

CRITICAL ANALYSIS OF THE EFFICACY OF THE ReCAAP IN COMBATING PIRACY AND ARMED ROBBERY AGAINST SHIPS IN ASIA

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Abstract

The Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia 2004 is an important regional agreement for alleviating incidents of piracy and armed robbery against ships and all the member states are sincerely enforcing its treaty norms through appropriate national legislations. However, the agreement has failed to achieve considerable success because the two major players, Malaysia and Indonesia, of the navigation industry have yet to accept its membership, and also because the definition of maritime crimes in the agreement is not wide enough to encompass all kinds of maritime crimes pertaining to piracy and armed robbery. Because of these and some other deficiencies, it becomes necessary to critically examine the agreement and to offer necessary viable suggestions. The paper undertakes this task and suggests that the two states should be persuaded to be members of the agreement. It further designs a workable definition to the term maritime crimes so that the objectives of the agreement are achieved.

I Introduction

THE REGIONAL Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia 2004¹ is the first regional agreement for promoting

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1 Hereinafter referred to as ReCAAP.

and enhancing cooperation in suppressing piracy and armed robbery against ships across Asia. The agreement was drafted by 16 states² in 2002 and the scope as well as content of the ReCAAP were finalised in the Tokyo meeting on November 11, 2004. It came into force on September 4, 2006 after receiving its tenth ratification for the entering into force³ and, as of January 5, 2016, it has 20 contracting parties.⁴ Generally, it covers only two types of maritime crimes, namely, piracy and armed robbery against ships. As information sharing is one of an essential requirement for achieving objectives of the ReCAAP, an information sharing centre⁵ was established with the vision to be the information hub for combating piracy and armed robbery against ships in Asia. On November 29, 2006, it was officially launched and its first governing council was also set up and an executive director was appointed.⁶ On January 30, 2007, it was formally recognised as an international organisation.⁷

The ReCAAP requires all the contracting parties to implement the agreement to the possible extent through their respective national laws and regulations for preventing and suppressing piracy and armed robbery against ships.⁸ Based on facts, one can assert with utmost certainty that the ReCAAP is greatly helpful in combating and suppressing piracy and armed robbery against ships in the region. Nevertheless, it has failed to fully address the problem due to the reluctance by two major maritime countries in the region to ratify, narrow definition of maritime crimes, limitation on the information

2 Ten ASEAN Members, namely, Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam; and six non-members, namely, India, Sri Lanka, Bangladesh, Republic of Korea, China, Hong Kong, and Japan. See Japanese Ministry of Foreign Affairs, *Japan's efforts to combat piracy and armed robbery against ships* (Nov. 2001), *available at*: <http://www.mofa.go.jp/region/asia-paci/asean/relation/piracy.html> (last visited on Mar. 10, 2016).

3 ReCAAP, art. 18 (3).

4 ReCAAP ISC, *About ReCAAP* (2016), *available at*: <http://www.recaap.org/AboutReCAAPISC.aspx> (last visited on May10, 2016).

5 Hereinafter referred to as ISC.

6 The ReCAAP ISC, *The 9th Meeting of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea* (June 23 – 27, 2012), *available at*: http://www.un.org/depts/los/consultative_process/documents/9_ito_presentation.pdf (last visited on Mar. 14, 2016).

7 The ReCAAP ISC, *Enhancing Regional Cooperation – the ReCAAP Model* (Nov. 28, 2011), *available at*: http://www.rsis.edu.sg/nts/events/docs/ASI%20LeeYinMui_PPT.pdf (last visited on Mar. 10, 2015)

8 ReCAAP, art. 2 (1).

sharing mechanism, poor capacity building, and lack of specific cooperation among the member states. Thus, in order to make this international legal instrument an effective legal tool to really alleviate the problem, there is a pressing need to critically examine the efficacy of the treaty norms of the ReCAAP and to offer suitable suggestions.

Accordingly, the authors intend to analyse shortcomings of the ReCAAP and propose viable solutions to issues that are still there to be addressed. First and the foremost, in order to make the treaty have a widespread and long-term impact, the existing contracting parties are suggested to persuade Indonesia and Malaysia to ratify the agreement. It is also proposed to widen the scope of maritime crimes and include the acts of maritime terrorism. It is preferable to remove the two ships requirement from the piracy definition. All contracting parties are advised to allow the hot pursuit in their territorial waters in arresting culprits or seizing pirate ships and cooperate with the requesting contracting parties. All ships passing through the waters in the region are recommended to notify the flag states, the nearest focal point of a contracting state and the ISC when any incident takes place. All focal points of the contracting states should also be well equipped with advanced technologies. The cooperative measures among the contracting states should be more specific and extradition to a requesting contracting party, which has jurisdiction over the offenders, should also be mandatory under the agreement.

II The emergence of the ReCAAP

In November 1999, the late Japanese Prime Minister Keizo Obuchi,⁹ looking at the rising number of piracy and armed robbery incidents in southeast Asia, proposed for the establishment of a regional agreement in order to ensure efficient cooperation to combat piracy and armed robbery against ships,¹⁰ especially in the Straits of Malacca and South China Sea. Numerous hijacking and kidnapping instances causing loss of lives of various citizens including Japanese, made the proposal of a regional agreement even more critical. This state of affair, in fact, created a degree of threat to maritime navigation carried out in the region. In response to this situation, at the Association of Southeast Asian Nations (hereinafter ASEAN) ASEAN+1 summit

9 The ReCAAP ISC, An Initiative & Next for the ISC (Nov. 5, 2007), *available at*: <http://www.intertanko.com/upload/PiracyForumReCAAP.pdf> (last visited on Apr. 20, 2016).

10 Japanese Ministry of Foreign Affairs, *supra* note 2.

meeting,¹¹ the heads of state of the members of ASEAN and Japan agreed on the need to deepen cooperation in combating the crime of piracy and armed robbery. They also welcomed Japan's offer to host an international conference of coast guard authorities for exploring possible cooperative approaches in the region.¹²

Consequently, the Government of Japan organised the Regional Conference on Combating Piracy and Armed Robbery against Ships with the participation of the heads of coast guard agencies and the director-generals of maritime policy authorities of 16 states and one region¹³ in April, 2000. In the beginning of the conference, former Japanese Prime Minister Yoshiro Mori and the then senior state secretary for foreign affairs, Tetsuma Esaki expressed their strong desire for the establishment of a cooperative measures among the countries involved, as well as the intention of Japan, which would benefit greatly from security in the waters surrounding southeast Asia, to support and cooperate on such a framework to the fullest extent. The conference was divided into two sessions: the session for heads of regional coast guard agencies, and the session for maritime policy authorities and representatives from ship owners' associations. The session for heads of regional coast guard agencies, adopted the Asia Anti-Piracy Challenges 2000 which affirms the importance of each country cracking down on piracy and armed robbery against ships, and enhancing cooperation among the relevant institutions of each country. The session for maritime policy authorities and representatives from ship owners' associations from each country adopted the Tokyo Appeal and the Model Action Plan for Maritime Policy Authorities and Private Maritime Related Concerns to Combat Piracy and Armed Robbery against Ships,¹⁴ which called for enhancement of self-protection measures

11 Japanese Ministry of Foreign Affairs, The Summit Meetings of the Heads of State/ Government of ASEAN member states and the Premier of the People's Republic of China, the Prime Minister of Japan, and the President of the Republic of Korea was held in Manila, Philippines on Nov. 28, 1999, available at: http://www.mofa.go.jp/region/asia-paci/asean/pmv9911/release_c.html (last visited on Jan. 20, 2016).

