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Workshop on International Maritime Crimes: Legal Issues and Prospects for Co-operation in ASEAN

Grand Copthorne Hotel, Singapore
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WORKSHOP REPORT

EXECUTIVE SUMMARY

1. On 17 and 18 January 2011, the Centre for International Law (CIL) organised a **Workshop on International Maritime Crimes: Legal Issues and Prospects for Co-operation in ASEAN**.[1] The objective of the Workshop was to examine whether ASEAN States can better combat serious maritime crimes such as piracy, ship-hijacking, and hostage-taking of crew (for purposes of this Report, collectively referred to as "maritime crimes") by ratifying and effectively implementing various relevant global and regional instruments.

2. The Workshop examined three types of global conventions which might be used to combat maritime crimes. First, it examined the piracy provisions in the 1982 UN Convention on the Law of the Sea (UNCLOS), which is the framework convention for all matters relating to the oceans. Second, it examined three UN "terrorism conventions": the 1979 International Convention Against the Taking of Hostages (1979 Hostages Convention), the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988 SUA Convention) and the 1999 International Convention for the Suppression of the Financing of Terrorism (1999 Terrorist Financing Convention). Third, it examined two UN "transnational crimes" conventions: the 2000 Convention on Transnational Organised Crime (2000 UNTOC); and the 2003 Convention against Corruption (2003 Corruption Convention) (collectively, these conventions shall be referred to as the "**Global Conventions**"). In addition, the Workshop also examined two regional conventions which are relevant to maritime crimes: the 2004 Treaty on Mutual Legal Assistance in Criminal Matters (2004 MLAT), and the 2007 ASEAN Convention on Counter-Terrorism (2007 ACCT) (collectively referred to as the "**Regional Conventions**)".

3. The Workshop brought together international legal experts on maritime crimes and transnational crimes as well as government officials responsible for law of the sea and counter-terrorism to discuss various issues including:

    - The possibility of the Somali piracy business model (kidnap of crew and hijacking of ships for ransom) being replicated in Southeast Asia;
    - The key provisions of the relevant Global and Regional Conventions and how they can be used to combat maritime crimes;
    - The problems faced by ASEAN States in the ratification and implementation of these Conventions.

4. To provide essential background on the practical problems in ratifying and effectively implementing the Global Conventions, CIL commissioned scholars in eleven (11) States, six (6) ASEAN States and six (6) others from Asia-Pacific and Europe, to prepare Country Reports summarizing the laws, procedures and practices in their countries on the ratification

[1]CIL would also like to thank Captain J. Ashley Roach and Dr. Kevin Tan for their comments on the Workshop Report. The views (and any mistakes) expressed herein are solely those of CIL.

and implementation of treaties generally, as well as the specific implementing legislation which each country promulgated for the Global Conventions to which it was a party. These Country Reports were taken into account in preparing this Report and are available on the CIL Website.[2]

5. On the problems faced by the international community in combating piracy and possible legal solutions to such problems, the Workshop concluded that:

5.1 Piracy committed by Somali pirates off the Horn of Africa, consisting primarily of ship-hijacking and hostage-taking of crew for ransom, continues to be a grave threat to the safety of international navigation. One of the main challenges in dealing with piracy off the Horn of Africa is what to do with the pirates after they have been caught. A common practice of States patrolling the area, coined as "catch and release", is to release pirates which have been arrested or are in custody, often because they are unable or unwilling to prosecute them or find another State able or willing to prosecute them. The inability to prosecute is frequently due to the fact that many States do not have adequate national piracy legislation to prosecute Somali pirates. It was also noted that many States, even if they did have adequate piracy legislation, lacked the political will to prosecute Somali pirates.

5.2 From the discussions at the Workshop, it was clear that there are several important lessons to be learned from the challenges faced by the international community in combating Somali piracy.

5.3 First, States should have piracy as an offence in their domestic law and should provide their law enforcement authorities with the necessary jurisdiction to arrest pirates and their national courts with the necessary jurisdiction to prosecute acts of piracy committed outside the territorial sovereignty of any State as provided in UNCLOS.

5.4 Second, States should have, among themselves, a framework of international legal co-operation, including extradition and mutual legal assistance arrangements through which they are able to extradite pirates to States that are able and willing to prosecute them and to facilitate mutual legal assistance in the investigations and prosecutions.

[2] See http://cil.nus.edu.sg/research-projects/international-maritime-crimes/. The eleven (11) Countries included in the study were as follows: Australia, China, Indonesia, Malaysia, the Netherlands, New Zealand, the Philippines, Singapore, South Korea, Thailand and Vietnam.

5.5 Third, attacks on ships should not be treated solely as cases of piracy under UNCLOS. There are other conventions complementary and supplementary to each other, and to UNCLOS, which can be used to effectively combat international maritime crimes.

5.6 Two terrorism Conventions, namely the 1979 Hostages Convention and the 1988 SUA Convention, can also be used against attacks against vessels, including acts which constitute piracy under UNCLOS. For example, the hijacking of a ship is also an offence under the 1988 SUA Convention. Similarly, taking crew members hostage is also an offence under the 1979 Hostages Convention.

5.7 These two terrorism Conventions supplement the piracy provisions of UNCLOS. First, they oblige States to criminalise ship hijacking and hostage-taking of crew under their national legislation. Secondly, they expand the traditional bases of jurisdiction that can be exercised by States and oblige States Parties to exercise jurisdiction over acts occurring outside their territory. Critically, they oblige States Parties to establish jurisdiction over the offences set forth in the Conventions in cases where the alleged offenders are present in their territory and they decide not to extradite them to any of the States Parties. Also, if the alleged offenders are present in their territory, they are obliged to either extradite them or submit the case to the authorities for the purpose of prosecution. This is known as the obligation to "extradite or prosecute", or the principle of *aut dedere aut judicare*. Lastly, they provide the mechanisms for international co-operation such as extradition and mutual legal assistance among States Parties for the investigations and prosecution of Convention offences.

5.8 In many instances, hijacking of ships or hostage-taking of crew members are not stand-alone events but part of a chain of criminal events. Before its commission, there may be persons who have organised, financed and assisted in facilitating the offence. Likewise, proceeds of the crime, if any, will definitely be utilised in one way or another after its commission.

5.9 Three other Conventions considered in this Workshop provide useful tools in combating these aspects of maritime crime. The 1999 Terrorist Financing Convention can be used to arrest and prosecute persons who finance the hijacking of a ship or the taking of crew members hostage for ransom. The 2000 UNTOC and 2003 Corruption Convention can be used to pursue persons, including public officials, or criminal groups who are involved in the planning, organizing or financing of maritime crimes as well as the persons or groups who are laundering and profiting from the ransom payments and other proceeds of crimes. These Conventions also provide mechanisms for international co-operation such as extradition and mutual legal assistance among States Parties for the investigations and prosecution of Convention offences.

5.10 Thus, used in a manner complementary and supplementary to each other, these Global and Regional Conventions collectively form an effective legal framework or

legal toolbox that all States can use to combat serious maritime crimes. However, this legal toolbox will be effective only if States ratify or accede to the Conventions and effectively implement them through their national legislation.

6. With respect to maritime crimes in Southeast Asia and the legal framework of ASEAN States enabling them to combat such maritime crimes, the Country Reports and the discussions from the Workshop noted that:

6.1 The ship-hijacking model used by Somali pirates off the Horn of Africa is not likely to be replicated in Southeast Asia because it is unique to Somalia's status as a "failed State". Its lack of an effective law enforcement regime and the absence of a functioning economy allow hijacked ships and crew members to be held onshore with the support of coastal communities.

6.2 Nevertheless, it is imperative that ASEAN States learn from the challenges in combating Somali piracy and put in place an effective legal framework to combat maritime crimes. Incidents of maritime crimes are steadily increasing and, more importantly, transnational criminal groups operating in the region might adopt variations of the 'Somali business model', such as taking crew members hostage for ransom and holding them at sea. The reported cases of transnational ship hijacking, especially of tugboats for resale — which are unique to the region and involve several jurisdictions — should also be a cause for concern.

6.3 Further, ASEAN States with either vessels or crew traversing the Horn of Africa are subject to the threat of Somali pirate attacks. ASEAN States must ensure that their national courts can effectively prosecute Somali pirates for crimes against their vessels or nationals.

6.4 As mentioned above, Global Conventions used in a complementary and supplementary manner collectively provide an effective legal framework or a legal toolbox ASEAN States can use to combat serious maritime crimes. The Global Conventions also enhance legal co-operation among the ASEAN States.

6.5 Aside from these Global Conventions, ASEAN States have also entered into regional agreements such as the 2004 MLAT and 2007 ACCT that reinforce their obligations under the Global Conventions as well as facilitate implementation of these Conventions at the regional and national levels.

6.6 However, the Global and Regional Conventions will be effective only if ASEAN States ratify or accede to the Conventions and have effectively implemented them through national legislation.

6.7 The level of ratification or accession of the Global Conventions and the Regional Conventions by ASEAN States varies across the region. While all ten ASEAN States are States Parties to the 1999 Terrorism Financing Convention, only eight are parties to 1982 UNCLOS, 1979 Hostage Taking Convention and 2000 UNTOC.

Furthermore, only six are parties to 1988 SUA Convention. There are six parties to 2007 ACCT and nine parties to the 2004 MLAT.

6.8 Moreover, the level of implementation by ASEAN States of those Conventions they have ratified or acceded to is also uneven. For the six ASEAN States included in the Research Project, apart from Singapore, the rest of the States have not fully implemented the Conventions at the domestic level due to political, institutional and capacity challenges. This will be further discussed in the Report.

6.9 Domestic implementation of UNCLOS within ASEAN ranges from municipal piracy laws that do not conform with 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.

6.10 The use of the 1988 SUA Convention and the 1979 Hostages Convention for cases of ship-hijacking and hostage-taking of crew members is yet to be fully realised and pursued. Some ASEAN States have still not ratified or acceded to them. In addition, ASEAN States who are parties have not implemented them in their national legislation.

6.11 Similarly, ASEAN states have yet to appreciate the utility of the 1999 Terrorist Financing Convention in combating the financing of ship-hijacking and hostage-taking of crew. Indeed, some States believe that a terrorist intent or motive is necessary under the Convention. ASEAN States have also not taken the necessary steps to enable them to utilise the 2000 UNTOC or the 2003 Corruption Convention to pursue organisers, financiers, leaders of criminal syndicates, accomplices and accessories. Some ASEAN States have either not ratified these Conventions or face considerable difficulties in implementing them.

6.12 While the use of 2000 UNTOC and 2003 Corruption Convention may be appropriate for organised criminal groups involved in organizing and financing Somali piracy, the situation in Southeast Asia has not reached a level warranting their use, given the nature and number of incidents involving organised criminal groups in the region. Nevertheless, it would be advantageous for ASEAN States to study the use of these Conventions and, in applicable situations, have them as part of their legal arsenal in combating international maritime crimes.

7. Based on the above, CIL has the following recommendations:

7.1 All ASEAN 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 of 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;

7.2 All ASEAN 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.

7.3 All ASEAN States should ratify and effectively implement the 1999 Terrorism Financing Convention and ensure that their laws criminalise the act of financing of hijacking of ships or taking persons hostage for ransom, regardless of whether the motive of the offender is purely for personal gain or tainted with terrorist intent.

7.4 ASEAN States should co-operate with each other and other relevant organizations such as UNODC, the ASEAN Secretariat and research institutions to develop capacity-building programmes to assist ASEAN States in evaluating the Conventions and implementing them through national legislation, including programmes to enhance the international law expertise of government officials responsible for implementing these Conventions and drafting model legislation or legislation checklists to guide ASEAN States in drafting the necessary implementing legislation.

WORKSHOP CONCLUSIONS

A. THE IMPORTANCE OF THE GLOBAL CONVENTIONS

8. The major objective of the Workshop was to examine whether ASEAN States can better combat serious maritime crime such as piracy, ship-hijacking, and hostage-taking of crew by ratifying and effectively implementing the major Global Conventions which relate to maritime crimes.

9. After examining the Country Reports and the proceedings of the Conference, CIL reached the following conclusions with respect to the Global Conventions examined at the Conference:

    9.1 First, the importance of the piracy provisions in UNCLOS in combating serious international maritime crimes has yet to be fully understood by some States. It is thus critical for States to review their national legislation on piracy to bring it into conformity with the piracy provisions of UNCLOS and effectively implement them in their national laws.

    9.2 Second, some States have yet to realise the usefulness of the three UN terrorist conventions in combating serious international maritime crimes. It is thus imperative for States to understand them, and then to ratify or accede to them and effectively implement them into their national law.

    9.3 Third, some States have yet to appreciate the fact that the enforcement mechanisms under the UN terrorism conventions are consistent with UNCLOS and with principles of general international law on criminal jurisdiction, and that these conventions provide valuable tools for combating serious maritime crimes including ship-hijacking and crew hostage-taking.

