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Cooperation to Combat “Piracy” in Southeast Asia

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Introduction

This paper will analyze piracy and armed robbery against ships in Southeast Asia. It will first examine the nature of attacks on ships in Southeast Asia and explain that the majority of attacks are not considered “piracy” under international law but “armed robbery against ships”. It will then examine the relative increase in the number of attacks in 2010 and 2011, including the increase in the number of incidents which would either be defined as piracy under article 101 of the *United Nations Convention on the Law of the Sea (UNCLOS¹)* or as offences under the *1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (1988 SUA Convention²)*. It will then examine fundamental differences between Somali piracy and piracy in Southeast Asia. Finally, it will focus on the steps that should be taken by States in Southeast Asia to combat piracy and armed robbery against ships in the region.

Nature of attacks on ships in Southeast Asia

Under *UNCLOS*, piracy can only be committed against ships on the high seas³ or in the exclusive economic zones⁴ of States, that is, against ships in areas outside the territorial sovereignty of any State. While attacks on ships in Southeast Asia are commonly described as “piracy,” in most cases, this is not true. Most attacks on ships in Southeast Asia are against ships in port, in internal waters, in the territorial sea, in straits used for international navigation (such as the Malacca Strait or Singapore Strait) or in the archipelagic waters of Indonesia, i.e., in maritime zones under the sovereignty of the coastal State.⁵ These attacks are not considered acts of piracy

¹ *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 397, (entered into force 16 November 1994, adopted and opened for signature in Montego Bay, Jamaica).

² *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 10 March 1988, 1678 UNTS 222, (entered into force on 1 March 1992, adopted in Rome).

³ Article 101 *UNCLOS* (n 1).

⁴ Article 58 (2) *UNCLOS* (n 1).

⁵ Robert C Beckman, ‘The 1988 SUA Convention and the 2005 SUA Protocol: Tools to Combat Piracy, Armed Robbery and Maritime Terrorism’ (Winter 2006) 2 (2) *Maritime Affairs*, 29, reprinted in Sam Bateman and others (eds), *Lloyd’s MIU Handbook of Maritime Security* (CRC Press 2009).

governed by the *UNCLOS* regime⁶ but are defined by the International Maritime Organisation (IMO) as “armed robbery against ships”:

“any illegal act of violence or detention, or any act of depredation, or threat thereof, other than an act of “piracy” committed for private ends and directed against a ship, or against persons or property onboard such ship, within a State’s internal waters, archipelagic waters and territorial sea”.⁷

The rules on piracy do not apply in these areas. Attacks on ships in maritime zones under the sovereignty of the coastal States are not crimes under international law, but are only crimes under the laws of the coastal State, and possibly the laws of the flag State and the State of nationality of the perpetrators.⁸ The coastal State has the exclusive power to exercise the power of arrest over persons in maritime zones under its sovereignty.⁹ Foreign warships have no power to patrol in maritime zones under the sovereignty of a coastal State, and they have no power to board ships or arrest persons without the consent of the coastal State.¹⁰ Areas in the region where attacks on ships would be piracy if they take place outside the territorial sea of any State include the upper half of the Straits of Malacca and the South China Sea.¹¹

The distinction between piracy and armed robbery against ships is very important because it limits the types of cooperative measures which can be taken to enhance the security of sea lanes and combat attacks against vessels. The countries in Southeast Asia guard their sovereignty and they oppose any suggestion for cooperative regimes which could undermine

⁶ Article 101 *UNCLOS* (n 1).

⁷ International Maritime Organization, Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships, IMO Assembly Resolution A. 1025 (26) (adopted 18 December 2009).

⁸ For a general overview of criminal jurisdiction, see Robert Jennings and Arthur Watts (eds) *Oppenheim’s International Law*, vol 1 (9th edn, Addison Wesley Longman Inc, 1996), 456.

⁹ Robert Beckman and Tara Davenport, ‘Maritime Terrorism and the Law of the Sea: Basic Principles and New Challenges’ (2010) (Centre for International Law Working Paper) available online <<http://cil.nus.edu.sg/wp/wp-content/uploads/2010/12/Beckman-and-Davenport-Maritime-Terrorism-31-Jan-2011-Final.pdf>> accessed 21 December 2011.

