason for the decline in piratical activity in the world's oceans was the increase in naval presence in the major seaways of the world. This was essentially a by-product of colonialism in which the flag followed trade. The colonial powers were assiduous in ensuring that hard-won trade in far-flung regions of the world would not be assaulted or diverted by lawless pirates. Considerable naval resources were therefore directed towards policing the oceans with the aim of eradicating any threat of piracy. Thirdly, while piracy is a sea-borne offence, it frequently has its origins on land. Pirate vessels must equip and provision themselves, and the increased land-based civil presence during the colonial period also meant that it was more difficult for pirates to secure the materiel they required to prosecute their nefarious activities. Finally, regard must be had for the effect of legal regulation. While piracy proper was an offence committed on the high seas, many states adopted an extended definition of piracy in their domestic laws, which dealt with what was essentially armed robbery within their territorial waters, internal waters and ports.<sup>9</sup> The penalties for the offence of piracy were often severe, with capital punishment frequently available to the domestic criminal courts.<sup>10</sup>

At the turn of the twentieth century piracy was an almost negligible problem, although its legal regulation was discussed at some length at the unsuccessful Hague Conference on the codification of the law of the sea in 1908 and at the rather more successful UNCLOS I in 1958.<sup>11</sup> The ensuing definition of piracy in article 15 of the Geneva Convention on the High Seas has been incorporated without amendment as article 101 UNCLOS. There was a lack of attention devoted to the drafting of the provisions on piracy at UNCLOS III; it is attributable to the fact that, by that time, it was thought that maritime piracy was of such little practical concern to the world community as to require scant consideration. This approach was to prove particularly myopic, as subsequent events have demonstrated.

The reasons for the rise of modern piracy in the twentieth and twenty-first centuries have been almost the inverse of the reasons for its fall in the late eighteenth and early nineteenth centuries.<sup>12</sup> First, pirates have gained access to some of the technological advances that once gave merchant vessels an element of protection against these maritime marauders. Modern pirates use fast, manoeuvrable craft, often working in pairs. They are equipped with up-to-date communications equipment and are armed with light but powerful

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<sup>9</sup> O'Connell, n. 2, at 979-83.

<sup>10</sup> *Ibid.*

<sup>11</sup> Dubner, n. 1, *passim*.

<sup>12</sup> Kawamura, Sumihiko, "Combating Piracy and Armed Robbery at Sea: Charting the Future in Asia Pacific Waters", Regional Cooperation Against Piracy and Armed Robbery, Conference held at Montien Riverside Hotel, Bangkok, 24-25 March 2001.

weapons. It has been suggested that some pirates in South East Asian waters are, in fact, military personnel ‘moonlighting’ as pirates to supplement their income, but this suspicion has never been proved beyond doubt.<sup>13</sup> Furthermore, technological advances have meant that very large ships with valuable cargoes can be operated by small crews, a fact that makes them more vulnerable to pirates.

The second reason for the increase in piratical activity in the last decade is a direct result of the ‘peace dividend’ that has arisen from the end of the Cold War. The reduction in size of the British navy, the almost complete disappearance of the former Soviet navy, and the corresponding lack of necessity for the United States and British navies to patrol the ocean spaces of Asia have together caused a vacuum in which piracy has been able to thrive. Thirdly, many States in the South East Asian region are unable to afford the appropriate naval resources necessary to patrol their coastal waters, especially with the advent of the 200 mile exclusive economic zone (EEZ) which has placed greater policing demands on existing law enforcement vessels.<sup>14</sup> The emergence of the archipelagic State in UNCLOS has also increased the pressures on maritime surveillance in States such as Indonesia, the Philippines, Malaysia and Singapore. In the Indonesian archipelago alone, for example, there are over 20,000 islands and rocks to be policed. Finally, there is some suggestion that the problem of piracy has been exacerbated by the expansion of open registry shipping or flags of convenience, as they are also known. The States that operate open registries do not have the naval resources to police the high seas in protection of the vessels flying their respective flags. If, for example, British or American flagged shipping were attacked by pirates, it is likely that protective measures would be taken by the navies or coastguards of those States. Indeed, Japan has become so concerned about attacks on its own vessels that it has engaged in joint anti-piracy patrols in the Malacca Straits.<sup>15</sup> Liberia and Panama cannot offer the same level of, if any, practical protection to vessels flying their flags.<sup>16</sup>

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<sup>13</sup> See *infra*.

<sup>14</sup> Kidd, Joanna, “Indonesia’s overstretched navy”, *IJSS Strategic Pointers*, 28 February 2001.

<sup>15</sup> Valencia, Mark, “Joining Up With Japan to Patrol Asian Waters”, *International Herald Tribune*, 28 April 2000; Chanda, Nayan, “Foot in the Water: A Japanese plan to send armed coastguard vessels to combat pirate attacks in Asia’s sea lanes is finding a surprisingly positive response”, *Far Eastern Economic Review*, 9 March 2000. Japan has also offered to train personnel from other states in the region in anti-piracy activities at its Coast Guard Academy.

<sup>16</sup> According to the International Maritime Bureau, the following nationalities suffered the greatest number of pirate attacks: Bahamas (25), Cyprus (35), Liberia (27), Malta (33) and Panama (86). Singaporean flagged vessels suffered 46 attacks. ICC International Maritime Bureau, *Piracy and Armed Robbery Against Ships: Annual Report 1 January- 31 December 2000* (January 2001), (hereafter ‘*IMB Piracy Report 2000*’), at 9.

### 3. THE EXTENT AND NATURE OF MODERN PIRACY

In recent years there has been an exponential increase in piracy, so much so that in May 1995 the Maritime Safety Committee of the International Maritime Organization (IMO) instructed its Secretariat to compile monthly figures of all incidents of piracy and armed robbery against ships reported to it. In its report of 28 February 2001,<sup>17</sup> the IMO Secretariat disclosed that since it started keeping these figures 2,211 incidents had been reported to it. These numbers have increased steadily year by year. In 2000 there were 501 incidents reported to the IMO; that is nearly a quarter of all offences in the five years since reporting began.<sup>18</sup> In January and February 2001 alone, 81 piratical incidents were reported to the IMO.<sup>19</sup> According to the Piracy Reporting Centre of the International Maritime Bureau (IMB), which is itself an organ of the International Chamber of Commerce, piracy, according to its definition, increased by 56 per cent between 1999 and 2000.<sup>20</sup> Although these figures are undoubtedly significant in themselves, they do not reveal the full extent of the problem, since not all incidents of piracy are reported. There are at least two major reasons for this. First, acts of piracy or armed robbery committed against small local craft may not be reported by victims for fear of reprisal. Second, owners sometimes instruct their ship-masters not to report incidents since the delay inevitably incurred by investigations can be extremely costly, ranging from US\$ 10-50,000 per day.<sup>21</sup> There is also the added problem that in certain parts of the world, there is little chance that pirates will be either detected or apprehended. This may be because of an insufficiency of law enforcement personnel or a lack of expertise in combating maritime crime among such personnel as there may be.<sup>22</sup> There is also the possibility of collusion between local officials and

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<sup>17</sup> MSC/Circ.990.

<sup>18</sup> Figures compiled from MSC/Circ.985, Monthly report – December 2000; MSC/Circ.977, Monthly report – November 2000; MSC/Circ.976, Monthly report – October 2000; MSC/Circ.975, Third quarterly report 2000 – (July to September); MSC/Circ.970, Second quarterly report 2000 (April to June); MSC/Circ.944, First quarterly report 2000 (January to March). The *IMB Piracy Report 2000* reports a figure of 469 reported pirate attacks.

<sup>19</sup> MSC/Circ.990, Monthly report – February 2001; MSC/Circ.989, Monthly report – January 2001.

<sup>20</sup> *IMB Piracy Report 2000*, at 12.

<sup>21</sup> See *Oceans and the Law of the Sea, Report of the Secretary-General 1998*, A/53/456, paras 147-8.

