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LENGTH: 8631 words**NOTE: CASTING A WIDER NET: ADDRESSING THE MARITIME PIRACY PROBLEM IN SOUTHEAST ASIA****NAME:** ERIK BARRIOS ***BIO:**

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SUMMARY:

... Piracy has posed a threat to all states' maritime interests for nearly as long as people have sailed the oceans. ... This Note discusses the basis under international law for punishing the maritime attacks in Southeast Asia, and considers whether the definition of piracy under customary international law encompasses these attacks. ... To date, Indonesia, Malaysia, and the Philippines, the states most heavily impacted by piracy, are parties to UNCLOS and as such are bound by the rights and obligations of the UNCLOS definition of piracy. ... After the *Achille Lauro* attack, the international community, through the UN and its International Maritime Organization (IMO), promulgated the Rome Convention, which established a legal basis for prosecuting maritime violence that did not fall within the UNCLOS piracy framework. ... Furthermore, a party state is permitted to exercise jurisdiction if the victim is a national of the state, if the perpetrator's habitual residence is in the state, or if the act was committed in an attempt to compel the state to do, or abstain from doing, any act. ... Thus, the UNCLOS definition is too narrow to be considered the authoritative definition of piracy under customary international law. ...

HIGHLIGHT: Abstract: Because of the damage that maritime piracy inflicts on international trade and general safety, it has long been treated as a universal crime whose perpetrators were subject to punishment by any country that caught them. Piracy remains a serious threat to the international community in modern times, especially in Southeast Asia. Roughly 45% of the world's commercial shipping passes through Southeast Asia, so the maritime attacks in this region cause billions of dollars in economic loss each year. These attacks have attracted additional attention due to the fact that they are now being committed by terrorists as well as traditional maritime bandits. This Note discusses the basis for punishing these attacks under international law, and considers whether the definition of piracy under international law can encompass these attacks.

TEXT:

[*149] INTRODUCTION

Piracy has posed a threat to all states' maritime interests for nearly as long as people have sailed the oceans. ⁿ¹ States have long recognized the threat that piracy poses to political and commercial interests, as well as to human safety. ⁿ² Since pirates operate on the seas, the "great highway of all maritime nations," and since piracy can inflict

harm upon all states, international law treats piracy as a universal crime whose perpetrators are subject to punishment by any state that apprehends them. ⁿ³

[*150] Piracy remains a serious threat to international commerce and safety in modern times, especially in Southeast Asia. ⁿ⁴ Commercial ships in this region have always been particularly vulnerable to the maritime attacks that characterize piracy due to the narrow waterways and countless small islands that define the region's geography. ⁿ⁵ Nevertheless, there was a sharp increase in these attacks in the late 1990s following the massive unemployment and political instability caused by the Asian economic crisis. ⁿ⁶ Indeed, in 2002, Southeast Asian waters played host to approximately 140 attacks. ⁿ⁷

The explosion of maritime violence in Southeast Asia is reason for serious international concern given the region's significant role in international commerce. ⁿ⁸ Roughly 45% of the world's commercial shipping moves through the region's waters, and the frequent attacks on commercial vessels passing through the region can hamper international trade and lead to severe economic loss. ⁿ⁹ Indeed, maritime attacks in the region have caused an estimated \$ 16 billion in economic loss over the past five years. ⁿ¹⁰

In addition, the possible links between the maritime attacks, local dissident groups, and terrorist groups such as al Qaeda justifies increased international attention. ⁿ¹¹ While violent dissident groups have [*151] existed in the region for centuries, the attacks of September 11, 2001 and the subsequent war on terrorism have focused increased attention upon possible links between al Qaeda and dissident groups in countries such as the Philippines, Malaysia, Indonesia, Singapore, and Thailand. ⁿ¹² Officials in Southeast Asia worry about the increased frequency with which these dissident groups have attacked maritime targets. ⁿ¹³ Indeed, the International Maritime Bureau (IMB), an organization of the International Chamber of Commerce that tracks incidents of maritime crime throughout the world, reports the emergence in Southeast Asia of a "new brand of piracy" in which the attacks are motivated by political agendas rather than a traditional motive to rob. ⁿ¹⁴ These attacks are consistent with the theory that terrorists in Southeast Asia have shifted strategies to encompass economic, as well as political and military, targets. ⁿ¹⁵ Actual attacks by terrorists have thus far been limited to temporary seizures of vessels and crewmen, but officials express concern over the ease with which large vessels such as oil tankers could be hijacked and used as weapons with which to block commercial waterways or attack one of Southeast Asia's numerous busy harbors. ⁿ¹⁶ In addition to direct attacks, terrorists may also exploit the region's maritime shipping activity to facilitate their operations in other parts of the world. ⁿ¹⁷ For example, authorities suspect that terrorist groups have been using container ships to smuggle weapons, supplies, and even the terrorists themselves. ⁿ¹⁸

