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New Developments in the International Law of Piracy

ZOU Keyuan*

Abstract

The law of piracy can be regarded as the oldest branch of international law, particularly the law of the sea. While the basic legal stipulations in international law as embodied in the 1982 UN Convention on the Law of the Sea remained unchanged for a long time, there are some new developments relating to the change of the law of piracy associated with the resurgence of contemporary piracy in the 1990s and the so-called “anti-terror war” led by the United States after the September 11 event. This paper will address three aspects: the definition of piracy; new international legislation concerning piracy; and recent State practice, all contributing to the development of the international law of piracy.

I. Introduction

1. According to the existing literature, early references to piracy can be found in *Justinian’s Digest* in 529 AD and in *King John’s Ordinance* of 1201.¹ However, a law specifically governing the issue of piracy is traced back to the seventeenth century. The English act on piracy enacted in 1698 was probably the first law of piracy at the

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1 See Patricia W. Birnie, *Piracy: Past, Present and Future*, 11 *Marine Policy* (1987), 163.

national level.² Other States such as Germany and the United States then followed suit to enact their laws of piracy.

2. From these old pieces of legislation, we can see that piracy was punished at the beginning within the domestic legal domain. Later on, the piracy issue came into the international scene since it threatened transnational maritime commerce and transportation. The first legal document governing piracy in international law was the 1856 Treaty of Paris, which ended privateering by commissioned pirate ships. The 1889 Montevideo Convention accepted the principle that the suppression of piracy was the responsibility of mankind. The Nyon Agreement of 1937 defined the unidentified attacks in the Mediterranean as “acts of piracy”. However, the most important treaty which codified the international law of piracy was the 1958 Geneva Convention on the High Seas, which contains eight provisions concerning the suppression of piracy on the high seas.³ The 1982 UN Convention on the Law of the Sea (the LOS Convention)⁴ simply incorporates the anti-piracy provisions of the 1958 Convention without any change. Accordingly, States are obliged to cooperate in the suppression of piracy,⁵ and can use their warships or military aircraft or similar governmentally authorized ships or aircraft to seize a pirate ship or aircraft and arrest pirates.⁶ It is to be noted that the above piracy suppression clauses are also applicable to the exclusive economic zones (EEZs) to the extent that they are in consistency with the relevant provisions of the LOS Convention regarding the EEZ, which is the maritime zone where the coastal State enjoys sovereign rights to its natural resources and certain kinds of jurisdiction over, *inter alia*, environmental protection and marine scientific research. Though the EEZ is a maritime zone within national jurisdiction, some high seas freedoms are preserved there, such as the freedom of navigation. Piracy endangers navigation and thus greatly affects the exercise of the navigational freedom. The enforcement of the law of piracy in the EEZ may not be viewed as an impingement on any rights reserved to the coastal State.⁷

- 2 Text is reprinted in Alfred Rubin, *The Law of Piracy* (Newport, RI: Naval War College Press, 1988), 362–369. Unlike the Act of 1536, which was also relevant to piracy, this law was specifically dealing with the suppression of piracy.
- 3 See Arts 14–21 of the Conventions on the High Seas, untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_high_seas.pdf (accessed 14 January 2009).
- 4 The Convention was adopted in 1982 and came into force in 1994. Text is reprinted in 21 ILM (1982), 1261.
- 5 Art. 100 of the LOS Convention provides that “All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State”.
- 6 Art. 105 of the LOS Convention provides that “on the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board”.
- 7 See Thomas A. Clingan, Jr, *The Law of Piracy*, in: Eric Ellen (ed.), *Piracy at Sea* (Paris: ICC Publishing, 1989), 170.

3. While the basic legal stipulations in international law as embodied in the LOS Convention remained unchanged for a long time, there are new developments relating to the change of the law of piracy associated with the resurgence of contemporary piracy in the 1990s and the so-called “anti-terror war” led by the United States after the September 11 event. This paper will discuss these developments in three areas: the definition of piracy; new international legislation concerning piracy; and recent relevant State practice.

II. Definitional change

4. The term “piracy” usually refers to a broad range of violent acts at sea. The classic and typical definition of piracy is contained in the LOS Convention which defines it as:

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 a private aircraft, and directed to: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).⁸

5. It consists of five elements: (i) the acts complained against should be crimes of violence such as robbery, murder, assault or rape; (ii) committed on the high seas beyond the land territory or territorial sea, or other territorial jurisdiction, of any State; (iii) by a private ship, or a public ship which through mutiny or otherwise is no longer under the discipline and effective control of the State which owns it; (iv) for private ends; and (v) from one ship to another, so that two ships at least are involved.⁹ The definition may also refer to piratical acts which are not necessarily violent, such as detention or any act of depredation. According to William T. Burke, “personal behaviour that is entirely peaceful can be piracy when it occurs in the operation of a vessel that one knows to be committing piracy”.¹⁰

6. However, the definition provided for in the LOS Convention has limitations in respect of contemporary piracy. First, it defines “piracy” as only for “private ends”, and therefore piracy for political or other ends is generally excluded from the above definition. Second, accordingly, piracy *juris gentium* presupposes that a criminal act be

8 Art. 101 of the LOS Convention.

9 L.F.E. Goldie, *Terrorism, Piracy and the Nyon Agreement*, in: Yoram Dinstein (ed.), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Dordrecht: Martinus Nijhoff, 1988), 227.

10 Personal communications dated 23 April 2008.

exercised by passengers or the crew of a ship against another ship or persons or property on its board. The two-vessel requirement is an ingredient of the crime of piracy, unless a criminal act occurs in *terra nullius*.¹¹ Thus “internal seizure” within the ship is hardly regarded as an “act of piracy” under the definition of the LOS Convention.¹² Because of the above limitations and other alleged deficiencies in the definition, some scholars have suggested revising this definition.¹³ It is recalled that in 1970, before the Third United Nations Conference on the Law of the Sea (UNCLOS III), the International Law Association suggested a definition of piracy as “unlawful seizure or taking control of a vessel through violence, threats of violence, surprise, fraud or other means”,¹⁴ but it was not taken into account in UNCLOS III. In addition, since the above definition is only applicable to the acts of piracy on the high seas or places outside jurisdiction of States, it has a geographic limitation and could not cover the whole picture of contemporary piracy.

7. Having said that, we have to know that during the time when the LOS Convention was negotiated and adopted (1973–1982), piracy was not an issue on the agenda. It is recalled that the issue of piracy returned to the international maritime agenda only in 1983 when the Swedish delegation to the International Maritime Organization (IMO) sponsored Resolution A545 (13) “Measures to Prevent Acts of Piracy and Armed Robbery against Ships” in IMO’s Maritime Safety Committee.¹⁵

8. The IMO has taken the position to divide acts of piracy into two categories by geographical and legal divisions of maritime zones: piracy on the high seas is defined as “piracy” in accordance with the LOS Convention, while acts of piracy in ports or national waters (internal waters and territorial sea) are defined as “armed robbery against ships” (“any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of ‘piracy’, directed against a ship, or against persons or property on board such a ship, within a State’s jurisdiction over such offences”).¹⁶ However, we may notice that the shortcoming of such a division is obvious: piracy is not equivalent to armed robbery and it may also include other

11 Natalino Ronzitti, *The Law of the Sea and the Use of Force against Terrorist Activities*, in N. Ronzitti (ed.), *Maritime Terrorism and International Law* (Dordrecht: Martinus Nijhoff, 1990), 1.