12 *Ibid.*

13 16 states and areas include (ASEAN, India, the Democratic Socialist Republic of Sri Lanka, the People's Republic of Bangladesh, the Republic of Korea, China, Japan and Hong Kong. See Japanese Ministry of Foreign Affairs, *The Issue of Piracy in Asia (Present State of Affairs)* (Sep. 2001), available at: <http://www.mofa.go.jp/policy/piracy/asia2000.html> (last visited on May 15, 2016).

14 Hereinafter referred to as The Model Action Plan. Available at: <http://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Pages/Default.aspx> (last visited on Apr. 20, 2016).

on ships, thorough reporting to relevant authorities, the strengthening of cooperation among organisations within the governments of each country, the establishing an international intelligence network, and the promotion of the analysis of information. Later, both the Tokyo Appeal and the Model Action Plan together became the pivotal documents for drafting of the ReCAAP.¹⁵ The participants¹⁶ exchanged their views and agreed to the idea that the issue of piracy is one that greatly affects the stability and prosperity of the entire region. Thus, cooperation among all countries will be essential to take the first step towards regional cooperation on anti-piracy measures. As a result, they agreed to strengthen regional cooperation in order to tackle piracy and armed robbery against ships which had become more brutal and organised.¹⁷

In following up on the Regional Conference on Combating Piracy and Armed Robbery against Ships, in September 2000, the Japanese government dispatched the Mission for Combating Piracy and Armed Robbery against Ships to Malaysia, Indonesia, Singapore and Philippines mainly to discuss about more but viable specific measures, assistance and cooperation.¹⁸ In November 2000, a Japan coast guard patrol vessel visited India and Malaysia, and implemented joint training to combat piracy. In this way, bilateral cooperation was being steadily developed.¹⁹ Again, in November 2000, former Japanese Prime Minister Yoshiro Mori called upon the other countries to support the holding of the Asian Cooperation Conference on Combating Piracy and Armed Robbery against Ships at the ASEAN+3 summit meeting.²⁰

15 See Joshua Ho, Combating piracy and armed robbery in Asia: The ReCAAP Information Sharing Centre (ISC) 33 *Marine Policy* 432 (2009); Ved P. Nanda, Maritime Piracy: How Can International Law and Policy Address This Growing Global Menace? 39 *Denn. J. Int'l L. & Poly* 190 (Spring, 2011).

16 Heads of coast guard agencies from 16 countries and one region, including the ten ASEAN countries, as well as maritime policy authorities (equivalent to the Director-General of the Maritime Bureau of the Ministry of Land, Infrastructure and Transport), representatives from International Maritime Organizations (IMO) and representatives from ship owners associations from each country. See, Japanese Ministry of Foreign Affairs, *supra* note 13.

17 Japanese Ministry of Foreign Affairs, *supra* note 2.

18 *Ibid.*

19 Japanese Ministry of Foreign Affairs, *supra* note 13.

20 The 10 ASEAN countries and Japan, the People's Republic of China and the Republic of Korea participated in the meeting which took place in Singapore.

In October 2001, the Government of Japan, hosted the Asia Cooperation Conference on Combating Piracy and Armed Robbery against Ships in order to discuss medium and long-term vision for a regional cooperation framework. The conference was divided into three sessions. At the first session, participants discussed the threat of piracy and they were all deeply concerned about the increase of piratical incidents in 1990s, especially in the southeast Asian waters. They also shared the view that piratical issues posed a serious threat to maritime navigation and that the Asian region as a whole should join together to combat the ever growing issue of piracy and armed robbery. At the second session, after the discussion of the latest counter measures taken by each country, including domestic measures and bilateral cooperation arrangements, they subscribed to the view that it was important for Asian countries to continue such efforts, and they should even make efforts to cooperate with private sectors. At the third session, participants actively discussed the future direction of regional cooperation and they shared the view that multilateral regional cooperation was indispensable in order to effectively combat piracy and armed robbery against ships in the region.²¹ In brief, the participants were aware that the piratical incidents were on the rise despite the various efforts made by countries and organisations concerned. Thus, they upheld the view that it was necessary to explore a new approach and consider developing a regional cooperation agreement for more effective implementation of counter measures against piracy and armed robbery against ships. The participants agreed that modality of such cooperation agreement should be developed by the experts working group and subject to further discussion at an appropriate time.²²

In 2002, the 16 countries (ASEAN+6) started an endeavour to draft the ReCAAP. On November 11, 2004, the scope and the content of the ReCAAP were finalised in the Tokyo meeting.²³ The participants agreed in the meeting to set up an information sharing centre for the ReCAAP in Singapore. Japan, the Republic of Singapore, the Lao People's Democratic Republic, the Kingdom

21 Japanese Ministry of Foreign Affairs, Chairman's Concluding Statement for Asian Cooperation Conference on Combating Piracy and Armed Robbery against Ships (Oct. 4-5, 2001), *available at* : <http://www.mofa.go.jp/policy/piracy/state0110.html> (last visited on Dec. 20, 2015).

22 Japanese Ministry of Foreign Affairs, *supra* note 2.

23 The ReCAAP ISC, General Assembly Informal Meeting on Piracy Enhancing Regional Cooperation (May 14, 2010), *available at* : <http://www.un.org/ga/president/64/thematic/piracy/Yoshihisa.pdf> (last visited on Feb.12, 2016).

of Thailand, the Republic of the Philippines, the Republic of the Union of Myanmar, the Republic of Korea, the Kingdom of Cambodia, the Socialist Republic of Vietnam and the Republic of India ratified it during April 2005 to June, 2006.²⁴ Accordingly, on September 4, 2006, the ReCAAP entered into force, 90 days after the date on which the tenth instrument of notification was submitted by India to the depository.²⁵

The Democratic Socialist Republic of Sri Lanka acceded to the ReCAAP while waiting 90 days for its entering into force. The People's Republic of China, Brunei Darussalam and the People's Republic of Bangladesh acceded after it came into force. As the contracting parties agreed earlier to set up an information sharing centre, the ReCAAP, ISC was officially launched on November 29, 2006. On the same day, its first governing council was also set up and the executive director was appointed.²⁶ On January 30, 2007, it was formally recognised as an international organisation. As of January 5, 2016, 20 states have become contracting parties to the ReCAAP, namely, Australia, the People's Republic of Bangladesh, Brunei Darussalam, the Kingdom of Cambodia, the People's Republic of China, the Kingdom of Denmark, the Republic of India, Japan, the Republic of Korea, the Lao People's Democratic Republic, the Republic of the Union of Myanmar, the Kingdom of the Netherlands, the Kingdom of Norway, the Republic of the Philippines, the Republic of Singapore, the Democratic Socialist Republic of Sri Lanka, the Kingdom of Thailand, the United Kingdom (UK), the United States (US) and the Socialist Republic of Vietnam.²⁷ It is interesting to observe that countries outside the regional mandate of the agreement such as the Kingdom of Denmark, the Kingdom of the Netherlands, the Kingdom of Norway, the UK and the US have taken interest to become parties to the ReCAAP in order to safeguard their ships operating in the Asian waters. In this way, they can have information of the situation in the region and seek assistance from other contracting parties. As a result, the ReCAAP marks as the first multilateral regional agreement in combating piracy and armed robbery against ships in Asia.²⁸

24 *Supra* note 6.