¹⁰ *Ibid*, citing *SS Lotus (France v Turkey)*, 1927 PCIJ (ser A) No 10, 18.

¹¹ International Maritime Bureau, *Piracy and Armed Robbery Against Ships Annual Report 1 January – 31 December 2000*, cited in Robert C Beckman, ‘Combatting Piracy and Armed Robbery Against Ships in Southeast Asia: The Way Forward’ (2002) 33 *Ocean Development and International Law* 326.

their sovereignty.¹² They are very unlikely to agree to other States patrolling waters or exercising police powers in maritime zones under their sovereignty. They are likely to insist that any proposal for cooperative measures recognize their sovereignty and be consistent with the principles and rules of international law, especially *UNCLOS*.

Attacks in Southeast Asia, 2010-11

The International Maritime Bureau (IMB) reported that in 2010 the number of attacks on ships in Indonesia increased from 10 in 2008, to 15 in 2009, and to 40 in 2010.¹³ It also reported an increase in the number of attacks on ships in the South China Sea, from no attacks in 2008 to 13 in 2009 and 31 in 2010.¹⁴ In addition, the number of attacks in Malaysia increased from 10 in 2008, to 16 in 2009, and to 18 in 2010.¹⁵ There were only two attacks per year from 2008 to 2010 in the Malacca Strait.¹⁶ In the Singapore Strait there were six attacks in 2008, nine in 2009 and three in 2010.¹⁷ The ReCAAP Piracy Reporting Centre reports similar statistics.¹⁸

Although attacks on ships in Southeast Asia are not nearly as high as in 2002 and 2003, there are indications of at least two trends which give rise to concern. In a paper presented in January 2011 at a Workshop on International Maritime Crimes organized by the Centre for International Law (CIL) at the National University of Singapore, Karsten von Hoesslin of Risk

¹² Eric Barrios, 'Casting a wider net: Addressing the Maritime Piracy Problem in Southeast Asia' (2005) *Boston College International and Comparative Law Review* 149, 160; Robert Beckman, 'The Establishment of a Cooperative Mechanism for the Straits of Malacca and Singapore under Article 43 of the United Nations Convention on the Law of the Sea' in Aldo Chircop, Ted L McDorman and Susan J Rolston (eds), *The Future of Ocean Regime-Building: Essays in Tribute to Douglas M. Johnston* (Maritonus Nijhoff Publishers 2009).

¹³ International Chamber of Commerce (ICC) International Maritime Bureau (IMB), *Piracy and Armed Robbery Against Ships Annual Report 1 January – 31 December 2010*, 5-6.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ ReCAAP Information Sharing Centre (Incident Reports 2006 – 2011) available online <<http://www.recaap.org/AlertsReports/IncidentReports.aspx?EntryId=11>> accessed 22 December 2011.

Intelligence¹⁹ analyzed the types of incidents taking place in Southeast Asia and identified certain trends.²⁰

Von Hoesslin confirmed that the most common type of attack in Southeast Asia is the same as it has been for many years. The attacks are on-board thefts conducted against ships at anchor within territorial waters.²¹ Targeted vessels are usually boarded at night. Perpetrators armed with long knives (parangs) use the element of surprise. They generally seek to steal engine parts, crew effects, cash or other portable high-value items.²²

Von Hoesslin also identified two trends which are more worrying.²³ First, he asserts that since 2008, a sophisticated campaign of piracy and armed robbery at sea has been waged off the Anambas Islands of Indonesia, orchestrated by experienced criminal syndicates. He states that the attacks off the Anambas Islands are seasonal. They commonly occur during the transitional monsoon period between March and the end of October. As the rainy season begins in early-to-mid November, incidents taper off due to stronger winds and greater wave heights, both of which make night-time boardings significantly more difficult.²⁴

¹⁹ Risk Intelligence is a private company. Risk Intelligence provides consulting services to private and governmental clients on security threats and risks. See <http://www.riskintelligence.eu>.