Thus, in addition to the usual concern over the threat to international commerce, apprehension about the possible connection between pirates and terrorists also draws attention to the problem of [*152] piracy in Southeast Asia. ⁿ¹⁹ These magnified concerns highlight the need for more effective maritime law enforcement in the region, and have led scholars to examine the legal issues that may frustrate efforts to address these maritime attacks. ⁿ²⁰

This Note discusses the basis under international law for punishing the maritime attacks in Southeast Asia, and considers whether the definition of piracy under customary international law encompasses these attacks. Part II of this Note outlines the current state of international law on piracy and other forms of maritime violence. This section also discusses the definition of piracy in the United Nations Convention on the Law of the Sea (UNCLOS); perhaps the most widely known definition of piracy in international law. This section further describes the Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (referred to herein as the "Rome Convention"), which addresses forms of maritime violence that are not encompassed by the UNCLOS definition. Part III discusses the shortcomings of UNCLOS and the Rome Convention when they are applied to the acts of maritime violence in Southeast Asia. Finally, Part IV examines possible solutions to these shortcomings. Part IV presents solutions proposed by scholars, discusses weaknesses in these proposals, and suggests a more readily applicable legal perspective to the Southeast Asian context.

I. A BRIEF HISTORY OF INTERNATIONAL LAW REGARDING PIRACY AND MARITIME VIOLENCE

Piracy became a crime under international law as seafaring became prevalent and international trade became a major part of all states' economies. ⁿ²¹ Early on, states recognized that piracy posed a threat to trade and the orderly functioning of the international community in general. ⁿ²² Thus, the international community branded pirates as *hostes humani generis* or enemies of the human race, and treated piracy as one of the few crimes over which universal jurisdiction applied. ⁿ²³ As such, piracy remains punishable by all nations, [*153] wherever the perpetrators were found and without regard to where the offense occurred. ⁿ²⁴

For centuries the international prohibition on piracy existed in varying definitions, but it was not until the international community adopted the Geneva Convention of the High Seas in 1958 that a definition was set forth in a major international instrument. ⁿ²⁵ UNCLOS, which was signed in 1982 and entered into force in 1994, identically restates the definition established in the Convention on the High Seas. ⁿ²⁶ According to the definition found in the Convention on the High Seas and UNCLOS, "piracy" consists of (1) illegal acts committed on the high seas (2) for private ends (3) by the crew or passengers of one ship against the crew, passengers, or property onboard another ship. ⁿ²⁷ The requirement that the acts be motivated for private ends restricts this definition to attacks committed with the intent to rob, and also limits the ability of states to claim universal jurisdiction over politically motivated attacks. ⁿ²⁸ This requirement reflects the states' primary underlying concern about interference with commercial shipping and transportation, and underscores the states' general unwillingness to assert jurisdiction over politically motivated acts that do not have a commercial aspect. ⁿ²⁹ To date, Indonesia, Malaysia, and the Philippines, the states most heavily impacted by piracy, are parties to UNCLOS and as such are bound by the rights and obligations of the UNCLOS definition of piracy. ⁿ³⁰ Many writers treat UNCLOS as a codification of the customary international law on piracy and consider all states, whether parties or not, as bound by the UNCLOS definition. ⁿ³¹

[*154] Soon after UNCLOS was adopted, it became clear that its conception of piracy did not cover many of the violent crimes committed on the seas. ⁿ³² On October 7, 1985, four armed stowaways onboard the Italian cruise liner *Achille Lauro*, hijacked the ship and killed one American passenger. ⁿ³³ The apparent political motivations for the attack, the location of the attack in Egyptian waters, and the fact that the attack originated from the target ship rather than from a separate ship, placed the attack outside the UNCLOS definition of piracy and, presumably, beyond the purview of universal jurisdiction. ⁿ³⁴ The United States, and other states that may have had an interest in prosecuting the attackers, were apparently left without the authority under international law to do so. ⁿ³⁵

After the *Achille Lauro* attack, the international community, through the UN and its International Maritime Organization (IMO), promulgated the Rome Convention, which established a legal basis for prosecuting maritime violence that did not fall within the UNCLOS piracy framework. ⁿ³⁶ The Rome Convention made it unlawful to seize or take control of a ship by force or the threat of force, to perform an act of violence against a person on board a ship if it is likely to endanger safe navigation of that ship, to destroy or damage a ship or its cargo if it is likely to endanger safe navigation, to place devices or substances on a ship that are likely to destroy that ship, to knowingly communicate false information to a ship that would endanger safe navigation, and to injure or kill any person in connection with any of the above acts. ⁿ³⁷ The Rome Convention authorizes and, under certain circumstances, requires party states to establish jurisdiction over the perpetrators, either extraditing the perpetrators to another interested signatory state or prosecuting the alleged offenders themselves. ⁿ³⁸ The state of which the perpetrator is a national, the state in whose territorial waters the act is committed, and the flag state of the ship against whom the act is committed are all required to take measures necessary [*155] to establish jurisdiction over the offenses. ⁿ³⁹ Furthermore, a party state is permitted to exercise jurisdiction if the victim is a national of the state, if the perpetrator's habitual residence is in the state, or if the act was committed in an attempt to compel the state to do, or abstain from doing, any act. ⁿ⁴⁰

