3. Controlling piracy in Southeast Asia – Thinking Outside the Box

Introduction and background

At a basic level, piracy (like all crimes) is caused by illicit opportunity structures, motivations to take advantage of such opportunities and social control weaknesses, all of which are affected by the globalization processes.[1] Therefore piracy control strategists would do well to focus on these processes - which not only create attractive targets but have also aggravated disparities between societies and peoples[2] - and on the protection of vulnerable locations through efforts to improve governance. Governance is understood broadly as the set of norms, processes and institutions through which diverse interests emerge, are articulated and acted out, and through which conflicts of interests are addressed or resolved in a given social group or community.

[1] Nikos Passas, "Globalization, Criminogenic Asymmetries and Economic Crime" (1999) 1:4 Eur. J. L. Ref. 399; Nikos Passas, "Global Anomie, Dysnomie, and Economic Crime: Hidden Consequences of Globalization and Neo-liberalism in Russia and Around the World" (2000) 27:2 Social Justice 16.

[2] Vijay Sakhuja, "Security threats and challenges to maritime supply chains" (2010) 2 Disarmament Forum: Maritime Security 3, online: UNIDIR <www.unidir.org/pdf/articles/pdf-art2967.pdf > [Sakhuja, "Security threats"].

The most common contributing factor suggested in the literature on piracy is opportunity.[3] The concept of opportunity refers to several elements, ranging from favorable geography (for example, narrow waterways and the availability of hideouts), busy shipping routes with convenient and plentiful targets, to limited control capacity, access to weapons, as well as legal and jurisdictional weaknesses.

As both the Centre for International Law (CIL) conference discussions and the literature suggest, control weaknesses are compounded by socio-economic contexts that make piracy viable. Piratical attacks may be rationalized and rendered acceptable or 'not that bad' in the minds of those pondering different options for survival and economic advantage. Combined with the integration of maritime piracy within formal and informal economies, a lack of political will and cultural permissiveness, such factors contribute to the emergence, continuation and growth of this criminal activity.

Capacity building, awareness raising and legal address of this issue is thus a priority

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[3] Joel M. Caplan, William D. Moreto & Leslie W. Kennedy, "Forecasting Global Maritime Piracy Utilizing the Risk Terrain Modeling Approach to Spatial Risk Assessment" in Leslie W. Kennedy & Edmund F. McGarrell, eds., *Crime and Terrorism Risk: Studies in Criminology and Criminal Justice* (Routledge, 2010) 97; Peter Chalk, *The Maritime Dimension of International Security: Terrorism, Piracy and Challenges for the United States* (Santa Monica, CA: RAND, 2008); Peter Lehr, "Introduction" in Peter Lehr, ed., *Violence at Sea: Piracy in the Age of Global Terrorism* (London: Routledge, 2007) vii; Martin N. Murphy, *Contemporary Piracy and Maritime Terrorism: The threat to international security* (London, UK: Routledge, 2007) [Murphy, *Contemporary Piracy*]; Martin N. Murphy, *Small Boat, Weak States, Dirty Money: Piracy and Maritime Terrorism in the Modern World* (New York: Columbia University Press, 2009); Adam J. Young, *Contemporary Maritime Piracy in Southeast Asia: History, Causes and Remedies* (Singapore: Institute of Southeast Asian Studies, 2007) [Young, *Contemporary Maritime Piracy*].

for justice to victims, certainty and for security in trade and for a comprehensive approach to cross-border crimes in the region. This paper will look at the nature of modern piracy in Southeast Asia, outline traditional international legal instruments used to combat piracy - illustrating some of the deficiencies of the legal environment as it stands today - and review some UN Conventions that can be considered as alternative instruments possibly applicable in maritime piracy cases.

The nature of contemporary piracy

At the beginning of the 20th century the British historian Philip Gosse announced that 'the modern age seems to have done away with piracy… What with thirty-five knot cruisers, aeroplanes, wireless and above all the police power of the modern State, there seems little chance for the enterprising individual to gain a living in this fashion'.[4] Gosse was unable to foresee how enterprising pirates of the future would take advantage of the modern State and new technology. Although today we know that Gosse was wrong, the developments he identified did all but eradicate piracy.[5] It was not until some years after the end of the Cold War that piracy began to reemerge on a larger scale. The problem became serious enough in Southeast Asia that by 1983 the International Maritime Organization (IMO) began requesting annual reports from the International Maritime

[4] Philip Gosse, *The History of Piracy* (Mineola, NY: Dover Publications Inc, 2007) at 297-98.

[5] Only sporadic piracy events remained, see Lehr, "Introduction", *supra* note 3.

Bureau[6] (IMB) on the phenomenon.[7] By 1992 the IMB had set up a free service to seafarers, the Piracy Reporting Center (PRC) in Kuala Lumpur, Malaysia, where shipmasters could report actual and attempted attacks to a single point of contact in order to initiate a process of response.[8]

Although the term piracy is loosely applied to a variety of acts both in modern and historical times, there are some vital elements of contemporary piracy which distinguish it from its historical counterpart.[9] Adam Young describes three particular discontinuities between modern and historical piracy: the static territorial borders introduced by nation State consciousness; the fact that in the past piracy had some conditional legitimacy whereas in the present it is considered completely illegal; and the material, political, social and cultural changes of the modern era.[10] The idea of territoriality that Young refers to is

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[6] The IMB is a specialized division of the International Chamber of Commerce. It is a non-profit organization, established in 1981 to act as a focal point in the fight against all types of maritime crime and malpractice.

[7] I.R. Hyslop, "Contemporary Piracy" in Eric Ellen, ed., *Piracy at Sea* (Paris: ICC Publishing, 1989) at 3.

[8] For more information see IMB Piracy Reporting Center, online: ICC Commercial Crime Services <http://www.icc-ccs.org/piracy-reporting-centre>.

[9] Graham Gerard Ong-Webb, "Piracy in Maritime Asia: Current Trends" in Peter Lehr, ed., *Violence at Sea: Piracy In the Age of Global Terrorism* (London: Routledge, 2007) at 37-94 [Ong-Webb, "Piracy in Maritime Asia"]; Carolin Liss, "Maritime Piracy in Southeast Asia" (2003) Southeast Asian Affairs 52.

[10] Adam J. Young, "Roots of Contemporary Maritime Piracy in Southeast Asia" in Derek Johnson & Mark Valencia, eds., *Piracy in Southeast Asia: Status, Issues and Responses* (Singapore: Institute of Southeast Asian Studies Publications, 2005) 1 at 16.

based on the concept of sovereignty, which is not only a priority for coastal States[11] but is also engrained in the legislation governing maritime piracy. This and the legal status of piracy will be discussed in more detail in the next section of this paper. With reference to the dramatic changes in the modern era, it is in the context of globalization and neo-liberalization that piracy has re-emerged as an evolved crime. This is evidenced not only in how piracy responds to levels of maritime traffic and the presence of potential targets[12] but also in its use of technology[13] and the impact of globalization on socio-economic and political conditions within nations which have marginalized large sections of the population.[14]

Keeping these discontinuities in mind, it is important to understand the nature of contemporary maritime piracy and how it has exploited the modern world, which will also make it easier to explore the applicability of different legal instruments against it. Piracy is a highly mobile act where pirates are able to maneuver from the territorial waters of one country to another and into the high seas (*Appendix A*) quickly and easily, in contrast with

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[11] Joyce Dela Pena, "Maritime Crime in the Strait of Malacca: Balancing Regional and Extra-regional Concerns" (2009) 2 Stanford Journal of International Relations 1 at 6.

[12] Lehr, "Introduction", *supra* note 3 at vii.

[13] Michael H. Passman, "Protections Afforded to Captured Pirates under the Law of War and International Law" (2008) 33:1 Tul. Mar. L.J. 1; Jack A. Gottschalk et al., *Jolly Roger with an Uzi: The Rise and Threat of Modern Piracy* (Annapolis, MD: US Naval Institute Press, 2000); Alexa K. Sullivan, "Piracy in the Horn of Africa and its effects on the global supply chain" (2010) 3:4 Journal of Transportation Security 231.