    9.4 In light of the above, this Workshop Report provides a brief discussion on how the piracy provisions in UNCLOS, the three terrorism Conventions as well as the two "transnational crimes" conventions can collectively work; why it is imperative that all States in the region become parties to these Conventions and effectively implement them in their national laws; and the problems ASEAN States face in ratifying and implementing these Conventions.

B. UNCLOS PROVISIONS ON PIRACY

Overview and Importance of UNCLOS

10. As a general rule, ships on the high seas (or in the EEZ) are subject to the exclusive jurisdiction of its flag State and cannot be boarded by any State without the express consent of the flag State. Considered *hostis humani generis*, piracy is one clear exception to this rule. In cases of piracy, warships of any State may board a pirate ship and arrest the pirates on board. Article 58(2) provides that the high seas provisions on piracy also apply in the EEZ.

11. UNCLOS piracy provisions do not contain any offences for attempted acts of piracy and only criminalises "any act of inciting or of intentionally facilitating" piracy.

12. The majority of attacks on ships in Southeast Asia are NOT acts of piracy since they take place in territorial seas or archipelagic waters within the territorial sovereignty of coastal States. Attacks on ships in these maritime zones are considered "armed robbery against ships" and not piracy. In cases of armed robbery against ships, only the coastal State has jurisdiction to arrest the perpetrators. Warships of foreign States have no right to exercise police power in maritime zones under the coastal States' territorial sovereignty.

13. However, when an attack on a ship takes place on the high seas or in an EEZ, outside the territorial sovereignty of any State, the laws of piracy as set out in UNCLOS apply. Therefore, a State must have piracy legislation in place to ensure that its warships have a right to board and arrest pirate ships on the high seas or in the EEZ, and to ensure that it can eventually prosecute and punish the pirates. The key benefit of UNCLOS is that it provides all States the right to arrest pirates as well as the right to prosecute them.

14. The following hypothetical fact situations illustrate how the provisions on piracy apply in practice:

    Illustration 1. A product tanker flying a Panama flag is attacked 10 miles off the coast of Malaysia by Singaporeans. Since the location is within Malaysia's territorial sea, the offence is that of armed robbery against ships, and Malaysia is the only State with authority to arrest the offenders. If the ship thereafter proceeds to the EEZ, no State can board it or arrest the offenders for the act they committed in Malaysia's territorial sea.

    Illustration 2. The attack takes place 15 miles off the coast, in the EEZ. This is piracy under UNCLOS. Although States have no obligation to do so, UNCLOS gives any State Party the right to board the pirate ship and arrest the pirates. The arresting State can then prosecute the offenders for piracy if its national legislation makes piracy a criminal offence and its courts have jurisdiction over piracy.

Ratification of UNCLOS by ASEAN States

15. All ASEAN States except Cambodia and Thailand are parties to 1982 UNCLOS. Cambodia and Thailand are parties to the 1958 Convention on the High Seas which contains similar provisions on piracy. Further, since it is generally accepted that the UNCLOS provisions on piracy are binding on all States under customary international law, Cambodia and Thailand need not wait until they ratify UNCLOS before reviewing their piracy legislation. They can and should review their piracy legislation to bring it into conformity with UNCLOS and the High Seas Convention.

Implementation of UNCLOS by ASEAN States

16. A review of the Country Reports and discussions at the Conference indicate several problems in implementing the UNCLOS piracy provisions.

17. First, some States like Malaysia and Vietnam have no offence of piracy in their laws at all. This severely limits the enforcement and prosecutorial options that they have in combating acts of piracy which occur in the EEZ or on the high seas.

18. While they can resort to "similar offences" in their criminal laws to prosecute pirates, this is problematic in international law because the criminal laws of a State do not apply to acts outside their territorial sea unless the offence is committed by their nationals or on a ship flying their flag. UNCLOS only confers universal jurisdiction for piracy *as defined in UNCLOS*, but not for "similar offences". For example, South Korea has an offence of sea robbery, as opposed to piracy as defined under UNCLOS. The jurisdiction of Korean courts is limited to sea robbery committed within Korean territory or by "all Korean nationals who commit crimes outside the territory of Korea; aliens who crimes on board a Korean vessel or Korean aircraft outside the territory of Korea."

19. Second, some States who have piracy legislation have not conferred universal jurisdiction to their national courts over acts of piracy on the high seas or in the EEZ. Instead, they limit their jurisdiction to flag-state, nationality, passive personality or protective principles. From the six ASEAN Country Reports, this does not appear to be an issue for ASEAN States. However, several European countries experience similar limitations.

20. Third, while some States confer their courts with universal jurisdiction over piracy offences committed on the high seas or EEZ, they have not made piracy an offence. For example, Malaysian law confers its courts jurisdiction over "all offences committed by any person on the high seas where the offence is piracy by the law of nations", but there is no offence of piracy in its Penal Code.

21. Several days after the Conference ended, the Malaysian and South Korean navies operating in the Gulf of Aden arrested several Somali pirates in separate incidents. South Korea was able to try the pirates for sea robbery only because the attacked ship was registered in South Korea. If the attack had occurred on the high seas or EEZ of another State, without any link to nationality or flag State, South Korea may not have been able to

prosecute the pirates at all. Malaysia, on the other hand, may be able to try the pirates because its jurisdiction covers the high seas – but not on the grounds of piracy but for the crime of discharge of firearms and other crimes because it does not have a piracy law. These situations highlight the necessity for States to review their national laws on piracy and jurisdiction.

22. Fourth, even if States have piracy legislation and universal jurisdiction, it may not conform with UNCLOS or has not been updated to be consistent with UNCLOS. Examples include Philippines, Thailand and Indonesia who have piracy laws, but which are not consistent with the UNCLOS definition.

23. Fifth, in some States, attacks that have taken place in the EEZ are not covered in piracy laws. This can give rise to problems in the prosecution of piracy cases because under UNCLOS all States are given the right to seize and arrest pirates on the high seas and in the EEZ.

24. Sixth, a State with a legal system based on the civil law tradition may not have an offence against piracy in their national laws because it believes that international conventions such as UNCLOS – to which they are a party – are automatically incorporated into its national law. Arguably, there is no issue if some UNCLOS provisions such as the right to arrest pirates on the high seas, automatically become part of their national law, without any need for implementing legislation. However, the problem lies in the imposition of penalties. UNCLOS does not provide for penalties since this discretion is given to States and their courts. Thus, if a State relies on the automatic incorporation of UNCLOS, there will be no penalty provision for piracy, making it difficult for the courts to punish pirates.

25. ASEAN States should bear the following points in mind when drafting piracy legislation:

    24.1 The definition for the offence of piracy should, if possible, be exactly the same as that in Article 101 of UNCLOS. Otherwise, it may be possible for the accused to challenge the lawfulness of the arrest or prosecution since a State's power to arrest and prosecute for acts of piracy is based solely on UNCLOS.

    24.2 It should clearly state that national maritime enforcement agencies have the power to board ships and arrest for acts of piracy in both the EEZ and on the high seas without any requirement for a connection between the act and the arresting State (for example, a requirement that the act must be against a ship flying its flag or by one of its nationals). It should provide maritime enforcement agencies with universal jurisdiction over acts of piracy.

    24.3 Similarly, national legislation should also give national courts the power to try acts of piracy occurring in both the EEZ and on the high seas without any requirement for a connection between the act and the arresting State (for example, a requirement that the act must be against a ship flying its flag or by one of its nationals). It should provide national courts with universal jurisdiction over acts of piracy.

24.4 A convenient short-hand to ensure that piracy laws cover both the EEZ and high seas is to provide that an act of piracy is committed if it is committed "outside the territorial sovereignty of any State," meaning the high seas or in an EEZ.

24.5 The penalty for piracy under national legislation is commensurate with the seriousness of the offence. (There is no penalty for piracy under international law. The penalty must be set by each State in their national legislation.)

C. THE UN TERRORISM CONVENTIONS

26. There are now 15 global conventions and protocols aimed at preventing and suppressing terrorism. Described as UN terrorism conventions, they define certain specific offences as international crimes among the States Parties that agree to co-operate in the suppression of these crimes.

27. Since there is no comprehensive treaty on terrorism nor an official definition of terrorism agreed upon by the international community, States enter these conventions to criminalise "specific manifestations of terrorism." As such, it is not necessary for offences under these conventions to be committed with a "terrorist motive" or for "terrorist purposes" as these terms are commonly understood. Many offences under these terrorism conventions do not require a terrorist motive at all because their mere commission is already considered a terrorism offence, regardless of intent.

28. Underlying these conventions is a scheme requiring all States Parties to co-operate and ensure that persons who commit these offences are arrested and punished, no matter where the act took place. The conventions do so by:

    28.1 First, defining specific offences.

    28.2 Second, requiring States Parties to penalize these offences under their national law.

    28.3 Third, requiring States Parties to establish jurisdiction over the defined offence, consistent with general principles of international law on jurisdiction.

    28.4 Fourth, obliging States Parties to establish jurisdiction over the offence if the offender is found in their territory, and submitting the offence for prosecution if the Party does not extradite (also known as the principle of "extradite or prosecute" or *aut dedere aut judicare)*.

    28.5 Fifth, creating a framework of extradition and mutual legal assistance co-operation.

29. The key to the cooperative mechanism underlying these terrorism conventions is the principle of "extradite or prosecute." Under this obligation, States Parties must take alleged offenders present in their territory into custody, and decide whether to extradite them to

another State Party or to submit the case to their own authorities for prosecution. Through this mechanism, States ensure that alleged offenders are eventually arrested and ultimately punished, wherever they can be found.

30. This cooperative mechanism is supported by a framework of extradition and mutual legal assistance provisions, found in all terrorism conventions, which provide that:

    30.1 The offences be deemed extraditable offences under any extradition treaty in force between any of the States Parties.

    30.2 The conventions may be used as a legal basis for extradition, in cases where extradition is conditional on the existence of an extradition treaty between States Parties and there is no extradition treaty.

    30.3 The offences are considered extraditable offences as between any of the States Parties who do not make extradition conditional upon the existence of a treaty.

    30.4 The States Parties are obliged to afford each other the greatest measure of mutual assistance in connection with investigations or criminal or extradition proceedings.

31. In addition, the terrorism conventions also contain provisions on attempts, abetment and accomplices (as opposed to the piracy provisions in UNCLOS).

32. In sum, because of the obligations they impose on States and the mechanisms they set up, these UN terrorism conventions become useful tools in combating piracy and other serious international maritime crimes. This will be further discussed particularly as regards the 1988 SUA Convention, the 1979 Hostages Convention and the 1999 Terrorism Financing Convention.

1988 SUA Convention

33. The need for the 1988 SUA Convention came about during the 1980s amid growing concerns that the piracy provisions in UNCLOS would not cover attacks against a vessel committed by crew or passengers on board a vessel for terrorist purposes. Thus, the SUA Convention became the legal instrument enabling States Parties to combat terrorist acts against or involving ships.

34. Essentially, 1988 SUA Convention applies only to two types of aggravated acts of piracy or armed robbery against ships. First, when persons intentionally seize or exercise control of a ship by force or threat of force, such as when a ship is hijacked. Second, when persons intentionally perform an act of violence against a person on board a ship that is likely to endanger the safe navigation of the ship, such as when pirates use violence against the master on the bridge.

35. The SUA Convention applies no matter where the acts are committed, whether it is in the territorial sea, archipelagic waters, international straits, exclusive economic zone or the high

seas provided the ship "*is navigating or is scheduled to navigate into, through or from the waters beyond the outer limit of the territorial sea of a single State or the lateral limits of its territorial sea with adjacent States,*" i.e. it is on an international voyage. It will also apply to offences committed against ships on a domestic route that is purely within territorial waters of a State if the alleged offender is found in the territory of another State Party.

36. The SUA Convention *obliges* States Parties to establish jurisdiction over offences which are committed within the territory or territorial sea of the State Party but also obliges States Parties to establish jurisdiction over acts which occur outside of the territory or territorial sea of a State Party if it is committed (a) against a ship flying its flag; (b) by a national of that State; and (c) if the offender is present in the territory or territorial sea of the State Party after the commission of the offence.

37. The SUA Convention *allows* (as opposed to obliges) States Parties to establish jurisdiction over acts which occur outside of the territory or territorial sea of a State Party if it is committed (a) by stateless persons who are habitual residents in that State; (b) if it is committed to compel the State to do or abstain from doing any act; and (c) if their nationals are seized, threatened, injured or killed during its commission. The last jurisdictional link is significant for States, like the Philippines and Indonesia, from which many of the world's seafarers come, because through this, they are able to protect and seek redress for their nationals.

38. Once an alleged offender is present in the territory of a State Party, that State Party is obliged to take him into custody or to take other such measures to ensure his presence to enable any criminal or extradition proceedings to be instituted. If the State Party does not extradite the alleged offender, that State Party is obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without delay to its competent authorities for the purpose of prosecution.