To date, Indonesia, Malaysia, and the Philippines, the states with the largest maritime presence and with the greatest potential to be affected by incidents of maritime violence covered by the Rome Convention, have neither ratified, nor even signed it. ⁿ⁴¹ Unlike UNCLOS, there is no assumption that non-signatories would be bound by the terms of the Rome Convention; it is clearly not a reflection or codification of customary international law, but rather a relatively recent departure from it. ⁿ⁴²

II. SHORTCOMINGS OF INTERNATIONAL LAW REGARDING PIRACY AND MARITIME VIOLENCE WITH RESPECT TO SOUTHEAST ASIA

A. *The Limits of UNCLOS*

The definition of piracy contained in UNCLOS excludes many of the types of maritime attacks that currently occur in Southeast Asia.ⁿ⁴³ In particular, UNCLOS requires that a crime occur on the high seas in order to be punishable as piracy.ⁿ⁴⁴ However, the majority of maritime attacks in Southeast Asia occur within a state's territorial waters.ⁿ⁴⁵ Under UNCLOS, only the states in whose territorial waters the attacks occurred would be permitted to prosecute the offenders.ⁿ⁴⁶ Assuming such a state is willing to act, its efforts would be limited by UNCLOS rules regarding "hot pursuit" as applied to Southeast Asia's geography.ⁿ⁴⁷ UNCLOS provides that a state may commence pursuit of an offending ship within its territorial waters, and continue into international [*156] waters so long as the pursuit is uninterrupted.ⁿ⁴⁸ The right of hot pursuit ends, however, as soon as the fleeing ship enters its own or a third state's territorial waters.ⁿ⁴⁹ These limitations on the states' ability to pursue offenders are especially problematic in insular Southeast Asia, where the islands of multiple countries are densely packed within relatively small areas.ⁿ⁵⁰ With little international water separating neighboring states, fleeing ships can quickly escape into the territorial waters of another state and avoid capture and prosecution if the neighboring state is unwilling to act.ⁿ⁵¹

The requirement that an attack be motivated by private and material ends further limits UNCLOS' applicability to Southeast Asia.ⁿ⁵² Since UNCLOS excludes attacks that are politically motivated, it excludes acts of maritime terrorism that have become increasingly common in the region.ⁿ⁵³ Thus, maritime crimes committed by regional dissidents, including kidnappings of crewmen to put pressure on regional governments and environmental attacks involving hijacked oil tankers, are not punishable as piracy under UNCLOS.ⁿ⁵⁴

The two-vessel requirement imposes a third limitation on the UNCLOS piracy provision's usefulness.ⁿ⁵⁵ UNCLOS requires that perpetrators stage an attack from one vessel against the crew or passengers of another vessel in order for the attack to qualify as piracy.ⁿ⁵⁶ Thus, an attack on a ship committed by its crew, its passengers, or stowaways likely would be excluded even though the social and economic harm would be identical to an attack that satisfied all of the UNCLOS elements.ⁿ⁵⁷

[*157] B. *The Limits of the Rome Convention*

The Rome Convention was meant to fill these gaps left by the UNCLOS definition of piracy.ⁿ⁵⁸ In particular, the Rome Convention covers acts occurring in territorial waters and acts motivated for political ends, as well as eliminating the two-vessel requirement.ⁿ⁵⁹ While the Rome Convention would empower Southeast Asian states to act more decisively in responding to maritime attacks, none of the states in Southeast Asia that are especially hard-hit by these attacks, namely the Philippines, Malaysia, and Indonesia, have signed it.ⁿ⁶⁰

The unwillingness of the region's large insular states to join the Rome Convention can be explained in large part by the characteristic jealousy with which Southeast Asian states guard their political and territorial sovereignty.ⁿ⁶¹ States in this region view the Rome Convention's obligations concerning the extradition or prosecution of maritime criminals as an affront to their sovereignty because these provisions prescribe how states should deal with matters concerning their own territorial waters.ⁿ⁶² The unwillingness to participate in the Rome Convention deprives the states in Southeast Asia of an important legal framework for dealing with the acts of maritime violence that do not fall within the UNCLOS definition of piracy.ⁿ⁶³