[14] Young, *Contemporary Maritime Piracy*, *supra* note 3 at 57; Sakhuja, "Security threats", *supra* note 2 at 3; John Mo, "Options to Combat Maritime Piracy in Southeast Asia" (2002) 33 Ocean Devel. & Int'l L. 343 at 350.

naval vessels which are restricted due to jurisdictional considerations.[15] Not to mention that warships equipped with precision weaponry are built to fight each other, not pirates on board captured vessels.[16] Another issue is that it is difficult to identify pirates, who - unlike their romanticized counterparts portrayed in storybooks and the media - do not wear eye patches and have peg legs. The reality is that many pirates can only be recognized when they are about to or in the midst of committing a piratical act.[17]

The bulk of piracy in Southeast Asia is characterized as petty sea robbery, with low levels of organization and sophistication.[18] Most incidents occur at night, in small ad hoc groups, often committed in territorial waters from small, fast boats.[19] These incidents usually involve thefts of items such as mooring ropes or other ship equipment. A more aggravated form of petty piracy involves the seizure of the vessel for a short period of time (usually no more than half an hour), where the crew is held hostage and there is a noticeable threat or even use of violence in order to ascertain the location of crew valuables or ship's electronics. Rarer are the incidents that involve permanent or long term seizures, which target cargos and/or the vessel itself.[20]

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[15] Sakhuja, "Security threats", *supra* note 2 at 11.

[16] Jenisch, Uwe, "Piracy, Navies and the law of the sea: the case of Somalia" (2009) 8:2 World Maritime University Journal of Maritime Affairs 123 at 126.

[17] Mo, *supra* note 14 at 350.

[18] Young, *Contemporary Maritime Piracy*, *supra* note 3 at 13.

[19] Hyslop, *supra* note 7 at 12.

[20] Young, *Contemporary Maritime Piracy*, *supra* note 3 at 13.

In the 1980s the majority of the acts in Southeast Asia were of the petty variety. However after 1991 the scale of piracy increased dramatically in terms of number of incidents, the use of arms and level of organization.[21] Particular to the 1990s is the incidence of a few, high profile cases of phantom ships in Southeast Asia. These were incidents where the entire vessel with its cargo was stolen; crew was often thrown overboard or otherwise disposed of. The vessel would be repainted and renamed, registered under one of the many flags of convenience and would be used to defraud unsuspecting cargo shippers or to smuggle goods.[22] More recently, in the late 2000s there has been a gradual decline of piracy in the Malacca Straits; however, this has been accompanied with a displacement of the crime to the South China Sea.[23]

Definition of piracy – United Nations Convention on the Law of the Sea

Despite its long history, the crime of piracy remains a concept that is not clearly defined; this may be because piracy changes over time and varies depending on context. Moreover the development of the concept over time mirrors the politics of the day, illustrated clearly by the separation of pirates from buccaneers and privateers in the past.[24]

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[21] Ong-Webb, "Piracy in Maritime Asia", *supra* note 9 at 48-49.

[22] Jayant Abhyankar, "Phantom Ships" in Eric Ellen, ed., *Shipping at Risk: The Rising Tide of Organised Crime* (Paris: ICC Publishing, 1997) 58.

[23] Sam Bateman, "Assessing the Threat of Maritime Terrorism: Issues for the Asia-Pacific Region" (2006) 2:3 Security Challenges 77.

[24] Angus Konstam, *Scourge of the Seas: Buccaneers, Pirates and Privateers* (Oxford: Osprey Publishing, 2007).

However piracy is one of the oldest crimes and unique in that it is described as *hostes humani generis*[25] – that is, enemies of the human race. This designation was created because piracy was considered a threat to all maritime States, and jurisdiction over pirate ships was granted to all nations, a legal exception known as *jure gentium (universal jurisdiction)*.[26] This is codified in the *1982 United Nations Convention on the Law of the Sea* (*UNCLOS*);[27] every State may seize a pirate ship and decide the penalties to impose (article 105).

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[25] *'Hostis humani generis'* is a legal term that originates from admiralty law and refers to the unique status of maritime pirates since the 18th century. It has its source in the understanding that the high seas are common property of all nations and that every nation has the right to trespass through it. Pirates violate this universal right and therefore represent a crime against all nations, and therefore hold this universal status.

[26] A vessel is *jure gentium* if it is considered as a pirate ship or aircraft. According to article 103 of *UNCLOS*:

> A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act. Usually jurisdiction over vessels on the high seas is exclusive to that of the flag state.

See Eugene Kontorovich, "A Guantánamo on the Sea: The Difficulty of Prosecuting Pirates and Terrorists" (2010) 98 Cal. L. Rev. 243 at 252; E.D. Brown, "Maritime commercial malpractices and piracy under international law" (1981) 8:2 Maritime Policy & Management 99 at 100; Lucas Bento, "Toward An International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish" (2011), 29:2 Berkeley J. Int'l L. 101 at 122; Helmet Tuerk, "The Resurgence of Piracy: A Phenomenon of Modern Times" (2009) 17 U. Miami Int'l & Comp. L. Rev. 1 at 7.

[27] *United Nation Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S. 397, online: United Nations <http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm> [UNCLOS].

Contemporary piracy is distinguished from historical piracy in its manifestations and modus operandi.[28] However, the definition of piracy and legal framework to combat it both stem from the patterns and methods of historical piracy. At the time that *UNCLOS* was drafted, piracy had all but disappeared from the world's oceans.

Under customary international law, there was no single definition of piracy, and a broad array of behaviors fell under the concept.[29] According to James Brierly, the essence of piracy was an act of violence, committed at sea or closely connected with the sea, by persons not acting under State authority.[30] This approach was supported by courts in the United States and Britain, where it was held that both an act of robbery and an act of insurgency constitute piracy.[31] The only exceptions were when it was a lawful act of war or an insurgency targeting its own government.

In 1958, the *Convention on the High Seas*[32] framed piracy (article 15) within an

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[28] Ong-Webb, "Piracy in Maritime Asia", *supra* note 9.

[29] Erik Barrios, "Casting a Wider Net: Addressing the Maritime Piracy Problem in Southeast Asia" (2005) 28:1 B.C. Int'l. & Comp. L. Rev. 149; Malvena Halberstam, "Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety" (1988) 82:2 A.J.I.L. 269.

[30] As cited in Halberstam, *supra* note 29 at 273.

[31] In the United States this was established in the case of *United States v. the Brig Malek Adhel*, 43 U.S. (2 How.) 210 at 232 (U.S.S.C. 1844). In Britain, the famous case of *In re Piracy Jure Gentium* [1934] A.C. 586 makes the same point.

[32] *Convention on the High Seas*, Geneva 29 April 1958, 450 U.N.T.S. 11, 13 U.S.T. 2312 (entered into force 30 September 1962) [*Geneva Convention*].

international instrument, a definition that was echoed verbatim in *UNCLOS* (article 101). [33] According to these conventions piracy consists of:

a) Any illegal acts of violence, 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) of this article.

Effectively the act of piracy is limited by these articles to those *for private ends*, involving a *ship-to-ship* conflict, and to incidents that occur *outside the sovereignty of any State*.[34] According to *UNCLOS* piracy must be for *private ends*, a relic of historic piracy

[33] *UNCLOS* took on the articles referring to piracy verbatim from its predecessor, the *Geneva Convention*, *supra* note 32 at article 15.

