COMBATING PIRACY UNDER THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982

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Abstract

Piracy has long been a serious threat from the time when people started navigation at seas and it still occurs in various parts of the world despite serious efforts being made by the international community. The highest number of attacks occurred as recent as in 2011 ever since International Maritime Organization started coming out with annual report since 1984. Definition of piracy under the primary global anti-piracy instrument, *i.e.* the - the United Nations Convention on the Law of the Sea 1982 (UNCLOS 1982), simply presents codified version of customary international law relating to piracy and thus it only provides a legal basis to cover traditional piracy. Pirates have adopted new trends and employed new methods, which are different from the classical piracy, by taking advantage from technological advancements of the modern era. The UNCLOS 1982 piracy regime is too narrow to be effective in combating modern-day piracy, and thus there is a need to provide a comprehensive definition of piracy in which all forms of modern-day piratical attacks can be considered as offences. In suppressing piracy, it is paramount to re-examine the efficacy of the piracy regime under the UNCLOS 1982. Accordingly, the authors have evaluated its shortcomings and proposed viable solutions. The paper critically analyses the essential elements of the definition of piracy, *i.e.* acts of piracy, private ends, two ships, private ships, and locality of piracy. Moreover, the jurisdiction to seize pirate ships and prosecution of pirates are also examined thoroughly with the intention to contribute in suppressing piracy all over the world.

I Introduction

PIRACY HAS been a serious threat to the humankind from the time when people started navigation at seas. Undeniably, it is still posing threat to the safety of maritime navigation in modern times. Pirates have taken new trends and employed new methods, which are different from the classical piracy by taking advantage from technological advancements of the modern era. Modern-day piracy involves not only robbery at seas but also hijacking of vessels and kidnapping crews for ransom. Sometimes, pirates seize vessels for a short-term with the intention to discharge the cargo on board at a port selected by them or to transfer the cargo into another vessel. Pirates use weapons ranging from knives to AK47, M16 rifles and rocket launchers.[1]

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1 Virtual Information Centre, "Piracy in the Malacca Straits" Special Press Summary, Feb. 16, 2005 at 7.

Piracy continues in various parts of the world despite efforts by the international community to curb the crime. It is well documented that incidents of piracy have sharply been escalated in the last decade of the 20th century and the early 21st century. Especially, the highest number of piracy has been recorded in the year 2011. According to the International Maritime Organization (IMO), the numbers of piracy incidents (including incidents that have occurred or have been attempted) reported to the organisation in 2011 were 544.[2] However, there were only 341 reported incidents to the IMO in 2012 and thus it was a sharp decrease of 203 incidents (37.32%) from a total of 544 reported incidents in 2011.[3]

It is apparent that contemporary international law of the sea conventions are not efficient enough to encounter piracy and thus maritime navigation is not totally free from the risk of such maritime crime. The statistics show that piracy is still a threat to the safe navigation and the highest number of attacks occurred as recent as in 2011 ever since IMO started preparing annual report from 1984.[4]

The definition of piracy under the primary global anti-piracy instrument - the United Nations Convention on the Law of the Sea 1982[5] - is too narrow to be effective in suppressing the modern-day piracy. In combating piracy, it is paramount to appraise the efficacy of the UNCLOS 1982. Accordingly, this paper critically analyses the essential elements of the definition of piracy as well as jurisdiction to seize pirate ships and prosecution of pirates for the purpose of providing pragmatic solution to shortcomings under the UNCLOS 1982.

II Evolution of the definition of piracy under international law

Piracy under international law must not be confused with the conception of piracy under various municipal laws. The definition of piracy and penalties to be imposed on pirates vary from one domestic jurisdiction to another. International law merely sets out provisions, which identify certain act as piracy but does not stipulate any punishment for perpetrators and leave the matter to the domestic courts.

At the international level, piracy has long been regarded as a crime against the entire mankind and pirates have also been regarded as enemies of the entire human race (*hostic humani generis*). This notion is maintained under modern international law and the act of piracy has been ascribed as an international crime (*delicta jure gentium*).

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2 IMO, *Reports on Acts of Piracy and Armed Robbery against Ships: Annual Report – 2011*, Mar. 1, 2012 at 2.

3 IMO, *Reports on Acts of Piracy and Armed Robbery against Ships: Annual Report – 2012*, Apr. 2, 2013 at 2.

4 *Id*., Annex 4.

5 Hereinafter referred to as UNCLOS 1982.

In 1668, Sir Leoline Jenkins called for international attention in suppressing piracy with a note which stated that: "[A]ll pirates and sea rovers are outlawed, as I may say, by the law of all nations, that is, out of the protection of all princes and law whatsoever. Everybody is commissioned and is to be armed against them as against rebels and traitors, to subdue and to root them out".[6] This conception revived again after more than a century when Sir William Scott (Lord Stowell) observed, in *Le Louis*[7] that: "[W]ith professed pirates there is no state of peace. They are the enemies of every country and at all times, and therefore are universally subject to the extreme rights of war". Again, in *United States* v. *Smith*,[8] Story J delivered the opinion of the court that: "[I]f any person or persons whatsoever shall, upon the high seas, commit the crime of piracy as defined by the law of nations, and such offender or offenders shall be brought into or found in the US, every such offender or offenders shall, upon conviction thereof, be punished with death". However, it should be noted that now the US penalises its citizens as well as foreigners who commit act(s) of piracy only with the imprisonment for life.[9]

Thus, under international law, pirates and pirate vessels will lose the right to be protected by their states of nationalities and the flag states for committing an act of piracy on the high seas. Every state will have the right to arrest as well as punish pirates and seize pirate vessels. It is also important to note that, piracy will not result in any legal change in ownership of the property. The property must be restored to the rightful owner after capturing from the pirates.[10] This principle was applied in the case *The Telegrafo*[11] where Sir Robert Phillimore held that, "Goods taken by pirates cannot be transferred to a third party and to an innocent purchaser for value as against their legitimate owner".

Since 1873, the International Law Association produced several reports, which discussed the various branches of the law of the sea including piracy.[12] In the 20th century, piracy came to be regarded as one of the most devastating threats to the growing international trade, so numerous efforts were made by the international community to codify the crime of piracy. Series of formal discussions were held among states to transform the crime of piracy from the customary international law to the treaty law. In 1926, the Committee of Experts for the Progressive Codification

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6 E.D. Dickinson, "Is The Crime of Piracy Obsolete?" 38 *Harv. L. Rev.* 34 (1925).

7 *Le Louis*, (1817) 2 Dods 210, 244, 165 Eng Rep 1464, 1475.

8 (1820) 18 US 5 Wheat 153.

9 R. Chuck Mason, "Piracy: A Legal Definition" Congressional Research Service Dec. 13, 2010 at 5.

10 This doctrine is derived from the Latin phrase: *Pirata not mutat dominium*. See C.J. Colombos, *The International Law of the Sea* 447 (5th rev ed. 1962).

11 (1871) 8 Moo PC NS 43 60-61.

12 R.R. Churchill and A.V. Lowe, *The Law of the Sea* 11(2nd ed. 1988).

of International Law of the League of Nations treated piracy as a matter that has to be codified under international agreements.[13] In 1932, the Harvard Law School produced the Draft Convention on Piracy[14] with comments in order to define the crime of piracy in a concrete manner.[15] The Harvard Draft Convention on Piracy defines the crime thus: [16]

> Piracy is any of the following acts, committed in a place not within the territorial jurisdiction of any state:
>
> (1) An act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without *bona fide* purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air. If the act is connected with an attack, which starts from on board a ship, either that ship or another ship, which is involved must be a pirate ship or a ship without national character.
>
> (2) Any act of voluntary participation in the operation of a ship with knowledge of facts, which make it a pirate ship.
>
> (3) Any act of instigation or of intentional facilitation of an act described in paragraph 1 or paragraph 2 of this article.

This definition describes piracy as an act of violence or depredation committed with the intention to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property for private gain. Thus, an act of violence or of depredation committed with political motive is not covered under this definition. Any voluntary participation, instigation or facilitation in the operation of a pirate ship with knowledge is considered as act of piracy as well. Albeit, the Harvard Draft Convention was not an international legal document *per se*, it greatly assisted to the International Law Commission[17] in drafting the law relating to piracy under the High Seas Convention.[18]

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13 *Id*. at 12.