12 A different view holds that internal seizures could be piracy. See Samuel P. Menefee, *Piracy, Terrorism, and the Insurgent Passenger: A Historical and Legal Perspective*, in: Ronzitti (ed.), *ibid.*, 60. In addition, it is acknowledged that even the internal seizure was not piracy in international law; it is still piracy under municipal law of the flag State.

13 See Alfred P. Rubin, *Is Piracy Illegal?*, 70 AJIL (1976), 95.

14 International Law Association, *Piracy: Sea and Air*, Report of the Fifty-fourth Conference, 23–29 August 1970, 708.

15 Max Mejia, Jr, and P.K. Mukherjee, *Selected Issues of Law and Ergonomics in Maritime Security*, 10 *Journal of International Maritime Law* (2004), 318.

16 See 2.2 of the Draft Code of Practice for the Investigation of Armed Robbery against Ships, in MSC Circ.984, 20 December 2000, www.imo.org/includes/blastDataOnly.asp/data_id%3D1880/984.pdf (accessed 12 March 2008).

violent acts such as murder, assault and rape. Recent piratical incidents show that hijacking and kidnapping of crew for ransom has become a new phenomenon as evidenced by piratical acts in Somalia. What is more questionable is its contents describing what constitutes the “armed robbery against ships”. In comparison with the definition of piracy in the LOS Convention, the IMO definition on armed robbery against ships can be described as a definition for any piratical act which occurs in a place within the jurisdiction of States over such a crime, since the definition does not limit itself only to “armed robbery” as seen above. Therefore, the attempt of the IMO is clear in that it tried to use an alternative term in covering piratical acts within the waters of national jurisdiction (except the EEZ).

9. The 2004 Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) reflects the divisional definition on piracy and armed robbery by following the definition of the LOS Convention for “piracy” and the definition from the IMO Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships for “armed robbery against ships” (Article 1). It is to be noted that, first, the ReCAAP has slightly modified the LOS Convention definition by omitting the word “aircraft” as a pirate-attacked target;¹⁷ and, second, the significance of the ReCAAP concerning the definition on piracy is that it is the first international treaty which has turned the non-legally binding IMO definition into a legal definition.

10. The Piracy Reporting Centre of the International Maritime Bureau (IMB-PRC) suggested a definition of piracy “as an act of boarding any vessel with the intent to commit theft or any other crime and with the intent or capability to use force in the furtherance of that act”,¹⁸ which seems to be accepted by the shipping industry but has not been recognized either in international law or domestic law.

11. The problem concerning different definitions also affects the number of incidents relating to piratical attacks. As some scholars point out, the definition of the piracy under the LOS Convention may lead to the conclusion that the low incidence of such acts implies that there is no significant problem of piracy today.¹⁹ On the other hand, the reported 115 incidents by IMB-PRC in 1999 were simply based upon its own definition. However, as the Piracy Reporting Center acknowledged, the number

17 For reference, see Art. 1 of the ReCAAP which provides that “(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 a private aircraft, and directed to: (i) on the high seas, against another ship, or against persons or property on board such ship; (ii) against a ship, persons or property in a place outside the jurisdiction of any State; (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).”

18 IMB-PRC, *Piracy and Armed Robbery against Ships, Report for the Period of 1 January–30 June 1998*, Kuala Lumpur, 1 July 1998.

19 Jason Abbot and Neil Renwick, *Pirates? Maritime Piracy and Societal Security in Southeast Asia*, 11 *Pacifica Review* (1999), 11.

they tallied was the lowest possible figure and true figures could be much higher due primarily to the under-reporting of incidents related to its definition.

12. This is related to the use of a different definition on piracy by the insurance industry since piracy is designated as “a marine peril” in the contemporary markets.²⁰ Since “theft without force or the threat of force is not piracy under a policy of marine insurance”,²¹ it at least partially explains why shipowners are reluctant to report piracy incidents which do not involve much loss.

13. What is more confusing is that the definition of piracy is intermingled with the possible definition of maritime terrorism. Although there is no universally accepted definition for terrorism, it is well believed that the violent acts performed by terrorists at sea are very similar to those by pirates. Thus, it is not strange that maritime terrorism can be defined as “political piracy”.²² Piratical attacks and hijacking off the coast of Somalia remind us of the similar hijackings committed by the Abu Sayyaf in the Southern Philippines.

14. In conclusion, the definition of piracy in the LOS Convention, though a valid legal definition until the time when there is a revision to be taken afterwards, becomes impractical in the fight against contemporary piracy, armed robbery and maritime terrorism.

15. First, the criterion for “private ends” is blurred by terrorist attacks which usually carry some political and public purposes. It is recalled that the definition of piracy in the US law does not expressly exclude piracy for “political ends” though making a reference to the definition in international law.²³ It is reported that pirates operating in the Somali waters carry some political and social ends and are likely to be commanded by a group of Somali local politicians.²⁴

16. The convergence of maritime terrorism and piracy can also be supported by the developments of counterterrorism law. Regional treaties de-link the political motive

20 D. Rhidian Thomas, *Insuring the Risk of Maritime Piracy*, 10 *Journal of International Maritime Law* (2004), 358.

21 Thomas, *ibid.*, 364.

22 According to Menefee, maritime terrorism refers to “any illegal act directed against ships, their passengers, cargo or crew, or against sea ports with the intent of directly or indirectly influencing a government or group of individuals”. See Samuel Pyeatt Menefee, “Terrorism at Sea: The Historical Development of an International Legal Response”, in: Brian A.H. Parritt (ed.), *Violence at Sea* (Paris, 1986), 192.

23 The US law defines “piracy” as “[a]ny act of piracy as defined by international law if the perpetrators are found in the United States; any act of murder, robbery, or hostility against the United States or against a United States citizen on the high seas, by a citizen of the United States; and acts by aliens against the United States or its citizens that are defined as piracy in the treaty between the nation that the individual is a citizen of and the United States”. See United States Code, Title 18, 1651–1653; cited in Jack A. Gottschalk et al., *Jolly Roger with an Uzi: The Rise and Treat of Modern Piracy* (Annapolis, MD: Naval Institute Press, 2000), 34.

24 See “China Conducts Escorts in the Gulf of Aden Mission Area Independent of Foreign Command”, military.people.com.cn/GB/42969/58519/8668187.html (accessed 16 January 2009).

from the crime of terrorism. According to the Council of Europe's European Convention on the Suppression of Terrorism (1977), certain offences like those found in The Hague Convention and Montreal Protocol are treated as non-political offences.²⁵ The 1971 OAS Convention to Prevent and Punish Acts of Terrorism considers acts of terrorism as "common crimes of international significance, regardless of motive".²⁶ In this sense, piracy and maritime terrorism can be treated within the same category of crime.