Even if the major insular states in Southeast Asia were to join to the Rome Convention, the Convention has shortcomings that prevent it from completely covering all the acts excluded by UNCLOS.ⁿ⁶⁴ Although the Rome Convention's definition of piracy covers attacks that do not fall within the UNCLOS definition, the Rome Convention's provisions are only applicable within the jurisdictions of states party to it.ⁿ⁶⁵ Arguably, the scope of criminal attacks embraced by the Rome Convention's definition of piracy includes acts that are not considered *ergo omnes*, and therefore

do not provide for universal jurisdiction. ⁿ⁶⁶ The acts within the Rome Convention's definition of piracy are only punishable by the states that are party to the treaty, only if the perpetrators [*158] or victims are nationals of a party state, and only if the offending acts take place in a party state's territorial waters or the offending vessel was scheduled to navigate through such waters. ⁿ⁶⁷ Furthermore, the decision by the parties to enforce the Rome Convention is ultimately discretionary. ⁿ⁶⁸ Even though a party may be obligated by the terms of the Rome Convention to act in response to an offense, the Convention does not provide for any sanctions against parties who fail to fulfill their treaty obligations. ⁿ⁶⁹ Thus, if a party authorized or obligated by the Rome Convention to act declines to do so, the purported attack may go unpunished and the other party states may have no recourse against that non-conforming state. ⁿ⁷⁰

Thus, even if all relevant Southeast Asian states were to become party to the Rome Convention, the limitations of the Rome Convention and UNCLOS leave a regulatory gap through which certain acts of maritime violence could slip by unpunished. ⁿ⁷¹ Terrorist acts occurring on the high seas, for instance, would fall outside of both the UNCLOS and Rome Convention frameworks. ⁿ⁷²

III. TOWARD A MORE HISTORICALLY ACCURATE PIRACY FRAMEWORK

Scholars have proposed two solutions to provide for more effective legal coverage of the forms of maritime violence that occur in Southeast Asia. ⁿ⁷³ First, as suggested by Tina Garmon, the UNCLOS definition could be revised to include acts motivated by political objectives. ⁿ⁷⁴ This expansion would provide for increased jurisdiction over maritime terrorism on the high seas and would allow UNCLOS and the Rome Convention to work together more cohesively, "extending a blanket of enforcement jurisdiction" over all types of maritime violence. ⁿ⁷⁵ However, Garmon's proposal seemingly would be ineffective in Southeast Asia, where none of the major insular states are party [*159] to the Rome Convention. ⁿ⁷⁶ Even if the UNCLOS party states were to agree to expand the definition of piracy to include politically motivated acts, Southeast Asia's lack of participation in the Rome Convention leaves many violent acts uncovered by the proposed definition. ⁿ⁷⁷ For example, without the Rome Convention, Garmon's expanded UNCLOS definition would not consider maritime attacks as "piracy" unless they occurred on the high seas or involved at least two vessels. ⁿ⁷⁸

The second proposed solution suggests the use of regional treaties to combat piracy and other forms of maritime violence. ⁿ⁷⁹ A regional approach, as opposed to exclusive reliance on the broad-based UNCLOS, would allow smaller groups of states to create and enforce anti-piracy measures tailored to the unique situations of a given region. ⁿ⁸⁰ One example of a regional piracy initiative, suggested by Timothy Goodman, would designate joint patrol areas to coordinate the policing of the region's waters by the signatories' naval and police forces, and would employ uniform extradition procedures among the party states. ⁿ⁸¹ A regional approach remains consistent with the purposes of UNCLOS, which permits two or more parties to conclude agreements that modify its provisions (effective only as between those concluding parties) so long as the modifications are not incompatible with UNCLOS' object and purpose, and do not affect the enjoyment of other parties' rights or obligations under the convention. ⁿ⁸² Furthermore, regional agreements would make it easier to enforce the treaty obligations between the states. ⁿ⁸³ Although UNCLOS requires that states cooperate to the fullest extent possible in order to repress piracy, the large number of party states makes it difficult to ensure that all states are meeting their obligations. ⁿ⁸⁴

In Southeast Asia, however, the concept of regional cooperation has always been problematic. ⁿ⁸⁵ As mentioned previously, the Southeast Asian states generally guard their territorial and political sovereignty [*160] with extreme jealousy. ⁿ⁸⁶ It is unlikely that Southeast Asian states would accept terms that would, for instance, allow neighboring naval forces to operate within their own territorial waters. ⁿ⁸⁷ As one official in Southeast Asia noted, "it would be very nice if [multilateral cooperation] could happen, but the issue of sovereignty in these countries [is] such that it won't happen soon . . . it's a very, very sensitive issue." ⁿ⁸⁸ Indeed, the limited efforts at cooperation in combating piracy in the past have been colored by the preoccupation with sovereignty. ⁿ⁸⁹ Southeast Asian countries have attempted joint patrols in the past, but their effectiveness has been limited by caveats preventing one state from operating in the territorial waters of another. ⁿ⁹⁰ Thus, although the states in the region, through the Association of Southeast Asian Nations (ASEAN), have paid lip service to preventing maritime attacks more effectively, ⁿ⁹¹ and although news reports

indicate that the ASEAN states are currently working towards implementing a new antipiracy pact, it remains uncertain whether such steps will lead to meaningful cooperation that will effectively combat piracy in the region, or whether such measures will be largely diluted. ⁿ⁹²