14 Hereinafter referred to as the Harvard Draft Convention.

15 Harvard Law School, "The Harvard Draft Convention on Piracy with Comments" 26 *AJIL* 749(1932).

16 The Harvard Draft Convention on Piracy, art 3.

17 In 1948, the International Law Commission was set up to promote the progressive development of international law and its codification under the auspice of the United Nations. See the Statute of the International Law Commission, art. 1(1). Hereinafter referred to as the ILC. See United Nations, *International Law Commission* (1998-2011) Codification Division (Office of Legal Affairs) *available at*: http://www.un.org/law/ilc/ (last visited on Mar. 21, 2010).

18 The draft convention of 19 articles with commentaries relating to piracy was prepared under the direction of Joseph Bingham. Generally the ILC was able to endorse the findings of that

In 1945, the League of Nations was replaced by the United Nations. Consequently, in 1948, the ILC was set up with the object of promoting the progressive development of international law and its codification[19] under the auspices of the United Nations.[20] In 1956, the ILC produced a report, which covered most of the areas pertaining to the law of the sea, including piracy, upon the request made by the General Assembly.[21] This report later formed as a basis framework for various international laws of the sea conventions.

III Piracy definition under law of the sea conventions

Series of United Nations conferences on the law of the sea were held in 1958, 1960 and 1973-1982 respectively and a number of international law of the sea conventions were also adopted accordingly. The rules of international law applicable to piracy are contained in articles 14 to 23 of the Convention on the High Seas 1958; and articles 100 to 107, article 110, article 111 of the UNCLOS 1982. In view of that, piracy regimes under these two laws of the sea conventions are analysed in the following discussions.

Piracy definition under the Convention on the High Seas 1958

The First United Nations Conference on the Law of the Sea (UNCLOS I) was held, in accordance with the United Nations General Assembly Resolution 1105 (XI), in Geneva from 24 February to 27 April 1958. The convening of the conference passed through a long process. It had its precedents in the work of the Hague Conference for the Codification of International Law held in 1930 under the auspices of the League of Nations and the ILC's final report, which covered all issues in relation to the sea as one systematically ordered body of draft articles, submitted to the General Assembly in 1956.

The 1958 Geneva Conference did not succeed in combining all the provisions on the law of the sea under one international instrument. Thus, four separate conventions were adopted, namely: the Convention on the Territorial Sea and the Contiguous Zone; the Convention on the High Seas; the Convention on Fishing and Conservation of the Living Resources of the High Seas; and the Convention on the Continental Shelf. The issue of piracy was addressed under the Convention on the

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research. See, "Documents of the Seventh Session including the Report of theCommission to the General Assembly" 2*Year Book of the International Law Commission* 25(1955); L.F.E. Goldie, "Terrorism, Piracy and Nyon Agreements" in Yoram Dinstein and Mala Tabory (eds.), *International Law at A Time of Perplexity: Essays in Honour of Shabtai Rosenne* 227(1989).

19 The Statute of the International Law Commission, art 1(1).

20 United Nations, *supra* note 17.

21 See Abdul Ghafur Hamid, *Public International Law: A Practical Approach* 291(3rd ed. 2011).

High Seas 1958 which entered into force on 30 September 1962.[22] It delimits the high seas as all parts of the sea not included in the territorial sea and internal waters.[23]

The Convention on the High Seas 1958 was the first international convention, which spells out the crime of piracy with detailed enunciation. It calls all states to co-operate 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.[24] It defines the act of piracy as follows: [25]

> (1) Any illegal acts of violence, 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:
>
> (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
>
> (b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any state;
>
> (2) 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; and
>
> (3) Any act of inciting or of intentionally facilitating an act described in sub-paragraph 1 or sub-paragraph 2 of this article.

The definition of piracy under this convention is not extensively examined in this part of the article because this definition had already been incorporated into the UNCLOS 1982 and thus further analysis of piracy definition is mainly based on the provisions under the UNCLOS 1982.[26]

Piracy definition under the UNCLOS 1982

Soon after the adoption of the 1958 Conventions, the General Assembly requested the Secretary-General to convene the Second United Nations Conference on the Law of the Sea (UNCLOS II) to consider the topics of the breadth of the territorial sea and fishery limits, which had not been agreed upon in the said conventions. The UNCLOS II was held from 17 March to 26 April 1960 and adopted two resolutions in

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22 There are 63 state members to the Convention on the High Seas 1958 as at July 23, 2008. See Tullio Treves, *1958 Geneva Conventions on the Law of the Sea* (2008) United Nations (Codification Division: Office of Legal Affairs) *available at*: http://untreaty.un.org/cod/avl/ha/gclos/gclos.html (last visited on Aug. 5, 2012).

23 The Convention on the High Seas 1958, art 1.

24 *Id*., art 14.

25 *Id*., art 15.

26 See Sabirin bin Ja'afar, "International Law of the sea and National Legislation on Piracy and Terrorism in the Straits of Malacca: A Study in Law and Policy" 58 (PhD Thesis, University of Greenwich, 2007).

its final Act.[27] Again, after one decade of the second conference, the General Assembly decided to convene a third conference on the law of the sea in 1973 under the Resolution 2750 C (XXV) on 17 December 1970 due to the disagreement among states with regard to maritime delimitation and the need for the new rules in order to be up to date with the technological advancements. The General Assembly instructed the Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction to act as preparatory body for the conference.

In 1973, the committee submitted its final report to the General Assembly. After considering the report, the General Assembly requested the Secretary-General to convene the first session of the Third United Nations Conference on the Law of the Sea (UNCLOS III) in 1973 and to invite states to the conference for the adoption of a convention dealing with all matters relating to the law of the sea under the Resolution 3067 (XXVIII) on 16 November 1973. The conference was held with 160 participating states between 1973 and 1982. After almost one decade later, the UNCLOS 1982, a comprehensive convention on the law of the sea containing 320 articles and nine annexes, was adopted by the conference on 10 December 1982 in Montego Bay, Jamaica and opened for signature on the same day. The UNCLOS 1982 is the most extensive attempt in creating a unified regime in the field of international law of the sea. The treaty addresses a number of topics including maritime limitations, navigational rights, economic rights, pollution and conservation of marine life, scientific exploration, piracy and so forth. It entered into force twelve months after the deposit of the sixtieth instrument of ratification on 16 November 1994.[28] There are 166 state members to the conventions as on 29 October 2013.[29]

Piracy is one of the great concerns under the UNCLOS 1982 and it imposes duty on the member states to cooperate in the repression of piracy.[30] It defines the crime of piracy and pirate ship[31] in detail. It also recognises acts of violence committed by a warship, government ship or government aircraft whose crew has mutinied as

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27 United Nations, *Second United Nations Conference on the Law of the Sea, 1960* (2009) Codification Division (Office of Legal Affairs) *available at*: http://untreaty.un.org/cod/diplomatic conferences/lawofthesea-1960/lawofthesea-1960.html (last visited on Aug. 5, 2012).

28 United Nations, *Third United Nations Conference on the Law of the Sea, 1973-1982* (2009) Codification Division (Office of Legal Affairs) *available at*: http://untreaty.un.org/cod/diplomatic conferences/lawofthesea-1982/lawofthesea-1982.html (last visited on Aug. 5, 2012).

29 United Nations, *Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at 29 October 2013* (2013) Division for Ocean Affairs and the Law of the Sea (Office of Legal Affairs) *available at*: https://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm (last visited on Nov. 17, 2013).

30 The UNCLOS 1982, art. 100.

31 *Id*., art 103.

piracy.[32] Moreover, it mentions retention or loss of the nationality of a pirate ship,[33] seizure of a pirate ship or aircraft,[34] ships and aircraft which are entitled to seize on account of piracy,[35]right of visit[36] and liability for seizure without adequate grounds.[37] Generally, with regard to the definition of piracy, UNCLOS 1982 incorporates the rules of international law codified under the High Seas Convention. The UNCLOS 1982 defines piracy as follows: [38]

> 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:
>
> (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 inciting or of intentionally facilitating an act described in subparagraph (a) or (b)".