39. The SUA Convention also allows the master of a ship of a State Party to deliver to the authorities of any other State Party, any person whom he has reasonable grounds to believe has committed a SUA offence.

40. As mentioned above, while UNCLOS limits piracy to the high seas and EEZ, the 1988 SUA Convention is wider since it also applies to acts in a State's territorial sea or archipelagic waters. This has resulted in an unfortunate misconception that the 1988 SUA Convention potentially infringes the territorial sovereignty of States Parties. However, the contrary is true. The Convention does not infringe territorial sovereignty of States Parties in any way as:

    40.1 The SUA Convention does not provide for enforcement jurisdiction, i.e. it does not give any State the right to board ships and arrest persons within the territorial waters of another State. A State Party can arrest persons for SUA offences committed in the territorial sea of another State only if such offenders are present in its territory after the commission of the offence. This is consistent with the principle that a State has enforcement jurisdiction within its own territory, i.e. the

power to arrest within its own territory and complementary to the principle of "extradite or prosecute" based on presence of the offender.

40.2 Although the SUA Convention is primarily concerned with the safety of international maritime navigation and applies whenever the attacked ship is scheduled to navigate to another State, it also applies to attacks on ships scheduled solely on domestic routes, but only when the offender is thereafter found in the territory of another State Party. This is consistent with the principle that a State has enforcement jurisdiction within its own territory, i.e. the power to arrest within its own territory and complementary to the principle of "extradite or prosecute" based on presence of the offender.

41. It should be noted that because of the serious nature of offences covered by the 1988 SUA Convention, it does not apply to most acts of armed robbery against ships in Southeast Asia where persons board a ship and steal valuables or supplies. Nevertheless, it is important that all ASEAN States ratify and effectively implement the 1988 SUA Convention because it provides them with the added tools to combat the more serious attacks on ships in the region when they do arise. This is especially crucial in the case of the three important maritime ASEAN States (Indonesia, Malaysia and Thailand), who are not parties to 1988 SUA Convention.

42. In sum, the 1988 SUA Convention becomes an effective mechanism in combating international crimes because it covers offences that endanger the safety of navigation such as ship-hijacking, supplementing the UNCLOS provisions on piracy. By expanding the bases of a State's criminal jurisdiction, particularly jurisdiction based on the presence of offenders, and obliging states to take them into custody and to either extradite or prosecute them, the SUA Convention supplements and complements the existing international legal framework and ensures no safe havens for such offenders.

43. The following hypothetical fact situations will illustrate how the SUA Convention would apply in practice if all the States in the region were parties and had the necessary implementing legislation:

Illustration 1. A ship flying a Thai flag is hijacked by Indonesian pirates in the South China Sea, *within Malaysia's EEZ*. This is piracy as well as a SUA offence. With respect to piracy, a warship of any State has the right to board the pirate ship and arrest the pirates in the EEZ of any State and prosecute them for piracy, but it does not have any obligation to do so. Under the SUA Convention, States with jurisdiction would be Thailand (flag-state) and Indonesia (nationality). Any State party to 1988 SUA would have the right to board the ship and arrest the offenders only if it enters its territorial sea or archipelagic waters. Therefore, if the ship enters the territorial sea of Singapore, Singapore, like any other State Party to the SUA Convention, acquires jurisdiction on the basis of the offender's presence. Also, since the alleged offenders are present in its territory, Singapore is obliged to take them into custody, and to either extradite them to another State Party (Thailand or Indonesia) or prosecute them in Singapore for an offence under the SUA Convention.

Illustration 2. A Singapore-registered ship enroute from Bangkok to Cambodia is attacked and hijacked by Malaysians in Thailand's territorial sea. Since the attack is in the territorial sea, it is not piracy but an offence of armed robbery against ships under Thai law. It would also be a SUA offence. Under the SUA Convention, the States with jurisdiction would be Thailand (territory), Malaysia (nationality) and Singapore (flag State). Thus, when the ship is within Thailand's territorial sea, only Thailand can board the ship in its territorial sea and arrest the perpetrators. However, if the hijacked ship escapes and enters the port of Manila, the Philippines like other State Parties to the SUA Convention, acquires jurisdiction based on the presence of offender and is obliged to take the offenders into custody, and to either extradite them to another State Party (Thailand, Malaysia or Singapore), or to prosecute them in the Philippines for an offence under the SUA Convention.

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 hostage for ransom. The Hostages Convention also applies in situations where crew members are taken captive and threatened with injury or death unless the captain or other crew members do something, such as open the safe or open the door to the citadel.

45. The 1979 Hostages Convention follows exactly the same scheme as the 1988 SUA Convention with respect to jurisdiction, obligation to extradite or prosecute, etc. as discussed above (see paragraphs 36, 37 and 38). As such, it is a useful addition to the toolbox States can use in cases of hostage-taking in the commission of international maritime crimes.

46. All the ASEAN States are parties to the 1979 Hostages Convention except Indonesia and Vietnam. As with the 1988 SUA Convention, it will only be an effective tool against maritime crimes if all the States in the region become parties and effectively implement the Convention.

47. The following hypothetical fact situations will illustrate how the 1979 Hostages Convention would apply in practice if all the States in the region were parties and had the necessary implementing legislation:

Illustration 1. A Philippine-registered ship is boarded in the Malaysia's territorial sea by Thai nationals carrying long knives. They take a crew member and threaten to kill him unless the captain opens the ship's safe. After taking the valuables on board, the offenders escape in a small boat, without the crew on the bridge knowing that they have been boarded. As this happened in Malaysia's territorial sea, the offence is not piracy but armed robbery under Malaysian law. Likewise, it is not a SUA offence because SUA applies only to acts that endanger the safety of maritime navigation. However, the acts may be an offence under the 1979 Hostages Convention. Aside from Malaysia, the other States which may have jurisdiction in this case include Thailand (nationality) and the

Philippines (flag state). Therefore if the offender enters the territory or territorial sea of Singapore, Singapore acquires jurisdiction by virtue of his presence in the territory. Also, Singapore is obliged to take the alleged offender into custody and either extradite him to one of the States Parties with jurisdiction (Malaysia, Thailand or Philippines), or prosecute him in Singapore for a violation of its national implementing legislation for the Hostages Convention.

Illustration 2. A Singapore-registered tanker is forcibly hijacked by Indonesian nationals in Malaysia's EEZ and taken to the Philippines. All crew members are put in life raft and sent off to sea, except for the Polish captain and chief engineer who are kept on board. A demand of $5 million dollars was made to the ship owner for the release of ship and the two crew members. A Philippine Navy ship patrolling the South China Sea locates the hijacked vessel in its EEZ, boards the ship and arrests the hijackers. In this scenario, three offences are committed. It is piracy because the attack took place in the EEZ. It is a SUA offence because the attack endangered the safety of maritime navigation. It is also an offence under the Hostages Convention because two crew members are held in captivity unless ransom payment is made. As such, the arresting State (Philippines) can prosecute for all three offences or it can extradite them to either Singapore (flag State) or Indonesia (nationality) under either the SUA Convention or the Hostages Convention.

1999 Terrorism Financing Convention

48. The 1999 Terrorism Financing Convention is not readily seen as a tool to deal with ship-hijacking and hostage-taking cases. One possible reason is the misconception that it only applies to the financing of "terrorist acts" and that one has to prove that the act being financed is done with a terrorist intent. However, Article 2 the Convention provides that:

> *1. Any person commits an offence within the meaning of this Convention if that person, by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they 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;*

49. The treaties listed in the Convention's annex include the 1979 Hostages Convention and the 1988 SUA Convention. As such, a person who provides funds for the purpose of carrying out an act constituting an offence under either the 1988 SUA Convention (such as the forcible hijacking of a ship) or the 1979 Hostages Convention (such as taking a crew member hostage) has thereby committed an offence under the 1999 Terrorism Financing Convention. The financing of such offences is considered an offence under the Convention, regardless whether the intent is terrorist in nature or merely for private gain.

50. All ASEAN States are parties to the 1999 Terrorism Financing Convention. And if they are also Parties to the 1979 Hostages Convention and 1988 SUA Convention, their implementation of the 1999 Terrorism Financing Convention will enable them to take

appropriate measures to detect, freeze or seize the funds used or allocated for the purpose of committing the offences and to forfeit the proceeds derived from such offences, providing them additional tools necessary to pursue financiers of ship hijacking and hostage-taking.

Ratification and Implementation of UN Terrorism Conventions

51. Ratification of the UN Terrorism Conventions by ASEAN States is uneven. Both the 1979 Hostages Convention (8 out of 10 ASEAN States are parties) and the 1999 Terrorist Financing Convention (All 10 of the ASEAN States are parties) have seen a generally higher rate of ratification, compared to the 1988 SUA Convention (6 out of 10 ASEAN States are parties). This could be due to the misconception that the SUA Convention infringes on the sovereignty of States (see paragraph 40). Critically, Indonesia, Malaysia and Thailand have not ratified the SUA Convention.

52. Based on the Country Reports and discussions at the Workshop, the main implementation problem for States that have ratified them include the following:

    52.1 There is either an absence of or inadequate national legislation implementing the Conventions. This can be seen in domestic laws which do not incorporate all elements of the offence set out in the Conventions or which are not based on the Conventions. Other States which have existing laws also continue to rely on the existing offences, even though they are no longer adequate or in conformity with the Conventions.

    52.2 Although the Conventions clearly provide for universal jurisdiction and mandate the States to establish jurisdiction based on the presence of offender in their territory, more often than not, their implementing laws still require that the offences have the traditional jurisdictional nexus with the prosecuting State, such as territory, flag-state, or nationality of the offender. As such, States would not able to fulfill their obligation to extradite or prosecute under these Conventions under the principle of *aut dedere aut judicare*.

    52.3 There is also confusion whether the conventions are self-executing and hence automatically applicable without the need for subsequent implementing legislation. As a result, some States have not been able effectively to implement these conventions into their national legal systems.

53. ASEAN States should bear the following points in mind when drafting or amending implementing legislation for the UN Terrorism Conventions:

    53.1 The offences under national legislation should, as far as possible, be the same as that set out in the Terrorism Conventions.

    53.2 National legislation should ensure that national authorities have jurisdiction to prosecute offences which occur outside their territory based on jurisdictional indicia provided in the Terrorism Conventions. In particular, national authorities should be

able to prosecute for offences which occur outside their territory and which have no connection to the prosecuting State based simply on the offender's presence.

53.3 National legislation should ensure that the offences under the Terrorism Conventions are part of bilateral extradition relationships with other States Parties and that the Conventions can be used as a basis for extradition to other States Parties.

D. TRANSNATIONAL ORGANISED CRIME & CORRUPTION CONVENTIONS

54. These complex transnational crime conventions are generally not thought of as tools to combat serious maritime crimes such as piracy and ship-hijacking. However, they can be used to address organisation of such crimes, money-laundering of proceeds from such crimes as well as the involvement of public officials in such crimes.

55. 2000 UNTOC requires States Parties to criminalise four main offences: (a) participation in an organised criminal group; (b) laundering of proceeds of crimes; (c) corruption; and (d) obstruction of justice. It becomes potentially applicable when these serious transnational maritime crimes are committed by an organised criminal group; or when the proceeds of the crime are laundered; or when officials are influenced or bribed to refrain from pursuing the offenders.

56. 2000 UNTOC becomes part of the legal tool box available to States by providing a regime for international co-operation (extradition, mutual legal assistance, joint investigations, technical assistance) for prosecuting not only organizers and financiers of serious maritime crimes but also those who facilitate and abet their commission (including government officials who may be influenced or bribed to protect the perpetrators or who refrain from arresting them). Through UNTOC, States can also undertake measures for the seizure and confiscation of proceeds of piracy, ship-jacking and hostage-taking.

57. The 2003 Corruption Convention expands on the corruption provisions of 2000 UNTOC by requiring State Parties to criminalise bribery, embezzlement of public funds, trading in influence and concealment and laundering the proceeds of corruption. Like 2000 UNTOC, it provides for a framework for international co-operation as well as measures to support the tracing, freezing, seizure and confiscation of the proceeds of corruption. The Corruption Convention also provides additional mechanisms for asset recovery.

58. While the use of these two Conventions may be seen as appropriate in the case of organised criminal groups involved in organizing and financing Somali piracy, the present situation in Southeast Asia has not reached a level that warrants their use, especially considering the nature and number of incidents involving organised criminal groups in the region. Nevertheless, it would be advantageous for ASEAN States to study the use of these Conventions and, in applicable situations, have them as part of their legal arsenal in combating international maritime crimes.