Rather than attempting to expand the UNCLOS definition or create problematic regional agreements, the legal perspective from which states view the concept of piracy should be adjusted. ⁿ⁹³ As stated previously, the UNCLOS would exclude many of the maritime attacks in Southeast Asia from its concept of piracy. ⁿ⁹⁴ Nevertheless, these excluded attacks would inflict the same degree of damage on international trade, [*161] which is the primary motivation for treating piracy as *ergo omnes*. ⁿ⁹⁵ Thus, the UNCLOS definition is too narrow to be considered the authoritative definition of piracy under customary international law. ⁿ⁹⁶

The actual practice of states and the writings of jurists in past centuries indicate that customary international law on piracy encompassed a broader scope of activity than the restrictive definition found in UNCLOS. ⁿ⁹⁷ When the international community first attempted to codify international piracy law, no clear consensus as to the meaning of piracy could be derived from the writing of jurists or the practice of states. ⁿ⁹⁸ While many scholars supported the restrictive view of piracy ultimately adopted in UNCLOS, and while many acts considered to be piracy fell neatly within this definition, the actual practice of many states reflected a conception of piracy that covered a broad range of activities that had an adverse effect upon states' maritime interests. ⁿ⁹⁹ For example, the Norman Vikings in Western Europe and the Barbary Corsairs of the Mediterranean were considered pirates, yet much of their activity took place on coasts and territorial waters. ⁿ¹⁰⁰ British authorities in the 19th century cited piracy law as a justification to pursue maritime bandits led by local nobility in the Malay Peninsula, even though the acts of banditry occurred within territorial waters and were politically motivated. ⁿ¹⁰¹ English courts upheld this broad reading of piracy law, and held that "piracy is any armed violence at sea which is not a lawful act of war." ⁿ¹⁰² U.S. courts have also been willing to apply the law of piracy broadly. ⁿ¹⁰³ The U.S. Supreme Court has held that to bring an act within the scope of piracy it is not necessary for either actual plunder or an intent to plunder (*i.e.*, a private end) to exist; if one "sinks or destroys an innocent merchant ship, without any other object than to gratify his lawless appetite for mischief," it is as much an act of piracy as an act of robbery on the high seas. ⁿ¹⁰⁴ In 1937, during the Spanish Civil War, nine states, including Bulgaria, Romania, and the USSR, treated acts of submarine warfare against merchant [*162] ships as piracy, notwithstanding the fact that such attacks reflected no intent to rob and often took place in territorial waters. ⁿ¹⁰⁵ The wide range of activity treated as piracy indicates a conception of piracy under customary international law that was broader and more flexible than the definition established by UNCLOS. ⁿ¹⁰⁶ Historically, states recognized that a wide variety of activity could cause the type of harm that justified treating piracy as a universal crime. ⁿ¹⁰⁷

Thus, given the flexible manner in which piracy law has been applied previous to its adoption, UNCLOS should not be seen as having codified existing international law. ⁿ¹⁰⁸ Rather, UNCLOS presented a significant departure from what the international community accepted as piracy. ⁿ¹⁰⁹ As such, UNCLOS would be binding upon the countries that signed it, but would not reflect the customary international law binding upon the international community as a whole. ⁿ¹¹⁰ While it is true that the provisions of a treaty can gradually gain such wide acceptance that they become part of customary international law, ⁿ¹¹¹ the fact that UNCLOS only gathered enough signatures to enter into force in 1994 weighs against such an argument in this case. ⁿ¹¹²

Thus, certain crimes that do not fall within UNCLOS should still be considered piracy. ⁿ¹¹³ Southeast Asian states should be able to prosecute acts of maritime terrorism that would not otherwise satisfy the requirements of the UNCLOS framework, and those states could justify their actions by citing to the long existing customary practices of other states. ⁿ¹¹⁴ Given such legal authority, the actions of Southeast Asian states taken against piracy would not be dependent upon their participation in any treaty, as all states may rely upon customary international [*163] law when responding to attacks that threaten their maritime interests. ⁿ¹¹⁵

Southeast Asian states can respond to more incidents of maritime violence through reference to pre-UNCLOS customary international law than is currently possible relying solely upon UNCLOS as a legal basis. ⁿ¹¹⁶ Given the concerns for piracy's effect upon both international trade in Southeast Asia and the possible link between pirates and

Southeast Asian terrorist groups, the international community would likely embrace a broader construction of international piracy law. ⁿ¹¹⁷

CONCLUSION

Maritime piracy remains a serious concern in Southeast Asia due to its threat to international commerce and human safety. Furthermore, the possible link between piracy and the numerous terrorist groups operating in Southeast Asia has placed even greater attention on piracy's threat to the security of the region. International agreements that deal with piracy and other acts of maritime violence, such as UNCLOS and the Rome Convention, seem inadequate as a legal basis to protect the region from such acts. The definition of piracy found in UNCLOS is too narrow and does not encompass many acts that regularly occur in Southeast Asian waters. The lack of participation in the Rome Convention by the insular states in Southeast Asia makes the agreement virtually inapplicable in that region. The solution to the lack of coverage provided by these international agreements may lie in the customary law on piracy that existed prior to UNCLOS. The definition of criminal piracy, as evidenced by the historical practice and jurisprudence of states, was broader than the definition adopted by UNCLOS. As such, UNCLOS, which only entered into force in 1994, did not codify existing law, and acts of maritime violence that do not fall within UNCLOS may nonetheless constitute piracy. Thus, states in Southeast Asia may have a legal basis for prosecuting acts such as maritime terrorism as piracy, even though the same acts would not fall under the definition of piracy adopted by UNCLOS. Given the scope of international concerns over Southeast Asian piracy, it is likely that the international community would support the revival and readoption of the customary definition of piracy prior to UNCLOS.