The main text of the above piracy definition of the UNCLOS 1982 is substantially originated from the piracy definition of the Convention on the High Seas 1958 with some editorial changes.[39] Imperative essences of the definitions of piracy under both conventions are identical. Thus, in the following discussions, the authors thoroughly analyses only the essential elements, which donate to the crime of piracy under the UNCLOS 1982.

IV Elements of piracy definition under the UNCLOS 1982

After a careful analysis of the piracy definition spelled out under the UNCLOS, it is clear that there are five essential elements to be fulfilled for an act to be regarded as piracy under international law. They are as follows:

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32 *Id*., art 102.
33 *Id*., art 105.
34 *Id*., art 106.
35 *Id*., art 107.
36 *Id*., art 110.
37 *I*., art 107.
38 *Id*., art 101.
39 See Satya N. Nandan, Shabtai Rosenne and Neal R. Grandy, 3*United Nations Convention on the Law of the Sea 1982: A Commentary* 199 (1995).

(1) Acts of piracy;

(2) Private ends;

(3) Two ships;

(4) Private ships; and

(5) Locality of piracy.

These elements are discussed in detail in the following discourse.

Acts of Piracy

The acts of piracy under the UNCLOS 1982 generally includes "any illegal acts of violence or detention, or any act of depredation". The ILC did not clarify the phrase further. What would amount to illegal act is also to be determined by the courts of the state, which apprehends pirates, pirate ships or aircrafts[40] in the absence of international legal framework on the subject.[41]

The problem arises when there is no violence, where attackers are visibly armed, but only threaten violence.[42] On 19 March 2011, four robbers armed with long knives boarded *Fairchem Filly*, a Panama chemical tanker, while anchoring at Dumai Anchorage, Indonesia. When a crew spotted and shouted at them, they threatened him with long knives and asked him to stay away. The duty olier raised the alarm and all crew mustered. The robbers stole a spare part box and escaped with their waiting boat.[43] In this incident, there was no actual act of violence but mere threatened violence. The robbers also detained no crews. It is, thus, important to identify whether such threatened violence should be included within the meaning of act of violence under the piracy definition.

Another common form of attack is a clandestine attack where attackers board the vessel at night - whether steaming or at anchor - and steal cargo, equipment or

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40 The UNCLOS 1982, art. 105.

41 At the twenty-ninth meeting of the Second Committee of the First United Nations Conference on the Law of the Sea 1958, Krispis, a Greek delegate, proposed to delete the word "illegal" from the definition of piracy due to the lack of international instruments which spell out what acts to be illegal and the legal confusion that would arise might make it impossible to punish a pirate ship. This proposal to delete the word "illegal" was rejected by 30 votes to 4, with 16 abstentions. See United Nations, "United Nations Conference on the Law of the Sea, Official Records: Second Committee (High Seas: General Régime)", Summary Records of Meetings and Annexes, UN Doc. A/CONF.13/40 (UN Sales no. 58, vol. 4), 24 Feb. - 27 Apr.1958 at 83-84.

42 See Rosemary Collins and Daud Hassan, "Applications and Shortcomings of the Law of the Sea in Combating Piracy: A South East Asian Perspective" 40 *J. Mar. L. & Com.* 96-97 (Jan. 2009).

43 ICC International Maritime Bureau, "Piracy and Armed Robbery against Ships: Annual Report 1st Jan. – 31st Dec. 2011", Jan. 2012 at 45.

cash without the knowledge of the crew.[44] On 21 February 2011, robbers boarded *Westerems*, a Liberian container ship, unnoticed and stole ship's properties at Manila North Anchorage, the Philippines. Only after their escape, crews found padlock to the forward store were broken and ship's property stolen.[45] On 20 November 2011, robbers boarded *Maritime Fidelity*, a Singaporean bulk carrier, anchoring at Chittagong Anchorage 'B', Bangladesh. They broke forward store padlock and escaped with stolen ship's stores.[46] In these two incidents, crews on board were not even aware of the presence of robbers. On 28 January 2011, duty crew of *British Integrity*, a tanker from Isle of Man, spotted robbers and shouted at them while anchoring at Tanjung Priok Anchorage, Jakarta, Indonesia. The robbers immediately escaped with their waiting boat. Upon investigation, three padlocks were broken and some engine spares were stolen.[47] On 26 May 2011, about ten robbers boarded *Stadt Aachen*, a German container ship, while anchoring at Cochin Anchorage, India. Master spotted the robbers and directed the search light towards them. The robbers jumped over board and escaped with stolen ship's stores.[48] It can be observed that there was no act of violence or detention involved in the abovementioned incidents. Again, on 13 January 2011, four armed robbers boarded *Torm Clara*, a Danish Tanker, while anchoring at Tanjung Ayam, Malaysia. Duty engine room crews sighted the robbers and informed the bridge. Master raised alarm and all crews mustered. Robbers managed to escape and nothing was stolen.[49] Definitely, this type of attack would not fall within the definition of violence or detention, unless such act of trespassing is considered as depredation.[50]

In all the cases stated above, the perpetrators can only be regarded as thieves rather than robbers due to lack of any violent attack and detention towards the victim ship and the crews on board. Thus, there is a need of clarification whether such clandestine theft without any act of violence or detention can also be considered as piracy. The authors view that threatened violence and clandestine theft should be included under the definition of piracy of the UNCLOS 1982 as acts of piracy. This is because, at any stage, a threatened violence may convert to an actual violence and a clandestine theft may turn to a robbery. Another reason is that these maritime crimes are closely related to other acts of piracy. Hence, it is appropriate to group similar class of maritime crime with the general term in the piracy definition of the UNCLOS 1982.[51]

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44 See Rosemary, *supra* note 42.

45 ICC International Maritime Bureau, *supra* note 43 at 44.

46 *Id.* at 57.

47 *Id.* at 43.

48 *Id.* at 57.

49 *Ibid.*

50 See Rosemary, *supra* note 42.

51 In this aspect, the authors apply the *Ejusdem Generis* rule for the interpretation of treaty. See Abdul Ghafur Hamid, *supra* note 21 at 200-204.

Apart from committing acts of violence, detention or depredation, the UNCLOS 1982 also extends the acts of piracy to include any act of voluntary participation, inciting or intentionally facilitating in the operation of a ship or an aircraft with the knowledge of making it as a pirate ship or aircraft.[52] Thus, not only the person who commits actual acts of violence, detention or depredation, but also any person who knowingly assists pirates, pirate ships and aircrafts is also regarded as pirate under this piracy definition.[53]

Again, the piracy definition under the UNCLOS 1982 only deals with the actual piratical attack. It excludes attempted attack to commit piracy from regarding as piratical act and does not provide any legal basis. For example, pirates attempted to board a ship but they were resisted by the crew and could not commit any violent attacks. In this situation, the act does not fall under the piracy definition and it can be regarded as piracy only when the pirates succeeded in boarding the vessel.

The scope of piracy was defined in the classical law named as *Re Piracy Jure Gentium*[54] long before the adoption of the UNCLOS 1982. This case examined whether an attempt to rob at sea is sufficient to constitute piracy or the actual attack has to be present. In this case, the court treated an attempted piratical attack as piracy by stating that "actual robbery is not an essential element of the crime of piracy *jure gentium*. A frustrated attempt to commit a piratical robbery is equally piracy *jure gentium*". The United Kingdom endeavored to include attempted attacks into the piracy definition by paraphrasing the opening phrase and paragraph 1 as follows: "Such piracy consists in any of the following acts: (1) Any illegal acts of violence, detention or any act of depredation, or any attempt to commit such acts, committed for private ends by the crew or the passengers of a private ship or a private aircraft and directed".[55] Nonetheless, the attempt was defeated and the wording "any attempt to commit such acts" was finally excluded from inserting into the definition of piracy.[56]

The figures of attempted piracy incidents are on the rise all over the world along with actual attacks. In 2011 alone, 274 attempted incidents out of 544 (more than 50% of the total attacks of the year) were reported to the IMO[57] and 218 attempted incidents out of 439 (almost 50% of the total attacks of the year) were reported to

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52 The UNCLOS 1982, art.101(b) &(c).

53 See Sabirin bin Ja'afar, *supra* note 26.

54 *Re Piracy Jure Gentium* (1934) AC 586.

