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Regional Cooperation to Combat Piracy and International Maritime Crimes: The Importance of Ratification and Implementation of Global Conventions

by

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Abstract

This paper will examine the international legal regime governing piracy and armed attacks on ships, including more serious offences such as the hijacking of ships. It will examine the limitations of the piracy regime in the 1982 United Nations Convention on the Law of the Sea (UNCLOS) for dealing with international maritime crimes in Asia. It will also address problems resulting from the fact that many States in Asia have not amended their national laws to bring them into conformity with piracy provisions in UNCLOS. In addition it will examine the potential use in the region of the 1988 Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (1988 SUA) to combat attacks on ships. This is important given that the vast majority of attacks on ships in Southeast Asia take place in territorial waters. Despite providing a useful tool for States in combating some of the more serious attacks on ships, a number of States in Asia have failed to ratify or effectively implement the 1988 SUA Convention. Finally, the paper will examine whether it would be in the common interest of States in the region to ratify the 2005 Protocol to the SUA Convention, which creates new offences to combat maritime terrorism and has new provisions for the boarding of suspect vessels.

Introduction

Cooperation to combat piracy and international maritime crimes is in the common interest of all States. It is also consistent with the 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea and with several ASEAN Regional Forum instruments, including the 2011 ASEAN Regional Forum (ARF) Workplan on Maritime Security and the 2003 ARF Statement on Cooperation against Piracy and Other Threats to Security. Such cooperation would be a confidence building measure which could serve to create greater trust among the States surrounding the South China Sea.

The legal framework for all uses of the oceans, including cooperation to suppress piracy, is set out in the 1982 United Nations Convention on the Law of the Sea (UNCLOS). Regional cooperation should also be based on the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (1988 SUA Convention). These two conventions complement one another. Effective cooperation in Asia to combat piracy and international maritime crimes would be significantly enhanced if all States in the region were to ratify and effectively implement these global conventions.

Cooperation under the Piracy Regime in UNCLOS

Duty to cooperate to repress piracy under article 100 UNCLOS

Article 100 of UNCLOS provides that all States shall cooperate "to the fullest possible extent" in the repression of piracy. Article 100 establishes a duty on States to cooperate to repress piracy. However, it seems to give States considerable latitude in deciding how they will cooperate. It would be difficult to argue that a State would be in breach of its obligation to cooperate in article 100 if it refuses to exercise its right to arrest suspected pirates on the high seas or to exercise its right to prosecute suspected pirates it has arrested.

Definition of piracy under article 101 UNCLOS

The definition of piracy in article 101 UNCLOS is as follows:

> Piracy consists of any of the following acts:
> (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or intentionally facilitating an act described in subparagraph (a) or (b).

Piracy in the Exclusive Economic Zone (EEZ)

Article 101 UNCLOS provides that piracy must take place on the high seas. However, article 58(2) of UNCLOS provides that articles 101-107 also apply in the EEZ. In other words, the piracy provisions apply in the EEZ as well as on the high seas, that is, to attacks on ships any place seaward of the outer limit of the territorial sea of any State.

Arrest of pirates on the high seas or in the EEZ

The UNCLOS piracy regime provides the only lawful basis for boarding suspected foreign pirate ships on the high seas or in the EEZ and arresting the pirates without first obtaining the express consent of the flag State or the master of the ship. Under article 105 of UNCLOS, a warship of any flag or other ship in government service has the power to seize, on the high seas or EEZ (i.e. in areas beyond national jurisdiction), a pirate ship or a ship under the control of pirates, arrest the persons and seize the property on board. Further, once seized, the "courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith".

Differentiating piracy from armed robbery against ships

Attacks against ships in maritime zones under territorial sovereignty -- ports, internal waters, archipelagic waters and territorial sea -- are not acts of piracy governed by the UNCLOS regime. UNCLOS has no provisions governing such attacks, but they are generally referred to as "armed robbery against ships". The International Maritime Organization (IMO) defines armed robbery against ships as:

> "any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy committed for private ends and directed against a ship or against persons or property on board such a ship, within a State's internal waters, archipelagic waters and territorial sea."