Legal Topics:

For related research and practice materials, see the following legal topics:

International LawSources of International LawInternational Trade LawGeneral OverviewTransportation LawWater TransportationMaintenance & Safety

FOOTNOTES:

n1 See generally ALFRED P. RUBIN, *THE LAW OF PIRACY* 8 (Naval War College Press 1988) (discussing the ancient Roman belief in the "impropriety" of piracy and the threat that piracy might pose to the "new commercial and political order that could not countenance interference with trade in the Mediterranean Sea").

n2 See Delphine Soulas, *Poverty Stirs Turbulence in Asian Waters; Attacks on Ships Triple Since 93*, WASH. TIMES, Oct. 10, 2003, at A17, at 2003 WL 7720673.

n3 See ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES: YEARS 1919-1922, at 165 (Sir John Fisher Williams & H. Lauterpacht eds., 1932); Paul Arnel, *International Criminal Law and Universal Jurisdiction*, 11 INT'L LEGAL PERSP. 53, 60 (1999).

n4 See generally Peter Chalk, "Threats to the Maritime Environment: Piracy and Terrorism" Presentation at the RAND Stakeholder Consultation (Oct. 28-30, 2002) (noting the marked increase in piracy since the end of the Cold War, particularly in Southeast Asia); *Pirates In Asia a Growing Threat to Global Trade*, HERITAGE FOUNDATION, June 23, 2000, at <http://www.heritage.org/Press/NewsReleases/NR062300.cfm> (last visited Nov. 20, 2004) (describing attacks to commercial shipping in

Southeast Asia); Sonia Kolesnikov, *Piracy Still Rising*, UNITED PRESS INT'L, Apr. 20, 2002, available at LEXIS, News Library (reporting on the continuing rise in the incidents of piracy in Southeast Asia).

n5 See Ger Teitler, *Piracy in Southeast Asia: A Historical Comparison*, 1 MAST 1, 72 (2002), available at <http://www.marecentre.nl/mast/documents/GerTeitler.pdf> (last visited Nov. 20, 2004).

n6 Dana Robert Dillon, *Piracy in Asia: A Growing Barrier to Maritime Trade*, Heritage Foundation, HERITAGE FOUNDATION, June 22, 2000, at <http://www.heritage.org/Research/Asia andthePacific/BG1379.cfm> (last visited Nov. 20, 2004).

n7 See, e.g., INTERNATIONAL MARITIME ORGANIZATION, REPORTS ON ACTS OF PIRACY AND ARMED ROBBERY AGAINST SHIPS: ANNUAL REPORT 2002, MSC.4/Circ. 32, April 17, 2003, at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D7215/32-b&w.pdf (last visited Nov. 20, 2004).

n8 See HERITAGE FOUNDATION, *supra* note 4.

n9 See *id.*

n10 John J. Brandon, *Piracy as Terrorism*, J. COM., June 3, 2003, at <http://www.uscib.org/index.asp?documentID=2153> (last visited Nov. 20, 2004).

n11 See Richard Halloran, *What if Asia's Pirates and Terrorists Joined Hands?*, SOUTH CHINA MORNING POST (Hong Kong), May 17, 2003, available at <http://www.uscib.org/index.asp?documentID=2636> (last visited Nov. 20, 2004); See also *Is Terrorism Heading for the High Seas?*, YOMIURI SHIMBUN/DAILY YOMIURI, October 6, 2003, All, at 2003 WL 5140196.

n12 See James Gomez, *September 11: Asian Perspectives*, 13 IND. INT'L COMP. L. REV. 705, 707 (2003).

n13 See Halloran, *supra* note 11; YOMIURI, *supra* note 11.

n14 *New Brand of Piracy Threatens Oil Tankers in Malacca Straits*, ICC COMMERCIAL CRIME SERVICES, Sept. 2, 2003, at

http://www.iccwbo.org/ccs/news_archives/2003/piracy_ms.asp (last visited Nov. 20, 2004) [hereinafter *New Brand of Piracy*].

n15 Graham Gerard Ong, *Pre-empting Maritime Terrorism in Southeast Asia*, INST. OF SOUTH EAST ASIAN STUDIES VIEWPOINTS, Nov. 29, 2002, at www.iseas.edu.sg/viewpoint/ggonov02.pdf (last visited Nov. 20, 2004).