25 *Supra* note 3.

26 *Supra* note 6.

27 *Supra* note 4.

28 Yoshihisa Endo, *Enhancing Regional Cooperation: The Asia Initiative* (June 16–19, 2010) 1st Asia Pacific Heads of Maritime Agency's Forum, Manila, Philippines, available at: <http://www.amsa.gov.au/aphomsa/Meeting%2011/Presentations/>

III Definitions of maritime crimes under the ReCAAP

The ReCAAP is the first regional agreement to promote and enhance cooperation in suppressing piracy and armed robbery against ships across Asia.²⁹ The contracting parties are mindful of the increasing number of incidents of piracy as well as armed robbery against ships in the region and the complex nature of the issue. They also recognise the importance of safety of ships, including their crews, and are exercising the right of navigation provided under the United Nations Convention on the Law of the Sea, 1982 (UNCLOS, 1982). They reaffirm the duty of states to cooperate in prevention and suppression of piracy under the UNCLOS, 1982 and also recall Tokyo Appeal, Asia Anti-Piracy Challenges 2000 and Tokyo Model Action Plan after noting the relevant resolutions and recommendations adopted by the United Nations General Assembly and the International Maritime Organization (IMO).

They are also mindful of the importance of international as well as regional cooperation and coordination of all states affected within Asia in order to prevent and suppress piracy and armed robbery against ships effectively. They believe that information sharing and capacity building among the member states will significantly contribute towards the prevention and suppression of piracy and armed robbery against ships in the region. They further affirm that it is indispensable for each contracting party to strengthen its measures in preventing and suppressing piracy and armed robbery against ships.³⁰

To be in line with above notions, the ReCAAP mainly covers two types of maritime crimes, *i.e.*, piracy and armed robbery against ships. The ReCAAP defines the crime of piracy as follows:³¹

- (a) any illegal act of violence or detention, or any act of depredation, committed for private ends by the crew or

Topic%209%20Enhancing%20Regional%20Cooperation-Endo(ReCAAP).pdf (last visited on Feb.20, 2016).

29 See Barry Hart Dubner and Karen Greene, On the Creation of a New Legal Regime to Tame Sea Pirates 41 *J. Mar. L. & Com* 462 (July, 2010); Thaine Lennox-Gentle, Piracy, Sea Robbery, and Terrorism: Enforcing Laws to Deter Ransom Payments and Hijacking 37 *Transp. L. J* 208 (Fall, 2010); Manjiao Chi, International Legal Cooperation against Somali Piracy: Finding out the Achilles Heels : Piracy Suppression under International Law and Chinese Law 5 *JEAIL* 13-15 (Spring, 2012); Ved P. Nanda, *supra* note 15.

30 *Supra* note 3, preamble.

31 *Id.*, art 1 (1).

the passengers of a private ship or a private aircraft, and directed:

- (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).

In fact, the notion and wordings of this definition of piracy is derived from the previous international conventions, *i.e.*, the Convention on the High Seas, 1958³² and the UNCLOS, 1982.³³ Therefore, it shares the same deficiencies as in the definitions of piracy under the aforementioned international law of the sea conventions.³⁴ The ReCAAP further defines armed robbery against ships in line with the IMO's Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships as follows:³⁵

- (a) any illegal act of violence or detention, or any act of depredation, committed for private ends and directed against a ship, or against persons or property on board such ship, in a place within a Contracting Party's jurisdiction over such offences;
- (b) any act of voluntary participation in the operation of a ship with knowledge of facts making it a ship for armed robbery against ships;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

32 The Convention on the High Seas, 1958, art. 15.

33 The UNCLOS, 1982, art. 101.

34 See Leticia M. Diaz and Barry Hart Dubner, *An Examination of the Evolution of Crimes at Sea and the Emergence of the Many Legal Regimes in Their Wake* 34 *N.C.J. Intl L. & Com. Reg.* 535 (Winter, 2009).

35 *Supra* note 3, art. 1 (2).

Accordingly, the ReCAAP becomes the first multilateral agreement which spells out the crime of armed robbery against ships. In the following sections the paper analyses the essential elements pertaining to the crime of piracy and armed robbery against ships under the ReCAAP.

IV Elements of piracy and armed robbery against ships under the ReCAAP

After careful analysis of the definition of piracy and armed robbery against ships prescribed under the ReCAAP, it is found that there are four essential elements to be fulfilled for an act to be categorised as piracy and three essential elements for an act to be categorised as armed robbery against ships. These elements are discussed in detail in this section.

Acts of piracy and armed robbery against ships

Generally, acts of piracy and armed robbery against ships under the ReCAAP include any illegal acts of violence or detention, or any act of depredation, and there is no further clarification which indicates what kind of conduct would amount to illegal act. These definitions do not cover threatened violence, an illegal act which frequently used to occur at sea.³⁶ For example, in *Fairchem Filly* incident, on March 19, 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 oiler raised the alarm and all crew mustered. The robbers stole a spare part box and escaped with their waiting boat.³⁷ In this incident, there was no actual act of violence but threatened violence only. The crew was not even detained by the robbers. Thus, it is essential to identify whether such threatened violence should be treated as act of violence under the definition of piracy and armed robbery against ships under the ReCAAP.

Another common form of attack is a clandestine attack where attackers board vessels at night - whether steaming or at anchor - and steal cargo, equipment or cash without the knowledge of the crew.³⁸ On February 21,

36 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).

37 ICC International Maritime Bureau, Piracy and Armed Robbery against Ships: Annual Report 1st January - 31st December 2011 45 (Jan. 2012).

38 *Supra* note 36.

2011, robbers boarded *Westerems*, a Liberian container ship, unnoticed and stole ship's properties at Manila North Anchorage, Philippines. Only after their escape, crew men found that the padlock to the forward store were broken and ship's property stolen.³⁹ On November 20, 2011, robbers boarded *Maritime Fidelity*, a Singaporean bulk carrier, anchoring at Chittagong Anchorage B, Bangladesh. They broke forward store padlock and stole ship's stores and escaped.⁴⁰ In these two incidents, crews on board were not even aware of the presence of robbers. On January 28, 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 spare parts were stolen.⁴¹ On May 26, 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.⁴² It can be observed that there was no act of violence or detention involved in the abovementioned incidents. Again, in the case of *Torm Clara*, a Danish tanker, four armed robbers boarded 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.⁴³ Definitely, this type of attack would not fall within the definition of violence or detention, unless such act of trespassing is considered as depredation.⁴⁴

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 crew on board. Accordingly, there is a need of clarification whether such clandestine theft without any act of violence or detention can also be considered as piracy and armed robbery against ships. It is submitted that threatened violence and covert theft should be included under these definitions, because, at any stage, threatened violence may convert to an actual violence and a clandestine theft may turn to a robbery. Another

39 *Supra* note 37 at 44.

40 *Id.* at 57.

41 *Id.* at 43.

42 *Id.* at 57.