55 See United Nations, *supra* note 41 at annexes 137.

56 At the twenty-ninth meeting of the Second Committee of the First United Nations Conference on the Law of the Sea 1958, the United Kingdom proposal for the opening phrase and paragraph 1 (A/CONF.13/C.2/L.83) was rejected by 22 votes to 13, with 17 abstentions. See *id.* at 83-84.

57 See IMO, *supra* note 3 at annex 2, 1-2.

the International Maritime Bureau (IMB)[58] respectively. The authors are of the opinion that attempted attacks can still be considered as piracy despite the exclusion of the exact wording from the piracy definition.[59] If the same analogy could be applied as in the above case, an attempted attack could have been an actual attack if it was successful. Nonetheless, it is always desirable to prosecute frustrated pirates on the basis of express provision rather than presumption. Thus, it is proposed that the piracy definition under the UNCLOS 1982 should provide coverage for attempted or frustrated attacks.

Private ends

The UNCLOS 1982 definition of piracy further requires that acts of piracy must be committed for "private ends". Therefore, it does not cover attacks committed for a public purpose such as the highlighting of a cause of insurgent group or terrorist attacks.[60] This element of private ends draws a distinction between piracy and maritime terrorism which committed for "political ends" or "public ends".

However, the Convention on the High Seas 1958 and the UNCLOS 1982 do not identify specifically what "private ends" means. Nevertheless, the definition of piracy under the UNCLOS 1982 covers all unlawful acts of violence, detention, or depredation committed not merely by the desire for gain but also committed on the basis of hatred or revenge.[61]

The origin of the "private ends" requirement can be traced back to the Harvard Draft Convention. At the time of the creation of the Harvard Draft Convention, most of the former colonial nations frequently employed tacit maritime terrorism in their struggle for independence.[62] In customary international law, an attack on vessels for the political reason was a legitimate defense to piracy charges.[63] Consequently, the "private ends" requirement was included into the draft to distinguish attacks committed by pirates and recognised governments, recognised belligerents or recognised insurgents.[64] Later on, it was inserted as a requirement of motivation to commit piracy into the definition of piracy under the High Seas Convention. In 1971, Ambassador Pardo of Malta submitted a working paper, which included the definition of piracy

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58 See ICC International Maritime Bureau, *supra* note 43 at 8.

59 See Satya N. Nandan, *supra* note 39 at 202.

60 See Malvina Halberstam, "Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety" 82 *AJIL* 275(1988).

61 United Nations, "Yearbook of the International Law Commission 1955: Documents of the seventh session including the report of the Commission to the General Assembly", UN Doc. A/CN.4/SER.A/1955/ADD.1 (UN Sales no. 60, vol. 3), 1960 at 25.

62 See Sabirin bin Ja'afar, *supra* note 26 at 59-61.

63 See Malvina Halberstam, *supra* note 60 at 277.

64 See Abdul Ghafur Hamid, *supra* note 21 at 281.

without the "private ends" requirement at the session of the Sea-Bed Committee.[65] This requirement was omitted from the piracy definition of the High Sea Convention and was mainly to cover acts of violence or depredation committed for "political ends". However, this notion was not codified into the definition of piracy. Accordingly, attacks, which are politically motivated such as state sponsored attacks, insurgent attacks and terrorist attacks against vessels (on the high seas or in a place outside the jurisdiction of any state) cannot be regarded as acts of piracy under international law.[66]

Indeed, acts of piracy prescribed under international law are criminal *per se*. At any rate, no private individuals, belligerents, insurgents or even governments should be exempted from the liability of committing such acts. Even at war, it is reasonable to accept that the governments, belligerents or insurgents attack the enemy ships but not the civilian or other ships. Since the act of piracy is an indiscriminate attack, whoever commits it should be held liable for the crime to render justice properly.

For example, in the Straits of Malacca, the Gerakan Aceh Merdeka (GAM) or Free Aceh Movement in Aceh is believed to finance its insurgent activities through sea piracy.[67] In the Philippines, Abu Sayyaf Group (ASG), the Moro Islamic Liberation Front (MILF) and the Moro National Liberation Front (MNLF) all engage in maritime piracy to generate required funds for their liberation movements.[68] These insurgent groups have been committing piracy as a viable mean of raising funds for their rebellious activities[69] and terrorist attacks as an approach to get international attention towards their issues. Some commentators consider that they are motivated by pecuniary rewards

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65 The piracy is defined in the working paper as: "Piracy consists of any of the following acts: (a) Any illegal acts of violence or detention, or any act of depredation, committed by the crew or the passengers of a private vessel or a private aircraft, and directed anywhere in ocean space or in the superjacent atmosphere against another vessel or aircraft, or against persons or property on board such a vessel or aircraft;…". See Satya N. Nandan, *supra* note 39 at 198-199.

66 See P. Birnie, "Piracy, Past, present and future" 11 *Marine Policy*, at 171 (1987).

67 In 2002, it has admitted once an attack against a boat being chartered by Exxon Mobil. In 2003, it was also assumed that the hijacking of *M/V Penrider* was carried out by the Gerakan Aceh Merdeka (GAM). See Catherine Zara Raymond, *Maritime Terrorism in Southeast Asia: A Risk Assessment*, 9 (2005); Ralf Emmers, *Non-Traditional Security in the Asia-Pacific*, 37 (2004); Kate McGeown, Aceh rebels blamed for piracy, *BBC News Online*, (Sep. 8, 2003) *available at*: http://newswww.bbc.net.uk/1/hi/world/asia-pacific/3090136.stm (last visited on Aug. 5, 2012)

68 Eduardo Ma R. Santos, "Piracy & Armed Robbery against Ships: Philippine Perspective"Paper presented at ISEAS Conference: Maritime Security, Maritime Terrorism and Piracy in Southeast Asia, Sep. 23-24 2004.

69 Eduardo Ma R. Santos, "Piracy and Armed Robbery against Ships in the Philippines" in Graham Gerard Ong-Webb (ed.), *Piracy, Maritime Terrorism and Securing the Malacca Straits* 38-39 (2006).

rather than the political motive.[70] They have resorted to piracy only to generate funds for their political campaigns and thus these attacks amount to piracy, which is based on "private ends". This is merely because of ignorance of the fact that these attacks have the combined character of private and political motivation. There is a growing concern that terrorists may merge with pirates to carryout seaborne terrorism.[71]

In order to address a viable solution to this issue, it is recommended that the requirement of "private ends" should be removed from the definition of piracy under the UNCLOS 1982 in order to cover all form of acts of violence, detention or depredation committed by all kind of perpetrators including recognised governments, recognised belligerents or recognised insurgents. In this way, the definition of piracy can give wider maritime security coverage not only to the victim ships of piratical attacks committed by the private individuals but also state sponsored attacks, insurgent attacks and terrorist attacks regardless of the motive of the commission of such crimes.

Private ships

Under the piracy definition of the UNCLOS 1982, acts of piracy must be committed by the crew or the passengers of a private ship or a private aircraft[72]against another ship or aircraft, or against persons or property on board such ship or aircraft. In order to analyse meticulously, the authors divide this provision into two aspects such as "private ships" and "two ships". Firstly, the ship, which commits piracy, must be a private ship but not the government ship. Secondly, the piratical attack must commence from a private ship (pirate ship) towards another ship (victim ship which can be either private or government).

It can be noticed from the first requirement that piracy can only be committed by the crew or the passengers of a private ship or aircraft against another private ship or aircraft, or against persons or property on board such ship or aircraft. The UNCLOS 1982 considers a ship or aircraft as a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in Article 101. A ship or aircraft, which has been used to commit

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70 Stefan Eklöf Amirell, "Political Piracy & Maritime Terrorism: A Comparison between the Southern Philippines and the Straits of Malacca", Paper presented at ISEAS Conference, *supra* note 68.

71 *Supra* note 69 at 39.