n16 See *Peril on the Sea*, ECONOMIST, Oct. 4, 2003, at 5; Adam J. Young & Mark J. Valencia, *Conflation of Piracy and Terrorism in Southeast Asia: Rectitude & Utility*, 25 CONTEMP. SOUTHEAST ASIA 1, 32 (2003), at 2003 WL 5140196; YOMIURI, *supra* note 11 (discussing a tanker carrying liquefied petroleum gas as the "likeliest terrorist target").

n17 See YOMIURI, *supra* note 11 (describing anxieties about terrorists using container ships to smuggle people and explosives around the world).

n18 *Id.*

n19 *See id.*

n20 See, e.g., Tina Garmon, *International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11*, 27 TUL. MAR. L.J. 257, 259 (2002) (noting that reconciling notions of piracy and terrorism under the law of the sea is inevitable as maritime violence and threats of terrorism increase).

n21 *Id.* at 259-60.

n22 *See id.*

n23 Williams & Lauterpacht, *supra* note 3, at 165.

n24 *See id.*

n25 See Convention on the High Seas, Apr. 29 1958, art. 15, 450 U.N.T.S. 11, *available at* <http://www.un.org/law/ilc/texts/hseas.htm> (last visited Nov. 20, 2004) [hereinafter High Seas Convention]; Garmon, *supra* note 20, at 259-63 (discussing the varied applications of piracy law under customary international law and the eventual adoption of the Convention on the High Seas which sought to provide a standard definition of piracy).

n26 See High Seas Convention, *supra* note 25, art. 15; United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 101, 1833 U.N.T.S. 3, 436 [hereinafter UNCLOS].

n27 UNCLOS, *supra* note 26, art. 101.

n28 Garmon, *supra* note 20, at 265.

n29 See *id.*

n30 See UN DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, CHRONOLOGICAL LISTS OF RATIFICATIONS OF, ACCESSIONS AND SUCCESSIONS TO THE CONVENTION AS AT 1 Nov. 2004, *at* http://www.un.org/Depts/los/reference_files/chronological_lists_of_rati_fications.htm (last visited Nov. 20, 2004).

n31 See Garmon, *supra* note 20, at 275 (suggesting that the law contained in UNCLOS would apply to non-signatories as well).

n32 See *id.* at 271-72; Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AM. J. INT'L. L. 269, 285 (1998).

n33 Halberstam, *supra* note 32, at 269.

n34 See, e.g., UNCLOS, *supra* note 26, art. 101.

n35 See *id.*

n36 See Halberstam, *supra* note 32, at 295.

n37 Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, art. 3, 1678 U.N.T.S. 221, at http://www.unodc.org/unodc/terrorism_convention_maritime_navigation.html (last visited Nov. 20, 2004) [hereinafter Rome Convention].

n38 *Id.* arts. 6, 10(1); Halberstam, *supra* note 32, at 295-96.

n39 See Rome Convention, *supra* note 37, art. 6.

n40 See *id.*

n41 See INTERNATIONAL MARITIME ORGANIZATION, STATUS OF CONVENTIONS, at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D8068/status.xls (last visited Nov. 20, 2004) [hereinafter STATUS OF CONVENTIONS].

n42 See Garmon, *supra* note 20, at 271.

n43 See, e.g., *id.* at 267 (noting how the UNCLOS definition is restricted to piracy taking place on the high seas and most incidents of piracy occur within territorial or port waters).

n44 See UNCLOS, *supra* note 26, art. 101.

n45 See INTERNATIONAL MARITIME ORGANIZATION, *supra* note 7, annex 2.

n46 Garmon, *supra* note 20, at 264; see UNCLOS, *supra* note 26, art. 101.

n47 *See* UNCLOS, *supra* note 26, art. 111.

n48 *Id.*

n49 *Id.*

n50 *See* Zou Keyuan, *Enforcing the Law of Piracy in the South China Sea*, 31 J. MAR. L. & COM. 107, 111 (2000) (stating that most, if not all, of the South China Sea is located within the exclusive economic zone of one country or another).

n51 *See id.*

n52 *See* Garmon, *supra* note 20, at 265.

n53 *See id.*

n54 *See id.*; ECONOMIST, *supra* note 16, at 5.

n55 *See* Halberstam, *supra* note 32, at 287 (noting how a perpetrator of maritime violence could be caught on the high seas, have the motivation found to be for "private ends," yet still fail to qualify as a pirate because he did not act from one ship against another").

n56 *See* UNCLOS, *supra* note 26, art. 101.

n57 *See* Halberstam, *supra* note 32, at 286-87.

n58 See Zou Keyuan, *Part V: Piracy, Ship Hijacking and Armed Robbery in the Straits*, 3 SING. J. INT'L. & COMP. L. 524, 532 (1999).

n59 See *id.*; Rome Convention, *supra* note 37, at art. 3.

n60 See Keyuan, *supra* note 58, at 532; STATUS OF CONVENTIONS, *supra* note 41.

n61 See Young & Valencia, *supra* note 16 at 32.