E. REGIONAL CONVENTIONS ON MUTUAL LEGAL ASSISTANCE AND TERRORISM

59. There are two regional conventions that can become part of the tools ASEAN States can use in combating maritime crimes. One is the 2004 Treaty on Mutual Legal Assistance in Criminal Matters (2004 MLAT) and the other is the 2007 ASEAN Convention on Counter-Terrorism (2007 ACCT).

60. The 2004 MLAT is an agreement among nine ASEAN States to "render to one another the widest possible measure of mutual legal assistance in criminal matters, namely investigations, prosecutions and resulting proceedings."

61. By using the 2004 MLAT, ASEAN States may assist each other in investigations and prosecutions of serious maritime crimes. However, for this arrangement to be effective, the offence must be defined and criminalised by both requesting and requested ASEAN States. This is because the requested State may refuse to assist if the act or omission concerned is not a crime under its legal system. Thus, to make the 2004 MLAT effective, it is necessary for ASEAN States to have a certain degree of consistency and harmonisation of domestic legislation on serious maritime crimes - which they can do by faithfully implementing the provisions of UNCLOS, SUA, Hostage-Taking Convention, etc. Since mutual legal assistance takes place at the discretion and agreement of both requesting and requested States, political will to use the 2004 MLAT mechanism is also crucial for its effectiveness.

62. The 2007 ACCT provided for the "framework for regional co-operation to counter, prevent and suppress terrorism in all its forms and manifestations and to deepen co-operation among law enforcement agencies and relevant authorities of the Parties in countering terrorism". It covers offences defined in the fourteen (14) terrorism conventions, four of which include the 1979 Hostages Convention, 1988 SUA Convention and its 2005 Protocol, and the 1999 Terrorism Financing Convention.

63. As such, the 2007 ACCT is significant because first, it encourages all ASEAN parties to become parties as soon as possible to all the terrorism conventions. Second, it identifies possible areas of co-operation among ASEAN States that may be used to combat maritime crimes such as information-exchange, cross-border and travel controls, prevention measures, capacity-building, public awareness, among others. More importantly, through the 2007 ACCT, ASEAN States commit to co-operate in ensuring "that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice."

64. Thirdly, the 2007 ACCT obliges ASEAN States: (a) to promulgate the necessary national legislation covering the criminal offences defined by the ACCT in reference to the various international terrorism conventions; (b) to establish jurisdiction over the offences; (c) to carry out obligations under the 2004 MLAT; and (d) to include the offences as extraditable offences in extradition treaties subsequently entered or to consider the ACCT as the legal basis for extradition.

65. The ACCT could be a valuable tool in combating maritime crimes but this remains to be seen as three years after it has been signed, only four countries have ratified it, needing two more countries to ratify for it to enter into force.[3]

F. POLITICAL AND CAPACITY CHALLENGES IN THE RATIFICATION AND IMPLEMENTATION OF THE GLOBAL AND REGIONAL CONVENTIONS

66. The Global and Regional Conventions can only establish an effective legal framework if they are ratified and properly implemented within national legal systems. However, some ASEAN Member States still face both political and capacity challenges in ratifying and effectively implementing these conventions.

67. With regards to ratification of these Conventions, common obstacles include:

    67.1 The misconception that some of the Conventions unduly interfere with state sovereignty or change the current rules on international law;

    67.2 The perception that it is not in the State's national interest to ratify and in so doing, it does not become an urgent national priority;

    67.3 The lack of clear laws or rules setting out ratification procedures. Some States do not have specific committees or agencies responsible for studying conventions and recommending ratification. As a result, a comprehensive review of the Conventions or "national interest analyses" like that carried out by commonwealth jurisdictions such as Australia and New Zealand is not being made by these States.

    67.4 Additionally, the procedures requiring legislative approval and public consultations in the ratification process in some ASEAN States have also tended to delay ratification of these Conventions.

68. As for implementing these Conventions, there are also several institutional and capacity challenges faced by ASEAN States. They include the following:

    68.1 After 9/11, governments faced a regulatory "tsunami" and have been overwhelmed by the number of instruments they have to implement within their national legal systems. Hence, implementation of some Conventions tended to be put on the back-burner.

    68.2 Different parts of the same convention may fall under the responsibility of different government agencies and a lack of inter-agency coordination may hamper the effective implementation of conventions.

[3] After the workshop, two more ASEAN States ratified it. Thus, the ACCT entered into force 30 days after the deposit of the instrument of ratification by Brunei on 28 April 2011.

68.3 Officials may also lack the necessary international law expertise to enable effective implementation of the Conventions.

68.4 Some ASEAN States may still need to translate and/or interpret these Conventions into a foreign language and use terminology that can be understood by their judiciary and law enforcement officials which can delay implementation.

68.5 In some States which follow the civil law tradition, it is sometimes not clear whether the Conventions were self-executing and hence automatically applicable without implementation or require implementation into their national legal systems.

68.6 The involvement of national legislative bodies in reviewing implementing legislation may hamper the implementation process particularly if they lack expertise in international law and do not understand the Conventions.

WORKSHOP RECOMMENDATIONS

69. All ASEAN States should review their national legislation on piracy, and if necessary, amend their legislation to ensure that (a) the offence of piracy in their national laws is consistent with that of the 1982 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.

70. All ASEAN States should ratify and effectively implement the 1988 SUA Convention and the 1979 Hostages Convention so as to be able to prosecute cases of hijacking of ships and hostage-taking of crew members.

71. All ASEAN States should ratify and effectively implement the 1999 Terrorism Financing Convention, and should ensure that their laws criminalise the act of financing of hijacking of ships or taking persons hostage for ransom, regardless of whether the motive of the offender is purely personal gain or with terrorist intent.

72. All ASEAN States should co-operate with each other and other relevant organizations such as UNODC, the ASEAN Secretariat and research institutions to develop capacity-building programmes to assist ASEAN States in evaluating the Conventions and implementing them into national legislation, including programmes to enhance the international law expertise of government officials responsible for implementing these Conventions and drafting model legislation or legislation checklists that can guide ASEAN in drafting their own laws.

ANNEX 1: PROGRAMME

DAY 1:	GLOBAL PERSPECTIVES ON INTERNATIONAL MARITIME CRIMES
8:30	**Registration**
9:00	**Welcome Address by Robert Beckman,** Director, Centre for International Law, National University of Singapore
9:15	**Session 1: The UNCLOS Legal Regime** – The provisions on piracy in the 1982 United Nations Convention on the Law of the Sea, and the practice of States in implementing the provisions into their national law **Chairman:** **J. Ashley Roach**, Captain, JAGC, USN (ret.), Office of the Legal Adviser, U.S. Department of State (retired) **Paper Author**: **Robert Beckman**, Director, Centre for International Law, National University of Singapore **Panelists**: **Serguei Tarassenko**, Director, UN Division for Ocean Affairs and the Law of the Sea **Professor Zou Keyuan**, Harris Chair in International Law, Lancashire Law School, University of Central Lancashire
10:30	**Tea Break**
11:00	**Session 2: International Legal Co-operation to Combat Piracy in the Horn of Africa** – The cooperative measures which have been taken by the international community to combat piracy in the Horn of Africa, including the problems which have arisen in arresting, prosecuting and punishing persons who attack ships in the Horn of Africa **Chairman:** **Robert Beckman**, Director, Centre for International Law, National University of Singapore **Paper Author:** **Dr. Marie Jacobsson**, Principal Legal Adviser on International Law, Ministry for Foreign Affairs, Sweden **Panelists**: **Saiful Karim**, Lecturer, Macquarie Law School, Sydney **J. Ashley Roach**, Captain, JAGC, USN (ret.), Office of the Legal Adviser, U.S. Department of State (retired)
12:30	**Lunch Break**
14:00	**Session 3**: **Global Conventions on Piracy, Ship-Hijacking, Hostage-Taking and Maritime Terrorism** – The UN counter-terrorism conventions which can be used to combat piracy and other serious international maritime crimes such as ship hijacking, the taking of crew members hostage for ransom, and maritime

	terrorism, namely, the 1979 International Convention Against the Taking of Hostages (Hostages Convention 1979), the 1988 Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA 1988) and the 2005 SUA Protocol **Chairman** **Dr. Marie Jacobsson**, Principal Legal Adviser on International Law, Ministry for Foreign Affairs, Sweden **Paper Author:** **J. Ashley Roach**, Captain, JAGC, USN (ret.), Office of the Legal Adviser, U.S. Department of State (retired) **Panelists:** **Ambassador Kriangsak Kittichaisaree**, Thailand's Ambassador to Australia **Robert Beckman**, Director, Centre for International Law, National University of Singapore
15:30	**Tea Break**
16:00	**Session 4: Global Conventions Applicable to Organizers, Financiers and Accomplices** - The global conventions which may be used to arrest and prosecute the accomplices of persons who commit serious international maritime crimes, as well as those who organize and finance such crimes, namely, the 1999 International Convention for the Suppression of the Financing of Terrorism (1999 Terrorism Financing Convention) and the 2000 United Nations Convention on Transnational Organised Crime (UNTOC 2000). **Chairman:** **Robert Beckman**, Director, Centre for International Law, National University of Singapore **Paper Author:** **Dr. Nikos Passas**, Professor, Northeastern University, School of Criminology and Criminal Justice **Panelists:** **Ajit Joy**, Country Manager, UN Office on Drugs and Crime, Indonesia **J. Ashley Roach**, Captain, JAGC, USN (ret.), Office of the Legal Adviser, U.S. Department of State (retired)
17:30	**End of Day One**
DAY 2:	**REGIONAL AND NATIONAL PERSPECTIVES ON INTERNATIONAL MARITIME CRIMES**
9:00	**Session 5: International Maritime Crimes in the ASEAN Region: Incidents and Trends –** The threats of piracy and other serious international maritime crimes in Southeast Asia, including the possibility that organised criminal groups in this region may adopt some of the practices of the pirate gangs operating in the Gulf of Aden **Chairman:** **Robert Beckman**, Director, Centre for International Law, National University of Singapore **Paper Author:** **Karsten von Hoesslin**, Senior Analyst, Risk Intelligence

	Panelists: **Dr. Sam Bateman,** Senior Research Fellow, Maritime Security Programme, RSIS **Nicholas Teo**, Deputy Director, ReCAAP ISC
10:30	**Tea Break**
11:00	**Session 6: Regional Co-operation to Combat International Maritime Crimes** – ASEAN and other regional measures to combat piracy and international maritime crimes, including the 2007 ASEAN Convention on Counter-Terrorism and the 2004 regional Treaty on Mutual Legal Assistance in Criminal Matters **Chairman:** **Robert Beckman**, Director, Centre for International Law, National University of Singapore **Paper Author:** **Dr Termsak Chalermpalanupap**, Director, Political Security Directorate, ASEAN Secretariat **Panelists:** **Datuk Azailiza bt. Mohd Ahad,** Head**,** International Affairs Division, Attorney General's Chambers, Malaysia **Mathew Joseph**, Deputy Director-General, International Affairs Division, Attorney-General's Chambers, Singapore **Mayla Ibanez**, Research Associate, Centre for International Law, National University of Singapore
12:30	**Lunch**
14:00	**Session 7: Extradition and Mutual Legal Assistance under Global and Regional Conventions** – The practical issues relating to the investigation, prosecution and extradition of offenders and other issues of mutual legal assistance under the relevant global and regional conventions **Chairman:** **Dr. Nikos Passas**, Professor, Northeastern University, School of Criminology and Criminal Justice **Paper Authors:** **Cheah Wui Ling,** Assistant Professor, National University of Singapore **Panelists:** **Mathew Joseph**, Deputy Director-General, International Affairs Division, Attorney-General's Chambers, Singapore **Neil Boister**, Professor, School of Law, University of Canterbury
15:30	**Session 8: Problems of Ratification and Implementation of Global and Regional Conventions**– The problems and issues relating to the ratification and implementation of the various global and regional conventions, including the status of international treaties in national legal systems and the need to enact implementing legislation

	Chairman: **J. Ashley Roach**, Captain, JAGC, USN (ret.), Office of the Legal Adviser, U.S. Department of State (retired) **Presenter:** **Robert Beckman**, Director, Centre for International Law **Panelists:** **Ambassador Kriangsak Kittichaisaree**, Thailand's Ambassador to Australia **Ajit Joy**, Country Manager, UN Office on Drugs and Crime, Indonesia **Ong Chin Heng**, Deputy Senior State Counsel, International Affairs Division, Attorney-General's Chambers, Singapore **Henry Sicad Bensurto Jr.,** Secretary-General of the Commission on Maritime and Ocean Affairs (CMOA) Secretariat, Department of Foreign Affairs, Philippines
17:00	**Closing Remarks**
17:30	**End of Workshop**

ANNEX 2: SUMMARY OF PROCEEDINGS

FIRST SESSION: UNCLOS LEGAL REGIME

1. The workshop opened with the first session discussing the piracy provisions of the 1982 UNCLOS and the practice of States in implementing the provisions into their national law.