17. Second, the criterion on "high seas" is blurred by the fact that most of the piratical acts take place within the waters of national jurisdiction in the contemporary world. Although piracy committed within national waters is subject to punishment in accordance with relevant domestic penal codes, the current definition provided by the IMO and contained in the ReCAAP obviously applies to such piratical acts. This also can be seen through the resolutions adopted by the United Nations Security Council (UNSC) on the suppression of Somali piracy. In the same vein, the fact that the IMO definition brings piracy and armed robbery at sea together indicates that under current international law, piracy and armed robbery are treated as the same and receive the same criminal punishment.

18. Third, in some cases such as hijacking by pirates from within the ship, the "two ships requirement" may not be applicable. As we know, no pirate vessel was involved in the *Achille Lauro* incident,²⁷ as the hijackers were passengers on board. Terrorist attacks with suicide bombers on board are also relevant.

19. Finally, it seems that the world community at present has no choice but to accept the definition provided by the LOS Convention since there is no other well-established legal definition of piracy at the international level. But on the other hand, for the convenience of the suppression of piracy, the world community seems to have accepted the dichotomous definition provided by the IMO as manifested in numerous international documents including those UN documents relating to the LOS Convention.²⁸ Thus, the current prevailing term "piracy and armed robbery against ships" is a compromised combination so as to amend the obvious deficiencies left over by the LOS Convention.

25 See Art. 1 of the Convention. Text is reprinted in 15 ILM (1976), 1272.

26 See Art. 2 of the Convention. Text is reprinted in 10 ILM (1971), 256.

27 On 3 October 1985, a group of Palestinian guerrillas hijacked the Italian cruise ship *Achille Lauro* while it was in Egyptian territorial waters. The hijackers demanded the release of 50 Palestinians held in Israel in return for the release of the passengers. They ordered the ship to sail to Syria, which refused them port entry. The hijackers then on 8 October killed an American passenger. Several days later, the four hijackers gave themselves up to the Egyptian authorities. On 11 October, an Egyptian civilian aircraft was intercepted by US military aircraft over the Mediterranean Sea and instructed to land at an air base in Sicily. Four Palestinians on board were detained by the Italian authorities and subsequently indicted and convicted in Genoa for offences related to the hijacking of the ship and the death of the American passenger.

28 See, for example, "Oceans and Law of the Sea", Report of the Secretary-General, UN Doc. A/57/57, 7 March 2002, 27–29.

In this sense, it is expected that once there is a review conference convened for the LOS Convention,²⁹ the definition of piracy will be plausibly amended.

III. New legislation

20. While there is no change so far to the piracy provisions of the LOS Convention, the international law of piracy continues to develop. New legislations at the international and/or regional level can be seen in recent years. Some are directly dealing with the issue of piracy such as the ReCAAP, and some are closely related to it such as the 2005 SUA Protocol.

III.A. The SUA Protocol

21. The 2005 SUA Protocol is an additional important legal document to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention),³⁰ which was adopted in 1988 under the auspices of the IMO and came into force in 1992. The 1988 SUA Convention covers unlawful acts no matter whether they are for political ends or for private ends. It aims to punish any person who commits an offense by unlawfully and intentionally seizing or exercising control over a ship by force or threat thereof; or performing 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 destroying a ship or causing damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship. Each Contracting Party should take necessary measures to establish its jurisdiction over the above offenses or extradite the offender or the alleged offender to the other Contracting Party who has the corresponding jurisdiction. The SUA Convention applies to the offences committed in a ship which is navigating or is scheduled to navigate into, through or from the waters beyond the outer limit of the territorial sea of a coastal State or applies when the offender or the alleged offender is found in the territory of a Contracting Party other than the previous case.³¹

22. After the 9/11 terrorist attack, the weakness of the SUA Convention was saliently discovered since it did not cover all violent acts endangering maritime safety. The world community then reached the consensus to have an amendment to it so as to fill in its gaps. The discussion on the Protocol to SUA Convention is mainly focused on the possible incorporation of the shipboarding regime proposed by the United States (as reflected in the bilateral agreements signed between the United States and relevant flag-State countries) into the SUA Convention. The diplomatic conference on the SUA

29 According to Art. 312 of the LOS Convention, after 10 years of its entry into force, any Contracting Party may propose specific amendments to the Convention and request the convening of a conference to consider such amendments.

30 Text is reprinted in 27 ILM (1988), 672.

31 At the same time, the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (the SUA Protocol) was also adopted, which contains similar provisions.

Convention was held in October 2005 to consider the adoption of two Protocols incorporating substantial amendments aimed at strengthening the SUA Convention in order to provide an appropriate response to the increasing risks posed to maritime navigation by piracy as well as maritime terrorism.³²

23. As a consequence, the Protocol to the SUA Convention was adopted and there are two major revisions/additions concerning the SUA Convention: first, the Protocol expands the coverage of the unlawful acts under Article 3 of the SUA Convention by adding a new provision to cover:

Uses against or on a ship or discharging from a ship any explosive, radioactive material or BCN (biological, chemical, nuclear) weapon in a manner that causes or is likely to cause death or serious injury or damage; discharges, from a ship, oil, liquefied natural gas, or other hazardous or noxious substance, in such quantity or concentration that causes or is likely to cause death or serious injury or damage; uses a ship in a manner that causes death or serious injury or damage; transports on board a ship any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, death or serious injury or damage for the purpose of intimidating a population, or compelling a Government or an international organization to do or to abstain from doing any act; transports on board a ship any BCN weapon, knowing it to be a BCN weapon; any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an IAEA comprehensive safeguards agreement; and transports on board a ship any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon, with the intention that it will be used for such purpose.³³

24. Another major development is the shipboarding regime. According to Article 8*bis* of the 2005 Protocol, co-operation and procedures are needed if a State Party desires to board a ship flying the flag of a State Party when the requesting Party has reasonable grounds to suspect that the ship or a person on board the ship is, has been, or is about to be involved in, the commission of an offence under the Convention. The authorization and co-operation of the flag State are required before such a boarding. A State Party may notify the IMO Secretary-General that it would allow authorization to board and search a ship flying its flag, its cargo and persons on board if there is no response

32 See "Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation", www.imo.org/home.asp (accessed 28 March 2005).

33 "Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988", http://www.imo.org/Conventions/mainframe.asp?topic_id=259&doc_id=686review (accessed 26 October 2005).

from the flag State within four hours. A State Party can also notify that it authorizes a requesting Party to board and search the ship, its cargo and persons on board, and to question the persons on board to determine if an offence has been, or is about to be, committed. The Protocol limits the use of force and includes important safeguarding measures when a State Party takes action against a ship.³⁴

25. It is to be noted that the shipboarding regime, though new to the SUA Convention, has existed in international law for almost two decades since the Vienna Convention for the Suppression of Illicit Traffic in Narcotic Drugs and Psychotropic Substances was adopted in December 1988.³⁵ It is the first international treaty containing the “multilateral shipboarding provision”³⁶ as stipulated in Article 17 of the Convention. The boarding regime is also incorporated in other international treaties including the Protocol against the Smuggling of Migrants by Land, Sea and Air to the 2000 UN Convention against Transnational Organized Crime,³⁷ and the 1995 United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.³⁸

26. It is to be noted that the 2005 SUA Protocol only has a few ratifications as of the end of 2008. Nevertheless, the shipboarding regime provided for in the protocol is most applicable to piracy and maritime terrorism for the purpose of maintaining maritime security around the world.