[34] It has been suggested that the *Geneva Convention* (and therefore by implication, *UNCLOS*) was a departure rather than an incorporation of customary international law due to its limitation to private ends (Clyde H. Crockett, "Toward a Revision of the International Law of Piracy" (1976) 26 DePaul L. Rev. 78). Barrios suggests that this is also true because *UNCLOS* limits piracy to act committed in the high seas, whereas in the past acts that were committed in territorial waters were also considered piracy (Barrios, *supra* note 29 at 161). Such 'clear distinctions which we have today between territorial sea and the high seas did not exist and it

where State-sponsored piracy (also known as privateering) was to be excluded from the ambit of the Convention. According to Professor Joseph Bingham, who prepared the Comment to the Harvard Draft Convention on Piracy,[35] the public ends element of the definition excludes 'all cases of wrongful attacks on persons or property for political ends, whether they are made on behalf of States or of recognized belligerent organizations, or of unorganized revolutionary bands'.[36] This limitation effectively excludes from international jurisdiction any acts of piracy that are condoned or organized by nation States as well as acts of terrorism that are directed at the source State. The problem created by this exclusion is not only that it effectively distinguishes acts of terrorism from piracy, but also in that *UNCLOS* focuses on the motivation of the perpetrators but provides no guidance as to what constitutes a private motivation or how to classify an event where private and public motivations are co-mingled.[37]

UNCLOS states that except in the case of mutiny on a State-owned ship (article 102) piracy requires that members of one ship attack another ship, therefore excluding internal seizures on private vessels (which was the case on the *Achille Lauro*, for example).

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would have been quite proper to describe plunder and murder in port or in the territorial sea as acts of piracy.' (Brown, *supra* note 26 at 99).

[35] Published in Harvard Research in International Law, "Comment to the Draft Convention on Piracy", (1932) 26 A.J.I.L. Supp. 749, 750. This formed the basis for the *Geneva Convention*. *UNCLOS* then replicated the clause in the *Geneva Convention* verbatim. Therefore the document is often used in the interpretation of the piracy clauses of *UNCLOS*.

[36] As cited in Halberstam, *supra* note 29 at 278.

[37] Bento, *supra* note 26 at 119-120. For further discussion on the distinction between private and public ends, see Professor Robert Beckman's paper in Chapter 2 of this book.

It also excludes piracy within ports because of national sovereignty over territorial waters. So, this convention limits piracy to acts committed on the high seas and on the EEZ. The high seas are the areas of the ocean that are outside of the territorial sovereignty of a nation State, also known as international waters. *Appendix A* illustrates that territorial waters extend 12 nautical miles (nm) from the coast of a nation State. Beyond this, each nation State has an Exclusive Economic Zone (EEZ) stretching 200 nm from its coast. Within the EEZ, the State has exclusive exploitation rights over the natural resources therein. According to *UNCLOS*, ships have transit rights in the EEZ but they have to pay regard to coastal States' rights, laws and regulations (art. 88-115). Technically these are international waters and according to art. 58(2), the piracy provisions apply. That means all vessels, regardless of nationality, can arrest and arraign pirates encountered in the EEZs and bring them to justice under their own domestic law. The area that was excluded from international law was broadened by *UNCLOS* itself in article 3, which extended the limit of territorial seas from 3 nautical miles (nm) to 12 nm.

The reality is that the restricted definition of piracy provided by *UNCLOS* excludes many of the attacks that occur in Southeast Asia,[38] which predominantly occur in territorial waters. At the crux of the issue is that pirates do not distinguish between the high seas and territorial waters of this or that nation, whereas national laws, enforcement agencies and domestic court systems can only operate within their territorial limits. Therefore *UNCLOS* is of limited value in targeting contemporary piracy:

[38] Barrios, *supra* note 29 at 155.

> [the] UNCLOS regime is a product of the past intended for a world whose geopolitics and technology have since dramatically changed. As a consequence, the development of piracy law in the international realm has been handicapped by a treaty that was never, *ab initio*, intended to combat international piracy in its current form.[39]

This has been illustrated clearly in the response to the increasing piratical activity off the coast of Somalia. Faced with the limited application of *UNCLOS*, the United Nations Security Council adopted *Resolution 1816* on 2 June 2008 which, with the consent of the Somali Transitional Federal Government, allowed international coalition vessels to

> enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and … Use … all necessary means to repress acts of piracy and armed robbery.[40]

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[39] Bento, *supra* note 26 at 125-126.

[40] United Nations Security Council, *Resolution 1816 (2008)*, SC Res., UN SCOR, 5902d Mtg., UN Doc. S/RES/1816 (2008) [*Resolution 1816*]. *Resolution 1816* was in force for a period of 6 months. In December 2008 the UN Security Council went one step further and authorized States and regional organizations to undertake all necessary measure in Somalia itself (i.e. on land) to suppress piracy [United Nations Security Council, *Resolution 1851 (2008)*, SC Res., UN SCOR, 6047th Mtg., UN Doc. S/RES/1851 (2008)]. These were extended by subsequent Resolutions, most recently by United Nations Security Council, *Resolution 1850 (2010)*, SC Res., UN SCOR, 6429th Mtg., UN Doc. S/RES/1950 (2010) till 23rd November 2011. Note

Although *UNCLOS* does require that all 'States … cooperate 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' (article 100), it does not mandate cooperation between nations in territorial waters. Also the seizure of pirates can only be executed by warships or military aircraft or other vessels that are 'clearly marked and identifiable as being on government service and authorized to that effect' (article 107). Moreover, the treaty is silent on soliciting piracy, conspiracy to commit piracy and attempted piracy, therefore a pirate can only be seized in the act.[41]

Hot pursuit is when a naval vessel is pursuing a pirate vessel from territorial waters to the high seas [article 111(1)]. Under *UNCLOS* this is in conformity with international law.[42] However, such a right of hot pursuit does not exist under international law, if a naval vessel is pursuing a pirate ship from the high seas into territorial waters or when one nation is pursuing a pirate ship into the territorial waters of another country – therefore allowing the pirates to use borders to elude capture. Indeed, article 111(3) of *UNCLOS* states that "the right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State".

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however that these Resolutions expressly state that they do not create precedents under customary international law.

[41] Bento, *supra* note 26 at 125.

[42] Martin N. Murphy, "Piracy and UNCLOS: Does International Law Help Regional States Combat Piracy?" in Peter Lehr, ed., *Violence at Sea: Piracy in the Age of Global Terrorism* (London: Routledge, 2007) 155 at 163 [Murphy, "Piracy and UNCLOS"].

Today, piracy-like acts that are committed in territorial waters are technically not piracy. These are acts that may be covered by other international law – and require domestic legislation. The status of national laws on piracy varies dramatically, as *UNCLOS* does not require nations to criminalize piracy.[43] In 1995 the International Maritime Organization (IMO) adopted the *Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships,* which distinguished armed robbery against ships from piracy as defined by *UNCLOS*. Armed robbery against ships is defined as 'any 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 a ship within a State's jurisdiction over such offences'.[44] The resolution is aimed at encouraging cooperation and passing domestic legislation to help anti-piracy efforts. Although the resolution establishes a clear distinction between acts committed in the high seas and those in territorial waters[45], it provides the same guidelines in terms of investigation, cooperation and information sharing for both.

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[43] To date not all nations have piracy legislation. To see which countries do have national legislation on piracy and what the content of these laws is, see "National Legislation on Piracy", online: Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations <http://www.un.org/Depts/los/piracy/piracy_national_legislation.htm>.

[44] Note that although the territorial equivalent of piracy is called armed robbery against ships, there is no requirement for the offence to be conducted using weapons. (IMO, *Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships*, IMO Assembly Res. A.922(22), 22nd Sess., A 22/RES/922 (2001), online: IMO <http://www5.imo.org/SharePoint/blastDataOnly.asp/data_id=23528/A922%2822%29.pdf> at 4.)

[45] Tuerk, *supra* note 26 at 6.

The focus of *UNCLOS* was not piracy; primarily it was concerned with redistribution of resources to the new nations that were born with the end of colonization, whilst simultaneously ensuring freedom of navigation for the more established fleets.[46] Of the 320 articles in *UNCLOS*, only seven deal with piracy. At the time of drafting, piracy was largely regarded as a problem of the past. The drafters of *UNCLOS* were concerned with issues of sovereignty and *not* piracy, which explains why they failed to set any requirements for State parties to introduce comparable domestic legislation on piracy and to mandate cooperation between nations when dealing with this crime.