²⁰ Karsten von Hoesslin, 'International Maritime Crimes in the ASEAN Region: Incidents and Trends' (Centre for International Law Workshop on International Maritime Crimes: Legal Issues and Prospects for Cooperation, Singapore, 17 – 18 January 2011). Information on the Conference, including the Report of the Conference, available online <<http://cil.nus.edu.sg/research-projects/international-maritime-crimes/>> accessed 21 December 2011. The paper will be included in Robert Beckman & J Ashley Roach (eds), *Piracy and International Maritime Crimes in ASEAN: Prospects for Cooperation* [Edward Elgar Publishing Ltd, (upcoming)].

²¹ *Ibid*; ReCAAP Information Sharing Centre (n 18), 'Special Report on Hijacked/Missing Tug boats and barges in Asia March – June 2011' available online <<http://www.recaap.org/Portals/0/docs/Reports/Special%20Report%2029%20Jun%2011.pdf>> accessed 21 December 2011.

²² Von Hoesslin (n 20); ReCAAP Information Sharing Centre (n 18) contains detailed reports of five specific incidents in 2011, including the nature of the attack, the weapons carried, and how the crew are treated.

²³ *Ibid*.

²⁴ *Ibid*.

Von Hoesslin argues that the attackers off the Anambas Islands are engaged in what he calls "cluster piracy".²⁵ He maintains that from the period 2008 to 2010, there have been 57 reported incidents involving clustered piracy within the Anambas/Natuna/Tembalan corridor in Indonesian waters.²⁶ Cluster piracy entails a group of pirates operating within a specific maritime area within a short time period and systematically attacking a number of vessels. Some of these attacks are taking place in the archipelagic waters or territorial sea of Indonesia, but others take place in Indonesia's exclusive economic zone, which is outside its territorial sovereignty.²⁷

The second trend he identifies is an increased number of ship hijackings in Southeast Asia.²⁸ Von Hoesslin maintains that since 2008, there have been six successful hijackings of tugboats in Southeast Asia.²⁹ The tugboats are being hijacked, re-named and supplied to a pre-arranged buyer. They are usually hijacked off the coast of Malaysia, near the northern entrance to the Singapore Strait. The modus operandi in all of the tug hijackings is the same. The tugboats are boarded by well-organized groups of hijackers who immediately assume control of the vessel and detain the crew. The crew are not injured or mistreated. They are tied up and then released in a life raft, usually within the central South China Sea. The tugboats then proceed to their final destinations and undergo re-painting and re-naming to prevent identification. Von Hoesslin suspects that the group responsible for the tugboat hijackings could be the same group behind the Anambas piracy incidents.³⁰

Von Hoesslin reports that there were no incidents in Southeast Asia of ships being hijacked for ransom or crew members being held hostage for ransom.³¹

²⁵ Ibid.

²⁶ Ibid; ReCAAP Information Sharing Centre (n 18) does not document as many incidents, perhaps due to its record of those incidents which are reported to it (see para 5).

²⁷ Von Hoesslin (n 20).

²⁸ Ibid.

²⁹ Ibid; ReCAAP Information Sharing Centre (n 18), 2 – 3 (para 1,5) states that between 2008 and 2011, eleven hijacking and "missing vessel incidents" were reported to it – '[...] two incidents in 2008, one incident in 2009, three incidents in 2010 and five incidents (from March – June) in 2011'.

³⁰ Von Hoesslin (n 20).

³¹ Ibid.

Somali Piracy and Southeast Asia

The major concern which has arisen in the wake of the attacks against ships in the Horn of Africa is the fear that the “business model” of Somali pirates hijacking vessels and kidnapping crew for ransom could be adopted by pirates in Southeast Asia. However, there is no evidence that the “business model” of the Somali pirates is being imported to Southeast Asia. In fact, it is highly doubtful that it could be imported to Southeast Asia.³² Somali pirates hijack large vessels and hold the vessel and crew members for ransom with the support of local coastal communities. They are also highly organized, and closely linked with sophisticated networks of negotiators and persons willing to launder ransom payments. Syndicates in Southeast Asia do not appear to be so large or well organized, and there are no areas where there has been a breakdown of law and order where local communities would provide support to the hijackers, as is the case in Somalia.³³

As mentioned above, the majority of attacks on ships in Southeast Asia are conducted against ships at anchor in waters under the territorial sovereignty of a coastal State. Attacks on ships at anchor became a particular problem following the 2008 global financial crisis, when many ships were laid up. Hundreds of vessels were anchored in waters near the Singapore Strait during this time, especially in the territorial sea of Malaysia. Since they were manned by only a skeletal crew, these vessels were ripe for attack by robbers. As discussed above, these types of attacks are defined as armed robbery against ships, not as piracy. They present a threat to the safety of crew members, but they are not a threat to international navigation on major shipping routes through Southeast Asia.