III.B. SOLAS

27. The second important development related to the international law of piracy under the auspices of the IMO is the amendments to the 1974 International Convention for the Safety of Life at Sea (SOLAS) taking place in December 2002 when the SOLAS Chapter XI-2 on Special Measures to enhance maritime security and the International Ship and Port Facility Security (ISPS) Code were adopted. There are two parts in the Code: Part A, which is mandatory, and Part B, which contains voluntary guidelines for implementing the mandatory requirements.³⁹ “The regulation requires Administrations to set security

34 Ibid.

35 Text is reprinted in 28 ILM (1989), 497. It came into force on 11 November 1990.

36 See Brad J. Kieserman, Preventing and Defeating Terrorism at Sea: Practical Considerations for Implementation of the Draft Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, in: Myron H. Nordquist, John N. Moore and Kuen-chen FU (eds), Recent Developments in the Law of the Sea and China (Leiden: Martinus Nijhoff, 2006), 433.

37 It entered into force on 29 September 2003, www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_eng.pdf (accessed 10 March 2008).

38 It entered into force on 11 December 2001, daccessdds.un.org/doc/UNDOC/GEN/N95/274/67/PDF/N9527467.pdf?OpenElement (accessed 10 March 2008).

39 International Convention for the Safety of Life at Sea (SOLAS), 1974, www.imo.org/Conventions/contents.asp?topic_id=257&doc_id=647 (accessed 11 March 2008).

levels and ensure the provision of security level information to ships entitled to fly their flag. Prior to entering a port, or whilst in a port, within the territory of a Contracting Government, a ship shall comply with the requirements for the security level set by that Contracting Government, if that security level is higher than the security level set by the Administration for that ship.”⁴⁰ Regulation XI-2/8 confirms the role of the Master in exercising his professional judgment over decisions necessary to maintain the security of the ship.⁴¹ “Regulation XI-2/5 requires all ships to be provided with a ship security alert system, according to a strict timetable that will see most vessels fitted by 2004 and the remainder by 2006.”⁴² Regulation XI-2/6 requires Contracting Parties “to ensure that port facility security assessments are carried out and that port facility security plans are developed, implemented and reviewed in accordance with the ISPS Code”.⁴³ They entered into force in July 2004 and provide further safety measures, contributing to the fight against piracy and armed robbery against ships. Further amendments took place in June 2003 regarding the safety of navigation. A new paragraph is added to SOLAS regulation V/28 and requires all ships of 500 gross tonnage and above, engaged on international voyage exceeding 48 hours, to submit a daily report to their company regarding the ship’s position and course and speed, and details of any external or internal conditions that are affecting the ship’s voyage or the normal safe operation of the ship.⁴⁴

III.C. ReCAAP

28. The most significant development for the international law of piracy lies in the adoption of the ReCAAP.⁴⁵ It was signed by 16 Asian countries including Bangladesh, Brunei, Cambodia, China, India, Indonesia, Japan, Laos, Malaysia, Myanmar, the Philippines, Sri Lanka, Singapore, South Korea, Thailand and Vietnam on 11 November 2004. It is reported that Cambodia, Japan, Laos and Singapore were the first that officially ratified the Agreement on 28 April 2005.⁴⁶ The Agreement came into force on 4 September 2006 when it received ten ratifications.⁴⁷

40 Ibid.

41 Ibid.

42 Ibid.

43 Ibid. For comments on the amendments, see Nilufer Oral, *Terror at Sea: Detection and Prevention—The New International Ship and Port Facility Security Code and the Amended SOLAS Chapter XI-2*, in: Myron H. Nordquist, John N. Moore and Kuen-chen FU (eds), above n.36, 335–349.

44 International Convention for the Safety of Life at Sea (SOLAS), 1974, http://www.imo.org/Conventions/contents.asp?topic_id=257&doc_id=647 (accessed 11 March 2008). It entered into force on 1 July 2006.

45 <http://www.recaap.org/about/pdf/ReCAAP%20Agreement.pdf> (accessed 4 March 2008).

46 See “Singapore, Japan, Laos and Cambodia Take the Lead to Sign the Anti-Piracy Agreement”, *Lianhe Zaobao* (Singapore), 29 April 2005.

47 It is regretted that two major Strait States Indonesia and Malaysia have not yet ratified the Agreement.

29. The Agreement obliges Contracting States (i) to prevent and suppress piracy and armed robbery against ships; (ii) to arrest pirates or persons who have committed armed robbery against ships; (iii) to seize ships or aircraft used for committing piracy or armed robbery against ships; and (iv) to rescue victim ships and victims of piracy or armed robbery against ships.⁴⁸ The Contracting States pledge to implement the Agreement including preventing and suppressing piracy and armed robbery against ships “to the fullest extent possible” “in accordance with their respective national laws and regulations and subject to their available resources or capabilities” (Article 2.1).

30. For the above purposes, the Contracting States are required to cooperate between/among themselves. The first area required for cooperation is information sharing. Each Contracting Party designates a focal point responsible for its communication with the Information Sharing Center (ISC), and should “ensure the smooth and effective communication between its designated focal point, and other competent national authorities including rescue coordination centers, as well as relevant non-governmental organizations”. Each Contracting Party should “make every effort to require its ships, ship owners, or ship operators to promptly notify relevant national authorities including focal points, and the Center when appropriate, of incidents of piracy or armed robbery against ships” (Article 9). Contracting Parties are required to give prompt notification of the information about an imminent threat of, or an incident of, piracy or armed robbery against ships and in the event that a Contracting Party receives an alert from the Center as to an imminent threat of piracy or armed robbery against ships, that Contracting Party should promptly disseminate the alert to ships within the area of such an imminent threat (Article 9). The Agreement has created a right of request for all Contracting Parties regarding the information about piracy and armed robbery against ships.⁴⁹ The requested Contracting Party has the obligation to implement such request by taking effective and practical measures.⁵⁰

31. The second area required for cooperation lies in the endeavours to take legal and judicial measures for the prevention and suppression of piracy and armed robbery including extradition and mutual legal assistance. According to the Agreement, a Contracting Party should endeavour to extradite pirates to the other Contracting Party which has jurisdiction over them and to render mutual legal assistance in criminal matters including the submission of evidence related to piracy and armed robbery at the request of another Contracting Party, but all these endeavours are subject to the national laws and regulations of the Contracting Party concerned.⁵¹

32. The third area required for cooperation is in the process of capacity building (including technical assistance such as educational and training programmes) as the Agreement obliges each Contracting Party to endeavour to cooperate to the fullest

48 Art. 3 of the ReCAAP.

49 See Art. 10 of the ReCAAP.

50 See Art. 11 of the ReCAAP.

51 See Arts 12–13 of the ReCAAP.

possible extent with other Contracting Parties so as to enhance the capacity to prevent and suppress piracy and armed robbery against ships (Article 14.1). Contracting Parties can also make cooperative arrangements such as joint exercises between/among themselves (Article 15).