It is clear that *UNCLOS* fails to be a comprehensive tool to combat piracy, which was highlighted by the *Achille Lauro* case in 1985. The Italian flagged cruise ship *Achille Lauro* was seized by Palestinian Liberation Front members, who were posing as passengers en route from Alexandria to Port Said. The passengers were held as hostages and would only be released in exchange for 50 Palestinian prisoners held in Israel. When these demands were not met, a U.S. national was shot and thrown overboard. Although some characterized the act as piracy, it fell beyond the ambit of *UNCLOS* for two reasons.[47] Firstly, it did not meet the private ends requirement and secondly, there was no second ship involved. This prompted the drafting of a new international convention aimed at filling this gap in international public law.

Other international legal instruments used to combat piracy

[46] J.L. Anderson, "Piracy and World History: An Economic Perspective on Maritime Predation" 6:2 (1995) Journal of World History 175.

[47] Halberstam, *supra* note 29 at 269-267.

The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988

Although the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* [*1988 SUA Convention*]**]**[48] is often thought of as a maritime terrorism convention,[49] the term 'terrorism' appears only in the preamble, and its application is much broader. The *1988 SUA Convention* was meant to fill the gaps left by the *UNCLOS* definition of piracy: it does not have a two-ship requirement; it does not distinguish between territorial waters and the high seas (article 4), and; it is not concerned with the motivation of perpetrators.[50] However the *1988 SUA Convention* does not provide for universal jurisdiction and is only applicable to States parties – that is countries that have ratified it - when their nationals are subject to an attack, the act is committed on board a ship flying their flag or in their territory (article 6). The *1988 SUA Convention* also does not use the term piracy; instead it covers intentional 'within a ship' acts of violence irrespective of purpose or motivation, which endanger the safe navigation of the vessel (article 3).

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[48] Rome 10 March 1988, 1678 U.N.T.S. 222, 27 I.L.M 668 (entered into force 1 March 1992), online: United Nations Treaty Collection < http://treaties.un.org/doc/db/Terrorism/Conv8-english.pdf> and United Nations Office on Drugs and Crime <https://www.unodc.org/tldb/en/1988_Convention_Maritime%20Navigation.html> [*1988 SUA Convention*].

[49] Halberstam, *supra* note 29 at 270.

[50] Barrios, *supra* note 29 at 157.

Where *UNCLOS* requires State parties to take active measures against piracy, the *1988 SUA Convention* requires its State parties to either refer cases for prosecution in their own courts or extradite seized alleged offenders (article 7). However, if the perpetrator is not taken into custody under the *1988 SUA Convention*, the obligation to prosecute or extradite does not apply.[51] Unlike the law of piracy, the *1988 SUA Convention* criminalizes attempting, abetting and threatening as offences (article 3(2)) and creates an express obligation upon parties to create appropriate domestic offences. Under article 6, States parties *must* make the acts described in article 3 a crime under national law when committed: (a) against or on board their flag vessels; (b) within their territory, including their territorial sea; or (c) by one of their nationals. Finally, the *1988 SUA Convention* requires States Parties to co-operate in the prevention of maritime violence, by taking measures to prevent preparation in their territories of the commission of the offence and by exchanging information and coordinating efforts (article 13).

In 2008, Security Council Resolution 1846[52] confirmed that piracy and armed robbery against ships qualify as unlawful acts under the *1988 SUA Convention*. Although the *1988 SUA Convention* has overcome some of the glaring difficulties presented by UNCLOS, it has only been used in one case to date.[53] The reluctance to use the Convention, despite having 157 parties and being in force since 1992, has been because the

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[51] Kontorovich, *supra* note 26 at 254.

[52] United Nations Security Council, *Resolution 1846 (2008)*, SC Res., UN SCOR, 6026th Mtg., UN Doc. S/RES/1846 (2008).

[53] See *United States v Shi*, 525 F.3d 709 (9th Cir. 2008).

1988 SUA Convention is generally considered a 'defective remedy'.[54] The problem has been that the *1988 SUA Convention* is limited by placing an obligation on States parties to exert jurisdiction only in connection with piratical incidents against their own ships or nationals, while there is no obligation to exert jurisdiction over such incidents against vessels of other nations.

The 2005 revision of the *1988 SUA Convention* (by the *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* [*2005 SUA Protocol*])[55] has somewhat addressed this issue by permitting consensual boarding (article 8bis) of another vessel under the flag of a fellow party, when there are reasonable grounds to suspect that the ship or a person on board is, has been or is about to be involved in an offence under the Convention. The *2005 SUA Protocol* amendments came into force on 28 July 2010 after Nauru became the 12th State to ratify it. However the limit is that *2005 SUA Protocol* only applies to State parties.[56]

The reluctance to use the *1988 SUA Convention* may stem from mistaking it as a convention that is only applicable to terrorist acts, although under the *1988 SUA Convention*, the motive of the offender is irrelevant.[57] The *1988 SUA Convention* is seen as

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[54] Tuerk, *supra* note 26 at 13.

[55] *Protocol of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 1 November 2005, IMO Doc. LEG/CONF.15/21, online: <http://treaties.un.org/doc/db/Terrorism/Conv7-english.pdf> [*2005 SUA Protocol*].

[56] Jenisch, *supra* note 16 at 134.

[57] Robert C. Beckman, "Combating Piracy and Armed Robbery against Ships in Southeast Asia: The Way Forward" (2002) 33 Ocean Devel. & Int'l L. 317 at 330.

too restrictive in that it requires the unlawful act to 'endanger the safety of maritime navigation'[58] and in that it fails to address all criminal offences (for instance theft and armed robbery are not mentioned, though they would be covered if they endanger the safety of maritime navigation).[59] The applicability of the *1988 SUA Convention* to Southeast Asia is limited because several coastal countries in the area have not ratified the *1988 SUA Convention*, including key countries such as Malaysia and Indonesia, not to mention that none of the countries in the area have ratified the *2005 SUA Protocol* (see *Appendix B* for a list of coastal Southeast Asian countries and their ratification of the *1988 SUA Convention*, *2005 SUA Protocol* and *UNCLOS*).

The major problem with the legal anti-piracy framework has been and remains the asymmetry of the rules from one nation to the next and with the international framework. 'UNCLOS is based on the assumption that States have the appropriate domestic legislation to be able to prosecute offences that are considered piracy under international law';[60] this

[58] Murphy, "Piracy and UNCLOS", *supra* note 42 at 165.

[59] Max Mejia & Proshanto K. Mukherjee, "Selected issues of law and ergonomics in maritime security" (2004) 10:4 Journal of International Maritime Law 316 at 325.

[60] Murphy, "Piracy and UNCLOS", *supra* note 42 at 166; see also Zou Keyuan, "Seeking Effectiveness for the Crackdown of Piracy at Sea" (2005) 59:1 Journal of International Affairs 117 at 131 [Zou, "Seeking Effectiveness"].

however is not the case.[61] As long as this is not remedied, pirates will continue to have the upper hand.

Bilateral and multilateral treaties in Southeast Asia

Progress in regional maritime security and cooperation amongst Southeast Asian countries to combat piracy has been impaired by distrust and clash of interests between some of the neighboring countries.[62] Priority is often given to issues of national sovereignty,[63] protection of the resources within the EEZ[64] (see *Appendix A*), disputes over claims of certain ocean areas[65] and terrorism.[66]

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[61] For instance, no country in East Asia criminalizes piracy except for the Philippines (Zou, "Seeking Effectiveness", *supra* note 60 at 131).

[62] Mo, *supra* note 14 at 350; J.N. Mak, "Unilateralism and Regionalism: Working Together and Alone in the Malacca Straits" in Graham Gerard Ong-Webb, ed., *Piracy, Maritime Terrorism and Securing the Malacca Straits* (Singapore: ISEAS Publishing, 2006) 134 at 135.

[63] Barrios, *supra* note 29 at 159; Murphy, "Piracy and UNCLOS", *supra* note 42 at 167.

[64] Interestingly Mak points out that piracy has indirectly contributed to fishery management, that the presence of pirates in the northern Malacca Straits has prevented illegal fishing by Thai and Malaysian trawlers (J.N. Mak, "Pirates, Renegades and Fishermen: The Politics of 'Sustainable' Piracy in the Strait of Malacca" in P. Lehr, ed., Violence at Sea: Piracy in the Age of Global Terrorism (New York: Routledge, 2006) 199 at 216 [Mak, "Pirates, Renegades and Fishermen"].) See Dela Pena, *supra* note 11 at 3.