The closest analogy in Southeast Asia to Somali model of piracy is the hijacking of tugboats.³⁴ However, the tugboats are not being hijacked for ransom, but rather for sale to pre-arranged buyers.³⁵ Also, in the majority of cases, the crew members have been released with

³² Robert C Beckman, ‘Modern Piracy: Legal Challenges and Responses’ (London Meeting, London, 8 – 9 September 2011) (slide 33).

³³ *Ibid.*

³⁴ ReCAAP Information Sharing Centre (n 18).

³⁵ International Chamber of Commerce (ICC) International Maritime Bureau (IMB) (n 13), 26.

food and water, and have not been threatened or harmed. Nevertheless, these are clear cases of ship hijacking.

However, it is not possible to completely exclude the possibility of the Somali “business model” being adopted by criminal syndicates in Southeast Asia. Certain aspects of piracy operations, particularly those which do not require a large degree of organization or resources, such as the kidnapping of crew for ransom, may well be considered to be lucrative and sufficiently low-risk by syndicates in Southeast Asia.

As explained earlier, the littoral States in Southeast Asia can be expected to strongly resist anti-piracy measures similar to those that have been adopted by the international community to combat attacks against ships in the Horn of Africa. For example, the gravity of the problem posed by Somali pirates in the Horn of Africa prompted the UN Security Council, acting under Chapter VII of the United Nations Charter, to make exceptions to the normal rules governing piracy in order to allow foreign warships to arrest pirate ships in the territorial sea of Somalia. In a series of resolutions on Somali piracy, the Security Council has provided that the forces cooperating with the Transitional Federal Government (TFG) can apply the piracy rules to attacks on ships in waters under Somali territorial sovereignty, allowing such forces to enter into Somali territorial waters and arrest suspected pirate ships.³⁶

Such a radical departure from generally accepted principles of international law would not be readily accepted by States in Southeast Asia. Southeast Asian States jealously guard their sovereignty and strongly resist authorizing any foreign warships to exercise police powers within their territorial sea or archipelagic waters.³⁷ It was for this reason that elected members of the Security Council, including Indonesia, insisted that the UN Security Council Resolutions relating to Somali piracy include a paragraph stating that such resolutions are an exception which cannot be interpreted as evidence of a rule of customary law. The standard paragraph in such resolutions is as follows:

³⁶ See, for example, United Nations Security Council, Resolution 1816 (2008), SC Res 1816, UN SCOR 2008, UN Doc S/RES/1816 available online <http://www.un.org/Docs/sc/unsc_resolutions08.htm> accessed 21 December 2011.

³⁷ Beckman (n 12).

Affirms that the authorizations provided in this resolution apply only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of Member States under international law, including any rights or obligations under the Convention, with respect to any other situation, and underscores in particular that this resolution shall not be considered as establishing customary international law; and *affirms further* that such authorizations have been provided only following the receipt of the 20 November letter conveying the consent of the TFG.³⁸

Combating “Piracy” in Southeast Asia: The Way Forward

From the above discussion, it is unlikely that the Somali “business model” of hijacking ships and kidnapping crew for ransom will be adopted on a large-scale in Southeast Asia.³⁹ However, attacks against ships in Southeast Asian waters remain a serious problem, especially in light of the recent trends highlighted by Von Hoesslin of “cluster piracy” and tugboat hijackings.⁴⁰ Further, it is not possible to completely discount the possibility of certain aspects of the Somali “business model” being adopted in Southeast Asia. Accordingly, several steps should be taken to address these problems, which will be dealt with below.