43 *Ibid.*

44 *Supra* note 6.

reason is that these maritime crimes are closely related to other acts of piracy. Thus, it is appropriate to group similar class of maritime crime with the general term in the definition of piracy and armed robbery against ships under the ReCAAP.⁴⁵

In addition, these definitions deal only with the actual piratical attack and exclude attempted attack. For example, pirates attempt to board a ship but are resisted by the crew. In this situation, the act does not fall under the definition of piracy or armed robbery against ships under the ReCAAP unless perpetrators succeed in boarding the vessel. The figure 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 IMO⁴⁶ and 218 attempted incidents out of 439 (almost 50% of the total attacks of the year) were reported to the IMB⁴⁷ respectively. It is asserted that attempted attacks can still be considered as piracy or armed robbery against ships and it is always desirable to prosecute frustrated pirates on the basis of express provision rather than presumption. Thus, it is proposed that the definition of piracy and armed robbery against ships under the ReCAAP should be amended to give coverage for attempted or frustrated attacks.

Furthermore, the ReCAAP 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.⁴⁸ Therefore, not only the person who commits actual acts of violence, detention or depredation; but any person who knowingly assists pirates, pirate ships and aircrafts in committing such crime is also regarded as offender under this piracy definition. Nevertheless, the term aircraft is omitted from the definition of armed robbery against ships and the rest are of the same legal effect as piracy in this aspect.⁴⁹

45 In this aspect, authors apply the *ejusdem generis* rule for the interpretation of treaty. See Abdul Ghafur Hamid @ Khin Maung Sein, *Public International Law: A Practical Approach*, 200-204 (3rd edn., 2011).

46 See IMO, Reports on Acts of Piracy and Armed robbery against ships: Annual report 2011 (Mar. 1, 2012) Annex 2 at 1-2.

47 *Supra* note 37 at 8.

48 *Supra* note 33, art. 101 (b) and (c).

49 Abdul Haseeb Ansari, Kyaw Hla Win and Abdul Ghafur Hamid, Combating Piracy under the United Nations Convention on the Law of the Sea 1982 56 *JILI* 320-347 (2014).

Private ends

The ReCAAP definitions of maritime crimes further require acts of piracy or armed robbery against ships 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.⁵⁰ This element of private ends draws a distinction between piracy as well as armed robbery against ships and maritime terrorism which committed for political or public ends. Accordingly, state sponsored attacks, belligerent attacks, insurgent attacks and terrorist attacks (which are politically motivated) against vessels cannot be regarded as acts of piracy and armed robbery against ships under the ReCAAP.⁵¹

In the first decade of the 21st century, maritime terrorist attacks sharply increased. In southeast Asian region, the bombing of *Our Lady of the Mediatrix* had taken place in Iligan Bay of Mindanao in February 2000. In 2003, *M/V Penrider*, a fully laden shipping fuel oil taker, was hijacked on the way from Singapore to Penang in northern Malaysia. In 2004, *Super Ferry 14* was bombed in the Philippines and the incident has been listed as the most destructive act of terrorism in maritime history and the fourth most serious international incident since September 11, 2001. Moreover, there is a growing concern that terrorists may merge with pirates to carry seaborne terrorism.⁵² In the region, the group, especially those operating in southern Philippines, has both political and private ends. The insurgency and separatists has been committing piracy as a viable means of raising funds for rebels and terrorist attacks as an approach to get international attention towards their issues. The Straits of Malacca is

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

51 See P. Birnie, *Piracy, Past, present and future* 11 *Marine Policy* 171 (1987); Abdul Haseeb Ansari, Kyaw Hla Win and Abdul Ghafur Hamid, *Combating Unlawful Acts against the Safety of Maritime Navigation under the SUA Convention* 54 *IJIL* 147-176 (2014); Abdul Ghafur Hamid @ Khin Maung Sein and Kyaw Hla Win @ Md. Hassan Ahmed, *Assessing the Viability of the 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* 6 *Aust. J. Basic & Appl. Sci.* 137 144 (2012); Kyaw Hla Win @ Md. Hassan Ahmed, *Critical Analysis of the Feasibility of the 2005 Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988* 1-17 (Paper presented at the seventh Asian Law Institute Conference, International Islamic University Malaysia (IIUM), Kuala Lumpur, Malaysia) (May, 2010).

52 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* 39 (2006).

another area which is frequently identified as a potential locus of maritime terrorism activity by security analysts. Singapore can also be a possible target of maritime terrorism.⁵³

Although the ReCAAP includes an additional offence of armed robbery against ships, it does not tackle the issue of maritime terrorism which can be an eminent threat to the region. Thus, it is suggested that the contracting parties should take preventive measures not only to combat piracy and armed robbery against ships but also terrorist attacks towards all forms of ships and marine infrastructures such as ports, lighthouses, offshore platform for oil and gas exploitation and so on. In order to address a viable solution to this issue, it is recommended that the requirement of 'private ends' should be removed from the ReCAAP in order to cover all form of acts of violence, detention or depredation committed by all kinds of perpetrators including recognised governments, recognised belligerents or recognised insurgents. In this way, the definitions of maritime crimes can give wider security coverage not only to the victim ships of piratical attacks and robbery committed by the private individuals but also of state sponsored attacks, belligerent attacks, insurgent attacks and terrorist attacks regardless of the motive of the commission of such crimes.

Two private ships

Under this piracy definition, acts of piracy must be committed by the crew or the passengers of a private ship or a private aircraft⁵⁴ against another ship, or against persons or property on board such ship. It can be noticed from the

53 See Yoichiro Sato, *Southeast Asian Receptiveness to Japanese Maritime Security Cooperation* (Sep. 2007) Asia-Pacific Center For Security Studies, *available at* http://www.google.com.my/url?sa=t&rct=j&q=yoichiro%20sato%20southeast%20asian%20receptiveness%20to%20japanese%20maritime%20security%20cooperation&source=web&cd=1&ved=0CCIQFjAA&url=http%3A%2F%2Fwww.apcss.org%2FPublications%2FMaritime%2520security%2520cooperation%2520Japan-SE%2520Asia%2520Sato.pdf&ei=FOKBT7bnC8XtrAFT0sDbBQ&usq=AFQjCNFRIF-yeuKXBTYFKJz9_W1WT_UR9Q&cad=rja (last visited on Feb. 20, 2015); Kyaw Hla Win @ Md. Hassan Ahmed, *Preventive Measures to Protect the Straits of Malacca from Maritime Terrorism* 1-12 (Paper presented at the MSU Research Colloquium, Management & Science University (MSU), Shah Alam, Malaysia, Nov. 10 2011).

54 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 sea. See United Nations, *Yearbook of the International Law Commission 1955: Documents of the seventh session including the report of the Commission to the General*

above requirement that piracy can only be committed by the crew or the passengers of a private ship or aircraft against another private ship, or against persons or property on board such ship. However, the ReCAAP does not provide any definition of a private ship or a private aircraft and a warship, government ship or government aircraft operated for non-commercial purpose. It is likely to apply the UNCLOS, 1982 provisions in this aspect. Unlike the UNCLOS, 1982, there is no provision that expresses that acts of violence, detention or any act of depredation 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. Hence, a mutinied warship must still be regarded as a government vessel and immune from jurisdiction. Thus, illegal acts committed by such ship or aircraft against another vessel cannot be assumed as piracy under the ReCAAP. Since acts of piracy prescribed under the ReCAAP can also be committed by the warships or government aircrafts,⁵⁵ it is advisable to replace the phrase 'a private ship or a private aircraft' with 'a ship or an aircraft' in article 1 (1) (a) of the ReCAAP.