Since the criminal laws of the coastal State generally apply in all areas under its sovereignty, armed robbery against ships would bea crime under the laws of the coastal State. Such attacks could

also be crimes under the laws of the flag State (under the flag State principle) and the State of nationality of the perpetrators (under the nationality principle).

However, the coastal State has the exclusive power to exercise jurisdiction, including the power of arrest, in maritime zones under its sovereignty. Foreign warships have no power to patrol in maritime zones under the sovereignty of the coastal State, and they have no power to board ships and arrest persons without the consent of the coastal State.

The distinction between piracy and armed robbery against ships is very important because it limits the types of cooperative measures which can be taken to enhance the security of the sea lanes and combat attacks against vessels. States in Southeast Asia jealously guard their sovereignty and generally oppose any suggestions for cooperative regimes which could infringe on their sovereignty. They are likely to insist that any proposal for cooperative measures recognize their sovereignty and be consistent with the principles and rules of international law, especially UNCLOS.

Challenges to cooperation under UNCLOS piracy regime

Importance of the piracy regime

The piracy regime in UNCLOS provides the legal basis for States to cooperate to suppress piracy. It provides a legal basis for the warships of any State to board pirate ships and arrest pirates when they are on the high seas or in an EEZ. It is generally accepted that the piracy regime in UNCLOS is binding on all States under customary international law.

Weaknesses in using the UNCLOS piracy regime as a basis for suppressing Somali piracy

The attacks by Somali pirates in the Gulf of Aden and the Indian Ocean have resulted in an unprecedented effort by members of the international community to cooperate to suppress piracy in accordance with the UNCLOS piracy regime. However, the efforts to suppress Somali piracy have made it clear that there are many problems that States may encounter when using the piracy regime provided for in UNCLOS as a basis for combating piracy.

The fact that the UNCLOS piracy regime only applies to attacks on the high seas and in the EEZ was recognized as a major obstacle to combating Somali piracy, as pirates could seek refuge in the territorial sea of Somalia. Therefore, the United Nations Security Council exercised its powers under Chapter VII of the United Nations Charter and made an express exception to the UNCLOS regime on

piracy. It adopted a resolution providing that the States cooperating with the Transitional National Government of Somalia could arrest pirates in the territorial sea of Somalia. In effect, it extended the UNCLOS piracy regime to the territorial sea of Somalia.

The efforts of the international community to cooperate to suppress Somali piracy have highlighted other problems in using the UNCLOS piracy regime as a legal basis to suppress piracy.

First, article 101 of UNCLOS provides a definition of piracy, but it imposes no obligation on State parties to enact national legislation making piracy, as defined in UNCLOS, a criminal offence with appropriate penalties.

Second, article 101 in effect gives States the right to extend their criminal jurisdiction to include acts of piracy committed on the high seas by foreign nationals against foreign ships. However, UNCLOS does not impose an obligation on States to establish universal criminal jurisdiction for acts of piracy on the high seas.

Third, the piracy provisions apply only in areas outside of territorial sovereignty, or seaward of the outer limit of the territorial sea of any State. In Southeast Asia most attacks on ships are not piracy because they take place on ships in port, in archipelagic waters or in the territorial sea.

Fourth, article 105 of UNCLOS gives every State the right, in areas outside the territorial sovereignty of any State, to seize pirate ships and the property on board and to arrest the pirates. However, it imposes no obligation on States to exercise such powers.

Fifth, article 105 of UNCLOS gives the courts of the State which has seized a pirate ship and arrested the pirates the power to exercise jurisdiction by trying the pirates and imposing a penalty. However, it imposes no obligation on States to make the necessary changes within their domestic legal system to give their courts such jurisdiction. It also imposes no obligation on States to prosecute any suspected pirates in their custody.

Sixth, article 100 of UNCLOS imposes a general obligation on States to cooperate to the fullest possible extent in the repression of piracy. It does not impose an obligation on States to take any alleged offenders present in their territory into custody. Nor does it impose an obligation on States to either prosecute or extradite alleged offenders present in their territory. Further, there is no obligation imposed on States to give one another mutual legal assistance in connection with the criminal proceedings of persons charged with the offence of piracy.