Main Presentation

2. Prof. Robert C. Beckman first provided the historical context of the piracy provisions in UNCLOS and highlighted the extraordinary legal basis of jurisdiction in piracy cases. Generally, States may pass laws on the basis of territorial, flag state, nationality, passive personality, protective and/or universal principles. They also have exclusive right to enforce such laws in areas under their sovereignty. As flag states, they have exclusive jurisdiction over the ships on the high seas (and in the EEZ) that are registered to them. UNCLOS provides the exception to the general principles of criminal jurisdiction of States by permitting them to seize pirate ships in areas outside the territorial jurisdiction of any State and arrest the pirates. Since pirates are seen as enemies of mankind, they are denied the protection of the flag their ships fly.

3. Under international law, it was clarified that an attack on a ship in a maritime zone under the sovereignty of a State constitutes “armed robbery against ships” and not piracy. While some national legislation classifies attack on ships within the territorial sea as piracy, such designation is of no significance under international law.

4. The UNCLOS regime on piracy, however, suffers several weaknesses because it is a regime based on rights and not obligations. For one, although it defines piracy, UNCLOS does not impose any obligation on State Parties to enact national legislation criminalising piracy and making it an offence in areas outside the territorial jurisdiction of any State. Although States are given the right to seize pirate ships, UNCLOS imposes no obligation on States to exercise such right. Furthermore, unlike the newer suppression conventions, UNCLOS does not require States to establish jurisdiction based on the presence of the offender in their territory, which may be their only jurisdictional link over acts of piracy by foreign nationals against foreign ships. Although UNCLOS mandates States to co-operate to suppress piracy, it does not provide specific obligations, such as a duty to prosecute or extradite pirate in their custody, duty to provide mutual legal assistance to other States, etc.

5. The state of implementation of UNCLOS’ piracy provisions by States Parties through national legislation fares no better. The IMO report notes that only a few countries have fully incorporated both the definition of piracy and its jurisdictional framework into their national laws. In most cases, piracy is not addressed as an independent, separate offence. In some cases, domestic legislation simply makes reference to piracy as defined by international law or by the law of nations. In some cases, a State defines piracy broadly but instead of universal jurisdiction, only gives its courts jurisdiction over circumstances where they have a link to the act of piracy under general principles of jurisdiction discussed above.

6. The presentation concluded that it is in the interest of all States in the ASEAN region to fulfill their obligation under UNCLOS to co-operate in the repression of piracy. And the best way they can co-operate is to ensure that they have national legislation in place – which should include (1) the

definition of piracy, as defined in Article 101 of UNCLOS; (2) the authority for warships to seize pirate ships and arrest pirates in areas outside the territorial sovereignty of any State and (3) the jurisdiction of courts to try piracy cases contemplated under international law.

Panel Discussion

7. Mr. Sergei Tarassenko provided updates on UN activities with regard to UNCLOS and the UN Security Council (UNSC) actions on Somali policy. As part of the work of the UN Division for Ocean Affairs and Law of the Sea, they monitor States compliance to UNCLOS and compile national legislation on piracy, which presently numbers to about 60, in their website. He also noted the Ukraine proposal to draft a convention on piracy and transnational organised crime which covers proceeds from piracy, the establishment of maritime court, etc. has not received enough support from other States because UNCLOS is perceived to be sufficient enough to deal with piracy.

8. Prof. Zou Keyuan noted that the existing definition of piracy under UNCLOS is not really consistent with current events as in reality attack on ships and crew usually happens in territorial waters. He noted that, Somali piracy, because they are commandeered by local politicians, have become both for private and public ends. He shared China's experience where it may have universal jurisdiction but in reality the Chinese navy is not authorized to undertake measures to combat Somali piracy. He also related his doubts about the effectiveness of the agreements signed by EU and Kenya to transfer pirates for trial in Kenya.

Plenary Discussion

9. **Sufficiency of existing piracy regime**. The participants discussed whether the piracy regime under UNCLOS is sufficient to respond to the prevailing situations in Somalia and in ASEAN region, which mostly happens in territorial waters. It was explained that piracy should not be confused with armed robbery against ships which occurs in territorial waters. Piracy is a unique offence because it occurs outside the territorial jurisdiction of any State. The situation in Somalia is also a one-off exception as when the UNSC decided that piracy also covers those that happen in the territorial waters of Somalia it declared the Somali pirates as a threat to international peace and security.

10. With regard to the perceived weaknesses and limitations of the existing piracy regime, there are many modern conventions that can fill in the gaps in UNCLOS, the potential of which would be discussed in the next sessions of the workshop. The reference to the Ukraine proposal was an attempt to codify the modern elements of piracy but it will be up to the States to decide whether a new instrument is needed to deal with piracy. It was also suggested that human rights and its conventions should be included in the discussion of an improved piracy regime.

11. **Relevance of piracy as an offence**. Notwithstanding the existing gaps in the existing piracy regime, with its resurgence in Somalia and the continuing incidents in Southeast Asia, it was noted that piracy remains a relevant offence that States have to address as there is no other regime that governs the arrest of pirates on the high seas. None of the new conventions provide arrest power in the high seas as does UNCLOS.

12. **Transfer of detained pirates**. The UNSC encourages transfer of detained pirates. Since piracy is a crime against the law of nations and it is exacerbating the situation in Somalia which constitutes a threat to international peace and security, States other than the one that seized the pirates should be

allowed to try pirates through transfer procedures. Even with the transfers, human rights protection should still be accorded to pirates (e.g. right of defence).

13. **Maritime Zones should be in accordance with UNCLOS.** In combating piracy, it is necessary that there is a clear delineation of maritime zones. However, there are many instances when this is not the case. For example, in the northern half of the Malacca Straits, it is not clear where territorial sea ends and the Exclusive Economic Zone (EEZ) begins. Curbing illegal fishing, though it is not a piracy issue, has shown to be problematic because of inconsistency in maritime zones. Somalia, for example, extends its territorial sea into 200 nautical miles. As such, States Parties should ensure that its maritime zones are established in accordance with UNCLOS.

14. **Piracy in EEZ**. The concept of an EEZ was a new concept introduced in 1982 by UNCLOS, which with Article 58 providing that the piracy provisions in the high seas also apply to the EEZ. However, some States have not updated their piracy laws and taken into account the EEZ. It may be contended that since EEZ used to be part of high seas, residual rights can still be exercise over it. However, since there is already an EEZ regime, States must clarify its laws by including the EEZ. New Zealand is one country that has done so and as such, its piracy law provides that it will apply "whether that act is done within or outside New Zealand."

15. **Linking of political and private ends**. Piracy, as defined in UNCLOS, requires that it should be for "private ends." It was contended that it may be dangerous to link private and political ends, in the same way as linking piracy with terrorism. It was clarified that, historically, the meaning of private ends is broader than mere personal gain but it still does not include government ends. Private ends, in the context of UNCLOS, means attacks are made by those not recognized by a lawful government.

SECOND SESSION: International Legal Co-operation to Combat Piracy in the Horn of Africa

16. The workshop proceeded to provide the background and context on the cooperative measures which have been taken by the international community to combat piracy in the Horn of Africa, including the problems which have arisen in arresting, prosecuting and punishing persons who attack ships in the area.

Main Presentation

17. Dr. Marie Jacobsson first noted that while piracy is a very old crime, its recent resurgence in the past few years brought forth several questions as to the obligation of States to act and co-operate against piracy. As such, there have been wide-ranging discussions and processes regarding State responses to piracy among the following actors: UNSC, UN General Assembly, Contact Group on Piracy Off the Coast of Somalia (CGPCS), International Maritime Organization (IMO), UN Office on Drugs and Crime (UNODC), North Atlantic Treaty Organization (NATO) and the European Union (EU).

18. From 2007 to 2010, the UNSC has adopted eight resolutions, which wording has become stronger over the years, directing States to co-operate against piracy. Because of the escalating problem, one exceptional resolution is UNSCR 1846 (2008) which allowed States and regional organizations cooperating in the fight against piracy to enter the territorial waters of Somalia and use all necessary means to repress piracy and armed robbery against ships. Aside from the UNSC, the UN Secretary General is also involved in the process, having reported in 2010 on the implementation of UNSC resolutions and the options available to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery against ships.

19. The Working Group 2 of CGPCS that deals with legal aspects of the problem has also done intense work examining and exploring the options and mechanisms to address piracy. NATO has undertaken operations in the area. IMO adopted its first resolution on piracy in 1983 and has done so much in consolidating discussions on piracy which led to the Djibouti Code of Conduct, with its 16 signatories, which provides the framework for assistance to African regional states. The Combined Maritime Forces (CMF) also helps secure the Gulf of Aden and its surrounding waters. The EU through the EUNAVFOR Operation Atalanta has protected World Food Programme (WFP) vessels delivering food aid to Somalia as well as vessels off the Somali coast.

20. The problem faced by the EU involves reconciling the individual laws of its member states. Ideally, all EU member states should have laws that are in line with the EU legislation. However, when EU launched its counter-piracy efforts in Somalia, it was not easy for EU member states to hand over arrested pirates because rule of law questions and human rights issues had to be settled first.

21. Post-UN Charter, it bears noting that all these efforts against piracy should necessarily be in accordance with human rights laws and principles. EU member states have tried to ensure that all measures taken are consistent with human rights laws. This includes ensuring that there is a rule of law regime and appropriate national legislation in arresting and prosecuting States; protection against torture or degrading treatment; non-application of capital punishment; legal certainty and predictability in law and legal processes; as well as the preservation of the rights of an accused in detention, investigation phase and court proceedings.

22. The challenges for States seeking to co-operate in the fight against piracy are fourfold. For one, the "duty to co-operate" mandated by UNCLOS had seem stronger than was first made to appear. Secondly, is there "willingness to act" on the part of the States? In EU's case, the national legislation of some member countries may not be consistent with UNCLOS. Thirdly, is there an "ability to act" on the part of the States? It should be noted that States need not send their navies or patrols but there are a variety of ways they contribute to the efforts. Lastly, the rule of law should prevail in all these measures.

Panel Discussion

23. Mr. Saiful Karim talked about the problem of prosecution of Somali pirates. In the first six months of 2010, around 700 apprehended Somali pirates have been released without prosecution, which brings to question if there is an international obligation to prosecute pirates. Several options that are presently being explored include prosecution in the capturing States, or in a third State of the particular regions, or in an international or hybrid court.

24. Capt. J. Ashley Roach discussed the memoranda of understanding entered by Kenya with several States that will allow apprehended pirates to be tried in Kenyan courts. Although the arrangements brought the needed resources that improved its court systems, the situation has become burdensome for Kenya because of the growing number of cases and there are only a few States willing to share in taking on the burden. He also noted, in the context of piracy, ship-rider agreements are not quite useful because of time and distance constraints. As there are not enough ships to provide protection in the Gulf of Aden, the application of Best Management Practices by ships would serve as a deterrent against piracy. The efforts against piracy should also take into account ransom payments which have become an attractive business model for the pirates. It should also consider cutting of supply of arms, new ships and engines within Somalia and neighbouring countries.

Plenary Discussion

25. **Responsibility of flag states to ensure that ships are up to the standards**. Substandard ships with poor control records are prone to Somali pirate attacks. And if the ship has a greater risk of being attack, it cannot be considered as providing decent working conditions for seafarers. Although warships may provide protection to ships plying the Gulf of Aden, the flag state is responsible in regulating the standards of the ships registered to it. Having a better port state enforcement regime will help eradicate piracy.

26. **Prosecution and sentencing of pirates is a practical and costly problem for States**. Although there is willingness on the part of States to arrest and prosecute pirates, a larger number of pirates has been released than those put on trial because of practical and cost concerns. A warship may be able to arrest pirates but if there are no States that can readily prosecute them or immediately take them in, there is no other option but to release them later on. On the other hand, while some States are willing to prosecute, the problem arises with long sentences imposed on these pirates which can be costly and burdensome on the States. But it was also noted that the risk of having more asylum seekers is not really a problem as the number of arrested pirates is insignificant. An international tribunal to try piracy cases will also need funding and new jurisdictional arrangements. It was suggested that the use of national courts in Somalia should be explored because of their proximity. Prisoner transfer agreements may also help address the cost problems. There should be more assistance and capacity-building activities for States to absorb financial and prosecutorial/judicial responsibilities.

27. **States should also address the root causes and effects of piracy**. Aside from enforcement measures, States should also focus on improving the political and economic situation in Somalia. The African Union countries feel the negative effects of piracy but their focus is more on inland issues and they lack naval capability to address the problem. The WFP, which provides the food for Somali citizens as the country has very little capability to produce its own food, may contribute to helping in the situation in Somalia.

28. **Attention should also be made on the protection of seafarers**. In piracy attacks, the primary victims are the crew members whose protection should not be neglected. It also points to an element of human rights as seafarers also have the right to a decent livelihood. The issue of making ransom payments illegal should be balanced with the plight of the crew members.