33. Another important legal arrangement made by the Agreement is the establishment of the ISC, which is located in Singapore.⁵² The Center is composed of the Governing Council (which is the decision-making body composed of one representative from each Contracting Party) and the Secretariat (which is headed by the Executive Director, who is responsible for the administrative, operational and financial matters of the Center in accordance with the policies as determined by the Governing Council and the provisions of the Agreement). It is designed “to promote close cooperation among the Contracting Parties in preventing and suppressing piracy and armed robbery against ships” (Article 4.1). As provided for by the Agreement, the ISC carries the following functions:

- (a) to manage and maintain the expeditious flow of information relating to incidents of piracy and armed robbery against ships among the Contracting Parties;
- (b) to collect, collate and analyze the information transmitted by the Contracting Parties concerning piracy and armed robbery against ships, including other relevant information, if any, relating to individuals and transnational organized criminal groups committing acts of piracy and armed robbery against ships;
- (c) to prepare statistics and reports on the basis of the information gathered and analyzed under subparagraph (b), and to disseminate them to the Contracting Parties;
- (d) to provide an appropriate alert, whenever possible, to the Contracting Parties if there is a reasonable ground to believe that a threat of incidents of piracy or armed robbery against ships is imminent;
- (e) to circulate requests referred to in Article 10 and relevant information on the measures taken referred to in Article 11 among the Contracting Parties;
- (f) to prepare non-classified statistics and reports based on information gathered and analyzed under subparagraph (b) and to disseminate them to the shipping community and the International Maritime Organization; and
- (g) to perform such other functions as may be agreed upon by the Governing Council with a view to preventing and suppressing piracy and armed robbery against ships.⁵³

34. In addition, the ISC also plays an important role in providing capacity-building assistance.⁵⁴ The ISC was officially launched in November 2007 and the information about

52 See Art. 4 of the ReCAAP.

53 Art. 7 of the ReCAAP.

54 See Art. 14.2 of the ReCAAP.

its operations can be found at www.recaap.org/index_home.html. The daily operations of the ISC are funded by the host State as well as voluntary contributions from other Contracting Parties or even other sources as agreed by the Governing Council (Article 6.1). In addition to Singapore, three Contracting Parties—China, Japan and South Korea—also provide operational funds for the ISC.⁵⁵

35. There are several characteristics regarding the ReCAAP. First, though the original negotiators of the Agreement are 16 Asian States, the accession to the Agreement is not exclusive; any State can join after its entry into force as provided for in the Agreement (Article 18.5). Second, the ReCAAP is the first specific international treaty concerning the prevention and suppression of piracy. Because of this, it becomes a model of law for other regional legal arrangements. It is reported that a similar agreement will be concluded for the Western Indian Ocean.⁵⁶ Third, the ISC established under the ReCAAP is a governmental international organization, different from other organizations which operate similar functions such as the Piracy Reporting Centre (situated in Kuala Lumpur) of the IMB under the International Chamber of Commerce. Finally, it contributes to the legal definition on the piracy and armed robbery against ships as mentioned above.

36. In international law, some scholars tend to label non-legally binding but normative documents as “soft law”, such as resolutions adopted by the UN General Assembly.⁵⁷ On 15 March 2006, the Presidential Statement of the UN Security Council was issued to encourage “Member States whose naval vessels and military aircraft operate in international waters and airspace adjacent to the coast of Somalia to be vigilant to any incident of piracy therein and to take appropriate action to protect merchant shipping, in particular the transportation of humanitarian aid, against any such act, in line with relevant international law”.⁵⁸

37. Unlike resolutions passed by the UN General Assembly, resolutions passed by the UNSC, particularly those under Chapter VII of the UN Charter, have legal effect and, when the term “decide” is used, they contain the highest degree of compelling binding

55 As is reported, both China and South Korea agreed to provide the ISC with the respective amount of US\$50 000 and US\$100 000 annually for the ISC. See Cai Tianchen, ReCAAP Obtained 100,000 US Dollars from South Korea, *Lianhe Zaobao* (Singapore), 29 February 2008, www.zaobao.com.sg/sp/sp080229_540.shtml (accessed 29 February 2008).

56 A relevant meeting took place from 14 to 18 April 2008 in Dares Salaam. See UN Division for Ocean Affairs and the Law of the Sea, “Advance and unedited material on ‘maritime security and safety’ which will later be integrated into the Secretary-General’s report on oceans and the law of the sea for the sixth-third session of the General Assembly and for the ninth meeting of the consultative process”, 22 February 2008, 6, www.un.org/Depts/los/consultative_process/documents/maritime_security_and_safety.pdf (accessed 6 March 2008).

57 See Malcolm N. Shaw, *International Law* (6th edn, Cambridge: Cambridge University Press, 2008), 117–118. For further reference, see Hartmut Hillgenburg, *A Fresh Look at Soft Law*, 10 *EJIL* (1999), 499–515.

58 “Security Council urges action over piracy off Somalia”, www.imo.org/TCD/mainframe.asp?topic_id=1347 (accessed 11 March 2008).

force. In June 2008, the UNSC passed a resolution on combating acts of piracy and armed robbery off Somalia's coast (Resolution 1816).⁵⁹ While the Security Council expressed its grave concern about piracy and armed robbery against vessels in the waters off the coast of Somalia, it determined that such piratical incidents exacerbated the situation in Somalia "which continues to constitute a threat to international peace and security in the region".⁶⁰ Therefore, the Security Council decided to act under Chapter VII of the Charter of the United Nations. It urges "States whose naval vessels and military aircraft operate on the high seas and airspace off the coast of Somalia to be vigilant to acts of piracy and armed robbery" and "to cooperate with each other, with the IMO and, as appropriate, with the relevant regional organizations in connection with, and share information about, acts of piracy and armed robbery in the territorial waters and on the high seas off the coast of Somalia, and to render assistance to vessels threatened by or under attack by pirates or armed robbers, in accordance with relevant international law".⁶¹ More significantly, the Security Council decided that

for a period of six months from the date of this resolution, States cooperating with the TFG^[62] in the fight against piracy and armed robbery at sea off the coast of Somalia, for which advance notification has been provided by the TFG to the Secretary General, may: (a) enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and (b) use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery.⁶³

38. It is the first time that the UN Security Council had placed the issue of sea piracy on its agenda and treated it as a matter threatening international peace and security. According to the UN Charter, UN member States are obliged to implement UNSC resolutions as it is stipulated that UN members agree to accept and carry out the decisions of the Security Council in accordance with the Charter.⁶⁴ Furthermore, UN member States have the duty to contribute to the maintenance of international peace and security by supporting materialistically the actions undertaken by the Security Council, with armed forces, assistance and facilities, including rights of passage.⁶⁵ These

59 UN Doc. S/RES/1816 (2008), 2 June 2008, daccessdds.un.org/doc/UNDOC/GEN/N08/361/77/PDF/N0836177.pdf?OpenElement (accessed 30 October 2008).

60 See *ibid.*

61 See UN Doc. S/RES/1816 (2008).

62 Footnote added by the author. This refers to the Transitional Federal Government of Somalia.

63 See UN Doc. S/RES/1816 (2008).

64 Art. 25 of the UN Charter.

65 See Art. 43 of the UN Charter.

provisions in the UN Charter constitute a legal foundation for the UN member States to act in accordance with Resolution 1816. This resolution, together with two other similar ones adopted by the UNSC in 2008, will no doubt greatly promote the development of the international law of piracy.