72 Acts of piracy can be committed not only by vessels on the high seas, but also by aircraft, if such acts are committed against vessels or seaplanes floating on the high seas. However, acts committed by one aircraft against another do not fall within the scope of piracy if such acts are committed in the air and not on the high seas. See United Nations, *supra* note 61; Satya N. Nandan, *supra* note 39 at 201.

piracy and remains under the control of the persons guilty of piracy is also regarded as private ship or aircraft.[73]

Thus, this requirement excludes acts of violence, detention or any act of depredation, committed by or against a warship, government ship or government aircraft operated for noncommercial purpose.[74] Nevertheless, the acts of piracy committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft.[75] Hence a warship whose crew has taken control of the ship must be regarded as a private vessel and acts committed against another vessel can assume the character of the acts of piracy. Thus, piracy can be committed only by private vessels, not by warships.

Two ships

The piracy definition of the UNCLOS 1982 further requires that acts of piracy must be committed by a private ship or aircraft against another ship or aircraft, or against persons or property on board such ship or aircraft. Under this requirement, the pirate ship must commit acts of violence, detention or any act of depredation against the victim ship to be piratical acts. Thus, two ships must involve in a piracy, namely: pirate ship and victim ship. This is also known as "two-ship rule".[76] Accordingly, acts of violence, detention or any act of depredation committed on board a single ship by the crew or passengers directed against the ship itself, or against the persons or property on that ship cannot be regarded as acts of piracy.[77]

Nonetheless, once mutiny was considered as piracy in the case of *Regina* v. *M'Gregor and Lambert*.[78] Lord Abinger C. B. observed that "if any person shall lay violent hands on his commander, or make or endeavour to make a revolt in the ship, he shall be deemed a pirate and a robber. By revolt I understand something like rebellion or resistance to lawful authority". In this case, a person who revolts against the legitimate authority on the vessel was considered as a pirate. Even in modern times, some commentators observe that acts of violence, detention and depredation committed

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73 The UNCLOS 1982, art 103. The term "state aircraft" is defined under art. 3 (b) of the Convention on International Civil Aviation, 1944 (Chicago Convention) as: "aircraft used in military, customs and police services shall be deemed to be state aircraft". Therefore, it can be assumed that "private aircraft" refer to all types of aircrafts which do not fall under the categories of state aircraft.

74 *Supra* note 39 at 200.

75 The UNCLOS1982, art. 102.

76 *Supra* note 21 at 281.

77 *Supra* note 61.

78 (1844) 1 Car & K 428 431-432.

on board a single ship on the high seas should be regarded as piracy because the perpetrators seize the ship and/or the cargo for their own benefits.[79] The Chinese representative proposed to amend the definition of piracy in a broader sense to include munity as piracy with the following wordings: "any member of the crew or any passenger on board a vessel who, with intent to plunder or rob, commits violence or employs threats against any other member of the crew or passenger and navigates or takes command of the vessel, also commits piracy". This proposal was rejected, as the ILC did not wish to adopt the broad definition of piracy.[80]

Although the ILC made it clear in the commentary on its draft article 39 which spells out the definition of piracy that the crew or passengers mutinied on board a vessel and committed acts of piracy directed against the vessel itself do not amount to acts of piracy, article 101 (a) (ii) gives a space for such acts to be considered as piracy. It is provided that "against a ship, aircraft, persons or property in a place outside the jurisdiction of any State…". The word "another ship or aircraft" is not stated in the wording of the provision of article 101 (a) (ii).[81]

However, in practice, acts of piracy committed on a single ship do not fall under the UNCLOS 1982 piracy definition. The best example can be seen in the *Achille Lauro* incident occurred in 1985 where the hijackers boarded the ship by posing as tourists[82] and they later held the ship's crew and five hundred passengers as hostages.[83] Most of the commentators consider that the *Achille Lauro* seizure does not fall within the meaning of piracy under the UNCLOS 1982.[84] Thus, it is essential to exclude "two-ship" requirement from the UNCLOS 1982 piracy definition in order to provide legal basis for the acts of piracy committed on board a single ship.

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79 See Jose´ Luis Jesus, "Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects" 18 *IJMCL* 376-377(2003).

80 See United Nations, "Yearbook of the International Law Commission 1956: Documents of the eighth session including the report of the Commission to the General Assembly", UN Doc. A/CN.4/SER.A/1956/ADD.1 (UN Sales no. 1956, vol. 3), 1957 at 18.

81 *Supra* note 39 at 201.

82 Brad J. Kieserman, "Preventing and Defeating Terrorism at Sea: Practical Considerations for the Implementation of the Draft Protocol to the Conventionfor the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA)" in Myron H. Nordquist, John Norton Moore and Kuen-chen Fu (eds.), *Recent Developments in the Law of the Sea and China*, 425 (2005).

83 Glen Plant, "The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation" 39 *Int'l & Comp. L. Q.* at 27 (1990).

84 See M. Whiteman, 5*Digest of International Law* 666(1965); L.C. Green, "The Santa Maria: Rebels or Pirates" 37 *BYIL* 496(1961); Thomas Franck, "To Define and Punish Piracies - The Lesson of the Santa Maria: A Comment" 36 *N.Y.U. L. Rev.* 839(1961). As cited in Malvina Halberstam, "Book Review: Terrorism, Politics and Law: The Achille Lauro Affair by Antonio Cassese" 85 *AJIL* 410(1991).

The locality of piracy

The location of committing piracy is also well defined under the piracy definition of the UNCLOS 1982. Acts of violence, detention or depredation must be committed by a private ship or aircraft against another ship or aircraft, on the high seas or in a place outside the jurisdiction of any state.[85] Therefore, under international law, piracy can be committed only on the high seas or in a place situated outside the territorial jurisdiction of any state, and cannot be committed within a state's territorial sea and exclusive economic zone.[86] Despite some dissenting opinions, the ILC considers that the piratical attack which takes place within the internal waters or territorial sea of a state, as a general rule, is a matter for the state affected to take necessary measures for the suppression of the acts committed within its territory.[87]

There are two different zones of committing piracy, namely: "on the high seas" and "in a place outside the jurisdiction of any State". The high seas are defined as "all parts of the sea that are not included in the EEZ, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State".[88] Thus, acts of piracy committed within the EEZ, the territorial sea, the internal waters or the archipelagic waters of a state are subjected to the domestic jurisdiction of the coastal state alone. A place outside the jurisdiction of any state refers to *terra nullius*[89] or on the shores of an unoccupied territory.[90] The ILC includes the phrase "in a place outside the jurisdiction of any State" into the provision was with the intention to cover acts committed by a ship or aircraft on an island constituting *terra nullius* or on the shores of an unoccupied territory. This phrase is to prevent such acts committed on ownerless territories and escape from all penal jurisdictions.[91]

It can be noticed that the UNCLOS 1982 piracy definition limits the locality of occurring crime of piracy since acts of piracy must have taken place only on the high seas or in a place which is outside the jurisdiction of any state. This limitation forms as a great obstacle to the effectiveness of the UNCLOS 1982 provisions on piracy.

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85 The UNCLOS 1982, art 101 (a) (i) and (ii).

86 *Supra* note 61. Hereinafter referred to as the EEZ.

87 S*upra* note 80 at 282.

81 Robert Beckman, "Singapore Strives to Enhance Safety, Security, and Environmental Protection in Its Port and in the Straits of Malacca and Singapore" 14 *Ocean & Coastal L.J.* 183-184(2009).

88 The UNCLOS 1982, art. 86.

89 *Terra nullius* means that the territory which is not under the sovereign authority of any state or which has been abandoned by the previous sovereign. Nowadays, it is extremely rare to find *terra nullius* because most of the territories all over the world have been occupied by the existing states. See, *supra* note 21 at 103.

90 For example, Antarctica Continent.

91 *Supra* note 80 at 282.

This is because the expansion of the territorial sea from three nautical miles to twelve nautical miles[92] and the emergence of new maritime zone, *i.e.* the EEZ, which is 200 nautical miles,[93] create the geographical area of the high seas to be significantly lesser. Consequently, most of the piratical attacks occurred on the high seas in the past now shift into the territorial seas or EEZ. Generally, piratical attacks occur closer to shore because most of the vessels pass through near to ports and within straits. In addition, UNCLOS 1982 does not impose any obligation for state parties to suppress piracy occurring within the territorial sea or EEZ.[94] Pirates may establish their bases within this limit and not even necessary to go on the high seas.[95] Hence the limitation of the locality of piracy is one of the main contributing factors, which narrow down the application of the definition of piracy under the UNCLOS 1982 in coping modern-day piracy.

