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THE SUPPRESSION OF PIRACY UNDER INTERNATIONAL LAW AND THE CASE OF MV SINAR KUDUS OF INDONESIA

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Abstract

Piracy is an international problem that disrupts the global maritime trade and endangers the safety and security of crews, ship owners, and cargo owners. In this context it is pertinent to explore to what extent is the suppression of the piracy based on international law and the application of international law in the case of MV Sinar Kudus. The aim of this research is to analyse the current international legal framework for the suppression and prosecution of pirates in the Indonesian-flagged MV Sinar Kudus case. The research method used is a descriptive-analytical and juridical-normative approach. The conclusion is that there exists a well-established rule of international law on suppression and prosecution of acts of piracy, but international cooperation between states to combat and punish such crimes is weak because of a lack of commitment from states. This is despite the fact that piracy is a jure *gentium* international crime subject to the application of the universal jurisdiction principle.

I. INTRODUCTION: SOMALI PIRACY

This article explores the acts of piracy against the Indonesian-flagged MV Sinar Kudus by Somali pirates on 16 March 2011. This incident involved 46 days lost for the crew, the ships company, and the flag state, Indonesia. Shipping companies have suffered losses in excess of one hundred million US dollars; although fortunately to date, piracy has rarely resulted in the killing of hostages. The ships that are attacked by pirates are not only Indonesian-flagged vessels but also many other flagged vessels from countries such as China, Japan, France, Norway, Greek, Korea, Ukraine, Netherland, Malaysia, Singapore, Australia, India, and the US.

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Piracy by Numbers

Piracy is recognised as an international problem and various efforts to eradicate it have been attempted by both individual states and regional cooperative efforts. Focusing on piracy committed by Somali pirates in the Gulf of Aden, the amount generated from ransom is simply astonishing. The following table (Table 1) shows Somali piracy data obtained from 2011.

Table 1: Piracy incidents occurring in the Gulf of Aden in 2011 and corresponding ransom amounts.

Release statistics 2011							
No	Name and type, IMO	Nationality	Crew	Dates		Ransom ($ million)	Remarks (*)
				hijacked	released		
1	Product tanker Motivator 9340386	Greece	18	04.07.10	16.01.11		
2	General cargo Izumi 9414955	Japan	20	10.10.10	27.02.11	4.5	*
3	General cargo Ems River 9551662	Germany	8	27.12.10	28.02.11	3	*
4	LPG tanker York 9220421	Greece	17	23.10.10	10.03.11	4.5	*
5	General cargo Rak Africana 8200553	UAE	26	11.04.10	09.03.11	2	* Abandoned by the crew after release, fate unknown, presumably sank
6	Bulk carrier Jahan Moni 9102954	Bangladesh	26	05.12.10	14.03.11	4.2	*
7	Chemical tanker Hannibal II 8011756	Tunisia	31	11.11.10	17.03.11	2	*
8	VLCC Irene SL 9285823	Greece	25	08.02.11	08.04.11	13.5 (?!)	*
9	General cargo Thor Nexus 8712491	Thailand	27	25.12.10	11.04.11	4.77	*
10	Heavylift Beluga Nomination 9356402	Germany	8	22.01.11	13.04.11	5	*
11	Asphalt tankerAsphalt Venture 8875798	UAE	15	29.09.10	15.04.11	3.6	* 7 Indian crew still in capture
12	Bulk carrier Renuar 9042221	Greece	24	11.12.10	23.04.11	6.0	*
13	General cargo Sinar Kudus 9172507	Indonesia	20	16.03.11	01.05.11	4.5	*
14	Bulk carrier Khaled Muhieddine K 8105650	Syria	25	20.01.11	26.05.11	2.5	*
15	General cargo Yuan Xiang 7609192	China	29	12.11.10	08.06.11	3.6	*
16	Tanker aframax Zirku 9237802	UAE	29	28.03.11	10.06.11	12.0 (?!)	*
17	General cargo Suez 8218720	Egypt	23	02.08.10	11.06.11	2.1	*
18	General cargo Susan K 9344370	Germany	10	08.04.11	16.06.11	5.7	*
19	Bulk carrier Sinin 9274941	Iran	21	12.02.11	13.08.11		
20	Bulk carrier Eagle 8126408	Greece	24	17.01.11	20.08.11	6.0 (?!)	*
21	Tanker Polar 9299563	Greece	24	30.10.10	26.08.11		1 crew died in captivity
22	Boxship MSC Panama 8902125	USA	23	10.12.10	06.09.11	7.0 (?!)	*
23	Bulk carrier Hoang Son Sun 8323862	Vietnam	24	19.01.11	15.09.11	4.5	*
24	Bulk carrier Dover 7433634	Greece	23	28.02.11	30.09.11	3.8	*
25	Bulk carrier Blida 7705635	Algeria	27	01.01.11	03.11.11	2.6	*
26	Bulk carrier Rosalia D'Amato 9225201	Italy	21	21.04.11	25.11.11	6	* first pirates voiced 0.6 mil, later said it was 6 mil
27	Product tanker Gemini 8412352	Singapore	25	30.04.11	30.11.11	4	* 4 seamen of ROK nationality still in capture
28	Aframax tanker Savina Caylyn 9489285	Italy	22	08.02.11	21.12.11	11.5 (?!)	*