IV. Recent State practice

39. State practice is an important source for the development of international law including the law of piracy. After the September 11 terrorist attack, maritime security has been strengthened with various measures taken at domestic, regional and international levels. Moreover, efforts exerted by States can enhance the effectiveness of the implementation of the international law of piracy.⁶⁶

IV.A Maritime law enforcement

40. The riparian States to the Malacca Straits have contributed significantly to the State practice in the development of the international law of piracy either jointly or individually. The tripartite cooperation among Indonesia, Malaysia and Singapore for the maritime security in the Malacca Straits is worth mentioning. The three countries have been conducting a coordinated anti-piracy patrol off their waters in the Malacca and Singapore Straits and their efforts have resulted in a significant reduction of piracy in that region. In the end of July 2005, a scheme of maritime air surveillance was discussed, aiming to strengthen the crackdown of piracy in this critical international waterway.⁶⁷ In August 2005, the above three countries agreed to implement the scheme of air patrol over the Malacca Straits from September 2005 and also agreed to establish a Tripartite Technical Experts Group on Maritime Security.⁶⁸

41. Individually, among the three nations, Singapore is the most active. Although all are parties to the LOS Convention, only Singapore ratified the SUA Convention as well as the ReCAAP. The Singapore Ministry of Defence, which began in 2007 to establish a Changi Command and Control Centre where the Singapore Maritime Security Centre is located, will provide one-stop information and action coordinating centre for the Navy, Coast Guard and the Maritime and Port Authority of Singapore.⁶⁹ In addition,

66 For details, see Zou Keyuan, Seeking Effectiveness for the Crackdown of Piracy at Sea, 59 *Journal of International Affairs* (2005), 117–134.

67 See “Singapore and Malaysia discussed air surveillance over the Malacca Straits”, *Liaohu Zaobao* (in Chinese), 30 July 2005, www.zaobao.com/sp/sp050730_503.html (accessed 30 July 2005).

68 See “Singapore, Malaysia and Indonesia carry air patrol over the Malacca Straits from next month”, *Liaohu Zaobao* (in Chinese), 3 August 2005, www.zaobao.com/sp/sp050803_501.html (accessed 3 August 2005).

69 Lu Caixia, The Building of the Changi Command and Control Centre Began Yesterday to Promote Maritime Security Cooperation, *Lianhe Zaobao* (Singapore), 28 March 2007, www.zaobao.com.sg/sp/sp070328_501_1.html (accessed 28 March 2007).

Singapore is a member of the PSI but Malaysia and Indonesia are sceptical about this initiative and remain outside it.

42. In 2007, the Singapore Government together with the IMO convened the Meeting on the Straits of Malacca and Singapore: Enhancing Safety, Security and Environmental Protection (Singapore Meeting), where the Cooperative Mechanism for the Straits of Malacca and Singapore was created. The Mechanism comprises the Cooperation Forum, the Project Cooperation Committee and the Aids to Navigation Fund.⁷⁰ Strait-user States, including *inter alia*, Australia, China, Japan, UK and the United States, expressed their strong support for this initiative.

43. Besides the piratical acts in Southeast Asia, there is another world focal point of piracy which has caused a grave concern of the international community, i.e. the piracy in Somalia. After the UN Security Council passed several important resolutions concerning the suppression of piracy in Somalia, UN member States individually or collectively sent warships to the Somali waters and the Gulf of Aden in compliance with the UNSC resolutions. The combined maritime forces led by the United States established Combined Task Force 151 (CTF-151) in January 2009 to conduct counter-piracy operations in and around the Gulf of Aden, Arabian Sea, Indian Ocean and the Red Sea.⁷¹ It is remarkable that China, for the first time ever, sent warships to the sea areas around Somalia contributing to the international efforts to crack down on Somali piracy. The Chinese naval fleet consisting of two destroyers and a large supply vessel completed its first escort mission on 6 January 2009 for four Chinese merchant ships.⁷² According to a circular issued by the Ministry of Transport, Chinese merchant vessels including those from Hong Kong, Macao and Taiwan can apply for naval escort when entering the Gulf of Aden and Somali sea area through the Chinese Association of Shipowners.⁷³

IV.B. Proliferation Security Initiative

44. The Proliferation Security Initiative (PSI) is an effort to consider possible collective measures among the participating countries, in accordance with national legal authorities and relevant international law and frameworks, in order to prevent the proliferation of weapons of mass destruction (WMD), missiles and their related materials that pose threats to the peace and stability of the international community. It was first put

70 See "Singapore Statement on Enhancing Safety, Security and Environmental Protection in the Straits of Malacca and Singapore", IMO/SGP 1/4, 6 September 2007, 5.

71 See "New Counter-Piracy Task Force Established", 8 January 2009, www.navy.mil/search/display.asp?story_id=41687 (accessed 20 January 2009).

72 See "Navy escorts 4 vessels off Somalia on day one", 7 January 2009, www.chinadaily.com.cn/china/2009-01/07/content_7373037.htm (accessed 20 January 2009).

73 "Circular on the Matters concerning the Application of Chinese Vessels for Escort in the Gulf of Aden and Somali Sea Area", 24 December 2008, military.people.com.cn/GB/1076/142153/8638178.html (accessed 7 January 2009).

forward by President Bush on 31 May 2003 during a speech in Krakow, Poland.⁷⁴ The PSI is administered by the “core group” countries, which consisted of 11 countries (Japan, United States, UK, Italy, the Netherlands, Australia, France, Germany, Spain, Poland, Portugal), and later 4 countries joined (Canada, Singapore, Russia and Norway). According to the MOD PSI Maritime Workshop (25–26 September 2006, London) Press Release, over 75 countries expressed support for the PSI since its launch in 2003.⁷⁵

45. In September 2003, the United States published the principles of PSI. Accordingly,

The PSI is a broad international partnership of countries which, using their own laws and resources, will coordinate their actions to halt shipments of dangerous technologies to and from states and non-state actors of proliferation concern – at sea, in the air, and on land. The PSI will reinforce, not replace, other non-proliferation mechanisms. Cooperative and coordinated efforts by participating countries will give strength and substance to the broad political consensus against proliferation and help address an increasingly important challenge to international security. The United States is encouraged that all participants have agreed in Paris to abide by these Principles. We support the expansion of PSI to all responsible nations willing to accept the Principles, and will seek the involvement in PSI of such countries.⁷⁶

46. Since the core element in the PSI is interdiction, the interdiction principles are also laid out together with the PSI principles that participating States are to (i) undertake effective measures, either alone or in concert with other States, for interdicting the transfer or transport of WMD, their delivery systems and related materials to and from States and non-State actors of proliferation concern; (ii) adopt streamlined procedures for rapid exchange of relevant information concerning suspected proliferation activity; (iii) review and work to strengthen their relevant national legal authorities where necessary; and (iv) take specific actions in support of interdiction efforts regarding cargoes of WMD, their delivery systems

74 “Remarks by the President to the People of Poland, Wawel Royal Castle, Krakow, Poland, May 31, 2003”, <http://www.whitehouse.gov/news/releases/2003/05/20030531-3.html> (accessed 29 October 2005) (“When weapons of mass destruction or their components are in transit, we must have the means and authority to seize them. So today I announce a new effort to fight proliferation called the Proliferation Security Initiative. The United States and a number of our close allies, including Poland, have begun working on new agreements to search planes and ships carrying suspect cargo and to seize illegal weapons or missile technologies. Over time, we will extend this partnership as broadly as possible to keep the world’s most destructive weapons away from our shores and out of the hands of our common enemies.”).