THIRD SESSION – Global Conventions on Piracy, Ship-Jacking, Hostage-Taking and Maritime Terrorism

29. The workshop discussed the UN counter-terrorism conventions that can be used to combat piracy and other serious international maritime crimes such as ship-hijacking and the taking of crew members hostage for ransom, namely, the 1979 International Convention Against the Taking of Hostages (1979 Hostages Convention), the 1988 Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988 SUA Convention) and the 2005 SUA Protocol.

Main Presentation

30. Capt. J. Ashley Roach noted that there are more than 12 UN Conventions which establish a cooperative regime to combat specific offences among the State Parties. Three of these conventions could be used to combat piracy and armed robbery against ships: the 1979 Hostage-Taking Convention, 1988 SUA Convention and 2005 SUA Protocol.

31. He explained that the principles governing criminal jurisdiction at sea differs depending on location. In territorial sea, no foreign State can board or arrest without the coastal State's permission. Seaward of the territorial sea, as a general rule, flag state permission is still required to board the ship. This has not been changed by the terrorism conventions, except in cases of piracy or status of statelessness.

32. ASEAN States, except for Indonesia and Vietnam, are all parties to the 1979 Hostage-Taking Convention. Of the parties among ASEAN, all have implementing legislation except for Brunei, Indonesia, Myanmar and the Philippines. As for the 1988 SUA Convention, all ASEAN States are party except for Indonesia, Laos, Myanmar and Thailand. Only Cambodia, Philippines, Singapore and Vietnam have enacted implementing legislation, albeit at varying extent. Meanwhile, there is no ASEAN State who is a party to 2005 SUA Protocol.

33. In order to carry out their obligations by ratifying or acceding to the treaties, States Parties are mandated to make the offences in the Conventions as crimes under their respective national laws and to establish jurisdiction over the offender (a) if the offence occurred within its territory, including its territorial sea, (b) if it is a flag state; (c) if the offender is its national, or (d) of the offender is present in territory. If the alleged offender is present in the territory, States Parties are also obliged (a) to take them into custody and (b) either seek to prosecute them or extradite them. States Parties should also provide the greatest measure of assistance in connection with criminal proceedings.

34. The presentation went on to elaborate on the offences under the three conventions, highlighting the offences in 2005 SUA Protocol which added new offences to the 1988 SUA Convention such as use and transport of weapons of mass destruction as well as acting as accomplice, aiding and abetting the commission of the offences. 2005 SUA Protocol also codifies the shipboarding procedures which reinforces the general rule requiring flag state consent.

35. Hijackings of the ship crew off Somalia are offences under 1979 Hostage-Taking Convention because they intend to hold the crew hostage until ransom is paid. Hijackings of vessels off Somalia are offences under 1988 SUA Convention because the seizure of a ship by force is a SUA offence. They are offences under both conventions even if they took place under the territorial sea of another State. It should be noted that there is no authority under 1998 SUA Convention or 1979 Hostage-Taking Convention to board ships on the high seas and seize offenders without the flag State's consent. These obligations apply only when the alleged offenders are present in the territory of a State Party which is, in turn, obligated to take them into custody, and either (1) seek to prosecute them or (2) extradite them.

36. The presentation concluded that the three conventions fill many of the limitations in the UNCLOS provisions on piracy such that if all the ASEAN Member States ratified and effectively implemented them, they will have a set of useful tools to combat piracy and armed robbery at sea. These conventions, in turn, can also be supplemented by bilateral agreements to make them more effective.

Panel Discussion

37. Ambassador Kriangsak Kittichaisaree noted three problems in enforcement. First, coastal states even if they lack enforcement capabilities are protective of their rights or jurisdiction that they would refuse the assistance of other States. Second, there is no consistent state practice within the region in terms of implementing legislation to the Global Conventions. Third, States which may have jurisdiction over pirates may not have a genuine interest or have a lack of resources to prosecute.

38. Professor Robert Beckman clarified that although the three conventions under discussion are classified as terrorism conventions, terrorist intent is not an essential element because violations that amount as offences under the conventions are deemed acts of terrorism. There is no infringement of sovereignty of the coastal state because jurisdiction of the arresting state is based on the presence of offender in the territory of the arresting State. By establishing universal jurisdiction and through international co-operation, the international community ensures that it will not provide any refuge or safe havens to offenders. He also noted that SUA offences refers only to serious attacks that endanger maritime navigation, and as such, armed robbery which does not endanger the safety of maritime navigation is not considered as a SUA offence.

Plenary Discussion

39. **Addition of 2005 SUA Protocol to the annex to the 1999 Terrorism Financing Convention**. The 2005 SUA Protocol came after the 1999 Terrorism Financing Convention hence it was not part of the annex of the Convention which listed the various terrorism conventions. It may take time before the annex will be amended to include the SUA Protocol which only has 17 parties to date.

40. **Implementation of 1988 SUA Convention and freedoms of navigation**. Since the Convention is based on flag state consent, it cannot possibly be seen as interfering with the freedoms of navigation. It should also be kept in mind that the freedom of navigation is exercised with due regard for the rights and interests of others and in accordance with international law.

41. **Application of UNCLOS and SUA.** To a certain extent, both UNCLOS and SUA provisions may be applied to cover the same offences at sea. For example, taking a vessel by force as contemplated in UNCLOS piracy provisions may also be covered by SUA, but the latter would also require that such act affect the safety of navigation. Likewise, there would be no foreseen jurisdictional problems in using both Conventions as it may also be possible to start a law enforcement operation by using piracy laws to arrest the pirates and then hand over the suspects to another state which can proceed either on piracy or SUA. As long as the prosecution could prove the elements of SUA, there will no jurisdictional problems because then the suspects are present in the territory. In these instances, it is necessary for the State Parties to define the power of arrest of its law enforcement authorities vis-à-vis the jurisdiction of their courts to try the cases.

42. **Terrorist motive is not necessary**. One reason why terrorist motive is not required in these terrorism conventions because there is a lack of consensus on the definition of terrorism. As such, instead of terrorist intent, it may be better to consider the acts or manifestations covered by the conventions as acts of terrorism.

43. **Flag state's consent to board a vessel**. 2005 SUA Protocol has a provision that allows a party to board if there is no response from the flag state within 4 hours of the request to confirm nationality. This does not constitute a waiver of the flag state's consent because the flag state would still first have to give an advance authorization to the party. Besides, this is only an alternative option available to the parties as the first option for the requesting State is to request for express authorization.

FOURTH SESSION 4: GLOBAL CONVENTIONS APPLICABLE TO ORGANIZERS, FINANCIERS AND ACCOMPLICES

44. The session discussed two more global Conventions which may be used to arrest and prosecute persons that have organised, conspired with and aided persons who commit serious international

maritime crimes, namely, the 1999 International Convention for the Suppression of the Financing of Terrorism (1999 Terrorism Financing Convention) and the 2000 UN Convention on Transnational Organised Crime (2000 UNTOC)

Main Presentation

45. Dr. Nikos Passas espoused the use of other available suppression conventions to combat serious crimes like piracy. This "creative treatment" involves looking at the various aspects of serious crime problems such as assets and taxes, money laundering, organised crime, terrorism finance, corruption, human rights, etc. and using the existing conventions on them to complement and supplement UNCLOS. As it is, UNCLOS does not provide investigatory or prosecutorial procedures as well as guidelines for international co-operation among State Parties. However, other conventions may be used to address these gaps. Piracy can be defined as a serious crime under 2000 UNTOC which provides international co-operation and mutual legal assistance tools. It can also be considered an act of terrorism, to which the 1999 Terrorism Financing Convention may be applied to suppress the act of financing the offence of piracy.

46. The presentation discussed 2000 UNTOC and how it can be used by State Parties to combat piracy. 2000 UNTOC requires the States to criminalise the four main offences: Participation in an organised criminal group (Art. 5); Laundering of proceeds of crimes (Art. 6); Corruption (Art. 8); and Obstruction of justice (Art. 23). The Convention becomes potentially applicable if piracy is defined as a serious crime under national law and it is committed by participants in an organised criminal group; or where pirates launder the proceeds of their crime; or where pirates bribe or offer/attempt to bribe officials; or where they obstruct justice. In addition, 2000 UNTOC also covers transnational offences that constitute serious crimes and committed by organised criminal group. It can be helpful in piracy cases with its provisions on (1) seizure and confiscation of proceeds, (2) international co-operation, (3) extradition, (4) mutual legal assistance, (5) special investigative techniques, (6) joint investigations and (7) training and technical assistance.

47. It should be noted that, in using provisions of 2000 UNTOC for combating piracy, States Parties must first criminalise the act of piracy and contribute to the prosecution of suspected pirates especially their own nationals. They should also be more aware and prepared to use UNTOC against piracy.

48. However, UNTOC's usefulness may be limited as implementation of its provisions by States Parties remains constrained and challenged. UNTOC is a complex document involving multiple agencies within a State where capacity, resources, and political will to implement it may be limited. The situation is all the more compounded because of the "regulatory tsunami" where there are too many conventions to be implemented by States at the same time.

49. In order to address these implementation issues, some States have been provided technical assistance and legal assistance needs. With these assistance measures however, there may be problems with the quality of assistance received and with the coordination of various initiatives. In a study done, it was shown that the technical assistance needs identified by the States include, among others, training and capacity building (25%), legal assistance (19%), strengthening of regional and international co-operation (17%), assistance in complying with reporting requirements (16%), etc. As for legal assistance, States require assistance in drafting and amending legislation (41%), assistance in solving specific implementation issues (20%), model legislation/guidelines to harmonize domestic legislation with requirements of UNTOC (18%), discussion on case work and

best practices (14%), and advisory services during legislative approval and ratification process (7%).

50. Other than 2000 UNTOC, the presentation also discussed 2003 UN Convention on Corruption (UNCAC), 1999 Terrorism Financing Convention as well as UN Security Council Resolution 1373 (UNSCR 1373 (2001)). As to UNCAC, it may be applicable when pirates bribe or attempt to bribe officials. As to the Terrorism Financing Convention and the UNSCR 1373 (2001), it may be applicable in suppressing financing of piracy, when it is considered as an act of terrorism.

Panel Discussion

51. Mr. Ajit Joy discussed the activities of the UN Office on Drugs and Crime (UNODC), particularly its Counter-Piracy Program. As a UN agency providing technical assistance to States in implementing UNTOC and the various terrorism conventions, UNODC sees the potential of these conventions to provide the tools to deal with piracy.

52. Capt. J. Ashley Roach shared his observations about Somali diaspora and the evident growing wealth of Somali expatriates which may have come from piracy. As such, western countries should also focus on suppressing the money laundering of proceeds from piracy.

Plenary Discussion

53. **Transnationality element in maritime crimes.** UNTOC requires the transnationality or a state-to-state element of the crime. It was questioned how this can be applicable in maritime crimes where with the flag state principle, a State only has a quasi-territorial relationship with the ship. It was said that the transnationality element can also seen be in different phases of preparation, planning, execution, use of the proceeds of the maritime crime, as these may occur within several states. Further, when the crew has multiple nationalities, then there can also be a transnationality basis. It should be noted that, in implementing the UNTOC, it is not required that transnationality is made an element of the offence under national laws.

54. **Following the money in Somali piracy**. Some States are beginning to look at the money flows in Somalia, from the financing of piracy attacks to the laundering and concealment of proceeds.

FIFTH SESSION: INTERNATIONAL MARITIME CRIMES IN THE ASEAN REGION: INCIDENTS AND TRENDS

55. The workshop discussed the trends of piracy and other serious international maritime crimes in Southeast Asia, including the possibility that organised criminal groups in this region may adopt some of the practices of the pirate gangs operating in the Gulf of Aden.

Main Presentation

56. Mr. Karsten Von Hoesslin, using a special software which maps out incidents at sea, discussed the trends in the Horn of Africa and Southeast Asia comparatively.

57. He focused on four areas in the ASEAN region: (1) the Singapore Straits, (2) Tioman Coast, (3) Anambas Islands (including Natuna and Tambelan archipelagoes) and (4) Sulu-Celebes Sea. Many ships laid up by the recession have been particularly vulnerable to pirate attacks in these areas.

There are also notable incidents of tug-hijackings in the region. He noted, however, that that the crimes are "relatively low-level" or those that fall under petty crimes as opposed to serious maritime crimes. While there are incidents that follow a cluster-pattern comprising of 3-4 incidents in a 96-hour period, it was positive to note that vessels have become adept at defending themselves properly using Best Management Practices.

58. In studying the trends in Somalia waters, he noted that there are new emerging tactics on the part of the pirates that would need new responses from the States. The concept of piracy as reported in the media and other reports has been constantly changing. As such, he presented a "piracy umbrella" which includes the various modes in piracy such as hijacking, armed robbery, actual piracy, kidnap and ransom, insurgency incidents, etc. He noted that in the Horn of Africa hijacking is a predominant tactic, whereas in Southeast Asia petty armed sea robbery, anchorage, and piracy cases are the prevalent methods. There are minimal cases of hijacking in the latter region.