n62 See *id.*

n63 See Keyuan, *supra* note 58, at 532.

n64 See Garmon, *supra* note 20, at 272-73.

n65 See *id.*

n66 See *id.*

n67 See *id.*; Rome Convention, *supra* note 37, art. 6.

n68 Garmon, *supra* note 20, at 273.

n69 See Rome Convention, *supra* note 37, art. 16 (providing a forum for dispute resolution between parties regarding issues arising out of the interpretation or application of the Convention, but providing no specific sanctions).

n70 Garmon, *supra* note 20, at 273.

n71 *Id.* at 275.

n72 *See id.*

n73 *See* Garmon, *supra* note 20, at 275; Timothy H. Goodman, "Leaving the Corsair's Name to Other Times:" *How to Enforce the Law of Sea Piracy in the 21st Century Through Regional International Agreements*, 31 CASE. W. RES. J. INT'L. L. 139, 158 (1999).

n74 *See* Garmon *supra* note 20, at 275.

n75 *See id.*

n76 *See* STATUS OF CONVENTIONS, *supra* note 41.

n77 *See id.*; Garmon, *supra* note 20, at 275.

n78 *See* Garmon, *supra* note 20, at 275.

n79 *See* Goodman, *supra* note 73, at 156-57.

n80 *See id.* at 157-58.

n81 *See id.* at 159-60.

n82 *Id.* at 158.

n83 *See id.* at 156-57.

n84 Goodman, *supra* note 73, at 156-57.

n85 *See* Phillip Day, *Security in a Straitjacket?: Why It's So Hard to Make a Key Asian Waterway Safe from Terror*, WALL ST. J., June 13, 2002, at A5, available at 2003 WL-WSJ 3970564.

n86 *Id.*

n87 *See* Young & Valencia, *supra* note 16, at 32, 38-39.

n88 Day, *supra* note 85 (quoting Pootengal Mukundan, Director of the International Maritime Bureau).

n89 *See* Young & Valencia, *supra* note 16, at 38.

n90 *See id.* at 38-39 (describing the "hands off" policy underlying a joint patrol agreement between Indonesia, Malaysia, and Singapore).

n91 *See* ASSOCIATION OF SOUTHEAST ASIAN NATIONS, ARF STATEMENT ON COOPERATION AGAINST PIRACY AND OTHER THREATS TO MARITIME SECURITY, at www.aseansec.org/14837.htm (last visited Nov. 20, 2004).

n92 *See* *Asia to Roll out Anti-Piracy Pact, October*, BORNEO BULL., Nov. 19, 2004, at <http://www.brunet.bn/news/bb/fri/nov19w4.htm> (last visited Nov. 20, 2004); *Asian Countries to Sign Anti-Piracy Pact in October*, ASIA PULSE, September 22, 2003, at 2003 WL 64286644.

n93 *See generally* Garmon, *supra* note 20, at 273 (discussing broadening the definition of piracy); Goodman, *supra* note 73, at 156-57 (discussing regional piracy charters and accords); Halberstam, *supra* note 32, at 272-76 (discussing the customary international law of piracy).

n94 *See Garmon, supra* note 20, at 267.

n95 *See id.*

n96 *See id.*

n97 *See, e.g., Halberstam, supra* note 32, at 272-73.

n98 RUBIN, *supra* note 1, at 321.

n99 *See Halberstam, supra* note 32, at 273-74.

n100 *See RUBIN, supra* note 1, at 307.

n101 *Id.* at xiii.

n102 *See Halberstam, supra* note 32, at 273 (citing *In Re Piracy Jure Gentium*, 1934 App. Cas. 586, 598, *reprinted in* 3 BRIT. INT'L L. CASES 836, 842 (1965)).

n103 *Id.* at 273-74.

n104 *Id.* (citing *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 232 (1844)).

n105 See Halberstam, *supra* note 32, at 280 (discussing the conclusion of the Nyon agreement of 1937); RUBIN, *supra* note 1, at 295.

n106 See Halberstam, *supra* note 32, at 273.

n107 See *generally id.* (arguing that piracy has historically been seen as any act of violence, committed at sea or close to the sea, by persons not acting under proper authority).

n108 See Halberstam, *supra* note 32, at 283; Samuel Pyeatt Menefee, *Anti Piracy Law in the Year of the Ocean, Problems and Opportunity*, 5 ILSA J. INT'L & COMP. L. 309, 313-14 (1999); RUBIN, *supra* note 1, at 322 (discussing the new, narrow definition of piracy as *de lege ferenda*).

n109 See *id.*

n110 See Halberstam, *supra* note 32, at 283; Menefee, *supra* note 108, at 313-14; RUBIN, *supra* note 1, at 322.

n111 See RUBIN, *supra* note 1, at 322.

n112 See *id.*

n113 See Halberstam, *supra* note 32, at 273.

n114 See *id.*

n115 See Garmon, *supra* note 20, at 273.

n116 *See id.* at 273.

n117 *See Young & Valencia, supra* note 16, at 43.