Enhancing Information Sharing and Capacity-Building

There are several obstacles to the establishment of an effective system to combat attacks against ships in Southeast Asia. First, as mentioned above, the vast majority of attacks on ships in Southeast Asia take place within waters under the territorial sovereignty of coastal States. The piracy provisions in *UNCLOS* do not apply to attacks in these maritime zones. Foreign patrol ships cannot operate in such waters without the consent of the coastal State, and coastal States are reluctant to grant such consent to foreign patrol ships.

Many of the attacks in Southeast Asia occur in Indonesian waters under the territorial sovereignty of Indonesia. Indonesia is a very large country with vast maritime zones and limited enforcement capacity. It has many maritime security problems, including illegal, unregulated and

³⁸ United Nations Security Council, Resolution 1846 (2008), SC Res 1846, UN SCOR 2008, UN Doc S/RES/1846/, para 11 (unanimously adopted on 2 December 2008) available online <http://www.un.org/Docs/sc/unsc_resolutions08.htm> accessed 21 December 2011.

³⁹ Beckman (n 32).

⁴⁰ Von Hoesslin (n 20); ReCAAP Information Sharing Centre (n 18).

unreported (IUU) fishing and the smuggling of goods, people, timber and weapons,⁴¹ etc. The international community sometimes seems to expect that Indonesia devote most of its limited naval and coast guard resources to protecting international shipping, without considering the fact that Indonesia may have other maritime security issues which it believes to be of higher priority.

Second, it is highly unlikely that Indonesia, or any other country in Southeast Asia for that matter, would agree to naval or coast guard vessels from other States patrolling waters under its sovereignty. Therefore, the most that can be expected is for it to agree to hot pursuit into its waters by vessels from neighbouring States, provided that the perpetrators are turned over to the Indonesian authorities if they are its nationals.⁴² A further issue preventing effective cooperation is the belief that the majority of attacks against ships in Indonesian waters, the Straits of Malacca and Singapore, in Malaysian waters and in the South China Sea are committed by Indonesian nationals. Therefore, it would be natural for the Indonesian Government to be cautious about calls for cooperation which appear to target its nationals. Given this situation, the best ways to cooperate with Indonesia in order to combat piracy and armed robbery against ships may be to exchange information and to provide Indonesia with training as well as with vessels and equipment to better secure its waters. Indonesia should also be given incentives to investigate the activities of syndicates suspected of being engaged in piracy. Pirate gangs are more likely to be discovered through good police work on the ground than by arresting the perpetrators in the course of an attack at sea.

Ratification and Implementation of 1988 SUA and 1979 Hostages Conventions

The *1988 SUA Convention* establishes a cooperative regime among States parties designed to ensure that persons who commit the offences defined in the convention are arrested and either extradited or prosecuted. Some of the more serious attacks on ships in Southeast Asia are offences under the *1988 SUA Convention* because they involve either the hijacking of a ship or the use of violence against crew members which endanger the safety of navigation. Therefore,

⁴¹ The Indonesian Ministry of Defense identified the Strait of Malacca, Strait of Singapore and the Sunda Strait as three critical points used for smuggling of arms and explosive into the country, see the website of the Ministry of Defense, 'Three Major Points in Indonesian Waters for Arms Smuggling', available online <<http://www.dephan.go.id/modules.php?name=News&file=article&sid=4567>>.

⁴² Barrios (n 12); Beckman (n 12).

it would be in the common interest of States in the region to ratify and effectively implement the *SUA Convention*.

The *1988 SUA Convention* is administered by the IMO. It follows the scheme of the UN terrorism conventions which had first been established in the *1970 Convention for the Suppression of Unlawful Seizure of Aircraft (1970 Hague Convention)*.⁴³ Firstly, States Parties to the *1988 SUA Convention* are obligated to make the offences defined in the convention a crime under their national laws. The offences in the *1988 SUA Convention* include taking control of a ship by force and the commission of acts of violence against persons aboard the ship which endanger the safety of maritime navigation. Second, States Parties are required to establish jurisdiction over the offences defined in the convention when they have a link to the offence based on the territorial, nationality and flag State principles. Third, States Parties are obligated to establish jurisdiction over the offence when an alleged offender is present in their territory and they choose not to extradite them. Fourth, if an alleged offender is present in their territory, States Parties are obligated to take them into custody and to either extradite them or turn the case over to its authorities for the purpose of prosecution. Fifth, the Convention includes provisions which make it possible to extradite alleged offenders to other States parties as well as provisions requiring States parties to provide mutual legal assistance to assist the prosecuting State.