The piracy definition of the ReCAAP further requires that acts of piracy must be committed by a private ship or aircraft (pirate ship) against another ship (victim ship which can be either private or government ship), or against persons or property on board such ship. Therefore, two ships must involve in a piracy, namely, pirate ship and victim ship. This requirement is also known as 'two-ship rule'.⁵⁶ 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.⁵⁷ Thus, it is essential to review the aforesaid provision of the ReCAAP in order to cover acts of piracy committed by mutinied crews or hijackers on board a single ship. In such situation, despite the fact that a ship on the high seas is subjected to the exclusive

Assembly, UN Doc. A/CN.4/SER.A/1955/ADD.1 3 (UN Sales no. 60), 1960 at 25; Satya N. Nandan, Shabtai Rosenne and Neal R. Grandy (ed.), (3) *United Nations Convention on the Law of the Sea 1982: A Commentary* 20 (1995).

55 See L.F.E. Goldie, 1937 Nyon Agreements in Natalino Ronzittipp (ed.), *The Law of Naval Warfare: A Collection of Agreements and Documents With Commentaries* 483-498 (1988).

56 *Supra* note 45 at 281.

57 *Supra* note 54.

jurisdiction of the flag state, it is preferable to allow other states also to detain vessels controlled by mutinied crews or hijackers on account of piracy. If the flag state still has the interest to prosecute perpetrators of piracy on a single ship, it will have the right to request for extradition from the custodial state which shall have to extradite upon request. This notion contributes to balance the conflict of jurisdictional interest between the flag state and the custodial state.⁵⁸

Nonetheless, the definition of armed robbery against ships does not contain the phrase, as in case of piracy, by the crew or the passengers of a private ship or a private aircraft. Thus, the definition of armed robbery against ships does not necessarily require involving two ships in the attack and the attack may originate from any kinds of ground or vehicle against a victim ship.⁵⁹ This definition covers armed robbery committed by mutinied crews or hijackers on board a single ship. Again, it does not condone a warship, government ship or government aircraft operated for non-commercial purpose if it committed armed robbery against ships for their private gains.

Locality of piracy and armed robbery against ships

Under the ReCAAP, piracy must be committed on the high seas or in a place situated outside the territorial jurisdiction of any state and armed robbery against ships must be committed within a contracting party's jurisdiction. Unlike the UNCLOS, 1982, the ReCAAP does not provide the maritime limitation of its own for high seas, within a contracting party's jurisdiction and a place outside the jurisdiction of any state. It is likely to apply the UNCLOS, 1982 maritime limitations in this aspect. The high seas are defined under the UNCLOS, 1982 as 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.⁶⁰ Therefore, a contracting party's jurisdiction perhaps includes the internal waters of any state, the archipelagic waters of any archipelagic state, the territorial sea of any state and the exclusive economic zone (EEZ) of any state. A place outside the jurisdiction of any state perhaps refers to *terra nullius*⁶¹ or the shores of

58 *Supra* note 49.

59 *Supra* note 34 at 534-535.

60 *Supra* note 33, art. 86.

61 *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

an unoccupied territory.⁶² Thus, it can be analysed that the ReCAAP covers any illegal acts of violence or detention, or any act of depredation committed in all sea areas, *i.e.*, within or outside the jurisdiction of any state. In other words, it covers all maritime zones, namely, the internal waters of any state, the archipelagic waters of any archipelagic state, the territorial sea of any state, the EEZ of any state, the high seas and a place outside the jurisdiction of any state. These provisions remedy the narrow limitation of the locality of piracy in the previous international conventions, *i.e.*, the Convention on the High Seas, 1958 and the UNCLOS, 1982.⁶³

In a nutshell, it can be observed that in terms of criminal conduct the definition of piracy is not different from the definition of armed robbery against ships as both spell the same prescription any illegal act of violence or detention, or any act of depredation. Another similarity between these two definitions is that the attack must be for private ends. The major difference between these two definitions is that: the definition of piracy requires two private ships to constitute piracy, while the definition of armed robbery against ships does not require two private ships in the attack. Thus, armed robbery can be committed on a single ship. A warship or a government vehicle is considered as pirate ship or vehicle if it is committed for private ends. Moreover, piracy is committed on the high seas or in a place outside the jurisdiction of any state, whereas armed robbery against ships is committed within the jurisdiction of a contracting party. Generally, it can be observed that piracy and armed robbery against ships are the same types of crime but applicable to different maritime atmospheres. Therefore, it can be observed that the piracy definition under the ReCAAP suffers deficiency⁶⁴ mainly due to the exclusion of attempted attack as acts of piracy and requirement of private ends and two private ships. Similarly, armed robbery against ships also suffers inadequacy due to the exclusion of attempted attack as acts of piracy and requirement of private ends.

world have been occupied by the existing states.

62 For example, Antarctica Continent. See *supra* note 45 at 282.

63 *Supra* note 51.

64 Lucas Bento, Toward an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish, 29 *Berkeley J. Intl L* 427 (2011).

V Three pillars of the ReCAAP

Essentially, there are three main pillars of the ReCAAP,⁶⁵ *i.e.*, information sharing,⁶⁶ cooperative arrangements⁶⁷ and capacity building.⁶⁸ As information sharing is one of the pillars of the ReCAAP, the ISC was established with the vision to be the information hub for combating piracy and armed robbery against ships in the region.⁶⁹ On November 29, 2006, it was officially launched and its first governing council was also set up and the executive director was appointed.⁷⁰ On January 30, 2007, it was formally recognised as an international organisation.⁷¹ Its mission is to enhance regional cooperation in combating piracy and armed robbery against ships through information sharing, capacity building and cooperative arrangements.⁷²

Cooperation through the ISC

Under the ReCAAP, each contracting party is required to have a focal point⁷³ to provide a smooth and effective communication between the ISC, other competent national authorities and relevant non-governmental organisations.⁷⁴ When incidents of piracy or armed robbery or both against ships take place, ships, ship owners, or ship operators of the contracting parties are required to notify promptly to the relevant national authorities including focal points and the ISC.⁷⁵ Moreover, any contracting party which has received or obtained information about an imminent threat of, or an incident of, piracy or armed robbery against ships will also have to notify the ISC promptly through its designated focal point.⁷⁶ When a contracting party

65 *Ibid.*

66 *Supra* note 3, art. 9.

67 *Id.*, art. 15.

68 *Id.*, art. 14.

69 See Michael Bahar, Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operation 40 *Vand. J. Transnatl L* 78 (Jan. 2007); James Kraska and Brian Wilson, Piracy Repression, Partnering and the Law 40 *J. Mar. L. & Com* 55 (Jan., 2009).

70 *Supra* note 6.

71 *Supra* note 4.

72 *Supra* note 28.

73 *Supra* note 3, art. 9 (1).

74 *Id.*, art. 9 (3).

75 *Id.*, art. 9 (4).