Failure of States to update their national legislation on piracy

The underlying theme in all the weakness listed above is that many States who became parties to UNCLOS failed to review their national legislation on piracy to ensure that they had established universal jurisdiction over acts of piracy and that their government institutions had the power and authority to take the actions necessary to fully cooperate with other States in order to suppress piracy. There is a wide divergence in the practice of States globally and in the Asian region on the extent to which they have exercised the permissive prescriptive and enforcement jurisdiction provided for in the UNCLOS provisions on piracy.

States are not able to fully cooperate to suppress piracy unless they have passed the necessary legislation to: (1) make acts of piracy by foreign nationals on foreign vessels outside the territorial sea of any State an offence under their laws: (2) empower their naval or coast guard vessels and personnel to board and seize pirate ships and arrest the pirates and: (3) to provide that their courts have jurisdiction to try the offenders.

Many States in Asia do not have the national legislation in place to enable them to fully cooperate to suppress piracy.

Problems in national legislation in Asia regarding the offence of piracy

Several former British colonies (Brunei, India, Malaysia and Myanmar) have no provisions on piracy in their criminal code. This is because the Indian Penal Code was adopted by the British as the basic criminal law in those countries, and it contains no provision making piracy an offence.

The situation was the same in Singapore until 1993 when it enacted legislation to amend its Penal Code and created a new offence for piracy. The piracy provision in the Singapore Penal Code provides that a person commits piracy if s/he does any act that, by the law of nations, is piracy. The phrase "law of nations" is an antiquated term which refers to public international law, and a court could decide that in the modern context this would refer to piracy as defined in UNCLOS. The question which arises is whether piracy by the law of nations is exactly the same as piracy under article 101 of UNCLOS.

India recognized that it should have a specific offence on piracy after it had difficulty prosecuting several Somali pirates that its navy had arrested in the Indian Ocean in 2010. India finally introduced a Draft Piracy Bill into its Lower House on 24 April 2012, but the bill is still pending.

The lack of national legislation on piracy has created problems for Malaysia in dealing with Somali pirates captured by the Malaysia navy in the Gulf of Aden in January 2011. Malaysia could not charge the alleged offenders with piracy because piracy was neither criminalized nor punishable under Malaysia's domestic law. Consequently, the pirates were charged for offences relating to the use of firearms against the Malaysian armed forces.

The situation in Asian States which have legal systems based on European civil law is very complex because several of these States have provisions in their constitution or laws which provide that international law is automatically part of their national law. As a result, it is not clear whether implementing legislation is required to prosecute pirates. However, UNCLOS gives States parties jurisdiction to arrest pirates and defines the offence of piracy, but it leaves the penalty for piracy to be determined by the law of the prosecuting. Therefore, it seems that at a minimum, States should pass legislation to provide for a punishment for piracy.

Because the national laws on piracy in several Asian States were enacted long ago, the provisions on piracy may not be completely consistent with the definition of piracy in UNCLOS. For example, under article 122 of the Revised Penal Code of the Philippines 1930, as amended, the punishment of life imprisonment is imposed on anyone who commits piracy, which is defined as:

> any person who, on the high seas, or in Philippine waters, shall attack or seize a vessel or, not being a member of its complement nor a passenger, shall seize the whole or part of the cargo of said vessel, its equipment or personal belongings of its complement or passengers.

Article 123 of the Revised Penal Code provides the same punishment (but without the possibility of parole) for anyone who commits "qualified piracy", which is defined as anyone who commits the offence of piracy under the following circumstances: (a) "Whenever they have seized a vessel by boarding or firing upon the same"; (b) "Whenever the pirates have abandoned their victims without means of saving themselves"; or (c) "Whenever the crime is accompanied by murder, homicide, physical injuries or rape". Although the offence of piracy is not exactly the same as article 101 of UNCLOS, one could argue that it is materially the same.