The *1988 SUA Convention* in effect makes the hijacking of ship a universal crime among States Parties, even if the hijacking takes place in a maritime zone subject to the sovereignty of the coastal State, such as the territorial sea or archipelagic waters. However, the Convention does not give States Parties any additional rights or powers to seize ships and arrest persons for *SUA* offences. The enforcement of the *1988 SUA Convention* is based on the presence of the offender in the territory of a State Party.

The right of States Parties to board ships and arrest persons suspected of committing an offence under the *1988 SUA Convention* continues to be governed by *UNCLOS* and general international law. As explained, warships or patrol craft cannot board a ship in the territorial sea of another State without its consent. Also, they cannot board a ship flying a foreign flag on the

⁴³ *Convention for the Suppression of Unlawful Seizure of Aircraft*, 16 December 1970, 860 UNTS 105 (entered into force 14 October 1971, adopted The Hague, Netherlands).

high seas or in an exclusive economic zone without the consent of the flag State, unless the ship is a “pirate ship” as defined in *UNCLOS*.

Ratification and Implementation of the 1979 Hostages Convention

There were instance in the past in this region where crew members were taken hostage and held for ransom, but there have been no reported cases of such actions in the region in the past three years. However, this is one aspect of the “Somali business model” that could be adopted by criminal syndicates in this region because it is much easier than holding a ship for ransom. Crew members could be held at sea until the ransom is paid by the ship owner or ship operator.

Given this possibility, it would be in the common interest of States in the region to ratify and effectively implement the 1979 *International Convention against the Taking of Hostages (1979 Hostages Convention)*.⁴⁴ The *1979 Hostages Convention* is a general convention which applies to all acts of hostage-taking, whether on land or at sea. It is relevant to maritime crimes in instances where, in the commission of attacks on ships, the passengers or crew are also held as hostages for ransom. The *1979 Hostages Convention* may also apply in situations where crew members are taken captive and threatened to be injured or killed unless the captain or other crew members do something, such as open the safe or open the door to the citadel. The *1979 Hostages Convention* follows the same scheme as the *1988 SUA Convention* with respect to jurisdiction, obligation to extradite or prosecute, etc. as discussed above. As such, it becomes a useful addition to the toolbox that States can use when a ship is hijacked and ship and crew are held for ransom.

The *1988 SUA* and *1979 Hostages Conventions* do not provide effective tools for combating attacks on ships in Southeast Asian waters at this time because all the States in the region are not parties to them. Three key States in Southeast Asia are not parties to the *1988 SUA Convention* – Indonesia, Malaysia and Thailand.⁴⁵ In addition, Indonesia and Vietnam are not

⁴⁴ *International Convention against the Taking of Hostages*, 17 December 1979, 1316 UNTS 206 (entered into force 3 June 1983, adopted 17 December 1979, New York).

⁴⁵ International Maritime Organization, *Status of Multilateral Instruments in Respect of Which the International Maritime Organization or its Secretary-General Performs Depositary or Other Functions* (as at 29 February 2012) available online

parties to the *1979 Hostages Convention*.⁴⁶ Further, some ASEAN States, such as the Philippines, have ratified the *1988 SUA Convention* but have not implemented the Convention in its national legislation.⁴⁷

The problems relating to the failure of ASEAN countries to ratify and implement the *1988 SUA Convention* is illustrated by the hijacking of the tugboat ASTA on 5 February 2010.⁴⁸ The ASTA was flying a Singapore flag and was on route from Singapore to Cambodia towing an empty barge when it was hijacked by seven Indonesians in the territorial sea of Malaysia. Eleven of the twelve crew members were set adrift in a life raft on 10 February, and were rescued by Malaysian Navy on 17 February. The barge was also set adrift and was also recovered in Malaysian waters on 17 February. While underway to the desired destination, the hijackers repainted and renamed the vessels to 'mask' its identity. On 26 February the hijacked tugboat was found by the Philippine Coast Guard on a beach in the southern Philippines. One person, a Filipino, was aboard the tugboat when it was found. The seven Indonesian 'pirates' were arrested by the Philippines police.⁴⁹