<sup>22</sup> Such is not always the case. See, for example, the much-celebrated apprehension of the *Alondra Rainbow*. The ASAM report states “The 7,762-ton, Panamanian-flag cargo ship, *Alondra Rainbow*, was boarded and hijacked by ten pirates armed with pistols, knives and swords, operating from speedboats, in the vicinity of Kuala Tanjung, Indonesia (03-21N 099-29E). The vessel was en route to Miike, Japan with a cargo of 7,000 tons of aluminium ingots. The fifteen crewmembers were set adrift in life-rafts on 29 Oct. and were later rescued by Thai fishermen 8 Nov. off Phuket, Thailand. The Indian Coast Guard and Navy recovered the vessel off Goa, India on 16 Nov. Fifteen suspects were arrested. The hijackers attempted to scuttle the vessel by setting her afire and flooding her holds. 3,000 tons of cargo was reported missing and suspected to have been bartered in Cambodia



pirates, which, apparently, is not a negligible factor. Indeed, there may be a suspicion that law enforcement officials and pirates could be one and the same.<sup>23</sup>

There are a number of so-called piracy ‘hot-spots’ around the world. While there have been, and continue to be, a number of incidents off both coasts of South America and Africa and, more recently, in the Red Sea, the major geographical region for piratical activity is Asia, and most particularly South East Asia.<sup>24</sup> Of the more than five hundred piracy incidents reported to the IMO, nearly four hundred were committed in Asian waters, particularly in the vicinity of the Indonesian archipelago, the Straits of Malacca and off the port of Chittagong in Bangladesh.<sup>25</sup> These are areas that are particularly heavy in maritime traffic, particularly the Straits of Malacca, which are used by over 50,000 vessels a year. The reports of the IMO and the IMB Piracy Reporting Centre also reveal an increase in the level of violence perpetrated against seafarers. The IMB report for 2000 indicates that 72 seafarers were killed, 99 were injured and 26 remained missing at the time the report was compiled.<sup>26</sup> This was an increase from three killed, 24 injured and one missing in 1999. The number of seafarers taken hostage in 2000 was 202, which amounted to half the number taken in 1999. The various reports from the IMO, the IMB and Maritime Safety Information Center (MSIC) of the US National Imagery and Mapping Agency (NIMA)<sup>27</sup> also give a flavour of the techniques used by pirates in the commission of their offences. Vessels

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or Thailand for weapons destined to LTTE insurgents (Tamil Tigers) in Sri Lanka”. See also “International cooperation beats modern-day pirates”, International Chamber of Commerce, <[http://www.iccwbo.org/home/news\\_archives/1999/international\\_cooperation\\_beats\\_pirates.asp](http://www.iccwbo.org/home/news_archives/1999/international_cooperation_beats_pirates.asp)>. See more recently the capture of the Singaporean registered tanker *Selayang* by Indonesian naval forces after it had been hijacked in Malaysian waters. *Washington Post*, June 24, A24.

<sup>23</sup> See, for example, the case of the *M/V Hye Mieko*. The MSIC report provides the following narrative:

“On 23 June 1995 twelve men wearing Chinese army uniforms boarded the Panamanian-flagged general cargo ship *Hye Mieko* and hijacked the vessel. The ship’s master confirmed the seizure occurred north of Redang Island off the east coast of Malaysia and in international waters. The *Hye Mieko* departed Singapore 21 June en route to Cambodia. The ship was carrying cigarettes and photographic equipment (US\$ 2 million). On 25 June the ship was reported to be under escort by a Chinese patrol boat 140nm southeast of Ho Chi Minh City. The hijackers sailed the vessel to the Chinese port of Shanwei. On 23 July, after removing the cargo, the ship and crew were released.” A legitimate inference might be that these were members of the Chinese coastguard engaged in freelance activities. See also Jon Vagg, “Rough Seas? Contemporary Piracy in South East Asia”, 35 *British Journal of Criminology*, 63-80 (1995).

<sup>24</sup> *IMB Piracy Report 2000*, especially at 76-8.

<sup>25</sup> IMO, *Reports on Acts of Piracy and Armed Robbery against Ships Annual Report – 2000*, MSC/Circ.991, 31 March 2001.

<sup>26</sup> *IMB Piracy Report 2000*, at 7, Table 6.

<sup>27</sup> These can be conveniently located at <http://www.fas.org/irp/world/para/docs/ASAM-1999.htm>.

may be boarded while they are at anchor or in harbour.<sup>28</sup> Alternatively, they may be boarded whilst underway or ‘hijacked’ by ‘crew members’.<sup>29</sup> The primary method used by pirates for boarding ships underway is to use small, fast craft and approach the victim vessel from the stern, usually during the small hours of the morning when only a reduced watch is on duty. Since a ship’s crew is usually more concerned with where they are going rather than where they have been, they are often not aware of having been boarded.<sup>30</sup> The reports of the various concerned bodies also show that pirates are often well armed with firearms, machetes or knives. Even vessels travelling at speeds of seventeen knots or above are not immune from attack since the craft used by pirates can often travel at considerably greater speeds.<sup>31</sup> Furthermore, many of these craft are equipped with state of the art navigational equipment such as radar and global positioning systems. Indeed, there is a strong suspicion that some of the vessels are, in fact, government vessels.<sup>32</sup>

While theft at sea for their own enrichment is the fundamental objective of all pirates, this may take place on a large or a small scale. The aim of the majority of pirate attacks is to obtain money. Most merchant vessels travel with substantial amounts of cash in their onboard safes in order to pay harbour dues, to pay the crew’s salary and to defray other costs associated with the running of the ship. It is estimated that the average pirate raid nets approximately \$5,000.<sup>33</sup> More ambitious pirates may, however, take over a vessel and steal its cargo or may even steal the ship and its cargo in their entirety.

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<sup>28</sup> See, for example, the case of the Panamanian registered general cargo ship *Tradenes* which was boarded in the Samarinda River Road, Indonesia. The report notes: “While at anchor, four pirates armed with long knives boarded from stern and stole ship’s equipment. The duty officer noticed them and raised the alarm. When the duty policemen fired at the pirates, they jumped overboard and escaped in a small wooden boat”. *Piracy Report 2000*, 27, no. 68.

<sup>29</sup> See, for example, the case of the Panamanian registered LPG carrier *Gas Fortune*, which was boarded in the Malacca Strait. The report notes that: “While underway, six pirates armed with long knives boarded. They took hostage of one crew [sic] and threatened to kill him. They stole \$510,000 from the ship’s safe”. *Piracy Report 2000*, 27, no. 71.

<sup>30</sup> Enhanced vigilance that is recommended in IMO Circular 623, paras 19-22, together with other measures of preparedness can often turn away a pirate attack. See, for example, the case of Malaysian registered tanker, *Meridian Star* which was attacked in Malaysian waters. The report states: “While underway five men in two ... speedboats attempted to board from stern. Alert crew sounded the whistle and activated water hoses thus foiling the boarding. Pirates were wearing masks and they sped off towards Pulau Tiga”. *Piracy Report 2000*, 60, no. 24.

<sup>31</sup> Department of the Environment, Transport and the Regions, *Marine Guidance Note No 75: Piracy and Armed Robber*, para 5, <<http://www.shipping.detr.gov.uk/mgn/mgn075/>>.

<sup>32</sup> See, for example, the case of the Singaporean registered container vessel *X Press Makalau* which was attacked north east of the Andaman Islands off Myanmar (Burma). The report states: “While underway, an unidentified suspicious ‘naval boat’ tried to approach the ship at close range. The ship tried to contact the ‘naval boat on VHF CH 16 to identify herself. The ‘boat’ remained on radio silence and slowly retreated”. *Piracy Report 2000*, 60, no. 21. See also the case of the case of the *Hye Mieko*, *supra*.