Thailand seems to be the only ASEAN country whose definition of piracy in its national legislation is consistent with the definition of piracy in UNCLOS. This is because the provision on piracy in the Thai legislation is based on the definition of piracy in the 1958 Convention on the High Seas, which is the same as the definition in UNCLOS.

Japan had no legislation making piracy a crime until 2009. In light of its decision to cooperate to combat Somali piracy, Japan enacted the Law on Punishment of and Measures against Acts of Piracy (Piracy Act) in 2009. The Piracy Act provides not only the constituent elements of piracy, but also how to police and arrest pirates. Article 2 of the Piracy Act broadly conforms to piracy as defined in UNCLOS, with some modifications. For example, under Japanese law geographic scope of piracy is extended to the territorial and internal waters of Japan in order to provide equal treatment to persons who have committed piracy on the high seas and those who have committed piracy in the territorial sea and internal waters of Japan.

Problems in national legislation regarding jurisdiction over pirates

With the exception of Thailand, most ASEAN Member States, including Indonesia, Malaysia, the Philippines, Singapore and Vietnam have not passed legislation expressly giving their courts universal jurisdiction over acts of piracy, including jurisdiction over such acts in the EEZ.

States with legal systems based on European civil law often have provisions giving their courts jurisdiction over offences outside their territory if such jurisdiction is provided for in a treaty to which they are a party. For example, article 9 of the Criminal Law of China provides that it is applicable to the crimes specified in international treaties to which the People's Republic of China (PRC) is a party and the PRC exercises criminal jurisdiction over such crimes within its treaty obligations. Since the PRC is a party to UNCLOS and it exercises jurisdiction over piracy within its obligations under UNCLOS, there is a good argument that its criminal law would apply to pirate attacks on the high seas by foreign nationals against a foreign ship. Japan enjoys universal jurisdiction over acts of piracy based on articles 2 - 4 of its Penal Code, including extra-territorial jurisdiction over crimes covered by treaties. Similarly, Taiwan, through article 5(10) of the Criminal Code of the Republic of China, has universal jurisdiction over acts of piracy defined under the Code.

On 21 January 2011, Korean forces operating in the Gulf of Aden responded to an attack on the vessel *Samho Jewellery* and arrested several Somali pirates. The Korean forces took the alleged pirates back to the Republic of Korea (ROK) and indicted them for, inter alia, eight charges of criminal acts related to piracy and additional charges pursuant to the Punishment for Damaging Ships and Sea Structures Act 2003. The Korean Busan District Court in Republic of *Korea* v *Araye* – Korea's first piracy case, held that it had jurisdiction on several basis. One of the basis of jurisdiction was held to be article 6(1) of the Constitution of the Republic of Korea, which provides that treaties duly promulgated under

the Constitution and generally recognised rules of international law shall have the same force and effect of law as domestic laws of the ROK. Therefore, article 105 of UNCLOS is part of the laws of ROK, giving its courts jurisdiction over acts of piracy. The decision was upheld by the Supreme Court of the ROK on the basis that the Korean courts had jurisdiction pursuant to article 6(1) of the Constitution of the Republic of Korea. Nevertheless, on 25 March 2011, the Ministry of Justice proposed amendments to the Criminal Code to expressly provide for universal jurisdiction in particular circumstances, including piracy.

Conclusions on cooperation to suppress piracy in Asia

Given the problems experienced by Malaysia, India and Korea in dealing with the Somali pirates apprehended by their naval forces, all countries in Asia should review their national legislation in order to bring the relevant provisions into conformity with UNCLOS. This will help ensure that these States can exercise their rights and obligations to cooperate in suppressing piracy. First, they should ensure that piracy as defined in article 101 of UNCLOS is an offence under their national laws, with appropriate penalties. Second, they should ensure that their courts have jurisdiction over any act of piracy on the high seas, in an EEZ, or in any area where the UN Security Council has determined that the laws of piracy are applicable. Third, they should ensure that their navy or coast guard has the authority under their national laws to board suspect vessels in such areas and arrest the pirates.