[65] David Rosenberg & Christopher Chung, "Maritime Security in the South China Sea: Coordinating Coastal and User State Priorities" (2008) 39 Ocean Devel. & Int'l L. 51; Mak, "Pirates, Renegades and Fishermen", *supra* note 64.

Although these are still critical issues, the attitude towards anti-piracy efforts changed somewhat after the Joint War Committee (JWC) of the Lloyd's Market Association listed the Malacca Straits and some parts south of the Philippines (as well as Somalia, Iraq and Lebanon) as a war-risk in July 2005.[67] The Association of Southeast Asian Nations (ASEAN) had met before to discuss security, cooperation and joint anti-piracy efforts. For instance, in 2003 Malaysia and Thailand began coordinated patrols along their joint maritime border, followed in 2004 by MALSINDO (Malaysia-Singapore-Indonesia) coordinated patrols. These coordinated patrols were not joint patrols; each naval power would patrol their own territorial waters, there was no right to enter another nation's waters and no right of pursuit.[68] In September 2005, MALSINDO was expanded to air patrols over the straits ('Eyes in the Sky'). In reality, these coordinated patrols have been of limited value and have even been described as being a public relations exercise.[69]

The *2004 Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia* [*ReCAAP*][70] was the first regional Asian agreement that promotes and enhances cooperation against piracy and armed robbery. *ReCAAP* requires

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[66] Dela Pena, *supra* note 11 at 4.

[67] The effect of a war-risk listing is that insurance premiums for vessels passing through the region are higher. See David Rosenberg, "The Political Economy of Piracy in the South China Sea" (2009) 62:3 Naval War College Review 43 at 51 [Rosenberg, "The Political Economy of Piracy"].

[68] Mak, "Pirates, Renegades and Fishermen", *supra* note 64 at 155.

[69] *Ibid*. at 156.

[70] *Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia*, 11 November 2004, 2398 U.N.T.S. 199, 44 I.L.M. 839 (2005) (entered into force 4 September 2006), online: <http://www.mofa.go.jp/mofaj/gaiko/kaiyo/pdfs/kyotei_s.pdf> [*ReCAAP*].

Parties to take effective measures in preventing and suppressing piracy and armed robbery; to arrest pirates; to seize pirate ships and rescue victims (article 2.1). Cooperation is mandated in the form of information sharing (from each country to the Information Sharing Center – ISC in Singapore) (articles 4, 9); in legal measures including extradition and mutual legal assistance (articles 12-13); and in capacity building in the form of technical assistance (article 14.1).

With seventeen States parties,[71] *ReCAAP* is the first binding international legal document that recognizes the IMO definition of armed robbery at sea in addition to the *UNCLOS* definition of piracy.[72] It is important to note however that it is of limited applicability as long as China, Malaysia and Indonesia have not ratified it. Their refusal to join *ReCAAP* has been on the grounds of its implications for national sovereignty.

In terms of cooperation, coastal nations expect the international community to share in the cost of policing the area[73] and are open to material assistance, but they are reluctant

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[71] The seventeen Contracting Parties to *ReCAAP* are the People's Republic of Bangladesh, Brunei Darussalam, the Kingdom of Cambodia, the People's Republic of China, the Kingdom of Denmark, the Republic of India, Japan, the Republic of Korea, the Lao People's Democratic Republic, the Republic of the Union of Myanmar, the Kingdom of the Netherlands, the Kingdom of Norway, the Republic of the Philippines, the Republic of Singapore, the Democratic Socialist Republic of Sri Lanka, the Kingdom of Thailand and the Socialist Republic of Viet Nam.

[72] Zou Keyuan, "New Developments in the International Law of Piracy" (2009) 8:2 Chinese Journal of International Law 323 at 327.

[73] Rosenberg, "The Political Economy of Piracy", *supra* note 67 at 52; Murphy, "Piracy and UNCLOS", *supra* note 42 at 168-170.

to allow other States access to their maritime space for active military patrols.[74] In terms of legislation, we see that sovereignty remains a critical obstacle to the negotiation, agreement and implementation of treaties and conventions, especially in Southeast Asia.[75]

Thinking outside the box

Keeping in mind problems of the current international anti-piracy framework and its ability to deal with transnational networks,[76] and the reluctance in the region to enhance cooperation and implementation (either through a new instrument or through amendments to current legislation[77]) due to concerns for sovereignty, it may be prudent to think more laterally. Tax laws and money laundering offences, for instance, have been used to deal with criminal enterprises and serious crimes (predicate offences), which can be hard to prove. In a similar way, we can try to control maritime piracy with alternative legal

[74] Dela Pena, *supra* note 11 at 7.

[75] Murphy explains that the reason this area is so sensitive to issues of sovereignty is because the borders are mostly young and artificial, based on colonial–era territories (Murphy, "Piracy and UNCLOS", *supra* note 42 at 167). Any military intrusion for anti-piracy patrols is seen as militarism, especially by the United States, Japan, China and India (Mo, *supra* note 14; Dela Pena, *supra* note 11).

[76] Kontorovich, *supra* note 26 at 275.

[77] This has been recommended by several academics and jurists discussing the problems of anti-piracy legislation, see Zou, "Seeking Effectiveness", *supra* note 60; Bento, *supra* note 26; Mejia & Mukherjee, *supra* note 59; Mo, *supra* note 14; Tuerk, *supra* note 26. Mo also suggests that the World Trade Organization should come to a specific agreement on piracy control, however he admits that this would take time (Mo, *supra* note 14 at 353).

instruments even though these were not designed with this specific crime as their main target.

A strategy that may prove fruitful is to look at some recent international conventions on transnational crime, which have been drafted with full awareness of the nature of crimes that transcend domestic borders and which enjoy very wide consensus in the international community. Beckman[78] suggests that major criminal hijacks should be added to the *United Nations Convention against Transnational Organized Crime* [*2000 UNTOC*][79] through a Protocol. It is suggested here that *2000 UNTOC* can be a viable and effective tool beyond just vessel hijackings to other forms of organized piracy, as long as countries of the region are Parties and have the will to apply it. Moreover other conventions may be applicable, such as the *United Nations Convention for the Suppression of the Financing of Terrorism* [*1999 Terrorism Financing Convention*] and the *United Nations Convention against Corruption* [*2003 UNCAC*]. (See *Appendix B* for a list of coastal Southeast Asian countries and their ratification of *2000 UNTOC*, *1999 Terrorism Financing Convention*, and *2003 UNCAC*).

The application of United Nations Convention against Transnational Organized Crime

[78] Beckman, *supra* note 57 at 334.

[79] *United Nations Convention against Transnational Organized Crime*, 15 November 2000, 2225 U.N.T.S 209, 40 I.L.M. 335 (entered into force 29 September 2003) [*2000 UNTOC*].

The United Nations Convention against Transnational Organized Crime [*2000 UNTOC*] was adopted in November 2000 and came into force in 2003. It represents an acknowledgement that cross-border crime requires close international cooperation to tackle it. Through the ratification of the Convention, State parties commit themselves to creating consistent domestic criminal offences,[80] an extensive framework for extradition, mutual

[80] **Article 5. Criminalization of participation in an organized criminal group**

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally: (a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity: (i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group; (ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in: a. Criminal activities of the organized criminal group; b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above described criminal aim; (b) Organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group.

2. The knowledge, intent, aim, purpose or agreement referred to in paragraph 1 of this article may be inferred from objective factual circumstances.

3. States Parties whose domestic law requires involvement of an organized criminal group for purposes of the offences established in accordance with paragraph 1 (a) (i) of this article shall ensure that their domestic law covers all serious crimes involving organized criminal groups. Such States Parties, as well as States Parties whose domestic law requires an act in furtherance of the agreement

legal assistance, international cooperation in law enforcement and capacity building in the form of training and technical assistance. Offences covered by the *2000 UNTOC* are as follows:

1. Participation in an organized criminal group (article 5);
2. Laundering of proceeds of crime (article 6);
3. Corruption (article 8); and
4. Obstruction of justice (article 23).