The seven Indonesians were charged with immigration offences by the Philippines. The Philippines was not able to charge them with any *SUA* offences because it had not passed domestic legislation implementing the *1988 SUA Convention*, even though it had ratified the Convention in 2004. If all the States concerned had been parties to the *1988 SUA Convention* and had implemented the convention in their national legislation, the Philippines would have been

< <http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202012.pdf> > accessed 21 March 2012.

⁴⁶ United Nations Treaty Collection, 'Penal Matters: International Convention Against the Taking of Hostages', available online <http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-5&chapter=18&lang=en> accessed 21 December 2011.

⁴⁷ Mayla Ibañez, 'The Philippines Country Report' (2011) (Centre for International Law Research Project on International Maritime Crimes, January 2011) available online <<http://cil.nus.edu.sg/wp/wp-content/uploads/2010/10/Country-Report-Philippines.pdf>> accessed 22 December 2011.

⁴⁸ ReCAAP Information Sharing Centre, 'Special Report on the Hijacking of the ASTA' available online <<http://www.recaap.org/Portals/0/docs/Reports/Special%20Report%2029%20Jun%2011.pdf>>.

⁴⁹ ReCAAP Information Sharing Centre, 'Piracy and Armed Robbery against Ships in Asia: Half-yearly report, January – June 2011', 49, available online <<http://www.recaap.org/Portals/0/docs/Reports/Half%20Yearly%202011%20Report.pdf>> accessed 21 December 2011.

able to either prosecute the offenders for a SUA offence (ship hijacking) or extradite them to the flag State (Singapore), to the State in whose territorial sea the act took place (Malaysia), or to the State of nationality of the offenders (Indonesia).

In light of the above, all ASEAN member States should ratify and effectively implement the *1988 SUA Convention* and the *1979 Hostages Convention* to enable them to prosecute cases of hijacking of ships and hostage-taking of crew members.⁵⁰

Cooperation by reviewing and updating national legislation on piracy

A further reason why it is important for ASEAN States to have effective legislation on piracy in place is because it provides the only legal basis for warships from States in the region to board foreign ships engaged in piracy in the EEZ without first obtaining the express consent of the flag State or the master.

If attacks on ships off the Anambas Islands were to become a serious problem, Indonesia may have difficulty patrolling both the waters under its sovereignty (archipelagic waters and territorial sea) as well as the EEZ. In such cases it may consider entering into an arrangement with one or more of its neighbours (i.e., Malaysia, Singapore or Thailand) for coordinated patrols similar to the scheme in the Malacca Strait.⁵¹ Under such an arrangement, Indonesia could patrol its territorial sea in the area of the attacks, and patrol vessels of the neighboring countries could patrol in the EEZ. If the attacks met the definition of piracy under *UNCLOS*, the patrol vessels of the neighboring countries could board the pirate ships and arrest the pirates, no matter what flag their ships were flying. Under this arrangement, the patrol vessels of the neighbouring countries could agree to hand over to Indonesia any pirates which were Indonesian nationals. If the pirates were not Indonesian nationals, the neighbouring countries would have the right under international law to prosecute them for piracy.

However, such an arrangement would not be possible at the present time with Malaysia because Malaysia does not have the necessary national legislation in place. First, it currently has

⁵⁰ Centre for International Law (CIL) (n 20).