76 *Id.*, art. 9 (5).

receives an alert of an imminent threat of piracy or armed robbery against ships from the ISC, such party has to disseminate the alert immediately to the ships within the area of such an imminent threat.⁷⁷ However, a contracting party still has to respect the confidentiality of information transmitted from the ISC when it is requested to do so.⁷⁸ The role of the ISC is, in fact, wider than mere information sharing. Its functions generally include information sharing, supporting capacity building efforts and enhancing cooperative arrangements among contracting parties in combating piracy and armed robbery against ships.⁷⁹

The authors suggest that there is a pressing need to improve the information sharing practices mentioned in the ReCAAP. Under the current practice, when incidents of piracy or armed robbery against ships take place, ships, ship owners, or ship operators of the contracting parties are required to notify promptly to the relevant national authorities including the focal point and the ISC.⁸⁰ In fact, ships from various countries pass through the waters in the region. It would be inadequate to impose duty only upon the ships, ship owners, or ship operators of the contracting parties to notify the relevant focal point and the ISC. All ships, regardless of the fact that they are from contracting parties, passing through the waters in the geographical area

77 *Id.*, art. 9 (6). See James Kraska and Brian Wilson, The Pirates of the Gulf of Aden: The Coalition is the Strategy 45 *Stan. J Int'l L* 273 (Summer, 2009).

78 *Id.*, art. 9 (2).

79 The ISC also:

i. serves as a platform for information exchange with the ReCAAP Focal Points via the Information Network System (IFN); facilitate communications and information exchange among participating governments to improve incident response by member countries; analyse and provide accurate statistics of the piracy and armed robbery incidents to foster better understanding of the situation in Asia;

ii. facilitates capacity building efforts that help improve the capability of member countries in combating piracy and armed robbery in the region; and

iii. cooperates with organisations and like-minded parties on joint exercises, information sharing, capacity building programme, or other forms of cooperation, as appropriate, and agree upon among the Contracting Parties.

See The ReCAAP ISC, Background Information about the Regional Cooperation Agreement on Combating Piracy and Armed robbery against ships in Asia (ReCAAP), and the ReCAAP Information Sharing Centre (ISC), available at: <http://www.recaap.org/AboutReCAAPISC.aspx> (last visited on Mar. 10, 2016).

80 *Supra* note 3, art. 9 (4).

of the ReCAAP⁸¹ should notify the flag state, the nearest focal point of a contracting party and the ISC when incidents of piracy or armed robbery against ships take place. Any contracting party upon receiving the information of any incident has to immediately notify to the ISC through its designated focal point.⁸² Then ISC should disseminate to all designated focal points in the region and the ships within the area of such an imminent threat. When a contracting party receives an alert from the ISC, it is also required to disseminate the alert immediately to the ships within the area of such an imminent threat.⁸³ Being so informed, all ships can be alerted to possible threats of becoming victim and may divert their routes for the purpose of avoiding target areas.⁸⁴

Cooperative arrangements among contracting parties

The ReCAAP imposes duty on all contracting parties to implement the agreement to the fullest extent possible in accordance with their respective national laws and regulations for preventing and suppressing piracy and armed robbery against ships.⁸⁵ In implementing this agreement, contracting parties still have to carry out their obligations under the international agreements to which that contracting party is party, including the UNCLOS, 1982, and the relevant rules of international law.⁸⁶

The ReCAAP does not allow prejudicing the position of any contracting party with regard to any dispute concerning territorial sovereignty or any issues related to the law of the sea in carrying out any act or activity under the agreement.⁸⁷ Thus, a contracting party is not permitted to exercise its jurisdiction and performance of functions in the territory of another contracting party where such functions are exclusively reserved for the authorities of that other contracting party by its national law.⁸⁸ The ReCAAP also recognises the immunities of warships and other government ships operated for non-commercial purposes.⁸⁹

81 This geographical mandate begins from India until Japan.

82 *Supra* note 3, art. 9 (5).

83 *Id.*, art. 9 (6).

84 Thaine, *supra* note 29.

85 *Supra* note 3, art. 2 (1).

86 *Id.*, art. 2 (2).

87 *Id.*, art. 2 (4).

88 *Id.*, art. 2 (5).

89 *Id.*, art. 2 (3).

General obligations

Generally, all contracting parties are obliged to make every effort, in accordance with its national laws and regulations and applicable rules of international law, to take effective measures in respect of the following:⁹⁰

- (a) to prevent and suppress piracy and armed robbery against ships;
- (b) to arrest pirates or persons who have committed armed robbery against ships;
- (c) to seize ships or aircraft used for committing piracy or armed robbery against ships, to seize ships taken by and under the control of pirates or persons who have committed armed robbery against ships, and to seize the property on board such ships; and
- (d) to rescue victim ships and victims of piracy or armed robbery against ships.

Contracting parties may also exercise additional measures apart from what have been enumerated in the above provision.⁹¹ They are also encouraged to settle disputes arising out of the interpretation or application of the agreement amicably through negotiations in accordance with applicable rules of international law.⁹²

Request for cooperation among contracting parties

Apart from the cooperation through the ISC, a contracting party may request directly to any other contracting party to cooperate in detecting any of the following persons, ships, or aircraft:⁹³

- (a) pirates;
- (b) persons who have committed armed robbery against ships;
- (c) ships or aircraft used for committing piracy or armed robbery against ships, and ships taken by and under

90 *Id.*, art. 3 (1).

91 *Id.*, art. 3 (2).

92 *Id.*, art. 17.

93 *Id.*, art. 10 (1).

the control of pirates or persons who have committed armed robbery against ships; or

- (d) victim ships and victims of piracy or armed robbery against ships.

A contracting party may request any other contracting party for taking appropriate measures, *i.e.* arresting pirates and robbers, seizing pirate ships or aircraft,⁹⁴ or rescuing the victim ships and the victims of piracy or armed robbery against ships⁹⁵ within the limits permitted by its national laws and applicable rules of international law. The requesting contracting party is required to promptly notify to the ISC of such request.⁹⁶ A requested contracting party is obliged to offer effective and practical measures for implementing such request and may seek additional information from the requesting contracting party.⁹⁷ The requested contracting party is also required to notify promptly to the ISC of the relevant information on the measures taken.⁹⁸

Under the ReCAAP, the member states can arrest or seize against any of the persons or ships committing any illegal act of violence or detention, or any act of depredation on the high seas, in a place outside the jurisdiction of any state or within the jurisdiction of any contracting party. However, a warship or government ship of a contracting party cannot pursue offenders within the jurisdiction of another contracting party. This limitation provides plenty of opportunities for pirates to commit crimes on the high seas or territorial seas of a contracting party and escape into the territorial seas of another state.⁹⁹ They can escape if the coastal state is not aware of the occurrence of such incident or is reluctant to pursue them.¹⁰⁰ In order to deter such a situation, it is suggested that the contracting parties should allow the apprehension of offenders into their territorial seas and the EEZs

94 *Id.*, art. 10 (2).

95 *Id.*, art. 10 (3).

96 *Id.*, art. 10 (4).

97 *Id.*, art. 11 (1) & (2).

98 *Id.*, art. 11 (3).

99 *Supra* note 6 at 103-105.