75 “Preventing MWD Proliferation”, 26 September 2006, www.fco.gov.uk/Files/kfile/MOD_PSI MaritimeWorkshop_PressRelease.pdf (accessed 10 March 2008).

76 “Statement by the Press Secretary: Principles for the Proliferation Security Initiative”, 4 September 2003, www.state.gov/t/np/rls/prsr/23809.htm (accessed 29 October 2005).

or related materials.⁷⁷ Although the PSI does not target any particular country, countries of concern include North Korea, Iran and Syria.

47. PSI raises some issues in international law and there is a discussion in the international law circle whether it is consistent with international law. Despite its controversy,⁷⁸ it attempts to invoke the right of boarding, which applies to the suppression of piracy as provided in the LOS Convention,⁷⁹ to the prevention of maritime terrorism. In that sense, the shipboarding regime under the PSI is similar to the boarding regime for anti-piracy under the LOS Convention. Therefore, although the PSI does not directly deal with the issue of piracy, it no doubt helps suppress piracy since it is designed to enhance maritime security as well as the fight against terrorism.

48. According to one scholar, the PSI principles “represent a multilateral agreement” since 18 States “have ‘signed’ onto the initiative”.⁸⁰ Furthermore, “the PSI applies not only to the 21 states that are involved in the PSI, but also to all those states whose citizens own either vessels or cargo sailing under the flags of PSI states”.⁸¹ Thus it will produce impact on customary international law of the sea. Related to its practice, the United States Navy intensified its patrol off the coast of Somalia in accordance with the calls from the UN Security Council and the IMO, and in October 2007, it destroyed two pirate skiffs and provided aid to hijacked cargo ships.⁸²

IV.C. Domestic trials

49. As we know, in recent years, pirates have been tried before domestic courts in several Asian countries including China, India and Indonesia. Here are some cases describing the trials taking place in China. The trials began after China was criticized by the world community for releasing the suspects of piracy who were arrested because they hijacked

77 See “Proliferation Security Initiative: Statement of Interdiction Principles”, 4 September 2003, www.state.gov/t/np/rls/prsil/23764.htm (accessed 29 October 2005).

78 As commented, “Article 110 is explicitly exhaustive of the bases for interdiction on the high seas and thus creates a significant legal stumbling block to any assertion of authority to interdict foreign ships and aircraft under the PSI”. Daniel H. Joyner, *The Proliferation Security Initiative: Nonproliferation, Counterproliferation, and International Law*, 30 *Yale JIL* (2005), 534.

79 The other areas that Contracting Parties enjoy the right of boarding are transport of slave, illicit traffic in narcotic drugs, and unauthorized broadcasting. See Arts 99–109 of the LOS Convention. Besides, a warship with reasonable ground may visit a ship without nationality. See Art. 110 (1)(d) of the LOS Convention.

80 Timothy C. Perry, *Blurring the Ocean Zones: The Effect of the Proliferation Security Initiative on the Customary International Law of the Sea*, 37 *Ocean Development and International Law* (2006), 44.

81 Perry, *ibid.*, 45.

82 See “U.S. Military Raises Profile Against Piracy Off Somalia”, Associated Press, 1 November 2007, www.washingtonpost.com/wp-dyn/content/article/2007/10/31/AR2007103102923.html (accessed 11 March 2008).

the oil tanker *Petro Ranger* in 1998.⁸³ The Chinese law does not have a specific legal rule punishing piracy since there is no such definition as “piracy”. However, this definitional loophole does not prevent China from bringing pirates into courts. Certain crimes subject to the Chinese penal code are relevant and in fact some pirates were tried, as shown below, under the charge of crimes such as murder, robbery, etc. On the other hand, China enjoys universal jurisdiction over piracy by acceding to relevant international treaties including the LOS Convention and the SUA Convention.

50. There are five cases recorded in China’s judicial practice for the crackdown of piracy. The first one is the case of *The Tenyu*. *The Tenyu* was hijacked on 27 September 1998 and all 16 crew members went missing. The ship reappeared in Zhangjiagang in December that year with a new name. After a careful and detailed investigation, the ship was confirmed to be the missing *Tenyu*. The Chinese authorities, therefore, detained the ship and submitted the case to the court. The Zhangjiagang court finally made the decision to return the ship to the real owner, a Panamanian shipping company. Meanwhile, the Department of Public Security began to investigate the case of the missing crew members, who were most likely murdered. The men on board the hijacked ship were Indonesians who were finally released on the ground that they were not pirates. The *Tenyu* case was the first in which Chinese judicial organs like the maritime court intervened and ordered the return of the foreign ship within the Chinese territory to the relevant ship owner. By recalling that in the case of *Petro Ranger* the Chinese police treated the ship hijacked by the pirates as a smuggling ship and then had it confiscated, China realized the existence of piracy at sea. However, the real pirates who committed the crime were even not arrested and punished.

51. In the second case—the case of *The Cheung Son*—China tried the pirates in accordance with the relevant Chinese criminal law. On 12 November 1998, the *Cheung Son*, which belonged to a Hong Kong shipping company, disappeared in the South China Sea on the way to Malaysia from the Shanghai Harbour. Several days after, some bodies of crew members of that ship floated on the sea adjacent to the Guangdong Province. The public security department of the province registered the case as “Case 9901” and began to investigate it. The police finally found that it was a maritime hijack case designed by an Indonesian with Chinese collaborators. They

83 The oil tanker *Petro Ranger* was mysteriously missing in the South China Sea for several days and suddenly reappeared offshore the coast of the Hainan Island in China. It was proved later that the vessel was hijacked by a group of Indonesians in waters adjacent to Malaysia and Vietnam on 16 April 1998. The ship was identified and arrested by Chinese police while it was discharging its cargo into another tanker on 26 April 1998. After the initial investigation, the Chinese public security authority released the vessel and crew members two days later. According to China, it was evidential that the *Petro Ranger* was a smuggling vessel and dealt with as a smuggling case so that the gas oil and kerosene on board were confiscated. The hijackers were expelled from China due to the lack of clear evidence that they were pirates. China’s undertaking not to punish the suspects of piracy was sharply criticized by IMB as well as the victim shipping company.

killed all the 23 crew members and robbed the whole ship. As of 8 August 1999, China arrested all suspected pirates involved. The Intermediate Court in Shanwei, a port city in Guangdong Province, handled the case. On 10 January 2000, 13 pirates (1 Indonesian and 12 Chinese) received the death penalty and the remaining 24 pirates life sentence or long-term imprisonment under the charge of robbery and murder.