*Purported ransom amounts reported by pirates; no confirmation or otherwise from other sources.

The ransom figures presented in Table 1 total around $130 million. The most common figure provided by pirates was $4.5 million; however, these figures should treated with skepticism and it has been suggested that actual ransoms were at least one third less, so a reasonable estimate for total ransom amounts in 2011 could be $80-90 million.[1]

Additionally, it should be noted that the data may not be entirely true/accurate because of unreported acts of piracy or the silence of owners of vessels or cargo owners who pay ransoms and refuse to report the incident because of concerns about the safety of their crew and the reputation of the company.

Here are some examples of piracy committed by Somalian pirates against foreign ships:

1. 18 October 2005: A bulk carrier, the MV Panagia, and its cargo of coal from South Africa was released after the owner of the vessel, an Ukrainian-company, paid $700,000 in ransom to Somali pirates.
2. 16 January 2006: The MV Safina al-Birsarat and its crew of 16 Indian nationals were released by pirates after the USS Winston S. Churchill intercepted the vessel and fired warning shots. All 10 pirates on board surrendered and were taken into custody.
3. 28 May 2007: Chinese sailors were killed by Somali pirates after the ship owner rejected the pirate's requests for a ransom.
4. 5 October 2008: Somali pirates attacked and detained 20 Yemeni fishermen. The Netherlands Marine Corps, deployed as a NATO mission, assisted the fisherman. Unfortunately, the armed forces subsequently released the pirates.
5. 2 May 2009: Somali pirates detained the MV Arina, which had a 24-strong crew of Ukrainian nationals. Fortunately, the ship was freed by pirates on 10 December 2009 after the ransom amount requested by the pirates was paid. The ransom demanded was US$3 million.
6. 8 November 2009: Somali pirates abducted a couple by the name of Chandler from a French ship. The pirates requested a ransom of UK£500000 and the victim was released after the ransom was paid. This followed 388 days in captivity for the Chandlers.

[1]Maritime Bulletin, 'Statistics of Pirated and Released Vessels and Crews 2010-2012' (July 2013), online: Maritime Bulletin http://www.odin.tc/piracystst.htm

7. 11 May 2010: Somali pirate attacked a Bulgarian-flagged ship in the Gulf of Aden where the ship was on voyage with its crew of 15 from the Red Sea to India and Pakistan. The government and the company of Bulgaria were force to pay the ransom demanded by the pirates.
8. 12 May 2011: Somali pirates attacked a Liberian-flagged ship in the Gulf of Aden. The ship had a crew of 24, which included 2 nationals of the State and some Philippine nationals. The ship was on its way from the Ukraine to China and carrying a supply of iron.
9. 5 March 2011: The Indian Naval Force successfully captured a pirate ship with 61 pirates. The incident occurred 600 nautical miles away from the Arabian Sea and the Indian Naval Force managed to save 13 hostages.
10. 16 March 2011: An act of piracy in the Gulf of Aden that concerned Indonesian's interests was the case of MV Sinar Kudus. The vessel belonged to Indonesia's Samudera Company, and was attacked by Somali pirates when it was navigating from Sulawesi Indonesia to the Netherlands.
11. 16/21 February 2012: This was an act of piracy involving a German tanker in the Gulf of Aden. The pirates who were rejected by the owners of the vessel demanded a ransom of USD$2 million. Negotiations with the pirates were cancelled and the vessel is currently being used as a mother ship by the pirates.

In the first nine months of 2009, there were 294 reported pirate attacks from all over the world. These attacks included 34 successful hijackings involved 559 hostages. The majority of these reported attacks occur in Southeast Asia, off the Horn of Africa, and along the West Coast of Africa, with a few attacks scattered along the coast of South America.[2] For countries such as Japan, maritime crime is the most important issue that should be addressed by the international community because of its disruptive impact on international shipping routes; the world economy; and the safety and security of ship crewmen, ship owners, and cargo owners. As a consequence, Japan recently promulgated a new law, the Law on the Punishment of and the Measures against Acts of Piracy, which came into effect on 19 June 2009.