Cooperation under the 1988 SUA Convention

Hijacking of a private ship by passengers or crew not piracy

If the passengers or crew of a private ship take control of that ship by illegal acts of violence, this does not constitute piracy. Article 101 of UNCLOS provides that the acts must be committed by the crew or passengers of a private ship or private aircraft, and directed against "another ship" or against persons or property on board such ship or aircraft. The commentary to article 39 of the 1956 International Law Commission (ILC) Report specifically states that "[a]cts committed on board a ship by the crew or passengers and directed against the ship itself, or against persons or property on the ship, cannot be regarded as acts of piracy."

The rationale for the 'two-ship rule' is that if all the acts take place on a single ship on the high seas, the flag State has exclusive jurisdiction over that ship, and other States should not be given the right to board the ship or arrest persons without the consent of the flag State. This limitation created

considerable controversy after the hijacking of the *Achille Lauro* in the Mediterranean by Palestine extremists in 1985, and was a major reason why the international community drafted the 1988 *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* (1988 SUA Convention).

Status of the 1988 SUA Convention

The 1988 SUA Convention entered into force on 1 March 1992. The number of parties to the Convention increased significantly after maritime security became a matter of major concern for the International Maritime Organization (IMO) in 2002. The Convention is now generally accepted and, as of 31 July 2012, there were 160 States parties. There is also a 1988 Platforms Protocol to the Convention which governs the security of off-shore installations and structures.

From 2002 to 2005 the IMO made a major effort to amend the 1988 SUA Convention and its Platforms Protocol to bring them up to date in light of the threat of maritime terrorism. Protocols were adopted in 2005 with respect to the 1988 Convention and to the 1988 Platforms Protocol. The 2005 SUA Protocol will be discussed later in this paper.

The cooperative regime established in the 1988 SUA Convention

The 1988 SUA Convention establishes a cooperative regime among State parties designed to ensure that persons who commit offences defined in the Convention are arrested and either extradited or prosecuted.

The 1988 SUA Convention provides that certain acts against the safety of international maritime navigation are offences. Under article 3, a person commits an offence if that person unlawfully and intentionally:

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

The offences in the Convention apply in all maritime zones, including maritime zones under the sovereignty of the coastal State, so long as the ship which is the subject of the offence is scheduled on

an international voyage. This means that serious attacks on ships in archipelagic waters or in the territorial sea are offences under the SUA Convention. Serious attacks on ships on the high seas or in the EEZ may be piracy as well as offences under the SUA Convention.

The cooperative mechanism established in the 1988 SUA Convention follows the scheme of the UN terrorism conventions which was first been established in the 1970 *Convention for the Suppression of Unlawful Seizure of Aircraft* (1970 Hague Convention). The cooperative mechanism in all of these conventions is based on the following principles:

First, State parties are obligated to make the offences defined in the Convention a crime under their national laws, punishable by severe penalties.

Second, State parties are required to establish jurisdiction over the offences defined in the Convention when they have a link to the offence based on the territorial, nationality and flag State principles. Furthermore, State parties are obligated to establish jurisdiction over the offence when the alleged offender is present in their territory and they choose not to extradite them.

Third, if the alleged offender is present in their territory, State parties are obliged to take them into custody, and to either extradite them or turn the case over to its authorities for the purpose of prosecution.

Fourth, the Convention includes provisions which make it possible to extradite alleged offenders to other State parties as well as provisions requiring State parties to provide mutual legal assistance to assist the prosecuting State.

The 1988 SUA Convention does not strictly establish universal jurisdiction. However, it in effect makes prescribed offences, such as the hijacking of a ship, a universal crime among contracting parties.

The enforcement of the 1988 SUA Convention is based on the presence of the alleged offender in the territory of a State party. The 1988 SUA Convention does not give State parties any additional rights or powers to seize ships and arrest persons for offences under the Convention. The right of State parties to board ships and arrest persons suspected of committing an offence under the 1988 SUA Convention continues to be governed by UNCLOS and general international law. As explained earlier, warships or patrol craft cannot board a ship in the territorial sea of another State without its consent. Also, they cannot board a ship flying a foreign flag on the high seas or in an EEZ without the consent of the flag State, unless the ship is a "pirate" ship as defined in UNCLOS. Therefore, the regime in the 1988 SUA

Convention is consistent with UNCLOS and does not in any manner infringe the sovereignty or jurisdiction of coastal States.