<sup>33</sup> Gottschalk and Flanagan, n. 4, at 88-9.

Some stolen vessels then become so-called 'phantom ships'. These ships are vessels that, after their theft, are renamed and re-registered, usually under a flag of convenience. They then find a shipper with a cargo; the pirates, or an individual acting as their agent, issue a bill of lading when the cargo is loaded. The ship then sails with the cargo, but diverts from the port indicated on the bogus bill of lading and discharges the cargo elsewhere for direct payment. The ship is then renamed, re-registered and the practice is repeated.

There is little doubt that modern piracy is costly both in terms of losses to the shipping industry, and to the lives and welfare of mariners. It may also one day result in a major environmental catastrophe in some of the busiest shipping areas of the world. There have been reports of a tanker in the Straits of Malacca being without an officer on the bridge while pirates held the officers and crew hostage.<sup>34</sup> While all these problems have been recognised by the IMB, the IMO, the International Transport Workers Union and a variety of NGOs, States have, on the whole, been slow to react to the worsening problem.<sup>35</sup> It is now apparent, however, that the necessity of combating piracy is gaining some impetus, particularly among the nations of South East Asia, and that cooperation at both a formal and an informal level is beginning to be seen as the major practical method of defeating the pirate threat. Although this might be seen as a strictly pragmatic response, it is also a question of legal obligation. Article 14 of the High Seas Convention 1958 and article 100 UNCLOS 1982 both provide:

All States shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.

Of all the mandatory obligations in international law, this is perhaps one of the most precise and draconian, since it commits every State to participate, and to use their utmost endeavours, in the defeat of piracy. The threat or actual use of force seems to be implicit in this injunction.<sup>36</sup>

#### 4. THE LEGAL DEFINITION OF PIRACY

The term "piracy" is often used in a loose, colloquial sense to describe conduct which commentators find reprehensible taking place at sea or against

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<sup>34</sup> See generally, Dubner, Barry Hart, "Human Rights and Environmental Disaster – Two Problems that Defy the 'Norms' of the International Law of Sea Piracy", (1997) *Syracuse Journal of International Law and Commerce* 1. See also "Asia seen as high risk for oil spills due to piracy", *South China Morning Post*, 26 April 2001.

<sup>35</sup> See "Piracy: Political will needed to halt attacks", *South China Morning Post*, 30 July 2001.

<sup>36</sup> Note the use of the milder word 'suppression' in relation to illicit trade in drugs (article 108) and unauthorised broadcasting on the high seas (article 109). The only other sea-borne activity that the drafters considered to be worthy of repression was the slave trade (article 99).

vessels. In its ordinary or dictionary meaning, piracy is also given a broad definition, with the *Concise Oxford Dictionary* defining it simply as robbery at sea. Furthermore, while piracy has a particular meaning in international law, it also has a variety of definitions in municipal law. It is, however, primarily with the definition of piracy in international law with which this article is concerned. Piracy is defined for the purposes of international law in Article 101 UNCLOS. This replicates article 15 of the Geneva Convention on the High Seas, which was thought at the time of drafting to represent customary international law.<sup>37</sup> Article 101 provides:

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 the 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).

If this definition is analysed in detail it is apparent that there are a number of criteria that must be fulfilled if any particular activity is to be defined as piracy:

- (a) there must be acts of violence, detention or depredation;
- (b) those acts must be illegal;
- (c) they must be committed for private ends;
- (d) they must be committed by the crew or passengers of a private ship or aircraft;
- (e) they must be committed on the high seas or in a place outside the jurisdiction of any State; and
- (f) they must be directed against another ship or aircraft or persons or property on board a ship or aircraft.

When each of these criteria is examined in turn, it becomes apparent that piracy in international law is limited to a rather restricted set of circumstances. If we take the acts of violence, detention or depredation, it is clear that these will cover offences such as murder, all forms of physical injury, confinement, including hostage taking and damage. The question arises whether, however,

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<sup>37</sup> Brownlie, Ian, *Principles of Public International Law* (5<sup>th</sup> edn., 1998), 236. See also the commentary of the International Law Commission at YILC 1956, Vol. II: 282.

it includes theft<sup>38</sup> Certainly, robbery which requires the use of violence or the threat of violence will be included in this definition, but then a classification must be found for a thief who is able to slip aboard a vessel while it is on the high seas and steal some item of equipment or the crew's belongings. Such a person may be deemed to be a pirate if the other criteria are satisfied. Whether this is so depends on the definition attributed to "depre- dation". The *OED* defines depredation as "the action of making a prey of; plundering, pillaging, ravaging ..." If the accepted canon of construction *noscitur a sociis* is applied, all this seems to point to deprivation or destruction of property by violent means and would not seem to include the example of the sneak thief.<sup>39</sup> Furthermore, these actions must be *illegal*. While proof of such illegality will not in general be problematical, article 101 does not state under whose law this must be so. It would seem to be reasonable to assume, however, that the violence, detention or depredation must be illegal under the law of the flag State. Any other reading would appear to be unreasonable.<sup>40</sup> It is also possible, however, that it could refer to any illegality arising in the context of States which exercise passive personality jurisdiction if one of their citizens were the victim of a crime on board a vessel of a different nationality. Next, the illegal acts must be committed for private ends. This would seem to raise few difficulties initially, but on closer inspection it has the potential to cause problems of interpretation.

In most cases, attacks upon shipping are undoubtedly for private ends. Pirates, as indicated above, are usually interested in stealing money, cargo and even vessels themselves. In other words, pirates are concerned mainly with self-enrichment. There have been cases, however, where violence, threats of violence and taking of vessels have been for political rather than private ends. In the case of the *Santa Maria*, a Portuguese cruise vessel was reported

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<sup>38</sup> O'Connell, n. 2, at 967-8 writes, "a narrow definition of piracy assumes theft to be an essential element in the crime." It would appear, therefore, that a broader definition does not. In *Re Piracy Jure Gentium* [1934] AC 586, the Privy Council concluded that "actual robbery is not an essential element of the crime under international law". In US law, theft was not considered to be a necessary element of piracy: violence or damage inflicted for private ends was enough. See *The Marianna Flora*, 11 Wheat 1 (1826) and *Harmony v US (The Brig Malek Adhel)*, 2 How 210 (1844).

<sup>39</sup> While the IMB definition of piracy requires the intent or capability of using force to commit theft or any other crime (*see infra*), it seems that this is not always reflected in its piracy statistics. Take, for example, the case of the Singaporean registered tanker *Baroness*. The report states: "While at anchor, crew found the forecabin store locks broken. It was believed that during the rain, pirates had gained access to the ship via anchor chain. Ship's stores were stolen". Although it is clear that theft had taken place here, it is equally clear from the report that no one was in a position to know whether the 'pirates' had the capability to use force. It is arguable, therefore, whether this incident should have been reported in the statistics as one of piracy. *Piracy Report 2000*, 26, no. 62.

<sup>40</sup> See Menefee, Samuel Pyeatt, "The New 'Jamaica Discipline': Problems with Piracy, Maritime Terrorism and the 1982 Convention on the Law of the Sea", 6 *Connecticut Journal of International Law* 127 (1960).

to have been captured by pirates in the Caribbean.<sup>41</sup> The Portuguese government issued a request for assistance from the British, Dutch and US navies, which began searching for the vessel. Upon further investigation by the State Department, however, it was found that the *Santa Maria* had been boarded by a Captain Henrique Galvão and his men while the ship was in port and had then been hijacked on the high seas. The reason for the hijacking by Galvão and his men was to make a political point prior to elections that were to be held in Portugal. In consequence of this, it was clear that the action was not piracy since it had not been undertaken for private ends, and the US refused to intervene further.<sup>42</sup> It should be observed, however, that since the *Santa Maria* was a Portuguese registered vessel, Portugal was entitled to seek assistance from any friendly State to both locate and apprehend the vessel.