52. In the case of the *Marine Fortuner*, China invoked relevant international treaties. On 8 June 1999, a Honduran freight ship named *Nuevo Tierra* sailed into Fangchenggang, adjacent to the Gulf of Tonkin. After a check, the inspectors of the harbour superintendency department found that it was a phantom ship. Its original name was *Marine Fortuner*, a Panamanian registered ship which was hijacked in the Sea of Adaman on 17 March 1999 on the way from China to India (the crew was put in nine crafts and set adrift on the sea until they were rescued by Thai fishermen). The department of public security of the Guangxi Autonomous Region decided to investigate the case according to Article 27 of the LOS Convention (on criminal jurisdiction on board a foreign ship). On 4 August 1999, all the 14 Burmese suspects were arrested and the ship was finally returned to the owner. Treaty law was specifically mentioned in the case. In February 2000, a Chinese court in Guangxi sentenced 14 pirates, one of them to death, for raiding the ship. The ship was returned to the Taiwanese shipowner.

53. The case of the *Siam Xanxai* has some similarities to the above: the pirates were tried and the hijacked ship was returned to the owner. On 9 June 1999, ten Indonesian nationals hijacked the Thai-registered ship *Siam Xanxai* at the time when it was on route from Singapore to Thailand, laden with 2200 tonnes of diesel oil. Two days after the boarding, 16 of the vessel's seafarers were put on a speedboat, while one Thai crew member was held hostage. Those men cast adrift were later rescued by a Malaysian fishing boat. Chinese officers intercepted the ship off Shantou on 17 June, as the oil was being illegally supplied to a Chinese vessel. The ten alleged pirates were arrested and punished severely under the Chinese law. In 2003, the Chinese court in Shantou sentenced the pirates to imprisonment from 10 to 15 years. The ship and the goods on board were returned to the owner. China's commitment has been gratefully appreciated by the shipowner.

54. The fifth case is the case of *The MT Global Mars*. *Global Mars*, a Panamanian flagged vessel carrying a cargo of 6000 metric tonnes of palm oil products, was hijacked by a band of pirates (11 Philippine and 9 Myanmar nationals) barely a day after setting sail from Malaysia on 24 February 2000. The pirates blindfolded the crew of eight Koreans and ten Myanmar nationals and set them adrift in a small fishing boat with only basic provisions. The crew managed to get to Surin Island in Thailand. The hijacked vessel had been renamed *Bulawan* purportedly under the Honduran registry and sailed to the Chinese coast, where it was detained and investigated by the Chinese police. *Global Mars* was returned to the Japanese owner.

55. These cases have shown that China has gradually formulated a set of judicial procedures to try piracy cases and rendered harsh punishment on pirates including death penalty and long-term imprisonment. In comparison with trials in other countries, the

punishment imposed by Chinese courts is the most severe.⁸⁴ It is interesting to mention the case of the *MV Alondra Rainbow*, which was handled in India. The *MV Alondra Rainbow*, a Panama registered vessel belonging to Japanese owners was hijacked by pirates in September 1999. In the following month, the Indian Coast Guard and Navy captured the pirate-hijacked ship, and in February 2003, the Mumbai Sessions Court tried the 15 pirates and imposed on them the imprisonment of seven years and varying fines. However, on 18 April 2005, the Mumbai High Court overruled the lower court's decision and acquitted all the accused. This move was critically discussed in India.⁸⁵

56. The trials in China had the effect of deterring pirates from regarding China as an attractive destination for disposing of hijacked vessels and cargo, turning them instead to other preferred destinations in India and Iran.⁸⁶

V. Final remarks

57. From the above discussion and analysis, it can be easily seen that the international law of piracy continues to develop though encountering various difficulties. The definition of piracy remains a problem and needs necessary supplements such as "armed robbery against ships" to make it work in practice. It seems that no one would oppose the modification of the piracy definition provided by the LOS Convention. However, it should be realized that it is not easy to initiate and launch the process of modification since there is no sign to show that the Contracting Parties to the LOS Convention would like to hold a review conference in the near future. The LOS Convention contains 320 articles and the issue relating to the piracy definition would be a very minor matter in comparison with other law of the sea issues and it would not be a priority on the review agenda even if such a review conference were to take place.

58. Further to the examination of the definition issue, a question is naturally raised as to whether the international law of piracy will still remain a branch of international law. With the rapid development of the international law against terrorism, there could be a possibility that the law of piracy will eventually be merged into the law against terrorism since they are both international crimes and in the maritime domain receive the same deterrence and punishment.

59. Related to this, the possibility of inviting the International Criminal Court (ICC) to play a corresponding role in the fight against piracy and maritime terrorism should be sought. The ICC was established in 2002 pursuant to the Rome Statute of the

84 For example, an Indonesian court sentenced a band of hijackers to from only two to four years' imprisonment. See "Pirate attacks have tripled in a decade, IMB report finds", www.iccwbo.org/home/news_archives/2003/stories/piracy-quarter-1.asp (accessed 19 July 2003).

85 For details, see Commodore R.S. Vasan, *Alondra Rainbow Revisited. A Study of Related Issues in the Light of the Recent Judgment of Mumbai High Court*, www.southasiaanalysis.org/%5Cpapers14%5Cpaper1379.html (accessed 19 January 2009).

86 See "East Asian government must clamp down on piracy together", www.iccwbo.org/ccs/news_archives/2000/piracy_east_asia.asp (accessed 19 July 2003).

International Criminal Court⁸⁷ and has the jurisdiction over certain international crimes such as crime against humanity and genocide.⁸⁸ One deficiency in the international law of piracy lies in the fact that though piracy is defined under international law as an international crime and subject to universal jurisdiction, unlike other international crimes such as those mentioned above, it is in practice largely tried and convicted before domestic courts. If the scope of the ICC jurisdiction can be expanded to include piracy and terrorism, then the current law to fight piracy and maritime terrorism will be much more effectuated and strengthened. In fact, during the deliberations of the UNSC Resolution 1851 in December 2008, a number of countries raised the issue of bringing pirates to international justice.⁸⁹ It is well perceived that the international community will seriously consider this option to suppress and punish piracy.

Appendix

Ratification of Anti-Piracy Conventions in East Asia:

States	The 1982 LOS Convention (day/month/year)	The 1988 SUA Convention (day/month/year)
Brunei	05/11/1996	04/12/2003
Darussalam		
Cambodia		18/08/2006
China	07/06/1996	01/03/1992
Indonesia	03/02/1986	
Japan	20/06/1996	23/07/1998
Korea (North)		
Korea (South)	29/01/1996	14/05/2003
Laos	05/06/1998	
Malaysia	14/10/1996	
Mongolia	13/08/1996	
Myanmar	21/05/1996	19/09/2003
Philippines	08/05/1984	06/01/2004
Singapore	17/11/1994	03/02/2004
Thailand		
Vietnam	25/07/1994	10/10/2002

Source: Compiled by the author.

87 The Statute was adopted on 17 July 1998 and entered into force on 1 July 2002 when 60 States had become parties to it. As of March 2008, there have been 105 States joined the Statute, www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf (accessed 11 March 2008).

88 For details, see Arts 5–9 of the Rome Statute. In comparison, there are common and similar criminal elements contained both in the crime of piracy and in the crime against humanity such as murder, torture and rape.

89 For example, Denmark stated that “In the long term, there might be a need to examine the possibility of bringing suspected pirates before an international tribunal”, and Egypt suggested establishing an ad hoc international court empowered by a Security Council resolution. See UN Doc. SC/9541, 16 December 2008, www.un.org/News/Press/docs/2008/sc9541.doc.htm (accessed 17 December 2008).