How the cooperative mechanism is designed to work

To illustrate the way in which the cooperative mechanism in the SUA Convention is designed to work in practice we can examine a real case which took place in Southeast Asia in February 2010, the hijacking of the *ASTA*. The *ASTA* was a tugboat flying a Singapore flag. It was en route from Singapore to Cambodia towing an empty barge when it was hijacked by seven Indonesians in the territorial sea of Malaysia. Eleven of the twelve crew members were set adrift in a life raft on 10 February, and were rescued by the Malaysian Navy on 17 February. The barge was also set adrift and recovered in Malaysian waters on 17 February. While underway to the desired destination, the hijackers repainted and renamed the tugboat to 'mask' its identity. On 26 February the hijacked tugboat was located by the Philippine Coast Guard on a beach in southern Philippines. One person, a Filipino, was aboard the tugboat when it was found, but the seven Indonesian perpetrators were also apprehended in the Philippines.

If all the States concerned had been parties to the 1988 SUA Convention and had implemented it into their national legislation, the cooperative mechanism would have worked as follows. The obligations in the 1998 SUA Convention would have been triggered because the offenders had committed an offence under article3 by seizing or exercising control over the tugboat by force. Therefore, the Philippines would have been under a legal obligation to take the alleged offenders into custody and to ensure their presence in the Philippines while they undertook an investigation. The Philippines would also have been under an obligation to notify the other concerned States that it had arrested the alleged offenders. If there was sufficient evidence that the persons in custody did commit an offence under the SUA Convention, the Philippines would have been under a duty to either "extradite or prosecute" the alleged offenders. If the Philippines elected to extradite the offenders, they could have sent them to Singapore (the flag State), to Malaysia (the State in whose territorial sea the offence took place) or to Indonesian (the State of nationality of the offenders). If the Philippines did not have an extradition treaty with the State they decided to send the offenders to, the 1988 SUA Convention could have been used as the legal basis for the extradition. If the Philippines elected not to extradite the offenders, the only option would be to turn the offenders over to their own national authorities for the purpose of prosecution. Once it was determined which State the offenders would be prosecuted in, the other concerned States would have been under an obligation to provide legal assistance to the authorities of the prosecuting State, such as providing evidence or witnesses.

Problems in Ratifying and Implementing the 1988 SUA Convention

The 1988 SUA Convention is not an effective tool for combating attacks on ships in Asian waters at the present time because not all ASEAN Member States are party to it. Singapore is party to the Convention and has implemented it by passing the Maritime Offences Act. However, three key States in Southeast Asia -- Indonesia, Malaysia and Thailand -- are not parties to the SUA Convention. Another important State – the Philippines – ratified the SUA Convention in 2004, but has not passed legislation to implement the convention into its national laws.

To illustrate the need for all States in the region to ratify and effectively implement the Convention, we need only look at what actually happened in the *ASTA* case discussed above. The Philippine Coast Guard did arrest the Indonesian offenders. However, the Philippine Government was not able to charge them with an offence under the SUA Convention because it had not passed domestic legislation implementing the Convention. The Philippines had no jurisdiction under their laws to try Indonesians for hijacking a Singapore flag ship in Malaysia's territorial waters. The Philippines had not fulfilled its obligation under the SUA Convention to establish jurisdiction over SUA offences when its only link to the offence is that the alleged offenders were present in its territory. In any case, the Philippines could not have extradited the offenders to either Malaysia or Indonesia because neither Indonesia nor Malaysia is a party to the SUA Convention. Therefore, the only option available to the Philippines would have been to extradite the alleged offenders to Singapore, which is a party. However, because there is no extradition treaty between the Philippines and Singapore, and because the Philippines had not passed implementing legislation providing for the power to extradite persons to other States parties to the SUA Convention even in the absence of an extradition treaty, it was not possible for them to extradite the alleged offenders to Singapore. Therefore, the offenders could not be charged with a SUA offence for hijacking the tugboat. The Philippines was only able to charge them with "immigration offences".