[2] Diana Chang, 'Piracy Laws and the Effective Prosecution of Pirates' (2010) 33 *Boston College International & Comparative Law Review* 273.

II. THE SOURCES OF INTERNATIONAL LAW ON THE SUPPRESSION OF PIRACY

The sources of international law typically refer to Article 38 of the Statute of the International Court of Justice, which states that the Court shall be the principal judicial organ of the United Nations. It also states that the Court shall function in accordance with the annexed statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the Charter of the United Nations. Article 38 of the Statute states:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   b. International custom, as evidence of a general practice accepted as law;
   c. The general principles of law recognized by civilized nations;
   d. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.

Key Sources of International Law

Based on Article 38, the sources of international law consists of five key sources that can be divided into two categories; namely, primary and subsidiary sources of international law. Primary sources include international conventions customary international law, and general principles of law, while subsidiary sources include judicial decisions and the teachings of the most highly qualified publicists of various nations. International law sources of international conventions include the Charter of the United Nations and Statute of International Court of Justice of 1945, United Nations Convention on the Law of the Sea of 1982 (UNCLOS), the Convention for Suppression of Unlawful Acts against the Safety of Maritime Navigation of 1988

(SUA Convention), and the Protocol to the Convention for Suppression of Unlawful Acts against the Safety of Maritime Navigation of 2005 (SUA Protocol).

International law sources of customary international law are derived from state practice and *opinion juris sive necessitatis.* An example us piracy *jure gentium* as an international crime subject to the application of universal jurisdiction where all states have an obligation to prosecute the crime or to extradite the offender to a state that has jurisdiction to prosecute. Other principles of international law derived from the customary international law include the principle that states have an obligation not to pollute, the concept of state responsibility for international wrongful acts, and the prohibition on threat or the use of force. At the same time, such sources of international law in themselves are also derived from general principles of law. Sources of international law can be derivative of general principles of law such as the principles embodied by the Charter of United Nations, which include the concepts of state sovereignty, peaceful means of dispute settlement, *pacta sunt servanda* and good faith, and non-intervention. They can also include principles of law established in other international conventions; an example is the concept of sustainable development and the precautionary principle of the United Nations Convention on Biological Diversity and United Nations Framework Convention on Climate Change of 1992.

The subsidiary sources of international law as stated by Article 38 are judicial decisions both municipal and international courts or tribunals and the writing of experts. Some examples of judicial decisions in term of territorial sovereignty is the Island of Palmas case, which was ruled upon by sole arbitrator Max Huber who stated that:

> Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State… the fact that the functions of a State can be performed by any State within a given zone is, on the other hand, precisely the characteristic feature of the legal situation pertaining in those parts of the globe which, like the high seas or lands without a master, cannot or do not yet form the territory of a State ... title of acquisition of territorial sovereignty in present-day international law are either based on an act of effective apprehension, such as occupation or conquest or like cession.

This decision emphasises the principle of effective occupation in terms of state sovereignty, and the principle was followed by subsequent cases such as the decision of the International Court of Justice in the Eastern Greenland case of 1933 and an Indonesian interest-related case, namely the *Sipadan-Ligitan* case, where the court found that sovereignty over Pulau Ligitan and Pulau Sipadan belonged to Malaysia because of Malaysia had more effective control over the islands.

Other subsidiary sources of international law is the opinion of legal experts found in books authored by these experts. These opinions could also be sourced from codes of conduct in draft articles such as the Draft Articles on State Responsibility for Internationally Wrongful Acts of 2001. Therefore, the resolutions of General Assembly of the United Nations or some declaration of international conferences could be part of these subsidiary sources of international law. Note that Article 38 does not explicitly mention sources of international law found in the resolution of the United Nations General Assembly. As a result, many experts of international law have criticised Article 38 because it fails to list the resolutions as one of the accepted sources of international law. This is despite the fact that these resolutions play an undeniable role in developing international law. Examples of highly influential resolutions include the Universal Declaration of Human Rights of 1948, Permanent Sovereignty over Natural Resources of 1962, Declaration on Principles Of International Law Friendly Relations And Co-Operation Among States In Accordance With The Charter Of the United Nations of 1970.[3]

However, sources of international law relating to the suppression of piracy are referred to the above mentioned sources; namely, the Charter of United Nations, the United Nations Convention on the Law of the Sea of 1982, and the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) of 1988. Other accepted sources include the International Maritime Organization's (IMO) code of practice as a source of the opinions of the most highly qualified subject-matter experts, and the opinions of regional organizations such as the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) of 2004 and the Maritime Organization of West and Central Africa (MOWCA).