Although the *Santa Maria* incident took place in 1961, no attempt was made to amend the rules relating to piracy during the protracted negotiations leading to the adoption of UNCLOS in 1982. Considerations that piracy must be undertaken for private ends therefore remained unaltered. The possible inadequacy of the definition of piracy was once again exposed in 1986 when Palestinian Liberation Organisation hijackers took over the Italian-registered cruise ship *Achille Lauro* in the Mediterranean and killed an American hostage, Leon Klinghoffer.<sup>43</sup> The four hijackers were eventually intercepted while in transit from Egypt by US fighter aircraft and forced to land in Italy where they were tried by the Italian courts and convicted of murder. Although the US issued warrants for their arrest on the grounds, *inter alia*, of piracy under 18 USC sub-section 1651, it is clear that their actions did not constitute piracy under international law. The hijackers' actions were politically motivated and there was no satisfaction of the requirement of two vessels or two aircraft. The response of the international community to the *Achille Lauro* affair was to negotiate and adopt the Convention for the Suppression of Unlawful Acts Against the Safety of Navigation 1988.<sup>44</sup>

The requirement stating that piracy can be committed only by the passengers or crew of a private ship or aircraft raises the question of whether there are circumstances in which the crew of a warship or ship on public

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<sup>41</sup> Whiteman, 4 *Digest* 665-7; Dubner, n. 1, at 146-9 and Green, L. C., "The Santa Maria: Rebels or Pirates?" 37 *BYIL* 496 (1961).

<sup>42</sup> It can also be observed that this incident did not satisfy the 'two vessel' requirement of article 15 of the Geneva Convention on the High Seas 1958. Galvão and his insurgents eventually put into the Brazilian port of Recife and were granted political asylum.

<sup>43</sup> Freestone, David, "the Convention for the Suppression of Unlawful Acts Against the Safety of Navigation", 3 *International Journal of Estuarine and Coastal Law* 305 (1988); Halberstam, Malvina, "Terrorism on the High Sea: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety", 82 *AJIL* 269 (1988).

<sup>44</sup> Otherwise known as the 'Rome Convention' or 'SUA'. On SUA *see infra*.

service can commit piracy.<sup>45</sup> If the crew of a warship, without having mutinied, were to engage in acts having a piratical character, the normal rules of state responsibility relating to the imputability of such acts to the State would apply, even if the acts were clearly *ultra vires*.<sup>46</sup> There are numerous examples of military personnel exceeding their authority where tribunals have determined that if, to all intents and purposes, those personnel appeared to be acting on behalf of the State, that in itself would be sufficient to engage state responsibility.<sup>47</sup> The case of the *Mayaguez*, however, raised different issues. In this case, a US merchant vessel, *Mayaguez*, was arrested by a Cambodian warship in the Gulf of Thailand, sixty miles from the Cambodian coastline. Normally, the rules of state responsibility would apply in such a case, but here the US government had refused to recognise the Khmer Rouge as the legitimate government of Cambodia. The consequences of characterising such an act as piracy are not simply terminological, but have the effect of seeking to transform what would normally be considered a bilateral inter-State dispute into an international crime in the suppression of which all States are bound to cooperate. UNCLOS also deals with the circumstances in which the crew of a warship or government aircraft has mutinied. Article 102 provides that where a crew of such a vessel or aircraft has mutinied and taken control of the ship, their acts are assimilated to acts committed by a private ship. The acts of mutineers do not thus engage State responsibility on the part of the flag State or State of registration.

For the purposes of international law, piracy can take place only within clearly prescribed locations, those being the high seas or a place outside the jurisdiction of any State. Under the provisions of article 86 UNCLOS the high seas are defined as “all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State”. An act having piratical characteristics which takes place in the ports, internal waters, archipelagic waters or territorial sea of a State would thus not be piracy under international law, although it may be so under the domestic law of the State in question. There are sound reasons for this. Since States have sovereign rights in these maritime zones, it is clear that both their prescriptive and their enforcement jurisdiction in respect of criminal acts holds sway there. Different considerations apply in respect of the EEZ, since this is a hybrid zone having high seas characteristics together with sovereign rights to resource exploitation and management on the part of coastal States. While it might be thought that

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<sup>45</sup> The terms ‘warship’ and ‘ship on public service’ or ‘public vessel’ will be used interchangeably.

<sup>46</sup> Cases in which a ship’s crew has mutinied are dealt with by Article 102 of UNCLOS. This provides that where the crew of a warship has mutinied and taken control of the ship “are assimilated to acts committed by a private ship ...”

<sup>47</sup> See Article 7 of the International Law Commission’s *Draft Articles on State Responsibility*. On *ultra vires* acts see also the *Caire Claim* (1929), 5 RIAA 516, the *Youman’s Claim* (1926), 4 RIAA 110 and the *Mallen Claim* (1927), 4 RIAA 173.

the existence of these sovereign rights might operate to exclude the possibility of piracy under international law being committed in the EEZ, the position appears to be preserved by the second sentence of article 86 which provides that the provision “does not entail any abridgement of the rights or freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58”. It might seem strange to consider that piracy could be a “right or freedom” in this context, but a closer examination of article 58(2) reveals that “Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this part”. Since the provisions referred to include those on piracy in articles 101-107, it is clear that not only can piracy be committed in the EEZ, but also that the enforcement provision, article 105, applies, too, to piracy in this zone. It is also arguable that if piracy were to be considered contrary to customary international law, which its status as a possible *jus cogens* norm would seem to confirm,<sup>48</sup> it could be argued that the reference in article 58(2) to “other pertinent rules of international law” apply not only the act of piracy itself, but also to the engagement of universal jurisdiction, which would permit the public vessels of any State to take appropriate enforcement action against pirates. Furthermore, it seems clear that the prohibition of piracy and the ability of all States to take action against pirate vessels is not ‘incompatible’ with Part V of UNCLOS relating to the EEZ, given that it does not significantly affect the coastal State’s right to resource management and exploitation. Indeed, it might be cogently argued that the defeat of piracy within the EEZ is likely to enhance the coastal State’s ability to carry on its rightful activities in a peaceful manner in the zone.

The definition of piracy in article 101 also indicates that it comprehends acts that take place “outside the jurisdiction of any State”. The high seas are undoubtedly an area outside the jurisdiction of any state, but since they are covered explicitly by article 101(1)(a)(i) they must be taken to be excluded from subparagraph (ii) according to the normal principles of treaty interpretation. It must, then, be asked which of these places can be considered to be “outside the jurisdiction of any State” During the drafting of the equivalent provision in the Geneva Convention on the High Seas, the ILC made the following comment:<sup>49</sup>

In considering as ‘piracy’ acts committed in a place outside the jurisdiction of any State, the Commission had chiefly in mind acts committed by a ship or aircraft on an island constituting *terra nullius* or on the shores of an unoccupied territory. But

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<sup>48</sup> The International Law Commission’s Commentary on article 53 of the Vienna Convention on the Law of Treaties 1969 gives as an example of a *jus cogens* norm “a treaty contemplating or conniving at the commission of acts, such as ... piracy ... in the suppression of which every state is called upon to cooperate”. YILC 1966, Vol. II: 247-8.

<sup>49</sup> “Report of the International Law Commission to the General Assembly”, YILC 1956, Vol. II: 282, Commentary on draft art. 39, at para (4).



the Commission did not wish to exclude acts committed by aircraft within a larger unoccupied territory, since it wished to prevent such acts committed on ownerless territories from escaping all penal jurisdiction.