59. In the Indian Ocean, there are no jurisdictional issues but it was difficult to have control of the coast. Whereas in Southeast Asian waters, offenders take advantage of jurisdictional issues to evade arrest and prosecution. The difference is the navy and enforcement agencies in Southeast Asia are quite capable of controlling the coast, though not necessarily the entire sea area. The threshold or the extent that pirates will go through is different in both regions. In the Horn of Africa, the pirates would know how to fire back and deal with coalition forces. However this criminal behavior is not readily seen in Southeast Asian waters.

60. He concluded that although there are minor resemblances between the two regions – such as the desire for financial gain on the part of the perpetrators – the situation in the Horn of Africa is vastly different from that in Southeast Asia.

Panel Discussion

61. Mr. Sam Bateman commented on the tug-hijackings, the implications of the global financial crisis as well as the possibility of a Somali-type piracy occurring in Southeast Asia. Because of the nature of tugs as slow-moving and having small crews, they typically are easy targets for pirate attacks. But it should be noted that majority of the hijacked tugboats in Southeast have actually been recovered. The global financial crisis is a factor that needs to be considered in the increased pirate attacks as ship owners have been compelled to cut costs by reducing crew sizes and wages. This reduction and the fact that following Best Management Practices can be costly to ship-owners do not contribute to maritime security at all. In his opinion, the Somali business model will not be adopted in Southeast Asia especially because of the capabilities of on-shore policing agencies in the region. Although, the incidence of attacks may be increasing in Southeast Asia, he also does not believe that it would continue in the future.

62. Mr. Nicholas Teo shared that, because the term "piracy" was being used loosely as to cover all sorts of criminal incidents at sea, ReCAAP's first challenge was to clarify the term and sub-categorise incidents of piracy and armed robbery properly. Because of this appropriate categorisation, authorities have been able to give an accurate picture and channel their limited resources accordingly. In his opinion, it is highly remote that the piracy is Southeast Asia can resemble that of Somali piracy as there are differences in intent, geographical area and modus operandi. With intent, Somali pirates usually take the whole ship or its crew as a price, hold it for ransom and negotiate for the best outcome whereas Asian pirates usually only take what they can for self-gain. With geographical area, the whole area of the Gulf of Aden is very open and the coastal States have very little enforcement capability whereas in Asia, there are enforcement

mechanisms, either bilaterally and multilaterally, within the coastal states. With modus operandi, Somali pirates are usually heavily armed when they come on board while Asian pirates are usually low-key, do not use violence and do not harm the crew.

Plenary Discussion

63. **Arming the crew is not advisable**. Arming the crew as a measure of protection is not advisable because it will only escalate the situation and make it more unmanageable. There are many ways to defend the ship without the use of firearms. Best Management Practices are also implemented to prevent piracy situations. In any anti-piracy training, seafarers are usually taught not to resist pirates when they can no longer evade or defend themselves. Because of the burdens on the crew to protect the ship, it is necessary that they are also well-taken cared of because a crew that is angry or demoralized may not be able to operate or maintain the ships very well.

64. **Piracy as part of culture**. To some extent, Somali piracy has become embedded as part of local economy as it also brings business to many people in the community. In Asia-Pacific, there may still be a tradition of piracy in some island communities as a means of livelihood but there is also a code not to harm the crew. However, with more education and awareness, this kind of piracy has already shrunk over time.

SIXTH SESSION: REGIONAL CO-OPERATION TO COMBAT INTERNATIONAL MARITIME CRIMES

65. The workshop then discussed the ASEAN and regional measures undertaken to combat piracy and international maritime crimes, including the 2007 ASEAN Convention on Counter-Terrorism and the 2004 Treaty on Mutual Legal Assistance in Criminal Matters.

Main Presentation

66. Dr. Termsak Chalermpalanupap stated that although piracy is one of ASEAN's concerns, it has not yet become a high priority for the organisation. As such, there is neither an ASEAN instrument nor body specifically aimed to address piracy. One reason why ASEAN may not have made more inroads in maritime security issues is the ASEAN States already have strong views on the matter and have existing arrangements by themselves, individually and sub-regionally.

67. Nevertheless, ASEAN has been including piracy as well as other maritime security concerns in its political-security agenda as one area of co-operation. The Senior Officials Meeting on Transnational Crime (SOMTC) included piracy as one of the eight priority areas. The ASEAN Defence Ministers Meeting (ADMM) also agreed to take up maritime security as one of the five practical areas of co-operation. Malaysia and Australia, a member of ADMM Plus, have volunteered to lead this endeavor. The ASEAN Regional Forum (ARF), through its inter-sessional meetings on maritime security, has provided the venue for countries to share and discuss their activities. An upcoming meeting in Japan will finalise the ARF work plan on maritime security, which possibly will include more capacity-building activities for maritime law enforcement agencies in the region. ASEAN also has an agreement for co-operation with China on non-traditional security issues which includes anti-piracy activities.

68. There are two ASEAN plans, although not directly addressing maritime security, that are significant to note. One is the Master Plan on ASEAN Connectivity, which aims to establish infrastructure connectivity among ASEAN States in maritime transport by creating an "ASEAN Single Shipping

Market" that will certainly impact on maritime security and safety issues in the region. Another is the ASEAN Strategic Transport Plan (2011-2015) with its component on maritime transport, where ASEAN stated its aspiration to establish global standards in safety, security and protection of the marine environment.

69. There is also an ASEAN maritime forum where officials discuss maritime issues of the region. At this stage, however, ASEAN officials are still in discussion stage and law enforcement co-operation may still be a long way off, if it would be considered and taken up in the future.

70. ASEAN can still do a lot more in terms of maritime security. A welcome development is when Indonesia, which holds the ASEAN chairmanship this year, pledged to put more attention on maritime security.

Panel Discussion

71. Datuk Azailiza bt. Mohd Ahad shared about Malaysia's initiatives to pursue the 2004 Treaty on Mutual Legal Assistance on Criminal Matters among like-minded ASEAN countries (MLAT); a model legislation on piracy maritime crimes; and a region-wide extradition treaty. Because it was difficult to get a consensus within the ASEAN framework, Malaysia pushed for the signing and ratification of MLAT itself which presently has 9 out of 10 countries as States Parties. The model legislation on piracy and maritime crimes proposed in 2004 aimed to harmonize the domestic legislation of ASEAN States. Since the MLAT requires dual criminality, it would be essential that countries should have criminalised the similar offences to be able to provide mutual legal assistance. However, the proposal for model legislation did not receive consensus because it was not seen as a priority in the region. Likewise, the extradition treaty also encountered a similar stumbling block because ASEAN States deems that they still need to study the matter some more, with the traditional concerns on sovereignty and non-interference. For its part, Malaysia sees all these instruments, complementing each other, as indispensable to bring about legal co-operation in the region such as in investigation and prosecution of transnational crimes in a tangible and practical way. For now, Malaysia serves as a secretariat to the MLAT by coordinating MLA requests and providing assistance to the ASEAN States.

72. Mr. Matthew Joseph shared ASEAN's experience in drafting the 2007 ASEAN Convention on Counter-terrorism (ACCT), which with the MLAT comprise the two flagship instruments in terrorism and transnational crimes for the region. Coming from the background of the 9/11 terrorist attacks and the two Bali bombings, there was great impetus for the ACCT, taking ASEAN only a few months of negotiations and drafting before it was signed in January 2007. Although some ASEAN States delegations would like the ACCT to have unique ASEAN features, this was voted down as there may be a possibility of confusion vis-à-vis the existing international terrorism regime. However, it should be noted that there is novel and unique provision to the ACCT, which provides for promotion of best practices on rehabilitative programmes of the offenders. The main challenge however was the lack of expertise of ASEAN States in the subject matter. So it had to ask assistance from UNODC especially in the provisions pertaining to criminalization and jurisdiction. For now, 3 years after it was signed, the ACCT has already been ratified by 4 countries, needing 2 more to enter into force. The experience with drafting and the subsequent ratification of the ACCT showed that there remains a lack of expertise in region that needs to be addressed.

73. Ms. Mayla Ibañez discussed the development of traditional and non-traditional security in ASEAN's agenda since its founding in 1967. From the survey, it was concluded that co-operation in maritime security has been primarily functional (i.e. information-sharing, capacity-building). Although there

are efforts for regional legal co-operation, such as in mutual legal assistance, this aspect of co-operation may still take time to establish in the region.

Plenary Discussion

74. **ASEAN's principle of non-interference vis-à-vis regional co-operation in security matters.** The history of ASEAN showed that its ASEAN States still hesitate to discuss co-operation in security matters, including maritime security because of sovereignty concerns and the principle of non-interference. However, there have been many cooperative measures in marine safety and environmental protection, joint security training activities as well as joint confidence building activities that contribute and help facilitate more concrete co-operation in the future. It was also noted that the traditional principles of sovereignty and non-interference should be balanced with two new principles in the ASEAN Charter which is "shared commitment and collective responsibility in enhancing regional peace, security and prosperity" and having enhanced consultation on matters seriously affecting ASEAN's common interests. Such traditional principles should be reconciled and balanced with the ultimate goal of ensuring that the region as well as the ASEAN States does not become a safe haven for criminals.

75. **Co-operation at the regional level.** There is an opinion that discourages regional measures because individual ASEAN States may already have bilateral and sub-regional arrangements among themselves, for example in extradition matters. On the other hand, some would contend that a regional extradition agreement is critical because it harmonises the approach across all ASEAN States, and thus provide ease of implementation. In maritime security co-operation, ASEAN States should still analyze and decide the appropriate forum to talk about maritime security, which can be bilateral, sub-regional, or regional.

76. **Usefulness of a model law on piracy and maritime crimes.** Despite difference in legal systems in the region, a model legislation may provide a useful reference that can help the ASEAN States in drafting their domestic laws. A model legislation will have legislative guides, commentaries and explanations that will provide context and assist each State when it will draft its laws. The important thing in such endeavor is to have legal experts be part of the process.

77. **Need of ASEAN States for more capacity-building.** Even with a sophisticated international legal framework, implementation remains with the countries, thus, it is important that they have the appropriate domestic legal laws and mechanisms first to be able to co-operate with other States. For example, ASEAN States need to be educated on the tools to conduct mutual legal assistance among each other as well as encouraging them to set-up their own regulations to smoothen the process.

78. **Need to define 'maritime security'.** There is a need to define the scope of the term maritime security in ASEAN discussions, so as there will not be any confusion as to its usage.

SEVENTH SESSION: EXTRADITION AND MUTUAL LEGAL ASSISTANCE UNDER GLOBAL AND REGIONAL CONVENTIONS

79. The workshop discussed the practical issues relating to the investigation, prosecution and extradition of offenders and other issues of mutual legal assistance under the relevant global and regional conventions.

Main Presentation

80. Prof. Cheah Wui Ling provided an overview of the various mechanisms in the Conventions. The international conventions discussed in the workshop have all the aim to regulate the State's rights to legislate, adjudicate and enforce its laws, in accordance to international law and in relation to the exercise of other States of the same rights. As a general rule, States can exercise jurisdiction on the basis of territorial sovereignty. By way of exception, international law also recognizes the extra-territorial exercise of jurisdiction based on nationality, passive personality, protective and universal principles. The exercise of a State's jurisdiction is limited. For one, States may enact laws (prescriptive jurisdiction) that extend to acts occurring outside its territory but its power to enforce these laws (enforcement jurisdiction) extra-territorially may be limited. Secondly, because of its coercive nature and relation to state sovereignty and individual rights, States are also limited in their exercise of criminal jurisdiction on a territorial basis, as opposed to civil jurisdiction.

81. Because of the limits on the State's use of enforcement powers and criminal powers outside its territory, the challenge then is how States can deal with transnational crimes. There are two options available. States may either get permission from the territorial State so it can exercise its enforcement powers therein, or they engage in inter-state co-operation. The latter of which is the more preferred option by reason of state sovereignty and territorial integrity.

82. General inter-state co-operation agreements such as extradition and mutual legal assistance agreements are still generally rooted in the idea of state sovereignty such that the principles of state discretion, non-interference and equality of states still govern the practices in these agreements (e.g. exceptions that allow refusal to extradite or give assistance; adherence to dual criminality and specialty principles). However, a noticeable shift has been happening with crimes-specific co-operation agreements like the Conventions discussed in the workshop. From the strict confines of principles of non-interference and state sovereignty, these Conventions have moved on to co-operation as well as the regulation of this co-operation.