Issues concerning implementing legislation in Vietnam, China and Japan

Another important State in Southeast Asia – Vietnam – has ratified the 1988 SUA Convention, but has not passed any legislation to implement its obligations under the Convention. Although Vietnam does have some laws providing that international law is automatically part of its domestic law, it is not clear whether such provisions would be sufficient for it to fulfill its obligations under the SUA Convention. For example, the SUA Convention states that States parties shall establish jurisdiction over

an offence based on the presence of the offender in its territory. This seems to require action by States parties to amend their domestic laws to extend their jurisdiction in such cases. Furthermore, the SUA Convention carefully defines the "offences" which constitute a threat to the safety of maritime navigation. It is not clear whether a State can simply charge alleged offenders in their territory with "similar" offences under their penal code, especially when the provisions in the penal code are not materially the same.

There seems to be similar confusion in China as to whether implementing legislation is required in order for it to fulfill its obligations under the 1988 SUA Convention. One of the difficulties is the meaning of article 9 of the PRC Criminal Code, which provides that:

> This Law applies to crimes set forth by the international treaties concluded or acceded to by the People's Republic of China and over which the People's Republic of China has criminal jurisdiction within its obligations in accordance with the treaties.

The issue is whether article 9 would give China jurisdiction over SUA offences based solely on the presence of the offender within its territory. Another difficulty is that there are no offences in the Chinese Criminal Code that are materially the same as the offences in article 3 of the 1988 SUA Convention.

The situation in Japan is similar to that in China and Vietnam. Japan has acceded to the 1988 SUA Convention, but has not enacted any implementing legislation. The Government of Japan seems to have concluded that the existing provisions in its Penal Code provide a sufficient basis for it to carry out its obligations under the 1988 SUA Convention. With respect to jurisdiction based solely on the presence of offenders in Japan, article 4(2) of the Penal Code applies to anyone who commits outside the territory of Japan those crimes proscribed in Part II of the Penal Code "which a treaty obliges Japan to punish even if committed outside the territory of Japan". With respect to whether it has criminalized under its national law the offences set out in article 3 of the SUA Convention, Japan seems to take the position that existing provisions for ordinary crimes would cover the offences in article 3 of the Convention. This may be a stronger argument in the case of Japan because, unlike China and Vietnam, its Penal Code has offences similar to those in article 3 of the 1988 SUA Convention.

Implementing legislation of Singapore and Korea as "best practice"?

The legislation passed by Singapore and Korea to implement the 1988 SUA Convention could be described as examples of "best practice" in the region.

Singapore implemented the 1988 SUA Convention by passing the *Maritime Offences Act* (Cap. 170B, Singapore Statutes) in 2003. It creates offences almost exactly the same as those in article 3 of the 1988 SUA Convention and provides for severe penalties. It also has provisions expressly providing for extra-territorial jurisdiction. In addition, it contains provisions establishing exceptions to its normal laws on extradition to enable it to fulfill its obligations under the Convention with regard to extradition.

Korea acceded to the 1988 SUA Convention, and accordingly enacted the *Act on Punishment for Damaging Ships and Sea Structures,* 2003. The ROK's implementing legislation is short and simple, but covers all of the required provisions with respect to offences and jurisdiction. Articles 5 - 13 of the Act give effect to the obligation under the 1988 SUA Convention with respect to offences. The offences in the ROK Act are based on the offences set out in the SUA Convention (and its 1988 Platforms Protocol) and are substantially the same. Article 3(3) of the ROK Act establishes extra-territorial jurisdiction over foreign nationals who have committed SUA offences and are present on Korean territory.