State parties must criminalize all of these acts. It must be emphasized that transnationality and involvement in an organized criminal group need not and should not be elements of these offences in domestic law [article 34(2)].

The 'organized criminal group' is defined as a structured group of three or more persons that exist for a period of time, acts in concert and aims to commit serious crimes (i.e. crimes punishable by deprivation of liberty of at least four years or a more serious penalty – article 2(b)) or other offences covered by the *2000 UNTOC*, in order to obtain a direct or indirect financial or other material benefit (article 2).[81] A structured group does not require a formal organization, membership or structure, but it has to be more than just '… randomly formed for the immediate commission of an offence' (article 2(c)).

Participation in an organized criminal group is essentially agreeing to commit a *serious crime* for financial or material benefit or knowingly taking part in criminal or

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for purposes of the offences established in accordance with paragraph 1 (a) (i) of this article, shall so inform the Secretary-General of the United Nations at the time of their signature or of deposit of their instrument of ratification, acceptance or approval of or accession to this Convention.

[81] Ideologically motivated offences are thus not covered.

related activities of an *organized criminal group* to contribute to criminal aim. State parties can adopt different approaches to conspiracy or association, but the important point is that domestic law must ensure that all serious crimes committed by organized criminal groups are covered. The benefit of this clause is that it addresses inchoate offences, such as soliciting piracy, conspiracy to commit piracy, and attempted piracy, something on which *UNCLOS* is silent.[82]

The offence of money laundering includes acts designed to obscure the criminal source of assets through conversion or transfers ('layering'). The offence covers the concealment of the nature, source, location, disposition, movement or ownership of crime proceeds. To the extent that this is consistent with the fundamental legal principles of State parties, the offence covers also the knowing acquisition of crime proceeds as well as participation, association, conspiracy, attempts, aiding, abetting and facilitation of money laundering (article 6).

The mandatory offence of corruption covers the promise, offer, giving, solicitation or acceptance of any undue advantage to/by a public official in order to act or refrain from acting in any matter relating to the official's public duties (article 8). The *2000 UNTOC* also provides for the optional offence of bribery of foreign public officials or officials of international organizations – which is mandatory under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions – and other types of corruption, such as the abuse of power, abuse of function, illicit enrichment, etc. (see also *2003 UNCAC* below).

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[82] Bento, *supra* note 26 at 125.

The last mandatory offence of the *2000 UNTOC* is obstruction of justice: the use of force, threats or intimidation or promise, offer or giving of undue advantages, in order to interfere with giving of evidence or testimony or to interfere with exercise of duties of judicial or law-enforcement official in connection with proceedings on any offence of the 2000 UNTOC. In addition, the *2000 UNTOC* can be applied to any offences that are:

1. transnational,
2. constitute serious crimes, and
3. are committed by an organized criminal group.

A crime is considered transnational when it is committed (a) '... in more than one State'; or (b) '... in one State but a substantial part of its preparation, planning, direction or control takes place in another State'; or (c) 'in one State but involves an organized criminal group that engages in criminal activities in more than one State'; or (d) '... in one State but has substantial effects in another State' [article 3(2)].

Thus, piracy can be addressed through the *2000 UNTOC* in multiple ways. The most straightforward ones would be whenever pirates act as or participate in an organized criminal group, launder the proceeds of their crime, bribe public officials or obstruct justice. These are quite likely scenarios given the social organization of maritime piracy as outlined above. Unless profits from piracy are recycled into criminal enterprises or informal economies, proceeds of crime would have to be laundered before they can be enjoyed in open and legitimate transactions. Public officials in different positions may play a role in turning a blind eye or facilitating the commission of piratical acts, disposal of assets, money laundering or resisting investigation and offer government action against the offences.

In addition – and quite importantly – the *2000 UNTOC* can apply to any 'serious crime' that is transnational and committed by an organized criminal group. This is at the discretion of State parties, which need to make sure that acts of piracy are criminalized and punishable by four years of imprisonment or more severe penalties. The holistic approach provided by the *2000 UNTOC* is unmatched by dedicated anti-piracy conventions. Not only does the *2000 UNTOC* provide for the inchoate offences but it also provides a framework for dealing with the proceeds and instrumentalities of piracy. This is a central issue for piracy control, 'the battle against piracy will be assisted when we know precisely where the money goes, who controls the sources of financing, and who receives the profits'.[83]

Under article 15(1)(b) of the *2000 UNTOC*, States must establish jurisdiction to *2000 UNTOC* offences 'committed on board a vessel that is flying the flag of that State Party'. Therefore, offences planned, prepared, directed or controlled in one State and committed aboard another State's flagged vessel would be covered.[84] However the *2000*

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[83] Robert I. Rotberg, *Combating Maritime Piracy: A Policy Brief with Recommendations for Action*, Policy Brief #11 (Cambridge, MA: World Peace Foundation, 2010) at 7; Bento, *supra* note 26 at 150.

[84] **Article 15. Jurisdiction**

> 1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with articles 5, 6, 8 and 23 of this Convention when:
>
> (a) The offence is committed in the territory of that State Party; or
>
> (b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.
>
> 2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:
>
> (a) The offence is committed against a national of that State Party;

UNTOC provides a wider ambit for establishing jurisdiction than the *1988 SUA Convention* in that it suggests that countries criminalize activities of an organized criminal group or participation in money laundering outside their territory, aimed at the commission of a serious crime inside their territory [article 15(2)(c)].

(b) The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or

(c) The offence is:

(i) One of those established in accordance with article 5, paragraph 1, of this Convention and is committed outside its territory with a view to the commission of a serious crime within its territory;

(ii) One of those established in accordance with article 6, paragraph 1 (b) (ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 6, paragraph 1(a) (i) or (ii) or (b) (i), of this Convention within its territory.

3. For the purposes of article 16, paragraph 10, of this Convention, each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences covered by this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.

4. Each State Party may also adopt such measures as may be necessary to establish its jurisdiction over the offences covered by this Convention when the alleged offender is present in its territory and it does not extradite him or her.

5. If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that one or more other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.

6. Without prejudice to norms of general international law, this Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

Whenever available, any of these options would allow States to establish jurisdiction and benefit from extensive possibilities with respect to extradition, mutual legal assistance (especially regarding victims, witnesses, seizure and confiscation of proceeds and instrumentalities of piracy, evidence located in the requested State party, etc.), international cooperation, the use of special investigative techniques (e.g. undercover and proactive investigations) and joint investigations.

The *2000 UNTOC* provisions harmonize extradition under existing treaties and other arrangement and make extradition available for all offences of *2000 UNTOC*. State parties cannot refuse extradition solely on the basis of fiscal matters. The *2000 UNTOC* also contains an *aut dedere aut iudicare* (extradite or prosecute) obligation [article 16(10)]. It is noteworthy that the obligation to 'submit the case without undue delay to its competent authorities for the purpose of prosecution' springs from 'the request of the State Party seeking extradition'. Extradition may be refused when the requested State has

> substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.

The *2000 UNTOC* provisions on mutual legal assistance are comprehensive (see article 18) and quite useful. States Parties must 'afford one another *the widest measure of mutual legal assistance* in investigations, prosecutions and judicial proceedings in relation

to the offences covered' by the *2000 UNTOC* (article 18(1); emphasis added) and include [article 18(3)]:

> (a) Taking evidence or statements from persons;
>
> (b) Effecting service of judicial documents;
>
> (c) Executing searches and seizures, and freezing;
>
> (d) Examining objects and sites;
>
> (e) Providing information, evidentiary items and expert evaluations;
>
> (f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
>
> (g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
>
> (h) Facilitating the voluntary appearance of persons in the requesting State Party;
>
> (i) Any other type of assistance that is not contrary to the domestic law of the requested State Party.

States Parties are able to rely on these *2000 UNTOC* provisions and establish a legal basis for mutual legal assistance (MLA) as an alternative to other existing instruments or even in the absence of any bilateral or other arrangements. For the purposes of requesting and extending MLA, it suffices that the offence is one covered by the *2000 UNTOC* (see above) or that 'the requesting State Party has reasonable grounds to suspect that the [serious] offence … is transnational in nature, including that victims, witnesses, proceeds,

instrumentalities or evidence of such offences are located in the requested State Party and that the offence involves an organized criminal group' [article 18(1)].