A hypothetical question can be raised at this juncture is that should the piracy regime under UNCLOS 1982 be applicable to all sea areas, *i.e.* within or outside the jurisdiction of any state? In other words, should it cover all maritime zones, namely: territorial sea of any state, the EEZ of any state, the high seas and a place outside the jurisdiction of any state? The same concept was proposed in 1971 by Ambassador Pardo of Malta in the working paper submitted to the session of the sea-bed committee. It is stated in the proposal that "any illegal acts of violence or detention, or any act of depredation, committed by the crew or the passengers of a private ship or a private aircraft, and directed anywhere in ocean space or in the superjacent atmosphere against another ship or aircraft, or against persons or property on board such ship or aircraft…".[96] This definition of piracy broadens the application of the piracy provision to all sea areas or on the seabed beyond internal waters. Unfortunately, this notion was defeated because not many states were willing to compromise state sovereignty for the purpose of suppressing piracy.

Again, the status of the EEZ is quite controversial with regard to the application of the UNCLOS 1982 piracy regime. Generally, the EEZ is subjected to the jurisdiction of the coastal state and thus it cannot be considered as a place outside the territorial jurisdiction of any state too. However, the jurisdiction of the coastal state in the EEZ is limited only to the exploration and exploitation, conservation and management of the natural resources; the establishment and use of artificial islands, installations and structures; marine scientific research; the protection and preservation of the marine

92 Three nautical miles is equivalent to 22.224km.

93 Two hundred nautical miles is equivalent to 370.4km.

94 S*upra* note 42 at 89.

95 Mo, "Options to Combat Maritime Piracy in Southeast Asia" 33 *Ocean Development & International Law* 347 (2002).

96 *Supra* note 39 at 198-199.

environment and other rights and duties provided for in the UNCLOS 1982.[97] Thus, some commentators express that the provision of article 101 is applicable to acts of piracy committed in the EEZ in accordance with article 58 (2) of the UNCLOS 1982 which provides that: "Articles 88 to 115 (which includes provisions pertaining to piracy from Article 100 to 107) and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part".[98]

From the casual reading of the piracy provisions under the UNCLOS 1982, it seems to be not applicable to the EEZ at all because the location of the piracy is strictly confined in the provision itself only on the high seas or in a place outside the territorial jurisdiction of any State. Although the high seas is defined clearly in article 86 as all parts of the sea that are not included in the EEZ, in the territorial sea or in the internal waters of a state, or in the archipelagic waters of an archipelagic state; the next immediate sentence of this article makes it clear that it does not entail any abridgement of the freedoms enjoyed by all states in the exclusive economic zone in accordance with article 58. Accordingly, some commentators concluded after careful analysis of aforesaid provisions that the piracy regime under the UNCLOS 1982 is indirectly applicable to the EEZ.[99]

On the other hand, it should be noted that, in 1978, there was an attempt to include the EEZ into the definition of piracy. The broader scope of the application of the provision was suggested by the Peruvian representative at the seventh session of the Third United Nations Conference on the Law of the Sea (UNCLOS III).[100] This was a suggestion to amend article 101 (a) (i) with the wordings: "against another ship, or aircraft, or against persons or property on board such ship or aircraft in the exclusive economic zone or on the high seas".[101] Unfortunately, this proposal was not accepted and the text of the definition of piracy from the High Sea Convention was repeated as it is in the article 101 of the UNCLOS 1982.[102] This situation reflects the intention of the majority of the drafters and representatives of the UNCLOS III to exclude the EEZ from the application of the piracy regime.

In a nutshell, the authors are of the opinion that the piracy regime under the UNCLOS 1982 should be applicable to the EEZ as well. In other words, it should

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97 The UNCLOS 1982, art 56 (1); Jose´ Luis Jesus, *supra* note 79 at 379.

98 *Supra* note 39 at 202.

99 E.D. Brown, 1*The International Law of the Sea*: *Introductory Manual* 303(1994).

100 The Third United Nations Conference on the Law of the Sea was held with 160 participating states between 1973 and 1982. See United Nations, *Third United Nations Conference on the Law of the Sea 1973-1982* (2009) Codification Division (Office of Legal Affairs) *available at*: http://untreaty.un.org/cod/diplomaticconferences/lawofthesea-1982/lawofthesea-1982.html (last visited on Aug. 5, 2012)

101 *Supra* note 39 at 199-200.

102 *Ibid.*

cover, namely: the EEZ of any state, the high seas and a place outside the jurisdiction of any state. In practice, current narrow application of piracy provisions allows pirates to commit acts of piracy in the EEZ of a state and avoid from prosecution to another state. In order to eradicate safe havens for the pirates, the location of piracy in article 101 should be broadened to include the EEZ with express wordings instead of indirect application from article 58 on the basis of presumption.[103] In this way, every sovereign state will have the jurisdiction to arrest and prosecute pirates when the crime is committed in the EEZ of any state, on the high seas and in a place outside the jurisdiction of any state. If the coastal state of the EEZ in which the pirates are arrested has the interest to prosecute perpetrators, it shall have the right to request for extradition from the custodial state which shall have to extradite them upon request. This concept is suggested to avoid the jurisdictional conflict between the coastal state and the custodial state.

V Jurisdiction to seize pirate ships and prosecute pirates

Historically, the seas were subject to the freedom of the seas doctrine. Until the 17th century, states could only exercise limited jurisdiction over a narrow band of water along the national coasts. In the 18th century, the "cannon-shot rule" was developed for determining the jurisdiction of a nation at seas. According to this rule, a nation can exercise jurisdiction over a territorial sea as far as a projectile could be fired from a cannon based on shore - this range was approximately three nautical miles.[104] Subsequently, this principle was widely accepted by maritime nations and became well-established international customary law for determining the territorial sea of a state.[105] However, due to the technological advancement in the mid-19th and early-20th centuries, states claimed sovereignty beyond the traditional three nautical miles limit for protecting and exploiting natural resources in the seas.[106] After convening series of conferences among various nations, the UNCLOS 1982 eventually delimits

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103 See Zou Keyuan, "Enforcing the Law of Piracy in the South China Sea" 31 *J. Mar. L. & Com.* 111-112 (Jan. 2000).

104 A nautical mile is equivalent to 6,080 feet or 1,853 meters.

105 United Nations, *The United Nations Convention on the Law of the Sea: A Historical Perspective*, *available at*: http://www.un.org/Depts/los/convention_agreements/convention_ historical_ perspective.htm (last visited on Sep. 9, 2010).

106 Daniel J. Hollis and Tatjana Rosen, "United Nations Convention on Law of the Sea (UNCLOS) 1982" *The Encyclopedia of Earth,* June 22, 2010 *available at*: http://www.eoearth.org/article/ United_Nations_Convention_ on_Law_of_ the_Sea_ (UNCLOS),_1982

several maritime zones, namely: internal waters,[107] the territorial sea,[108] the contiguous zone,[109] the EEZ [110] and the high seas.[111]

Whether pirates, pirate ships or aircrafts are subjected to municipal law or the international law is determined on the basis of the place of the commission of the acts of piracy. If the piracy is committed within the internal waters, the territorial sea, the contiguous zone, the EEZ of a state, such crime may be considered as piracy under the coastal state's domestic law. Under international law, acts of piracy must be committed on the high seas or in a place outside the jurisdiction of any state. Only when pirates, pirate ships or aircrafts committed piracy under international law, every state has jurisdiction to seize the pirate ships or aircrafts, arrest the pirates, dispose their properties and bring them to trial before its own court regardless of the state of nationality. Accordingly, the following discussion focuses on the high seas regime alone among other maritime zones under the UNCLOS 1982.

Piracy and universal jurisdiction

Although only the flag state can exercise the exclusive jurisdiction over the vessel flying its flag on the high seas, other states still can enforce the law against foreign ships, which involve in committing piracy, which is subjected to the universal jurisdiction. There are numerous factors, which support this universal jurisdiction for piracy. Pirates indiscriminately attack all vessels in their maritime navigations. Consequently, piracy incriminates the interest of all countries in the world. In addition, since pirates' conducts are not authorised by their country of nationality,[112] there will be no objection from their home country when another state which is affected by piracy wishes to prosecute them.[113]

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107 The UNCLOS 1982, art. 8 (1): "[W]aters on the landward side of the baseline of the territorial sea form part of the internal waters of the state".