100 See Kyaw Hla Win @ Md. Hassan Ahmed, Abdul Ghafur Hamid @ Khin Maung Sein and Ashgar Ali Ali Mohamad, Prosecution of Pirates under International Law: In Limbo 4 *MLJ* lxxxiv (2014).

for the purpose of arresting or seizing against any of the persons or ship committing offences under the ReCAAP.¹⁰¹

In order to avoid the jurisdictional conflict between the pursuing state and the coastal state, the provision should also provide some legal basis for a warship which exercises pursuit to notify the coastal state for the permission and request for cooperation in pursuing immediately. When a coastal state receives request from a foreign warship pursuing pirates, it should allow such pursuit into its maritime zones and cooperate immediately. When the foreign warship seized pirate ship or aircraft within the maritime zone of another state, it shall transfer the pirate ship or aircraft and extradite pirates to the coastal state if the coastal state has requested to do so. In addition, the pursuing warship will escort the pirate ship or aircraft to a port of the coastal state for the purposes of an inquiry before the competent authorities, if the circumstances render this necessary. Only when the coastal state does not have interest to prosecute them, the foreign warship may bring the pirate ship or aircraft and pirates to its jurisdiction for the prosecuting purpose. If the right to pursuit is refused by the coastal state, the foreign warship should discontinue pursuing the pirate ship or aircraft into the maritime jurisdiction of a coastal state. When a coastal state refuses to allow a foreign warship to enter into its maritime zones in pursuing a pirate ship or aircraft, the coastal state shall have to commence the pursuit immediately within its maritime jurisdiction. The extension of right to exercise universal jurisdiction against pirates, pirate ships or aircrafts into maritime jurisdiction of contracting parties would greatly contribute to eliminate the safe havens for pirates.

Apart from the cooperative measures mentioned above, the contracting parties may also exercise any other form of useful cooperation.¹⁰² Contracting parties are also under the obligation to encourage ships, ship owners, or ship operators for taking protective measures against piracy and armed robbery against ships in accordance with the relevant international standards and

101 Since this is an issue directly relating to the sovereignty of each contracting party, it will not be an easy task to construct a legal framework for this aspect. This issue of sovereignty was also noted at the ASEAN + 3 (Japan, the People's Republic of China and the Republic of Korea) summit which took place in Singapore in November, 2000 where Prime Minister Yoshiro Mori called upon the other countries to support the holding of the Asian Cooperation Conference on Combating Piracy and Armed robbery against ships. See Japanese Ministry of Foreign Affairs, *supra* note 13.

102 *Supra* note 3, art. 15.

practices, particularly recommended by the IMO.¹⁰³ Nonetheless, these cooperative arrangements offered under the ReCAAP do not seem to be practically effective because it does not specify the kinds of arrangements to be made and legal assistance to be given.¹⁰⁴ It generally mentions that a contracting party may request another contracting party in detecting, arresting or seizing, against any of the persons or ships mentioned above, or taking effective measures to rescue the victim ships and the victims; and a requested contracting party shall make every effort to take effective and practical measures for implementing such request. In this regard, it does not specify how to cooperate practically with the requesting contracting party such as in patrolling and apprehending offenders. Hence, it is suggested that the cooperative measures among the contracting parties should be more specific and practical for the effective suppression of piracy and armed robbery against ships.¹⁰⁵

Extradition and mutual legal assistance

A contracting party may directly request to any other contracting party for cooperation involving extradition or mutual legal assistance.¹⁰⁶ A contracting party which has the custody of pirates or persons who have committed piracy and armed robbery against ships, or who are present in its territory, may extradite them in accordance with its national laws to the other contracting party which has jurisdiction over them upon the request of that contracting party.¹⁰⁷ Thus, a requested contracting party may still refuse to extradite offenders on the basis of its national laws. Accordingly, the extradition from a custodial contracting party to another contracting party which has jurisdiction over the offenders of piracy and armed robbery against ships should also be mandatory under the ReCAAP. Moreover, a custodial state party is obliged to render mutual legal assistance in criminal matters, including the submission of evidence in relation to the piracy and armed robbery against ships.¹⁰⁸

103 *Id.*, art. 16.

104 *Supra* note 36 at 112.

105 See Kyaw Hla Win @ Md. Hassan Ahmed, Abdul Ghafur Hamid @ Khin Maung Sein and Ashgar Ali Ali Mohamad, Combating Piracy and Armed Robbery against Ships: International Cooperation in High Risk Areas 1 *MCP Bulletin* 1-5 (2014).

106 *Supra* note 3, art. 10 (5).

107 *Id.*, art. 12.

108 *Id.*, art. 13.

Capacity building among contracting parties

The ReCAAP obliged each contracting party to cooperate to the fullest possible extent with other contracting parties which request cooperation or assistance to enhance the capacity in preventing and suppressing piracy and armed robbery against ships.¹⁰⁹ The ISC is also under a similar obligation to cooperate to the fullest possible extent in providing capacity building assistance, *i.e.*, technical assistance such as educational and training programs to share experiences and best practices.¹¹⁰ However, it is perceptible that some contracting parties in the ReCAAP are technologically advanced and resourceful in order to set up an efficient focal point to communicate with the ISC and other competent national authorities as well as relevant non-governmental organisations. On the other hand, there are also contracting parties with poor technology and fewer resources to do so. Thus, it is suggested that all focal points of the contracting parties should have the same capacity and be equally equipped with advanced technologies to avoid delay in communicating, receiving and disseminating information.¹¹¹

VI Number of incidents reported within the ReCAAP geographical mandate

Despite efforts being made by the contracting parties to the ReCAAP in suppressing piracy and armed robbery against ships, the crimes still appear to be a serious problem in the region. The number of incidents reported to the ISC were a total of 100 incidents (77 actual and 23 attempted incidents) in 2007; a total of 96 incidents (83 actual and 13 attempted incidents) in 2008; a total of 102 incidents (82 actual and 20 attempted incidents) in 2009; a total of 167 incidents (134 actual and 33 attempted incidents) in 2010; a total of 155 incidents (133 actual and 22 attempted incidents) in 2011;¹¹² a total of 132 incidents (123 actual and 9 attempted incidents) in 2012;¹¹³ a total of 150

109 *Id.*, art. 14 (1).

110 *Id.*, art. 14 (2), (3).

111 *Supra* note 105.

112 The ReCAAP ISC, Piracy and Armed Robbery against Ships in Asia , Annual Report 4 (Jan. Dec. 2011).

113 The ReCAAP ISC, Piracy and Armed Robbery against Ships in Asia , Annual Report 3 (Jan. Dec. 2012).

incidents (141 actual and 9 attempted incidents) in 2013;¹¹⁴ and a total of 183 incidents (168 actual and 15 attempted incidents) in 2014.¹¹⁵

The number of incidents continued to increase in the first half of the year 2015. A total of 106 incidents (100 actual and six attempted incidents) were reported to ISC during January-June 2015. In fact, this was an increase of 18% incidents of piracy and armed robbery against ships compared to the same period in 2014.¹¹⁶ However, in the second half of 2015, the number fell and settled down to 13 incidents, which is 3 incidents lower than 2104.¹¹⁷

It can be observed from the above facts and figures that the numbers of incidents have drastically been on the rise until 2014; the year 2015 experiences slight fall. What makes the matter worse in this region is that Indonesia and Malaysia are not contracting parties to the ReCAAP despite the fact that their waters mark as the piracy prone areas since the highest numbers of incidents have always been reported from there. This is especially due to the existence of the major sea-lanes of the region, namely, the Malacca Straits, the Singapore Straits, the Sunda Straits and the Lombok Straits, which are either partially or wholly situated within the territorial and archipelagic waters of Indonesia and Malaysia.¹¹⁸

The bulk of incidents of CAT1-CATP took place in the Straits of Malacca and Singapore while the whips were sailing; of the total of 120 such incidents, 104 took place in this Straits. Of the 120 incidents, 61 of them were CAT4; whereas, 12 were CAT1 incidents, 13 CAT2 incidents, and 22 CAT3 incidents. There were 80 while the ships were at the ports or anchorages. Most of them occurred in Vietnam, Indonesia, India and Bangladesh. Of the total 80 incidents, CAT4 incidents were four, and CAT2 and CAT3 incidents were 9 and 15 respectively.