This comment by the ILC raises a number of difficulties in respect of the definition of piracy. First, despite the ambiguous language – ‘*terra nullius*’ and ‘unoccupied territory’ do not necessarily refer to the same constituent – it seems clear that given the overall context of the comment, the Commission was, in fact, concerned with land belonging to no –one, or unclaimed territory. What, however, would be the position where territory were claimed by a number of States, but because of the lack of resolution of the conflicting claims the territory remained unoccupied? It could be asked whether this would truly be *terra nullius* because, in an objective sense, the territory must belong to the contesting party who can show the better claim. Until the question of title is finally settled, however, ownership remains in doubt and it could be said that until resolution such territories remain factually *res nullius* if they have remained unoccupied. This latter argument is, however, difficult to sustain since very often the question of whether or not unoccupied territory belongs to a particular State depends on the fact whether this State has acted as sovereign of the territory through the application and enforcement of legislative and administrative measures.<sup>50</sup> A State which thus applies its criminal law to acts of a piratical character taking place on unoccupied but disputed territory will, in fact, be reinforcing its claim as sovereign. While this might appear to be a merely theoretical question, there are areas of the world where it could have practical consequences were criminal acts having the character of piracy to occur on the territory in question. The Spratly and Paracel Islands in the South China Sea are, for the most part, unoccupied, but their sovereignty is contested by a multiplicity of regional States, including China, Vietnam, Malaysia, and the Philippines. Were an act having a piratical character to take place on one of these islands, the question would be whether it was piracy within the meaning of article 101(1)(a)(ii) since it took place on *terra nullius*, on the one hand, and on the other, whether any of the States contesting sovereignty would be able to apply their own domestic criminal law to the events. If it were the former, then all States would be able to exercise jurisdiction over the pirates no matter where they were subsequently apprehended; if it were the latter then the States whose criminal law applied would have jurisdiction and the situation would have to be dealt with through the normal methods of extradition or rendition of fugitive offenders. It is arguable that in the interests of law and order, it would be better to view acts

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<sup>50</sup> See, for example, the case concerning the *Legal Status of Eastern Greenland* (Norway v Denmark) PCIJ, Ser. A/B, No 53 (1933) and the *Minquiers and Ecrehos* case (France v United Kingdom), ICJ Rep. 1953 at 47 in which the exercise of legislative and administrative jurisdiction by Denmark and the United Kingdom respectively were taken to be of particular significance in determining that they had good title to the disputed territory.

of a piratical character committed on unoccupied territory, the title of which is contested, as piracy, despite any doubts which there might be about the status of the territory as *terra nullius* proper. This need not preclude claimant States' exercising their own criminal law in order to buttress their own territorial claims, and could, in fact, lead to a useful form of concurrent jurisdiction by which to combat piracy in these contested regions.

Finally, piracy requires that the illegal acts of violence, detention or depredation be directed by those on a private ship or aircraft *against* another ship or aircraft or persons or property on board a ship or aircraft. It has already been demonstrated in the *Santa Maria* and *Achille Lauro* incidents that hijackings of vessels do not fall within the definition of piracy. This point was confirmed by the ILC, which commented that "acts committed on board a ship by the crew or passengers and directed against the ship itself, or against persons or property on the ship, cannot be regarded as acts of piracy".<sup>51</sup> Furthermore, as indicated above, following the *Achille Lauro* incident, the international community decided to deal with the 'two ships' rule and to fill some of the jurisdictional gaps left by the traditional definition of piracy by adopting the Convention for the Suppression of Unlawful Acts Against the Safety of Navigation 1988 (SUA) and its protocols at Rome on 10 March 1988. Under SUA, a State party is obliged to make punishable under its domestic law the seven offences listed in article 3 SUA when they are committed by any person unlawfully and intentionally. The offences are committed where a person:

- (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
- (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).

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<sup>51</sup> ILC, n. 49, at 282, para (6).

If these offences in their substantive or inchoate form are committed against or on board vessels navigating or scheduled to navigate beyond the outer limits of a State's territorial sea, a State party must take jurisdiction when the offences take place:

- (a) against or on board a ship flying the flag of the State at the time the offence is committed; or
- (b) in the territory of that State, including its territorial sea; or
- (c) by a national of that State.

A State Party may also establish its jurisdiction over any offence prescribed in the Convention when:

- (a) it is committed by a stateless person whose habitual residence is in that State; or
- (b) during its commission a national of that State is seized, threatened, injured or killed; or
- (c) it is committed in an attempt to compel that State to do or abstain from doing any act.

Although SUA goes some way towards, potentially, resolving the problems associated with the definition of piracy in article 101 UNCLOS,<sup>52</sup> it does not entirely eliminate the difficulties related to hijackings of a political character where a State party might still refuse to extradite on the grounds of the political offence exception. Where hijackings occur for private ends, however, SUA is likely to cover most of the events that might escape the definition of piracy. This is particularly so where States Parties decide to exercise their discretion and to take jurisdiction on grounds which relate to the seizure, threat to, injury or killing of any one of its nationals, that is, on grounds of the passive personality principle. Furthermore, the territorial application of SUA provides a useful adjunct to the more limited scope *ratione territoriae* of article 101 UNCLOS, since it applies not only to vessels located on the high seas or within the EEZ of any State party, but also to a ship which is "navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State ...". If an offender thus commits one of the prohibited acts within the territorial sea of a State party in such circumstances, the relevant States parties' various jurisdictional competences and obligations will be engaged. The SUA does not, however, cover ports and harbours, river mouths, internal waters or archipelagic waters, unless a vessel is scheduled to navigate through the adjacent territorial waters. It would seem that the assumption here is that if criminal acts having piratical characteristics take place on board a vessel while it is in one of these loca-

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<sup>52</sup> The UN has observed that implementation of SUA provides a "more useful vehicle for prosecution than the nineteenth century pirate statutes", UN Doc. A/53/456, para 152.

tions, as well as in circumstances where a ship does not leave the territorial sea, then the coastal State will have the full range of jurisdictional powers in order to deal with such occurrences.

The potential usefulness of SUA as a supplement to the UNCLOS rules on piracy has, however, been considerably diminished by the relatively low number of ratifications of the instrument, particularly by those States in the Asian region. While China, India and Pakistan have ratified SUA, the States where piracy and armed robbery at sea is most in evidence – Bangladesh, Indonesia and the Philippines – have failed to do so.<sup>53</sup> A first step in combating piracy in South East Asia might therefore be for these States to make ratification of SUA a priority.

## 5. OTHER ‘INTERNATIONAL’ DEFINITIONS OF PIRACY

While much of the discussion so far has been concerned with the definition of piracy in international law and with the attempt by SUA to fill some of the gaps, it still remains clear that many acts of so-called piracy in the Asian region are simply robbery on board ship which takes place in the ports, harbours, roads, river mouths, internal waters, archipelagic waters, and the territorial seas of States. Although the definition of piracy in international law may be something of a hindrance in permitting the exercise of enforcement jurisdiction, it also fails to convey the full extent of the problem. Various organisations have thus adopted different definitions in order to accommodate this difficulty. When the Maritime Safety Committee of the IMB at its sixty-fifth session in May, 1995 instructed the Secretariat to prepare reports, they asked it to do so not only in relation to piracy as defined by article 101 UNCLOS, but also in relation to armed robbery against ships. For the purposes of the IMO ‘armed robbery’ is defined as:<sup>54</sup>

... [A]ny unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of “piracy”, directed against a ship or against persons or property on board such ship, within a State’s jurisdiction over such offences.

The wording of the IMB takes a much broader definition that comprehends acts which take place both within and without a States territorial jurisdiction. It defines piracy as:<sup>55</sup>

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<sup>53</sup> IMO, *Summary of Status of Conventions as at 30 April 2001*, <<http://www.imo.org/HOME.html>>. For details of ratifications see IMO, *Status of Complete Listings of Conventions*, *ibid*. The Convention entered into force on 1 March 1992.

<sup>54</sup> Article 2.2 of the IMO Draft Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships, MSC/Circ.984.

<sup>55</sup> ICC International Maritime Bureau, *Piracy and Armed Robbery Against Ships, Annual Report 1 January-31 December 2000*, 1.

An act of boarding or attempting to board any ship with the intent to commit theft or any other crime and with the intent or capability to use force in furtherance of that act.