The implementing legislation of Singapore and Korea would be good models for countries who wish to amend their national laws to ensure that there is no doubt as to whether they will be able to fulfill their rights and obligations under the 1988 SUA Convention. The Singapore legislation could be used as model for countries with legal systems based on English law. The Korean legislation could be used by countries with legal systems based on European civil law

The 2005 Protocol to the SUA Convention

The 2005 SUA Protocol was a response to the terrorist attacks on the United States on 11 September 2001. It was intended to update the 1988 SUA Convention in light of the threat of maritime terrorism. The Protocol entered into force on 28 July 2010. As of 31 July 2012, there are only 22 State parties, none of which are States from Asia.

Offences and Safeguards

The 2005 SUA Protocol may be a useful tool to combat maritime terrorism in the Asia region. It broadens the list of offences in the 1988 SUA Convention by adding three categories of new offences. The first category of new offences concerns acts of maritime terrorism such as using a ship as a weapon or as a means to carry out a terrorist attack. These new offences require a specific knowledge and intent. They also require a "terrorist motive" – the purpose of the acts must be to intimidate a population or

compel a government to do or abstain from doing an act. The second category of new offences are non-proliferation offences that are intended to strengthen the international legal basis to impede and prosecute the trafficking by commercial ships on the high seas of weapons of mass destruction, their delivery systems and related materials. The third category of new offences in the 2005 SUA Protocol makes it an offence to transport by sea any person who has committed an offence under the 1988 SUA Convention or its 2005 SUA Protocol or any of the other UN terrorism convention when intending to assist that person to evade criminal prosecution. The terrorism conventions are listed in an Annex. This offence also requires specific "knowledge and intent" to ensure that innocent seafarers and masters are not made criminals.

Boarding Provisions

The 2005 SUA Protocol also contains a comprehensive set of procedures designed to facilitate the boarding of a vessel that is suspected of being involved in a SUA offence. There is a common misunderstanding in many States that the 2005 SUA Protocol allows boarding and arrest in a manner inconsistent with UNCLOS. This is not the case. The Protocol only allows State parties to board the vessels of other State parties outside the territorial sea of any State with the express permission of the flag State. The boarding provisions contain a lengthy list of conditions and safeguards designed to ensure that they are not abused by boarding States. State parties can either: (a) consent on an ad hoc basis to requests for boarding; (b) consent implicitly by notifying the Secretary-General of the IMO that prior authorization to board is given if no response is received from the flag State after four hours of a request; or (c) consent implicitly by notifying the Secretary-General of the IMO that prior authorization to board is given (no time limit is imposed). Such notifications of implicit consent can be withdrawn at any time. If such notifications are not given to the Secretary-General of the IMO, the ship cannot be boarded without the express consent of the master or flag State.

Relevance to cooperation in Asia

The 2005 SUA Protocol entered into force on 28 July 2010 but as of 31 July 2012, there are only 22 States parties. No States in East Asia or Southeast Asia have become parties. Although there was a significant fear of maritime terrorism following the terrorist attacks on the United States on September 11, 2001, the fear of maritime terrorism has diminished in recent years. This could explain why very few major States have ratified the 2005 SUA Protocol.

Should the threat of maritime terrorism arise in Asia in future, the 2005 SUA Protocol would provide a strong framework for cooperation in the common interest. Therefore, it would be in the common interest for States to study its provisions now to determine whether it might be in the interest of States in the region to ratify it. If States wait until maritime terrorism becomes a significant threat before they begin to seriously examine the Protocol, it may be too late.

Conclusions

All States in Asia should bring their national legislation into conformity with the piracy provisions in UNCLOS so that they can arrest pirates outside the territorial sovereignty of any State and exercise jurisdiction over them by trying them in their courts. In addition all States in Asia should set out appropriate penalties for piracy given that UNCLOS leaves it to States to determine the appropriate punishment.

The 1988 SUA Convention complements the piracy regime under UNCLOS. All States in the region should ratify the 1988 SUA Convention and fully implement its provisions in their national laws in the following ways: (1) by making the offences in the SUA Convention crimes under their national laws; (2) by ensuring that they have jurisdiction over any alleged offenders who are present in their territory; and (3) by prescribing punishments considering the gravity of the relevant SUA offence.

All States in the region should study the 2005 SUA Protocol to determine whether it would be in their common interest for them to become parties and pass the necessary implementing legislation.