Most MLA requirements are operational, rather than legislative, but Parties must have in place the legal powers needed to produce and deliver assistance. Under the *2000 UNTOC*, State parties are required to designate a central authority to receive, execute or transmit legal assistance requests and cannot refuse MLA on the grounds of bank secrecy. Further, more direct liaison arrangements are allowed for other forms of cooperation**.** For example under article 27, State parties can:

1. establish and enhance channels of communication;
2. cooperate in inquiries concerning the identity, whereabouts and activities of suspects; the movement of proceeds of crime or instrumentalities;
3. exchange information on:
    a. specific means and methods used by organized criminal groups;
    b. general trends, analytical techniques, definitions, standards and methodologies.

Investigative measures are also supported by the *2000 UNTOC*, including agreements on joint investigations (article 19), domestic and international/cooperative use of special investigative techniques **-** such as controlled deliveries, electronic or other forms of surveillance and undercover operations (article 20) – and measures to encourage those involved in transnational organized crime to cooperate with law enforcement authorities (article 26).

The *2000 UNTOC* is replete with additional provisions regarding practical measures to enhance and facilitate international cooperation. For instance, provisions with application

to piratical events include those regarding the confiscation of money, property or other assets deriving from offences of the *2000 UNTOC* (articles 12-14), as well as assistance and protection for witnesses and victims (articles 24-25). [85]

In short, the *2000 UNTOC* may provide a common framework for Southeast Asian State parties when they wish to investigate, prosecute and generally control piracy in a collaborative manner. On the other hand, this proposition is not simple in its execution due to a series of challenges in the *2000 UNTOC*'s effective implementation.

Implementation challenges of the 2000 UNTOC

Firstly, the *2000 UNTOC* is not a simple document. Precisely because it is comprehensive and covers a lot of ground, its implementation relies not on a single government body, but rather multiple units and agencies, including Ministries of Justice, Finance, Foreign Affairs, as well as law enforcement, supervisory and other bodies.

This has challenged the capacity of many countries that may have the political will to implement but lack the means. As a consequence, they need technical assistance, which may not always be available in a timely fashion. Technical assistance and legal assistance needs are illustrated in *Appendix C* and *D* respectively. *Appendix E* illustrates the needs of countries in Asia in particular.

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[85] A detailed outline of the *2000 UNTOC* provisions which is available in all UN languages can be found in the "Legislative Guide for the Implementation of the UNTOC", online: UNODC <http://www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html>.

The number and scope of different instruments that countries are called upon or required to implement and comply with have generated a ‘regulatory tsunami’. In addition to the *2000 UNTOC*, there are thirteen universal counter-terrorism instruments, the *2003 UNCAC*, sanctions and counter-proliferation of weapons of mass destruction under Chapter VII of the UN Charter, Financial Task Force (FATF) Recommendations, just to mention a few. As a result, governments are overwhelmed and severely stretched. Even at the level of reviewing requirements, progress, accomplishments and needs, several countries, including those in Southeast Asia, have reported a need for technical assistance. Reports to the United Nations by States suggest that most technical assistance is needed for training and capacity-building (25 per cent), legal assistance (20 per cent), strengthening of international cooperation (16 per cent) and assistance in complying with reporting requirements (16 per cent). *Table 1* below highlights the situation in Asia in particular.

Table 1: Types and subtypes of technical assistance needs identified by a group of Southeast Asian States

COUNTRIES	Assistance in complying with reporting requirements	Advocacy and elaboration of national strategy	Data collection and analysis	Legal assistance	Training/ Capacity-building	Strengthening of regional and international cooperation	Protection and assistance for victims and witnesses	Financial and material resources	Comments on areas in which specific assistance is needed
Cambodia	X								
Indonesia					X			X	Lack of resource and access to modern technology
Malaysia					X	X			
Myanmar					X	X			
Philippines	X			X	X				
Thailand							X		Stressed the importance of prevention

Source: Accessed 26 June 2011 from UNODC Overview of technical assistance requests made by States through the questionnaires/checklist on the implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, CTOC/COP/WG.2/2009/3, <http://www.unodc.org/documents/treaties/organized_crime/CTOC_COP_WG2_2009_3_E.pdf>.

These needs have not always been at the top of priority lists both by the donor community and governments. As has been pointed out, the strengthening of law enforcement and prosecutorial activities, services and institutions especially against serious organized crime and corruption is comparatively neglected.[86] In addition to these issues, when available, the quality of technical assistance extended to different countries and agencies is quite diverse and occasionally leaves room for significant improvement.

Coordination of work conducted even within one capital city is another difficulty. This is partly because of the independent actions of the numerous implementing government agencies requesting and receiving assistance. Partly it is also due to the fact that most bilateral aid agencies do not work closely with those of other countries and have de-centralized their work so that it is hard even for a single agency to know precisely what work they do in each country in which they are active.

Finally, the political will – a *conditio sine qua non* for effective implementation – is not always strong enough, because the fight against the main offences of the *2000 UNTOC* are not everywhere considered as a top priority. Nonetheless, provided piracy is criminalized domestically with a penalty of four years or more, the *2000 UNTOC* may hold promise as a novel tool for controlling piracy primarily because it does not involve curtailing State parties' sovereignty (see article 4).[87]

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[86] Jan Van Dijk, *The World of Crime: Breaking the Silence on Problems of Security, Justice, and Development across the World* (Los Angeles: Sage Publications, 2008).

[87] Article 4. Protection of sovereignty.

The application of other United Nations instruments

In a similar fashion, one can also consider the application of the *International Convention for the Suppression of Financing of Terrorism* [*1999 Terrorism Financing Convention*][88] and, perhaps more productively, the *United Nations Convention against Corruption* [*2003 UNCAC*].[89] These options are briefly examined in turn.

International Convention for the Suppression of Financing of Terrorism

For the *1999 Terrorism Financing Convention* to apply, the piratical acts must be transnational and related to the actual, intended or attempted support of terrorism. Article 2 provides that someone commits the offense of terrorist financing if s/he

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> 1. States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.
>
> 2. Nothing in this Convention entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.

[88] *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, 2178 U.N.T.S. 197, T.I.A.S. No. 13075 (entered into force 10 April 2002, all ASEAN countries are party), online: <http://treaties.un.org/doc/db/Terrorism/english-18-11.pdf> [*1999 Terrorism Financing Convention*].

[89] *United Nations Convention against Corruption*, 9 December 2003, 2349 U.N.T.S. 41, 43 I.L.M. 37 (2004) (entered into force 14 December 2005), online: United Nations Office on Drugs and Crime <http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf> [*2003 UNCAC*].

> by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out
>
> a) an act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex;[90] or
>
> b) any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

In other words, piracy must be linked either to an offence defined by the universal instrument against terrorism or fall within the definition provided by sub-paragraph (b), which can be seen as an attempt to offer a general definition of terrorism.

The convention specifically provides that State parties must establish jurisdiction for offences committed 'on board a vessel flying the flag of that State or an aircraft registered under the laws of that State at the time the offence is committed' [article 7(b)]. The convention also provides for international cooperation, MLA and measures related to asset freezing, forfeiture and sharing between concerned States. Its utility for piracy

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[90] These are the nine universal instruments against terrorism, see online: UNODC <https://www.unodc.org/tldb/en/1999_Convention_Financing%20of%20Terrorism.html>.

offences is limited for two main reasons. Firstly, the empirical evidence suggests that pirates in Southeast Asia are rarely linked to terrorist groups.[91] Secondly, the actual implementation of the convention around the world is asymmetric and has yielded very few results so far. National laws are extremely diverse, sometimes out of date and inconsistently applied.[92]

Moreover, internal lack of clarity allows different interpretations of requirements. For example, article 14 provides that terrorism finance offences will not be:

> regarded for the purposes of extradition or mutual legal assistance as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.