108 *Id.*, art. 3: "Every state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention".

109 *Id.*, art. 33 (2): "The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured".

110 *Id.*, art. 57: "The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured".

111 *Id.*, art. 86: "The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a state, or in the archipelagic waters of an archipelagic state".

112 Kenneth C. Randall, "Universal Jurisdiction under International Law" 66 *Tex. L. Rev.* 793(1988).

113 Eugene Kontorovich, "Piracy and International Law" Global Law Forum: Jerusalem Centre for Public affairs, Feb. 8, 2009 *available at*: http://www.globallawforum.org/View Publication.aspx?ArticleId=96 (last visited on Sep. 9, 2010).

In fact, universal jurisdiction over piracy developed through customary international law, and later, it has been codified in various international conventions and treaties at international as well as regional levels. The Convention on the High Seas 1958 and the UNCLOS 1982 authorise every state, on the high seas or in any other place outside the jurisdiction of any state, to 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.[114] This provision is an exception to the exclusive jurisdiction of the flag state on the high seas. It gives the right to every state to seize pirate ships and ships controlled by pirates.

However, this provision is only applicable on the high seas or in any other place outside the jurisdiction of any state. A warship[115] cannot seize a pirate ship in the EEZ of another state. This narrow location of exercising universal jurisdiction provides safe havens for pirates. They may commit piracy either on the high seas or in any other place outside the jurisdiction of any state and enter to in the EEZ or the territorial sea of another state. In another way, they may also commit piracy either in the internal waters, the territorial sea or the EEZ of a state and evade from seizure into the EEZ or the territorial sea of another state. In this case, the coastal state alone can arrest and prosecute them. They can totally escape criminal liability if the coastal state is not aware of the occurrence of such crime or reluctant to pursue them. Even if a warship spots them on the high seas, the ship cannot pursue the perpetrators within the territorial sea of a foreign state.

Although the right of hot pursuit is granted to warships, it is with several restricted conditions.[116] Under article 111 of the UNCLOS 1982, such right ceases as soon as

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114 The Convention on the High Seas 1958, art. 19; the UNCLOS 1982, art. 105.

115 The UNCLOS 1982, art 29 defines warships as: "[A] ship belonging to the armed forces of a state bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the state and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline".

116 The conditions listed in art 111are as follows:

(1) The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal state have good reason to believe that the ship has violated the laws and regulations that state.

(2) Such pursuit must be commenced when the foreign ships or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing state.

(3) The pursuit has not been interrupted.

(4) The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own state or of a third state.

(5) The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance, which enables it to be seen or heard by the foreign ship.

the ship pursued enters the territorial sea of its own state or of a third state.[117] The pursuit must be commenced uninterruptedly when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing state.[118] Thus, the pursuing state can exercise such right into the EEZ of another state only when the piracy occurred in its internal waters, archipelagic waters, territorial sea or contiguous zone. If the piratical attacks commenced on the high seas or in any other place outside the jurisdiction of any state, no pursuing warship can enter into the EEZ of a coastal state and exercise the said right.

Therefore, the authors propose to extend the application of the provision of article 105 of the UNCLOS 1982 not only on the high seas or in any other place outside the jurisdiction of any state but also to the EEZ of any state. A warship, which exercises pursuit, of course, must first notify to the coastal state and second request to cooperate in pursuing instantaneously. Any coastal state, which receives request from a foreign warship which pursuing pirates within its EEZ should allow the pursuit and cooperate accordingly.

In 1971, a proposal akin to the above notion was suggested by Ambassador Pardo of Malta in the working paper, submitted to the session of the sea-bed committee, which states that: "In any place more than twelve miles from the coast or in a place outside the jurisdiction of a state, every state after notification to the state concerned or to the International Ocean Space Institutions, as the case may be, may seize a pirate vessel or aircraft, or a vessel or aircraft taken by piracy and under the control of pirates and arrest the persons and seize the property on board".[119] This draft allows for seizure only in the EEZ in accordance with current maritime delimitations. It also requires every state to notify either to the state concerned or the International Ocean Space Institutions in exercising seizure of pirate ships. In 1976, another similar proposal was made by the representative of Uruguay to allow a state encountering a pirate ship or aircraft in the EEZ of another state after notifying the coastal state and cooperate with it in seizure. This proposal further requires the coastal state to cooperate in seizure together with a foreign warship, which is in pursuit of a

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(6) The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

(7) Where a ship has been stopped or arrested outside the territorial sea in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained.

117 The UNCLOS1982, art 111 (3).

118 *Id.*, art 111 (1).

119 *Supra* note 39 at 213.

pirate ship or aircraft.[120] In 1978, the same concept was repeated again with different wordings in the proposal submitted by the representative of Peru at the seventh session of the UNCLOS III as: "Any state which in the exclusive economic zone of another state encounters a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, shall immediately so inform the respective coastal state and shall, if that state so request, co-operate in the adoption of appropriate measures".[121] The common characteristics of all the aforesaid proposals are to extend the marine zone to exercise universal jurisdiction against a pirate ship or aircraft into the EEZ of a coastal state with prior notification to the state concerned. Besides, later two proposals seek for cooperation from the coastal state in the pursuit.

The seizure on account of piracy can only be carried out by warships or military aircraft, or other ships or aircraft, which are clearly marked and identifiable as being on government service and authorised to that effect.[122] This provision identifies two types of ships and aircraft, which are qualified to exercise seizures on account of piracy such as "warships or military aircrafts" and "other ships or aircraft on government service". Except warships or military aircrafts, other ships or aircrafts must be clearly marked and identifiable as being on government service because warships or military aircrafts are easily identifiable as in government service. Again, other ships or aircrafts must be authorised to that effect, *i.e.*, ships authorised to patrol or seizure for maritime security. This provision limits the right to exercise the seizure on account of piracy only to warships and thus other government ships are not entitled to the same right.[123] Apart from a warship, a victim ship can also attack and seize a pirate ship in the exercise of self-defense. However, this right is not derived from article 107 of the UNCLOS 1982. The ILC made it clear in its commentary that this article does not apply in the case of a merchant ship, which has repulsed an attack by a pirate ship in exercising its right of self-defence, overpowers the pirate ship and subsequently hands it over to a warship or to the authorities of a coastal state.[124] The above exercise by a warship should be carried out by states with great caution to avoid friction among them. It is also important to note that the right to take action should be confined only to warships and not other state-owned vessels.[125] There is also a safeguard for the foreign ships where the seizure of a ship or aircraft on suspicion of piracy has been affected without adequate grounds. In such situation, the state making the seizure shall be liable to the ship or aircraft for any loss or damage caused by the seizure.[126]

Hence it is summarised that contemporary international law treats pirates as *hostes*

120 *Id.* at 214.

121 *Id.* at 215.

122 The Convention on the High Seas 1958, art. 21; the UNCLOS 1982, art. 107.

123 *Supra* note 39 at 221-222.

124 United Nations, *supra* note 80 at 283.

humani generis or enemies of all mankind. Piracy is also regarded as an international crime where the perpetrators are subject to the universal jurisdiction in which any state can apprehend, on the high seas or in any other place outside the jurisdiction of any state.[127]

Right of visit

Another exception to the exclusive jurisdiction of the flag state over the vessels flying its flag on the high seas is "right of visit". International law of the sea conventions allow a warship to visit on board a foreign ship on the high seas in certain circumstances. The UNCLOS 1982 authorises warships to visit and/or inspect ships on the high seas if there is reasonable ground for suspecting that the ship is engaged in piracy.[128] The subsequent provision elucidates the methods in which the right of visit should reasonably be exercised by a warship. Firstly, the warship may proceed to verify the ship's right to fly its flag, *i.e.,* documents issued by the flag state, which evidenced to the nationality of the ship. For the verification purpose, the warship may send a boarding party on a boat under the command of an officer to the suspected ship. The rank of the officer is not further specified and thus even any warrant officer or petty officer may take charge of such boarding and verification. Secondly, the boarding party may proceed for a further inspection on board the ship if suspicion remains even after the examination of the documents.[129] Right of visit therefore involves two portions such as boarding and inspection of a ship.[130]

Nonetheless, this right must be carried out with all possible consideration because the foreign ship shall be compensated for any loss or damage that may have been occurred due to the boarding process, if the suspicions prove to be unfounded or the ship boarded has not committed any act justifying exercise of such right of visit.[131]

Apart from warships, military aircrafts are also granted the same right of visit to foreign vessels on the high seas under the same conditions applicable to warships.[132] Military aircrafts not necessarily confined only to aircraft belong to air forces of a state but any state owned aircraft, which is authorised for such purpose may exercise

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125 United Nations, *supra* note 61 at 26.