The IMB notes that this definition “covers actual or attempted attacks whether the ship is berthed, at anchor, or at sea”. Petty thefts are excluded from the IMB figures, unless the thieves are armed. It is particularly noteworthy that the IMB definition does not concern itself with the locus of the offence; it is simply concerned with persons who:

- (a) board or attempt to board a ship;
- (b) with the intention of committing a crime; and
- (c) with the intention or capability of using force to commit that crime.

It should be noted, however, that this broad definition that focuses on the intention and conduct of the individual is only used for IMB reporting purposes. Similarly, the United States National Imagery and Mapping Agency’s (NIMA) Maritime Safety Information Centre (MSIC) which produces Anti-Shipping Activity Messages (ASAM) does not stipulate any pre-requisites for the compilation of reports which might represent a threat to shipping. As a consequence of this, NIMA’s database includes not only acts which fall within the definition of piracy proper, but it also includes, for example, information on interference by the pacifist organisation Greenpeace with navigation in the conduct of its protest activities and interference by naval or other public vessels with merchant shipping.

## 6. THE SEIZURE OF PIRATES

Much of the foregoing discussion concerning the definition of piracy is not simply of theoretical interest. The classification of any act as piracy, within the meaning of article 101 UNCLOS, entails certain jurisdictional consequences. While it is assumed that the occurrence of acts having a piratical quality which take place within a State’s territorial jurisdiction will be dealt with by the local authorities, piracy which takes place on the high seas confers universal jurisdiction upon States not only to apprehend, but also to try and punish pirates. The rationale for this is the maintenance of law and order on the high seas. Under article 105 UNCLOS any and every State may seize a pirate ship or aircraft or a ship or aircraft taken by piracy and under the control of pirates. Such seizure can be effected either on the high seas or in any other place outside the jurisdiction of any State only by the warships, military aircraft or other ships and aircraft on authorised govern-

ment service and which are clearly marked and identifiable as such.<sup>56</sup> The ILC also suggested that a merchant vessel which was attacked by a pirate ship would be entitled in self-defence to overpower it, if it were able, and hand it over to the authorities of any State.<sup>57</sup> Where a properly authorised public vessel seizes a vessel which it suspects of being a pirate ship without adequate grounds and it transpires that the vessel is not, in fact, a pirate, the State making the seizure is liable to the flag State for any loss or damage caused by the seizure.<sup>58</sup>

The pirates who are arrested may be tried by the seizing State whose courts are granted broad discretion to determine the appropriate penalties to be imposed on the individuals concerned and may also determine the action to be taken with regard to the ships, aircraft or property seized, subject to the rights of any third parties acting in good faith.<sup>59</sup>

## 7. PROBLEMS IN DEALING WITH PIRACY

The vast majority of so-called pirate attacks take place within the internal waters, archipelagic waters and territorial seas of a number of Asian States. This means that the primary responsibility for tackling the problem of piracy lies with the coastal State that has jurisdiction over such events occurring within its territory. While it may be possible for regional States to police the main shipping routes within their jurisdiction, it is apparent that States such as Indonesia, the Philippines and Malaysia are, despite their best efforts, unable to maintain complete maritime security throughout their entire archipelagic territories and territorial seas. There are two main reasons for this. First, they consist of widely dispersed islands of greater or lesser size, some of which are inhabited and some of which are not. This makes an ideal environment in which pirates can operate with relative impunity. Second, regional States do not have the material resources with which to police such a wide geographical area. Even if these regional States did have the requisite resources, they are further hampered by the physical proximity of their territories and the legal limitations placed on the exercise of enforcement jurisdiction. These problems may best be expressed by examining the following scenarios:

1. Pirates operate from the internal waters of State A and carry out their attacks on the high seas. They attack vessels from State B and then flee to the internal waters of State A.

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<sup>56</sup> Article 107, UNCLOS.

<sup>57</sup> See YILC 1956 Vol. II: 283.

<sup>58</sup> Article 106, UNCLOS.

<sup>59</sup> Article 105, UNCLOS.

2. Pirates operate from the internal waters of State A and conduct their operations in the territorial waters of State B. After carrying out their attacks they flee to the internal waters of State A.
3. Pirates from State A cruise the territorial waters of States B and C and attack vessels therein. They are spotted by the coastguard of State B, but flee to the waters of State C.

The normal method of enforcement of a coastal State's criminal law beyond the limits of its territorial sea is by the use of hot pursuit. The conditions under which hot pursuit might be undertaken are prescribed by article 111 UNCLOS. The main requirements for the conduct of hot pursuit by the public vessels of a coastal state are that:

1. the competent authorities of coastal state must have good reason to believe that a ship has violated the laws and regulations of that state;
2. the pursuit must be commenced when a foreign ship or one of its boats is within the internal waters, archipelagic waters, the territorial sea or contiguous zone of the pursuing state;
3. pursuit may continue outside the territorial sea or contiguous zone only if the pursuit has not been interrupted;
4. the order to stop must be given when pursuing vessel is itself within the territorial sea or contiguous zone;
5. if the ship is within the contiguous zone, pursuit may be effected only if there has been a violation of the rights for the protection of which the zone was established.

The right of hot pursuit also applies *mutatis mutandis* to violations of a State's law in its EEZ and continental shelf and the safety zones of installations in such maritime areas.<sup>60</sup> Most importantly for present purposes, however, the right of hot pursuit must cease when the pursued vessel enters the territorial sea of its own State or of that of a third State.<sup>61</sup> The jurisdictional barrier created by the outer limit of the coastal State's territorial sea can be overcome only by agreement between the States involved.<sup>62</sup> In the various scenarios outlined above, therefore, as soon as the pirate vessel enters the territorial sea of States A or C, the public vessels from State B must cease their pursuit immediately.<sup>63</sup> While there have been suggestions that it might be desirable to introduce a species of hot pursuit in reverse which would allow the public vessels of another State to pursue pirate vessels from the high seas

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<sup>60</sup> Article 111(2), UNCLOS.

<sup>61</sup> Article 111(3), UNCLOS.

<sup>62</sup> Menefee takes the view that such an agreement would undoubtedly be valid under Article 311, UNCLOS. See Menefee, Samuel Pyeatt, "Foreign Naval in Cases of Piracy: Problems and Strategies", 14 *International Journal of Marine and Coastal Law* 353 (1999).

<sup>63</sup> See Poulantzas, Nicholas M., *The Right of Hot Pursuit in International Law* (1969), at 187.

or from their own territorial seas into the territorial seas of another State,<sup>64</sup> this would run contrary to the accepted norms of international law which prohibit the governmental authorities of a State from conducting their public functions in the territory of another State without its consent.<sup>65</sup> The high level of confidence and trust which would be required for this to take place does not currently exist, and probably will not exist for some time, in the Asian region.

## 8. NEW REGIONAL ANTI-PIRACY INITIATIVES AND ACTIVITIES

That there has been a marked increase in the number of reported piratical-type incidents in the Asian region in recent years is undeniable. These incidents not only create problems for seafarers, and ship and cargo owners, but they also represent a major security threat for the region. The lack of safety in sea lines of communication (SLOC) is real and tangible; it requires considerable cooperation on the part of the States of the region to remedy the situation. Not only is cooperation demanded by the practicalities of the pirate threat; it also constitutes a legally binding obligation, as reference to article 100 UNCLOS above demonstrates. Given the pressures which piracy has been placing on Asian States, particularly Indonesia, Malaysia, and the Philippines, such cooperation is now becoming evident, and a number of multilateral and bilateral international and regional initiatives are emerging. These initiatives are policy driven, but also have implications for the future development of international law.