114 The ReCAAP ISC, Piracy and Armed Robbery against Ships in Asia , Annual Report 3 (Jan. Dec. 2013).

115 The ReCAAP ISC, Piracy and Armed Robbery against Ships in Asia , Annual Report 4 (Jan. Dec. 2014).

116 The ReCAAP ISC, Piracy and Armed Robbery against Ships in Asia , Half Yearly Report 2 (Jan. June 2015).

117 The ReCAAP ISC, Piracy and Armed Robbery against Ships in Asia , Annual Report (Jan. Dec. 2015), available at: http://www.recaap.org/DesktopModules/Bring2mind/DMX/Download.aspx?Command=Core_Download&EntryId=421&PortalId=0&TabId=78 (last visited on Jan 29, 2016).

118 See Yoichiro Sato, *supra* note 53.

It is to be noted here that the ReCAAP, ISC evaluates the significance of incidents according their seriousness of loss of life and economic loss. Based on these, there are four categories of incidents: CAT4, petty theft; CAT3, no use of arms but assailants are aggressive; CAT2, fall in the middle; and CAT1, serious incidents.

All kinds of cases of piracy and armed robbery in India and Bangladesh are quite significant in east Asia; in southeast Asia, Indonesia, Malaysia and the Philippines. The total numbers of cases in 2015 are significantly high because of poor enforcement of laws and inefficient regional cooperation. The gradual rise in piracy and armed robbery incidents in Asia, warrants proficient enforcement of laws, meaningful regional cooperation, and proper surveillance.

The numbers of incidents which occur in these areas seriously warrant the need of intensive cooperation among contracting parties and coastal states. Although Indonesia and Malaysia are not contracting parties to the ReCAAP, in fact, they have been cooperating with some of the contracting parties even before the entry into force of the ReCAAP.¹¹⁹ Although there is no clear explanation for not ratifying the ReCAAP by both countries, they have even been cooperating, to some extent, with the ISC at an operational level.¹²⁰ In any case, it is essential to persuade Indonesia and Malaysia to

119 See Japanese Ministry of Foreign Affairs, *supra* note 11; Japanese Ministry of Foreign Affairs, *supra* note 13; Asia Pacific News, 'Malaysia urges focus on South China Sea piracy' *Channel NewsAsia*, Nov. 30, 2009, available at: http://www.channelnewsasia.com/stories/afp_asiapacific/view/1021479/1/.html(last visited on May 10, 2016); Gaye Christoffersen, 'Japan and the East Asian Maritime Security Order: Prospects for Trilateral and Multilateral Cooperation' 33 *Asian Perspective* 124-128 (2009); 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); Kyaw Hla Win @ Md. Hassan Ahmed and Seeni Mohamed Nafees, 'Suppressing Piracy and Armed Robbery against Ships in the Malacca Straits: A Critical Analysis 1-4' (Paper presented at the 3rd International Seminar on Syariah and Common Law 2015 (ISCOL 2015), Faculty of Syariah and Law (FSU), Universiti Sains Islam Malaysia (USIM), Malaysia) Oct. 27-28 2015.

120 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* 185 (2009); Kyaw Hla Win @ Md. Hassan Ahmed, Seeni Mohamed Nafees, Ashgar Ali Ali Mohamed and Abdul Haseeb Ansari, 'Combating Piracy, Armed Robbery against Ships and Maritime Terrorism: A Malaysian Perspective 1-6' (Paper presented at the 8th UUM International Legal Conference, Golden Flower Hotel, Bandung, Indonesia) (Aug. 27-28 2015).

become contracting parties to the ReCAAP in order to fill up the most important gap in the region.¹²¹ The participation of these two countries would immeasurably contribute in suppressing and combating piracy and armed robbery against ships in Asia.

VII Conclusion

The ReCAAP is the first regional agreement which promotes and enhances cooperation against piracy and armed robbery against ships in Asia. It is an undeniable fact that the ReCAAP has been contributing significantly in suppressing and combating piracy and armed robbery against ships in the region. However, it does not fully address the problem due to the reluctance by two major maritime countries in the region to ratify, narrow definition of maritime crimes, limitation in information sharing system, poor capacity building and lack of specific cooperation arrangements.

Accordingly, it is suggested that the existing contracting parties should persuade Indonesia and Malaysia to become contracting parties to the ReCAAP in order to fill up the most important gap in the region. In defining maritime crimes, it is also proposed to widen the scope of piracy and armed robbery against ships and include clandestine thefts, threatened violence, and attempted piracy and armed robbery against ships. In addition to this, the contracting parties should take preventive measures not only to combat piracy and armed robbery against ships but also terrorist attacks against all types of ships and marine infrastructures such as ports, lighthouses, offshore platform for oil and gas exploitation and so on. Again, the definition of piracy requires two ships to constitute an act of piracy and when attack occurs on board a single ship, it will not amount to piracy under this definition. Thus, it is preferable to remove the two ships requirement from the definition of piracy under the ReCAAP. Besides, illegal acts committed by warship or government aircraft against another vessel should be governed under the ReCAAP.

In establishing better information sharing system, all ships, regardless of whether they are from contracting parties or not passing through the waters in the geographical mandate of the ReCAAP, should notify the flag state, the nearest focal point of a contracting state and the ISC when incidents of piracy or armed robbery against ships take place. Any contracting party which receives the information of any incident should also immediately notify the ISC. Then

121 See Catherine Zara Raymond, Piracy in Southeast Asia: New Trends, Issues and Responses 89 *Institute of Defence and Strategic Studies* 20 (Oct. 2005).

ISC should disseminate this information to all designated focal points in the region and the ships within the area of such an imminent threat. A contracting party receiving an alert from the ISC is also recommended to disseminate the alert immediately to the ships within the area of such an imminent threat. In order to facilitate smooth information sharing and to avoid delay in communicating, receiving and disseminating information, of course, all focal points of the contracting parties should equally be equipped with advanced technologies.

Moreover, the cooperative measures among the contracting parties should be more specific and practical for the effective suppression of piracy and armed robbery against ships. It is also suggested that the contracting parties should allow the apprehension of offenders into their territorial seas and EEZs for the purpose of arresting or seizing against any of the persons or ships committed offences under the ReCAAP. The extension of the limitation of right to exercise universal jurisdiction against pirates, pirate ships or aircrafts into maritime jurisdiction of contracting parties would greatly contribute to eliminate the safe havens for pirates. The extradition from a custodial contracting party to a requesting contracting party which has jurisdiction over the offenders of piracy and armed robbery against ships should also be mandatory under the ReCAAP. In this fashion, ReCAAP would be able to facilitate efficient maritime security and navigational safety in the region.