126 The Convention on the High Seas 1958, art. 20; the UNCLOS 1982, art. 106.

127 See Paul Arnel, "International Criminal Law and Universal Jurisdiction" 11 *Int'l Legal Persp*. 60(Spring 1999). As cited in Erik Barrios, "Casting a Wider Net: Addressing the Maritime Piracy Problem in Southeast Asia" 28 *Boston College International and Comparative Law Review* 149 (Winter 2005).

128 The UNCLOS 1982, art. 110 (1) (a).

129 *Id*., art 110 (2).

130 *Supra* note 39 at 239-240.

131 The UNCLOS 1982, art. 110 (3).

132 *Id*., art. 110 (4).

the right of visit. Hence the right of visit must be carried out only by duly authorised ships or aircraft clearly marked and identifiable as being on government service.[133]

Typically, this right of visit is exercisable by a warship or military aircraft against a suspected foreign ship on the abovementioned suspicious grounds only on the high seas. This geographical limitation to exercise the right of visit should extend not only on the high seas but also to the EEZ. In 1971, Ambassador Pardo of Malta submitted a proposal in which the areas of application of the right of visit by a warship towards a foreign ship is extended to anywhere beyond the internal waters.[134] Twice, in 1978 and 1980, the Peruvian representative to the UNCLOS III attempted to introduce a proposal in which the right of visit is granted to a warship in the EEZ of another state with immediate notification to the coastal state of what actions it has taken in accordance with article 110.[135]

In this regard, the authors propose to apply article 110 into the EEZ subject to some limitations to avoid jurisdictional conflict between the coastal state and the state of which warship or aircraft exercise such right. The foreign warships willing to exercise the right of visit in the EEZ shall immediately notify its intention to board a foreign ship on suspicious ground to the coastal state for the permission to do so. The warship may continue to exercise right of visit to a foreign ship when the permission is granted by the coastal state. If the suspicions prove to be unfounded or the ship boarded has not committed any act justifying exercise of such right of visit, it shall be compensated for any loss or damage that may have been occurred due to the boarding process. If the ship boarded has committed any act enumerated in article 110, there can be two situations. The first situation is that the warship, which seized pirate ship or aircraft and pirates may bring them to its jurisdiction and prosecute them. In second situation, the warship shall transfer the pirate ship and extradite pirates to the coastal state if it is requested to do so. In this case, the warship shall escort the pirate ship or aircraft to a port of the coastal state for the purposes of prosecuting them before the competent authorities if the circumstances rendered this necessary.

Prosecution of pirates

The UNCLOS 1982 further allows the courts of the state parties, which carried out the seizure to decide upon the penalties to be imposed and determine the action to be taken with regard to the ships, aircrafts or properties.[136] It could be observed from the said provision that any custodial state may prosecute pirates in accordance

133 *Id*., art. 110 (5).

134 *Supra* note 39 at 239-240.

135 *Id*. at 243-244.

136 The Convention on the High Seas 1958, art. 19; the UNCLOS 1982, art. 105.

with its municipal law before any hierarchy of its domestic court.[137] The UNCLOS 1982 does not stipulate any specific punishment for perpetrators of the crime piracy on its own and the matter is left to the domestic laws and courts of law of member states.

VI Conclusion

In general sense, it should be noted that the primary objective of the UNCLOS 1982 is to codify customary international law relating to piracy and thus it merely provides legal basis to cover traditional piracy.[138] The UNCLOS 1982 piracy regime is too narrow to be effective in suppressing modern-day piracy and thus there is a need to provide a wide-ranging definition of piracy in which all forms of modern-day piratical attacks can be considered as offences. Accordingly, it is subjected to various criticisms and there have been calls for the amendment of the piracy regime under the UNCLOS 1982. Its piracy definition consists of five essential elements, namely: acts of piracy; private ends; two ships; private ships; and locality of piracy. All these elements have been criticised by various commentators.

There is no clarification whether threatened violence and clandestine theft without any violence are considered as crimes under the piracy definition.[139] Thus, it is necessary to amend the definition of piracy in order to prescribe threatened violence and clandestine theft as acts of piracy. Moreover, the definition covers only actual piratical attacks and excludes attempted attacks.[140] It is, therefore, proposed that attempted or frustrated attacks should be covered under the piracy definition of the UNCLOS 1982.

This definition further requires acts of piracy must be committed for "private ends" and thus attacks committed for "political ends" are not covered under this definition.[141] Accordingly, piracy committed by some insurgent groups as a means to raise funds for their rebellious activities[142] and terrorist attacks as an approach to get international attention[143] do not fall under this definition of piracy. Therefore, it is suggested that the requirement of "private ends" should be removed from the definition

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137 See Samuel Shnider, "Universal Jurisdiction Over 'Operation of a Pirate Ship': The Legality of the Evolving Piracy Definition in Regional Prosecutions" 38 *N.C.J. Int'l L. & Com. Reg.* 531-556(Winter 2013).

138 See Harold Hongju Koh, "Twenty-First-Century International Lawmaking" 101 *Geo. L.J.* 738-740(Mar. 2013); Samuel Shnider, *id.* at 497-500.

139 *Supra* note 43.

140 See United Nations, *supra* note 2 at 83-84, annexes 137.

141 *Supra* note 60.

142 *Supra* note 70.

143 *Supra* note 69.

of piracy in order to cover all form of illegal acts committed without discrimination by all kind of perpetrators including recognised governments, recognised belligerents or recognised insurgents.

Another weakness in this definition is that acts of piracy committed on board a single ship by the crew or passengers directed against the ship itself or against the persons or property on that ship cannot be regarded as piracy[144] and two ships must involve in a piracy, namely: pirate ship and victim ship. Thus, the authors suggest excluding the "two-ship" requirement from the piracy definition for the purpose of providing legal basis for vessel controlled by mutinied crews or hijackers on account of piracy.[145]

In term of locality, piracy can be committed only on the high seas or in a place situated outside the territorial jurisdiction of any state. The applicability of this definition to the EEZ is very controversial as some commentators argue that it is indirectly applicable to the EEZ[146] despite the fact that this presumption was rejected by representatives from various states at the seventh session of the UNCLOS III.[147] Thus, it is recommended that article 101 should be extended to include the EEZ with express wordings instead of indirect application from article 58 on the basis of presumption.

Moreover, the UNCLOS 1982 allows a warship to seize a pirate ship or aircraft on the high seas or in any other place outside the jurisdiction of any state. This narrow location of exercising universal jurisdiction provides safe havens for pirates. Therefore, it is proposed that article 105 should be amended to extend its application to the EEZ for exercising seizure of a pirate ship or aircraft, of course, with prior notification to the coastal state. Similarly, the UNCLOS 1982 confers right of visit to a warship or military aircraft against a suspected foreign ship on the ground for suspecting of committing piracy on the high seas. This geographical limitation to exercise such right is narrow to be effective and thus article 110 should also be extended its application to the EEZ with prior notification to the coastal state.[148] Finally, it is humbly hoped that the aforesaid proposed pragmatic solutions to the piracy regime under the UNCLOS 1982 would greatly contribute in suppressing piracy all over the world.

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144 *Supra* note 61.

145 See Samuel Pyeatt Menefee, "Anti-Piracy Law in the Year of the Ocean: Problems and Opportunity" 5 *ILSA J Int'l & Comp L.*, at 312-313 (Spring 1999).

146 *Supra* note 99.

147 *Supra* note 39 at 199-202.

148 *Supra* note 103.