In 1999 the Maritime Safety Committee of the IMO adopted *Recommendations to Governments for Preventing and Suppressing Piracy and Armed Robbery against Ships*.<sup>66</sup> These recommendations not only establish a number of desirable jurisdictional and other practical measures which coastal and port States can take to combat piracy, but also suggest that flag States should develop Action Plans detailing the actions which should be taken in the event of a report of a pirate attack. In the Southeast Asian region, work has already begun on such an Action Plan. At an international conference involving fifteen regional States that took place in Tokyo in March 2000, the IMO and a number of ship-owners and their associations issued the *Tokyo Declaration* and a *Model Action Plan* which closely follows the IMO *Recommendations*.<sup>67</sup> These relate primarily to reporting structures and the development of effective

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<sup>64</sup> This was proposed by the Harvard Research in International Law Group. See Dubner, n. 1, at 78-80 for an evaluation of their draft articles.

<sup>65</sup> Poulantzas, n. 63, at 187.

<sup>66</sup> MSC/Circ.622/Rev.1, 16 June 1999.

<sup>67</sup> *International Conference of the Maritime Related Concerns both Governmental and Private on Combating Piracy and Armed Robbery against Ships*, March 28-March 30, 2000, Tokyo (the *Tokyo Appeal*). Copy on file with author.



communications between the various law enforcement agencies of regional States. The conference *communiqué* noted, however, that anti-piracy activities “including potential cooperation can only be done subject to relevant international treaties, each Participating Administration’s domestic legislation as well as its availability of adequate resources to sustain these activities”.<sup>68</sup>

Of particular significance in the development of cooperative instruments on a global scale is the IMO’s *Draft Regional Agreement on Cooperation in Preventing and Suppressing Acts of Piracy and Armed Robbery against Ships*.<sup>69</sup> The *Draft Regional Agreement*, which appears to be based on similar agreements to combat trafficking in drugs, provides under article 3 that law enforcement liaison officers of a State Party may, in appropriate circumstances:

1. embark on the law enforcement vessels of other Parties;
2. authorize the pursuit by the law enforcement vessels on which they are embarked, of suspect vessels fleeing into the territorial waters of the liaison officer’s Party;
3. authorize the law enforcement vessels on which they are embarked to conduct patrols to suppress acts of armed robbery against ships in the liaison officer’s Party’s national waters; and
4. enforce the laws of the Parties in national waters, or seaward therefrom in the exercise of the right of hot pursuit or otherwise in accordance with international law.

While the conclusion of such agreements would undoubtedly have far-reaching effects in reciprocal enforcement of the law and the consequent suppression of piracy, for the reasons identified earlier, it is unlikely that the *ILO Draft Regional Agreement* will find widespread favour in the South East Asia quite simply because there is a considerable degree of distrust concerning the operation of foreign military vessels in the territorial seas of neighbouring States. All regional States require prior notification by warships if they wish to exercise passage through their territorial waters, so the possibility of them allowing the use of force against pirate ships by foreign military vessels seems somewhat remote. In order to overcome this distrust, the adoption of confidence-building measures is necessary. There has been some evidence of such measures being developed on a bilateral basis. In 1992 Singapore and Indonesia agreed to establish direct communications between their navies and agreed to coordinate anti-piracy patrols,<sup>70</sup> as well as provisions for

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<sup>68</sup> Regional Conference on Combating Piracy and Armed Robbery against Ships, Asia Anti-Piracy Challenges 2000, Heads of Coast Guard Agencies of Brunei, Cambodia, China, Hong Kong, Taiwan, India, Indonesia, Japan, Laos, Malaysia, Myanmar, Philippines, Republic of Korea, Singapore, Thailand, and Vietnam, 27 to 29 April 2000, Tokyo, <[http://www.japan-emb.org/in/PressReleases/Embassy\\_Of\\_Japan/press-embassy11.htm](http://www.japan-emb.org/in/PressReleases/Embassy_Of_Japan/press-embassy11.htm)>

<sup>69</sup> See MSC/Circ.622/Rev.1, 16 June 1999, *Piracy and Armed Robbery Against Ships*, Appendix 5.

<sup>70</sup> Referred to as Indo-Sin Co-ordinated Patrols (ISCP).

coordinating the pursuit of pirates who fled from the waters of one State to the other. With prior authorisation the public vessels of one State might pursue pirate vessels into the territorial waters of the other.<sup>71</sup> Malaysia and Indonesia also in December 1992 used their Joint Border Committee for establishing a mechanism to coordinate maritime cooperation in the Straits of Malacca. The mechanism created led to coordinated patrols in the Malacca Straits. The result of this, together with unilateral measures against piracy by Singapore, Indonesia, and Malaysia, led to a noticeable decrease in piracy in the Malacca Straits throughout the period 1993 to 1999. Other regional cooperation on a bilateral basis has also been evident in recent years. In October 2000, for example, Vietnam and Cambodia conducted joint anti-drug smuggling and anti-piracy patrols in each other's national waters, and in March 2001 the Japanese Coast Guard and the Singaporean Navy engaged in joint anti-piracy exercises in the area of the Malacca Straits and Singapore Straits. The Japanese Coast Guard has also engaged in joint anti-piracy exercises with the Indian Navy in the Indian Ocean,<sup>72</sup> and has offered to train regional personnel in anti-piracy measures at its Coast Guard College. More recently, the Philippine and Malaysian navies have agreed to cooperate more closely in sharing information to combat the piracy, robbery and kidnappings that have been occurring within their proximate territories.<sup>73</sup> Despite these various bilateral measures, a meeting of the IMO in Singapore in March identified a need for States of the South East Asian region to operate in a more coordinated way if piracy were to be defeated. The IMO was therefore mandated to convene a meeting at some future date to consider establishing a regional agreement on cooperation against piracy and armed robbery against ships.<sup>74</sup>

In addition to the various developments that have been occurring at the inter-governmental level, there has also been some progress made in regional Track One and Two bodies. Track One bodies consist of governmental representatives at a variety of levels and are concerned with matters of security cooperation. Track Two bodies, on the other hand, are non-governmental groups designed to exchange views among academics, NGOs and concerned citizens. In the field of piracy, the Track One and Two bodies of

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<sup>71</sup> Beckman states that it has been reported that operations conducted by the Indonesian Navy in 1992 under this agreement resulted in the capture of 38 sea robbers operating along the Singapore Strait and Phillips Channel. Beckman, Robert, "Issues of Public International Law relating to Piracy and Armed Robbery Against Ships in the Malacca and Singapore Straits", <<http://www.sils.org/seminar/1999-piracy-03.htm>>.

<sup>72</sup> Weeks, Dr. Stanley B., "Sea Lines of Communication (SLOC) Security and Access", Policy Paper 33, University of California Institute on Global Conflict and Cooperation; "Japanese Coast Guard Vessel to Visit India to Conduct Joint Exercise with Indian Coast Guard at Chennai", <[http://www.japan-emb.org.in/PressReleases/Embassy\\_Of\\_Japan/press-embassy34.htm](http://www.japan-emb.org.in/PressReleases/Embassy_Of_Japan/press-embassy34.htm)>; Mark Valencia, n. 15; Chanda, n. 15.

<sup>73</sup> "Navies agree to anti-crime move", *The Star*, Wednesday, 8 August 2001.

<sup>74</sup> IMO, "Governments seek IMO help in fight against piracy", *IMO Newsroom*, 30 March 2001; "Singapore Hosts Meeting to Combat Regional Sea Crime", *Inside China Today*, 14 March 2001.

relevance are, respectively, the Western Pacific Naval Symposium (WPNS)<sup>75</sup> and the Maritime Cooperation Working Group (MCWG) of the Council for Security and Cooperation in Asia Pacific (CSCAP).<sup>76</sup> At the Seventh WPNS in Auckland, New Zealand in 2000, Admiral Soo-yong Lee, Director of Naval Operations of the Republic of Korea Navy suggested a number of measures which might be used in the fight against piracy.<sup>77</sup> Among these were the need for increased cooperation at a bilateral and multilateral level among States of the region; the need to increase joint anti-piracy patrol operations; the need to develop agreements to allow States to engage in hot pursuit of pirate vessels into each others waters and better coordination of on shore piracy measures.<sup>78</sup> In the Track Two MCWG of CSCAP the issue of cooperation for law and order at sea has been on the agenda for some time. It is the function of CSCAP to develop memoranda for presentation to the ASEAN Regional Forum (ARF), which then considers what action to take on the basis of any given memorandum. *CSCAP Memorandum No 4* which is entitled “Guidelines for Regional Maritime Cooperation”<sup>79</sup> provides as follows:

16. Parties recognize the importance of cooperation in the maintenance and enforcement of law and order at sea, including the prevention of piracy, drug smuggling and other crimes at sea, acknowledging the rights of states to enforce their domestic laws at sea to the extent permitted by international law.