83. The crimes-specific co-operation agreements regulate inter-state co-operation by setting out substantive and procedural conditions to the exercise of jurisdiction and co-operation between States. As to jurisdiction, they set out mandatory exercise of jurisdiction in certain instances; they allow provisional arrests and preliminary inquiry; they obligate the State to either extradite or submit for prosecution; they mandate the States to treat some offences as grave in nature. These agreements also provide grounds for refusal of co-operation (e.g. political offence, banking secrecy, fiscal offence). They also prescribe certain standards of fairness such as communication rights, fair treatment and non-discrimination for States to follow.

84. The procedural regulations set out in the crime-specific international conventions seek to streamline and facilitate the process for co-operation. As such, it would have provisions on consultation, information exchange, request requirements, etc.

85. In addition to substantive and procedural requirements, the various international conventions also provide for a variety of modalities of co-operation. Aside from extradition and mutual legal assistance, States may also co-operate in service of sentences, transfer of prisoners to assist in proceedings and freezing and seizure of assets. Pertinent to maritime crimes, provisions on hot pursuit, boarding rights and shore delivery of accused enable States to co-operate with each other.

86. The presentation then moved on to the existing trends in the governance of these international conventions. For one, territorial sovereignty remains to be of continued importance such that the

general powers of hot pursuit as well as of interdiction remain to be consent-based. Notwithstanding such adherence, as States see themselves as responsible members of a larger international community, there is also a trend towards mandating and regulating the exercise of jurisdiction and co-operation among States. This is consistent with respect for international rule of law, a reduction in the sphere of unlimited state discretion and conformity to certain standards of fairness.

87. The presentation concluded that with the existing legal frameworks there may be no longer a need to develop new conventions or agreements. Instead, States may do well by ensuring their interaction with each other. Nonetheless, with such existing frameworks, domestic capability-building is still needed especially in setting up the infrastructure for information exchange and communications as well as exchange of expertise and conduct of trainings. Focus should also be made on the development and sharing of standards in order to elaborate vague obligations, to develop informal implementation procedures and come up with good practices. Prevention of the crimes is also one facet that should be look into by the States.

Panel Discussion

88. Prof. Neil Boister talked about the enforcement problems encountered in transnational crimes. For one, only very few states are capable of effectively exercising extra-territorial enforcement jurisdiction which can be very expensive. Although conventions provide the framework for the international co-operation, it may still be necessary to have bilateral and regional arrangements, at the minimum extradition relations, with other States especially since the conventions are still rarely used as legal bases for co-operation. The usual exceptions to extradition may have slowly been cut down. However, vested state interests remain a significant bar to extradition as well as human rights, which is a growing bar. Considering these issues, the optimal way to deal with transnational crimes may be through universal extradition rather than universal jurisdiction. This way, States are able to extradite the perpetrators to States that have the interest in prosecuting them. Since there is no consolidating crime treaty and international law has not yet resolved how all these conventions should work together, one of the major challenges for States is integrating the various regimes set forth by the conventions at the domestic level. Likewise, it also follows that States should also organize their law enforcement agencies accordingly to prevent turf wars and disjointed implementation.

89. Mr. Matthew Joseph discussed the historical development of conventions dealing with transnational crimes and the usefulness of UNTOC and Corruption Convention as part of the tools available to States. UNTOC can cover terrorist offences, as almost all of terrorist cases will have a transnational element. However, in applying UNTOC, one has to keep in mind that there must also be a feature of ‘organised criminal group’ in the case. One difference that bears noting is that, UNTOC allows the refusal to extradite on the grounds of nationality, unlike anti-terrorism conventions where there is no such exception. This may defeat the underlying rationale of the “extradite or prosecute” obligation of denying safe havens as there would be States especially civil law countries that will not extradite their nationals. The problem is all the more aggravated when States do not carry out their domestic prosecution in lieu of extradition. It should be noted that UNTOC gives discretion to the State Parties to decline rendering mutual legal assistance if there is an absence of dual criminality. The Corruption Convention relaxes this constraint by providing that States may still provide assistance measures as long as they are not coercive in nature. Like UNTOC which covers money-laundering of proceeds from a crime, the Corruption Convention provisions on asset

recovery, a new mechanism in international law, should be also considered in the choice of tools, especially as it may be appropriate to the Somali piracy and ransom situation as well.

Plenary Discussion

90. **Status of political offence as a ground for refusal to extradite.** Although the terrorism conventions have done away with the concept of political offence as a ground for refusal to extradite or render mutual legal assistance, the 1999 Terrorism Financing Convention had effectively brought it back when it allowed a requested State Party to do so if the request has been made for the purpose of persecuting or punishing a person on the basis of a person's race, religion, nationality, ethnic origin of political opinion.

91. **Infrequent use of global conventions.** The reason why global conventions may not have been used more frequently as legal bases for international co-operation is they are still relatively new and it may take time for the States and prosecutors to have familiarity and awareness about their usefulness.

92. **Transnationality element in UNTOC**. It was clarified that although transnationality is a required element for UNTOC to apply, this does not mean that States should also make it as an element of the criminal offences in their domestic laws. National law is not required to provide for transnationality.

93. **Need to explore other options on asset recovery.** States have found out that recovery of ill-gotten gain entailed enormous resources as there will be a very high cost attached in pursuing the cases in other countries. Hence, aside from relying from the court system of other States which laws may not be altogether conducive to such cases or even just simple mutual legal assistance from other States, a State may well do to explore other options such as filing civil actions in their own courts as well as tapping pro-bono lawyers that can assist in actual court cases, and academic institutions, regional organizations and international NGOs that can give advice and help them undertake capacity building activities. Commissions from asset recovery may be a motivation factor but one has to ensure that there is no "bounty-hunting" mentality.

94. **Extradite or submit to prosecution as an obligation.** It was clarified that the obligation of the States is not a choice between extradition and prosecution, as the obligation is either to extradite or submit to prosecution. If States refuse to extradite, prosecution is not a mandatory alternative because independent prosecutors, to whom a case is submitted, still have it in their discretion whether to prosecute or not.

95. **Death penalty as a ground for refusal to extradite.** By virtue of human rights principles and on the basis of reciprocity, States may deny extradition to requesting States that will impose the death penalty. However, there are some ways to work with this limitation, as when States consult each other first on the various enforcement options instead of outright refusal to extradite or prosecutors can pragmatically choose lesser offences that will not be meted out with death penalty.

EIGHTH SESSION: PROBLEMS OF RATIFICATION AND IMPLEMENTATION OF GLOBAL AND REGIONAL CONVENTIONS

96. The workshop ended with a survey of the problems and issues confronted by ASEAN States relating to the ratification as well as implementation of the various global conventions into their national legal systems. The workshop then identified the various needs of the ASEAN States to encourage and improve their implementation of the conventions.

Main Presentation

97. Prof. Robert Beckman pointed out the gaps in the region, where critically important States like Indonesia, Malaysia and Thailand have not signed the 1988 SUA Convention. Likewise, all ASEAN States have not yet signed the 2005 SUA Protocol which should be given priority.

98. The most difficult issue for States is implementing the conventions at the national level. For one, the legislation of many countries is not in conformity with the piracy provisions of UNCLOS, as they have not reviewed their existing legislation after ratifying UNCLOS. Likewise, where they have legislation on 1988 SUA Convention, 1979 Hostage-Taking Convention and Terrorism Financing Convention, they have not formulated them according to the conventions' terms. One of the goals of the conventions is to create a regime of universal jurisdiction. However, one common oversight in the implementing legislation is the lack of provision on the State's obligation to extradite or submit for prosecution if the offender is present in its territory. In many other instances, States have relied on their existing criminal legislation which do not take into account the new features introduced by the conventions.

99. A particular point was made about the implementation of the 1999 Terrorism Financing Convention. Some States require a terrorist motive in the offence of terrorism financing. It should be noted that, for the Convention to apply, financing the commission of SUA offences or hostage-taking offences does not require such terrorist intent. The Terrorism Financing Convention provides that financing of any act which constitutes offences defined in the schedule of treaties, which includes 1988 SUA Convention and Hostage Taking Convention, is terrorism financing.

100. Clearly with the myriad of ratification and implementation issues, States need more guidance and assistance. With this, the States may want to look at and study the legislation of Asia-Pacific countries such as Australia and New Zealand which have the good examples of implementation. They may also look at these countries' practice of coming up with National Interest Analyses that are studies on why a country should become a party to a treaty, a discussion of the economic, environmental, social and cultural impacts of the treaty; the obligations and financial costs; how it will be implemented domestically, etc. They can also request for capacity-building workshops and other forms of assistance from research and academic institutions in the region and international organizations to help them in implementing their obligations.

Panel Discussion

101. Ambassador Kriangsak Kittichaisaree shared that Thailand's ratification problem is borne out of the desire to adhere to its international obligations, such that the Parliament requires the complete implementing legislation before consenting to the ratification of treaties. Because of the lengthy and difficult process of crafting domestic legislation, where they also need to translate the conventions into the Thai language, Thailand more often than not has failed to ratify many conventions. He

noted with the recent ratification of the Corruption Convention, and forthcoming for UNCLOS, the practice in Thailand may be changing.

102. Mr. Ajit Joy noted that international agencies like UN have always advocated and pushed for the ratification of many conventions, which may be difficult for some countries to do as ratification depends to a large extent on the efficiency of the government agencies of the State. However, once the States do finally ratify the conventions, the greater problem of implementation arises as some States are either unwilling or simply unable to comply with their obligations. Since the future of international law is its implementation in domestic level, it is important then to enable States. This can be done through a network of government agencies (as well as non-government organizations) across States that can interact and support each other. Through the shared sovereignty concept, responsibility can also be shared among international organizations, international bodies and national governments. It is also very important to employ the "backstopping approach" where an international body may be able to step in if a State fails in its duties, for example to extradite or submit to prosecution. Compelling resolutions by the UNSC for States to fulfill their obligations with accompanying reporting and peer review mechanisms may also contribute to better implementation.

103. Mr. Ong Chin Heng first shared the Singapore practice in treaty ratification and implementation, which proceeds simultaneously such that while the treaty negotiations are going on, the preparations for domestic implementation are also underway. He then focused on the challenges faced by governments in treaty implementation. Because of the new and more modern instruments, with the international regime becoming increasingly complex, it has been a challenge for States to reconcile its conflicting and overlapping aspects, and at the same time, not over-legislate their obligations. From a practical point of view, the extensive and cross-cutting obligations of the conventions requires more interdisciplinary co-operation on various aspects of or various agencies of the government making full compliance of the convention all the more difficult. Ensuring whether a State's implementing legislation has sufficiently complied with the obligations is also another challenge. Lastly, the State's perennial problem of operational capabilities should also be borne in mind, and capacity needs to be built in order to ensure proper compliance and implementation of the obligations.

104. Mr. Henry Bensurto discussed the Philippine practice. Notably, in a country where there is separation of powers between the executive and legislative branches, passage of an implementing law by Congress after ratification may not readily follow. National interests will still be debated and the executive should still muster enough support to generate political will to implement the treaty. The role of the judiciary in treaty implementation should also not be discounted. For example, in cases of piracy, the judiciary has taken a liberal and very broad approach in favour of universal jurisdiction. This clearly has an influence on the country's compliance with its UNCLOS obligations and there must be a way to harmonise the restrictive provisions of UNCLOS provisions versus the broader domestic interpretation. With its wide discretion, the executive department can also do a lot by resorting to other laws and regulations, for example, if the State cannot extradite because of there is no extradition law or treaty, then it can use its deportation laws as an alternative.

Plenary Discussion

105. **Improving implementation by review mechanism and strategic planning**. Mechanisms such as peer review, self-assessment and external review that evaluate the status of implementation of the conventions by States are essential to create pressure on them to come up with institutions and laws to comply with their obligations. However, to ensure the effectiveness of these institutions and

laws, States would need more strategic planning. States with limited resources may need to prioritize and sequence their initiatives while also learning from other States. They should also realise that the process will take a long time, but each incremental step taken contributes to their larger and longer term goals. In the end, States should strive for adequate, and not necessarily perfect, implementation.

106. **Encouraging implementation by appealing to the interests of States and gaining consensus from its stakeholders**. In order to improve on State implementation, it is critical that governments are made to realise that it is in their best interests to do so. It is important to show them not only the advantages of rule of law but that it creates conditions for better economic climate and improved relations in the international community, which are the true incentives of implementation. Aside from governments, there should also be consensus among their stakeholders: civil society, private sector, etc. as support and collaboration of these sectors have been beneficial in the implementation process, as shown in the responses against money-laundering.

107. **Applicability of "shared sovereignty" concept clarified**. The term is used to refer to situations when international organisations assist States in implementing international law, like the tribunals in Cambodia and Sierra Leone. However, it does not literally mean that these organizations have sovereignty themselves, as this is an exclusive attribute of States. It was clarified, however, that such concept may not be applicable to the conventions discussed in the workshop. All the conventions remain consistent with the basic principles of territorial sovereignty and flag state jurisdiction, and there is no instance of States surrendering their sovereignty in any way.