[3] For more examples please refer to G J H van Hoof, *Rethinking the Sources of International Law* (Kluwer International Law, London/Netherlands, 1983).

III. THE QUESTION OVER THE DEFINITION OF 'PIRACY'

In the extant literature, early references to piracy can be found in the Digest of Justinian in 529 AD and in King John's Ordinance of 1201. However, law specifically governing the issue of piracy can be traced back to the seventeenth century, when the English act on piracy was enacted in 1698. This was probably the first law of piracy at the national level. Other states such as Germany and the United States followed the English lead to enact their own laws of piracy. The first legal document governing piracy in international law was the Treaty of Paris of 1856, which abolished privateering or the state-approved commercial raiding by commissioned pirate ships. The 1889 Montevideo Convention accepted the principle that the suppression of piracy was the responsibility of humankind. The Nyon Agreement of 1937 defined the attacks on international merchant ships by fascist German and Italian submarines in the Mediterranean as 'acts of piracy'. However, the most important treaty that codified the international law of piracy was the 1958 Geneva Convention on the High Seas (the 1958 Convention), which contains eight provisions concerning the suppression of piracy on the high seas.[4]

The 1982 United Nations Convention on the Law of the Sea (UNCLOS) directly incorporates the anti-piracy provisions of the 1958 Convention without any changes.[5] Accordingly, states are obliged to cooperate in the suppression of piracy and are empowered to use their warships, military aircraft, or similar government-authorised ships or aircraft to seize a pirate ship or aircraft and arrest pirates. It is to be noted that the above piracy suppression clauses are also applicable to the exclusive economic zones (EEZs) to the extent that they are in consistency with the relevant provisions of the UNCLOS Convention regarding EEZs. Exclusive economic zones are maritime zones where the coastal state enjoys sovereign rights over its natural resources and certain types of jurisdiction over, inter alia, environmental protection and marine scientific research. Though EEZs are maritime zones within national jurisdictions, some high-seas

[4] Keyuan Zou, 'New Developments in the International Law of Piracy' (2009) 88 *Chinese Journal of International Law* 325.

[5] The Convention was adopted on 10 December 1982 and came into force on 16 September 1994. Article 100 of the UNLOS Convention provides that:

> All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State". Art. 105 of the LOS Convention provides that "on the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board.

freedoms and rights – such as the freedom of navigation – are preserved in these zones. Piracy endangers navigation and thus greatly affects the exercise of navigational freedom. The enforcement of the law of piracy in EEZs may not be viewed as an infringement on any rights reserved by coastal states.

The term of 'piracy' usually refers to a broad range of violent acts at sea. The classic and typical definition of piracy is contained in the UNCLOS Convention:

> Piracy consists of any of the following acts: (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed to: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

Thus the definition consists of five elements: (i) the acts complained against should be crimes of violence such as robbery, murder, assault or rape; (ii) committed on the high seas beyond the land territory or territorial sea, or other territorial jurisdiction, of any State; (iii) by a private ship, or a public ship which through mutiny or otherwise is no longer under the discipline and effective control of the State which owns it; (iv) for private ends; and (v) from one ship to another, so that two ships at least are involved.

The definition may also refer to piratical acts that are not necessarily violent, such as detention or any act of depredation. According to Burke, 'personal behaviour that is entirely peaceful can be piracy when it occurs in the operation of a vessel that one knows to be committing piracy'. However, the definition provided for in the UNCLOS has limitations in the context of contemporary piracy. First, it defines 'piracy' narrowly by framing it as acts carried out only for 'private ends'. As such, acts of piracy for political or other ends are generally excluded from the above definition. Second, accordingly, piracy *juris gentium* presupposes that a criminal act be exercised by passengers or the crew of a ship against another ship or persons or

property on its board. Thus the definition is limited to two-vessel contexts, unless a criminal act occurs in *terra nullius* under the definition of the UNCLOS. [6]

Legal scholar Bassiouni states:

> Piracy has been recognized as an international crime under customary international law since the 1600s, and has continued to be deemed a customary as well as a conventional international crime. Even though the occurrence of this crime is rare, it can also be said that piracy is an act of terrorism, which explains why the Nyon Arrangement, September 14, 1937, is also entered under this category of crime. There is no specialized convention on piracy, but its prohibition is included in international instruments on the law of the sea'[7].