This is contrasted by article 15, which states that

> Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request for extradition for offences set

[91] Bateman, *supra* note 23 at 81; Murphy, *Contemporary Piracy*, *supra* note 3 at 85.

[92] Nikos Passas, "Terrorism Financing General Report" (prepared for the International Association of Penal Law, 2008) 79:3-4 Rev. I.D.P. 326.

forth in article 2 or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.

United Nations Convention against Corruption

The *UN Convention against Corruption* could be another option, if piratical acts can be connected to any of its offences. The offences covered by the Convention are distinguished in those that are mandatory (State parties are obligated to establish domestic legislation criminalizing these) and those that are non-mandatory (which remain at the discretion of the State parties). Mandatory offences include:

1. Active bribery of public officials;
2. Passive bribery of public officials;
3. Active bribery of foreign officials and officials of international organizations;
4. Money laundering;
5. Embezzlement, misappropriation and other diversion of public property; and
6. Obstruction of justice.

Non-Mandatory offences are:

1. Passive bribery of foreign officials and officials of international organizations;
2. Illicit enrichment;
3. Abuse of function;

4. Trading in influence;

5. Private to private bribery; and

6. Embezzlement in private sector.

2003 UNCAC elaborates much further the corruption-related offences which are also covered by the *2000 UNTOC* and provides for several optional offences, which have indeed proved very practical and popular in many countries, especially those which relate to illicit enrichment. Everything stated above with respect to the linkages of piracy with offences of the *2000 UNTOC* applies also to *2003 UNCAC*, but some further advantages of applying the *2003 UNCAC* should be underlined.

2003 UNCAC not only has more State parties, but a great deal more momentum and genuine acceptance in the global South, thanks to its path-breaking chapter on asset recovery and repatriation. The implementation of the *2003 UNCAC* thus enjoys more activity and synergies with the development community, where the prevailing concerns are those of good governance and economic growth. The goals of the anti-corruption and development communities are the same or entirely consistent,[93] and as a result many more resources are devoted to *2003 UNCAC*-related reforms than for other international legal instruments.

Another substantive advantage of the application of *2003 UNCAC* is the advanced MLA and international cooperation framework it provides for willing States parties, which

[93] Nikos Passas, "Development Efforts and the UN Convention against Corruption" (Paper prepared on behalf of the Ministry of Foreign Affairs of Finland for the International Cooperation Workshop on Technical Assistance for the Implementation of the United Nations Convention against Corruption in Montevideo, Uruguay, 20 May 2007 – 1 June 2007) [unpublished].

can make processes and exchanges even easier in practice. For example, dual criminality (which is required by the *2000 UNTOC*) is relaxed by allowing the existence of different legal definitions, provided that the basic acts are the same. Also State parties are required to provide MLA even in the absence of dual criminality, as long as they are asked to apply non-coercive measures. Parties are also allowed to collaborate on their own initiative even if there is no dual criminality and encouraged to exchange information informally and even without a previous request from another State party. [94]

However the challenges to the implementation of *2003 UNCAC* are substantial. In addition to those challenges listed with respect to the implementation of the *2000 UNTOC*, which are equally if not more relevant to *2003 UNCAC*, the prevention chapter alone (Chapter II, articles 5-14), which is a blueprint for good governance in general, contains so many measures, policies and practices that the full and effective implementation of the *2003 UNCAC* for most countries is a long-term project.

Conclusions

The main point of this paper is that the contemporary manifestations of maritime piracy are not adequately addressed by international legal instruments developed with this specific offence in mind. Alternative approaches ought to be considered, including the resort to comprehensive, global instruments enjoying consensus support (including by

[94] See UNODC, "*Legislative Guide for the Implementation of the UNCAC*", online: UNODC <http://www.unodc.org/unodc/en/treaties/CAC/legislative-guide.html>.

countries in Southeast Asia), which can enable extensive international cooperation and practical solutions, as piratical acts can be defined as convention offences or offences connected with these convention offences. The *2000 UNTOC* and the *2003 UNCAC* seem to hold the more pragmatic promise despite the serious implementation challenges on the ground, which make progress incremental and slow. However the benefits of these Conventions are: they are equipped to deal with transnational crimes; many coastal and maritime nations are already party to these Conventions; and they do not derogate from the principle of sovereignty. Although there is need for political will to activate the use of these Conventions for piracy control, in sum the level of effort is less than the coordinated effort required to amend current international piracy legislation or to create a new international convention.

The final points to raise here toward assisting with the planning of such creative applications and assisting with the good work of many donor organizations and government agencies are lessons drawn from international implementation practice and experience. Precisely because of the significant activity necessary for some time to come, three main guidelines should be taken into consideration.

Firstly, countries and government bodies may express political will to implement these complex conventions, but the best results can be expected when officials are convinced about the concrete benefits they will derive in terms of their own priorities and policy objectives. Incentives are thus of paramount importance. When countries see for themselves the multiple applications and utility of these conventions (for example with respect to improved economic growth, foreign investment, rule of law and a criminal

justice system that is better able to raise revenue and mete out justice), efforts will be better resourced and supported.

Secondly, efforts must revolve around a strategy. These projects are long term, while political necessities demand short-term accomplishments. A well-constructed strategy would set long-term objectives and ensure the smaller scale programs and projects meet their targets but are also instrumental and conducive to the attainment of ultimate goals. In this way, momentum and credibility will grow, legitimacy will be strengthened and the process will become sustainable.

Thirdly, this strategic effort must be based on outreach and consensus that includes all stakeholders, including civil society, academia, and quite importantly, the private sector. Where everyone participates and owns the overall project, the long-term success will be based on a more solid foundation and will benefit all contributors.

Maritime piracy could thus be tackled through these innovative UN instruments (as efforts to do so are underway in Somalia), but the best outcomes for all types of security and other serious crime threats will be achieved through the concerted and thoughtful efforts described above.

Appendix A: United Nations Convention on the Law of the Sea (1982) definition of piracy and jurisdiction over piracy.

The 1982 United Nations Convention on the Law of the Sea (UNCLOS) limits piracy to acts committed on the high seas (article 101). The high sea is the area of the ocean that is outside of the territorial jurisdiction of a nation State, also known as international waters. *Figure 1* illustrates that territorial waters extend 12 nautical miles (nm) from the coast of a nation State (this 12 nm limit was set in UNCLOS itself, extending it from the previous 3 nm). Beyond this, each nation State has an Exclusive Economic Zone (EEZ) stretching 200 nm from its coast. Within the EEZ, the State has exclusive exploitation rights over the natural resources therein. According to UNCLOS ships have transit rights in the EEZ but they have to pay regard to coastal States' rights, laws and regulations (article 88-115). Technically these are international waters and according to article 58(2) the piracy provisions apply. That means all vessels, regardless of nationality, can arrest and arraign pirates encountered in the EEZs and bring them to justice under their own domestic law.

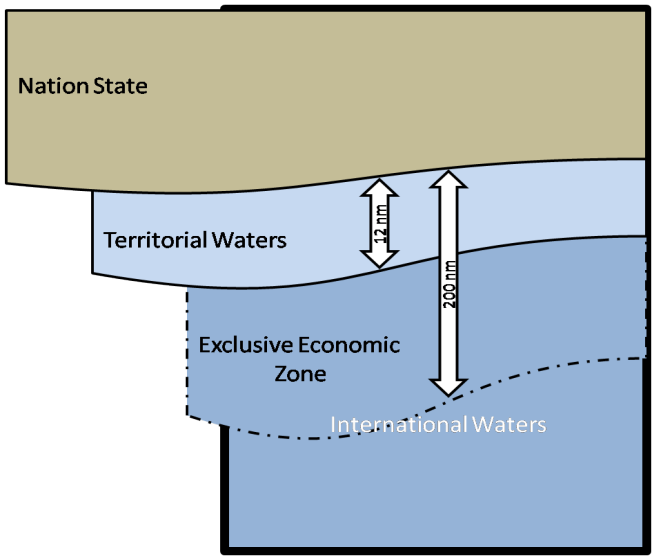

Figure 1. Jurisdictional Boundaries of the Oceans as per the United Nations Convention on the Law of the Sea