17. Parties are encouraged to institute regular meeting to enhance cooperation in their maritime enforcement activities.

At following meetings, the MCWG elaborated *CSCAP Memorandum No 5* which is entitled “Cooperation for Law and Order at Sea”. In the case of piracy, it suggested that a regional anti-piracy agreement might be considered for the region, but that as a prelude to this, some audit of national piracy laws might be undertaken to determine the compatibility of their scope and content and the possibility of their harmonization. It was also suggested that States could consider a redefinition of piracy. While these initiatives are conceivably

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<sup>75</sup> The Western Pacific Naval Symposium (WPNS) was established in 1988. It is a series of staff-level workshops and biennial meetings of the Chiefs of Naval Service (CNS) of 17 member and three observer countries with naval involvement in the Pacific. The WPNS CNS meetings are held on even-numbered years to complement the International Seapower Symposiums that are held on odd-numbered years. The WPNS seeks to increase transparency, promote confidence, reduce tension and enhance co-operation among the navies of member and observer countries.

<sup>76</sup> CSCAP is composed of representatives from 17 member countries and seeks to promote regional security through conferences among primarily academic strategic studies experts covering Maritime Cooperation, North Pacific Security, Comprehensive and Cooperative Security, Confidence and Security Building Mechanisms, and Transnational Crime.

<sup>77</sup> [http://www.navy.mil.nz/mzn/sub\\_page.cfm?Article\\_ID=629&Sequence\\_ID=69](http://www.navy.mil.nz/mzn/sub_page.cfm?Article_ID=629&Sequence_ID=69)

<sup>78</sup> *Ibid.*

<sup>79</sup> On file with the author.

of longer-term importance, the need for immediate cooperation and measures to stem piratical activity is nevertheless apparent to regional States. At an Extraordinary General Meeting of ARF in Kuala Lumpur on 16 April 2001, four concrete measures for combating piracy were proposed. These were the need to establish operational contact points among ARF enforcement agencies; sharing and circulating information and experiences on the best practices to combat piracy among ARF countries; maintaining close cooperation including making consistent piracy reports to the IMO and IMB and the need to provide better training and exposure for coast guard or equivalent authorities. Some members of ARF also took the view that the participating States that had not yet ratified SUA should be encouraged to do so as soon as possible. This position reflects that adopted in the 1998 *Oceans and the Law of the Sea Report* of the United Nations Secretary-General<sup>80</sup> in which it was stated that SUA “provides another more useful vehicle for prosecution than the nineteenth century piracy statutes”.<sup>81</sup>

In addition to these various multilateral measures, there have been certain unilateral actions and private initiatives designed to combat piracy. Indonesia, for example, has created a piracy reporting centre on Batam Island at the cost of some US\$ million. It has been reported that the reporting centre is under-used at present, but with increased awareness of its existence and role, it has the capacity to contribute greatly towards the control of piracy in the Indonesian archipelago. This initiative has been supplemented by the development of a coordinating agency for maritime security that operates under the aegis of the Indonesian Minister for Security and Political Affairs. This body controls approximately 120-135 vessels drawn from the navy, coastguard, immigration, customs and police.<sup>82</sup>

As far as private initiatives are concerned, some mention must be made of the role of the IMB in helping to combat piracy. Following the increase in piratical activity in the 1990s the IMB decided in 1992 to establish a Piracy Reporting Centre. The functions of the Centre are to receive reports of suspicious or unexplained vessel movements, boarding and armed robbery from ships, and to alert other ships and law enforcement agencies in the area; to issue status reports of piracy and armed robbery by daily broadcasts on Inmarsat-C via its SafetyNET service to collate and analyse information received, and to issue consolidated reports to relevant bodies, including the IMO; to assist the owners and crews of ships that have been attacked, and to locate vessels that have been seized by pirates and recover stolen cargoes.

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<sup>80</sup> *Oceans and the Law of the Sea, Report of the Secretary-General 1998*, A/53/456, para 151.

<sup>81</sup> *Ibid.* See also General Assembly Resolution 54/31 of 18 January 2000 in which the General Assembly urged (at para. 23) States to become parties to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and its Protocol, and to ensure its effective implementation.

<sup>82</sup> Information provided at the Tenth Meeting of the MCWG of CSCAP, Kuala Lumpur, Malaysia, June 2001.

The Centre also provides an important twenty-four hour piracy reporting service throughout the year. This enables the Centre to monitor the extent of piratical activity, to warn shippers of such activity and to collaborate closely with regional law enforcement bodies.<sup>83</sup> The Centre also produces weekly piracy reports on the Internet that allow ship-owners and masters to identify current piracy hot-spots.

## 9. CONCLUSION

There is little doubt that the level and extent of piracy and armed robbery against ships is a major problem to the safety of shipping and the security of SLOC in the wider Asian region. Since most of the incidents of 'piracy' and armed robbery take place in maritime zones lying within the sovereignty and exclusive jurisdiction of many States in the region, the definition of piracy in article 101 UNCLOS is in most respects inadequate to meet with many of the acts of violence, detention and depredation which occur within these areas. Furthermore, given the jurisdictional impediments to effective pursuit of pirates and the lack of confidence and trust among regional States which would enable them to deal effectively with pirates, it seems clear that the development of confidence-building measures based upon forms of bilateral and multilateral cooperation represent the most desirable way of attacking the problem. Such bilateral and multilateral cooperation can take both practical and legal forms. An immediate step that would be relatively cost-free to States in the region would be to secure the ratification of SUA. By this single expedient, fugitive pirates and other sea-robbers would be subjected to a coordinated system of prosecution, rendition and punishment. Further legal measures might be the creation of regional piracy agreement or securing the redefinition of piracy at international law to ensure that the appropriate jurisdictional grounds existed for its repression. At a practical level, better communications between the law enforcement agencies of regional States, together with the pooling and joint deployment of sea-borne policing resources, might produce not only the better coordination of activities, but also desirable economies of scale. Of all the flag States, only Japan seems to be interested in contributing to policing SLOC and training within the region, such participation by Japan is still the subject of considerable sensitivity. The significance of unilateral efforts by States, such as Indonesia's establishment of a piracy reporting centre, should also be applauded, but it will take time before such initiatives will begin to bear fruit. Furthermore, the useful role played by private entities such as the Piracy Reporting Centre of the IMB should be given full credit. The existence of a 'clearing house' for information on piratical activities and, most especially, the management

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<sup>83</sup> The URL for the IMB website is [www.iccwbo.org/ccs/imb\\_piracy](http://www.iccwbo.org/ccs/imb_piracy)

of an 'early warning system' is of considerable significance in helping vessels to avoid piracy 'hot spots'.

As have most criminal activities, piracy has probably been with the international community almost since the beginning of time. Where economic incentives exist, individuals will always be willing to take the risk of piracy. It should be the function of the international community to make this risk less attractive. While practical measures such as a stronger naval presence in the region and joint anti-piracy patrols will constitute one of the most obvious and direct methods of dealing with the problem of piracy, there is also a need for States to provide an appropriate legal framework in order to ensure that when pirates are apprehended, they cannot hide behind jurisdictional barriers.