⁵¹ Chew Men Leong, *Navies and Maritime Security—A Republic of Singapore Navy Perspective*, 33 *Pointer* 5,7 (2007), available at <<http://www.mindef.gov.sg/imindef/publications/pointer/journals/2007/v33n3/feature1.html>>

no legislation making piracy as defined in *UNCLOS* an offence under Malaysian law.⁵² Second, the Malaysian Maritime Enforcement Agency (MMEA) currently has no power to conduct patrols outside of Malaysia's EEZ.⁵³

It is important that the ASEAN States review their national laws on piracy so that they will have the option of arresting foreign pirate ships outside the limits of their territorial sea. Most ASEAN States did not review their national piracy legislation after becoming parties to *UNCLOS*. Domestic legislation on piracy in ASEAN States ranges from piracy legislation that does not conform to *UNCLOS*, to the total absence of piracy as an offence under national laws. In addition, instead of giving courts universal jurisdiction over acts of piracy committed outside the territorial sovereignty of any State, the domestic legislation of some States limits jurisdiction on the basis of flag-state, nationality or passive personality principles. It is not clear in some ASEAN member States whether the Government agencies have the legal authority to arrest pirates outside the territorial sea of any State. Also, some ASEAN member States do not have domestic legislation enabling them to prosecute persons who have been arrested for the offence of piracy.

The lack of national legislation on piracy has created problems for Malaysia in dealing with Somali pirates captured by the Malaysian Navy in the Gulf of Aden in January 2011. Malaysia has no provision in its Penal Code making piracy an offence so it could not charge

⁵² Siti Aliza Binti Alias, "Malaysia's Country Report", pp. 17-18, online: Centre for International Law <<http://cil.nus.edu.sg/wp/wp-content/uploads/2010/10/Malysias-Country-Report.pdf>> (accessed 20 March 2011) [though on 30 April 2010, the Government of Malaysia reportedly stated that it will be expressly making piracy as defined in *UNCLOS* an offence to implement its treaty obligations under *UNCLOS*: see "The scope and application of the principle of universal jurisdiction", UNGAOR, 64th Plen. Mtg., UN Doc. A/RES/64/117 (2009), online: United Nations Documentation: A Research Guide <<http://www.un.org/depts/dhl/resguide/r64.shtml>>; "Malaysia's comments on the Scope and Application of the Principle of Universal jurisdiction pursuant to GA Resolution 64/117 of 16 December 2009", online: <http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Malaysia.pdf> at 3.

⁵³ Malaysian Maritime Enforcement Agency Act 2004 (Act 633), s. 6 (3) [which states the following: "Notwithstanding subsection 2, the agency shall be responsible [...] for preventing and suppressing piracy [...] on the high seas". Section 6 (2) enables the MMEA to carry out its functions "within the Malaysia Maritime Zone", which includes its EEZ. However s. 6 (3) qualifies the MMEA's capacity to prevent and suppress piracy by appearing to limit it to the High seas], online: Attorney-General's Chambers, Malaysia <<http://www.agc.gov.my/Akta/Vol.%2013/Act%20633.pdf>>.

them with piracy. Consequently, the pirates were charged with offences relating to the use of firearms against the Malaysian armed forces.⁵⁴

ASEAN member States should review their national legislation on piracy, and if necessary, amend their legislation to ensure that (a) the offence of piracy under their national laws is consistent with that contained in *UNCLOS*, and that (b) their courts have jurisdiction to prosecute acts of piracy committed by anyone on the high seas or outside the territorial sea of any State.⁵⁵

Conclusions

There is little likelihood that the “business model” of the Somali pirates will be transferred to Southeast Asia because the Governments of this region are generally able to control their own maritime space. However, incidents in 2010 and 2011 have raised concerns that criminal syndicates are operating in Southeast Asia to engage in cluster piracy and to hijack tugboats. In addition, the prospect of syndicates holding crew members hostage for ransom cannot be ruled out.

Given these developments, it is in the common interests of the States in Southeast Asia to review their national legislation on piracy and to bring it into conformity with *UNCLOS*. It is also in their interests to ratify and implement the *1988 SUA Convention* and the *1979 Hostages Convention* so that the cooperative regimes provided for in those conventions can be utilized to combat transnational attacks on ships which involve offences under those conventions.

⁵⁴ ‘Somali “pirates” charged in Malaysia’ (*BBC News*, 11 February 2011)
<<http://www.bbc.co.uk/news/world-asia-pacific-12430671>> accessed 21 December 2011.

⁵⁵ Centre for International Law (n 20).