Some scholars have suggested revising the definition because of these limitations and other alleged deficiencies in the definition of piracy. Before the Third United Nations Conference on the Law of the Sea (UNCLOS III), the International Law Association (ILA) suggested a definition of piracy as the 'unlawful seizure or taking control of a vessel through violence, threats of violence, surprise, fraud or other means', but this recommendation was not taken into account in UNCLOS III. In addition, since the ILA's recommended definition is only applicable to the acts of piracy on the high seas or places outside the jurisdiction of states, it has a geographic limitation and cannot adequately provide for the whole geographical range of contemporary piracy.[8]

However, we may notice that the shortcoming of such a definition is obvious: piracy is not equivalent to armed robbery and it may also include other violent acts such as murder, assault,

[6] Please note that during the time when the UNCLOS Convention was negotiated and adopted (1973–1982), piracy was not an issue on the agenda. It is recalled that the issue of piracy returned to the international maritime agenda only in 1983 when the Swedish delegation to the IMO sponsored Resolution A545 (13) 'Measures to Prevent Acts of Piracy and Armed Robbery against Ships' in the IMO's Maritime Safety Committee.

[7] M.Cherif BASSIOUNI, *Introduction to International Criminal Law* (Ardsley, New York: Transnational Publishers, Inc., 2003).

[8] Note that the IMO has taken to dividing acts of piracy into two categories by geographical and legal divisions of maritime zones: piracy on the high seas is defined as 'piracy' in accordance with the UNCLOS Convention, while acts of piracy in ports or national waters (internal waters and territorial sea) are defined as 'armed robbery against ships' ('any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of 'piracy', directed against a ship, or against persons or property on board such a ship, within a State's jurisdiction over such offences').

and rape. Recent piratical incidents demonstrate that hijacking and kidnapping of crew for ransom has become a new phenomenon as evidenced by incidents of piracy in Somalia. What is more questionable is that its contents describe what constitutes the armed robbery against ships. In comparison with the definition of piracy in the UNCLOS Convention, the IMO's definition which is broadened by the inclusion of armed robbery against ships can be described as a definition for any piratical act which occurs in a place within the jurisdiction of states over such a crime, since the definition does not limit itself only to 'armed robbery' as seen above. Therefore, the attempt of the IMO is clear in that it tried to use an alternative term encompassing piratical acts within the waters of national jurisdiction (except the EEZ). In addition, it is acknowledged that even if the internal seizure were not piracy in international law, it would still constitute piracy under municipal law of the flag state.

In 2004, 16 Southeast Asian states signed the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP), the first multilateral agreement to address piracy in Southeast Asia. The ReCAAP established an information sharing centre in Singapore. The agreement reflects the divisional definition on piracy and armed robbery by following the definition of the UNCLOS for 'piracy' and the definition from Article 1 of the IMO Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships for 'armed robbery against ships'. Article 1 of the ReCAAP provides that:

> (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed to: (i) on the high seas, against another ship, or against persons or property on board such ship; (ii) against a ship, persons or property in a place outside the jurisdiction of any State; (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

It is to be noted that the ReCAAP slightly modified the UNCLOS definition by omitting the word 'aircraft' as a pirate-attacked target. The significance of the ReCAAP with respect to the definition on piracy is that it is the first international treaty which has turned the non-binding

IMO definition into a legal definition.[9] The Piracy Reporting Centre of the International Maritime Bureau (IMB-PRC) suggested that piracy be defined 'as an act of boarding any vessel with the intent to commit theft or any other crime and with the intent or capability to use force in the furtherance of that act', which seems to be accepted by the shipping industry but has not been recognised either in international law or domestic law.

The problem concerning different definitions also affects the number of incidents relating to piratical attacks. As some scholars point out, the definition of piracy under the UNCLOS Convention may lead to the conclusion that the relatively low incidence of such acts implies that there is no significant problem of piracy today. On the other hand, the reported 115 incidents by IMB-PRC in 1999 were based upon its own definition. However, as the IMB-PRC acknowledged, the number provided was the lowest possible figure and true figures could be much higher due primarily to the under-reporting of incidents related to its definition.

This is related to the use of a different definition on piracy by the insurance industry since piracy is designated as 'a marine peril' in the contemporary markets. Since 'heft without force or the threat of force is not piracy under a policy of marine insurance', it at least partially explains why ship owners are reluctant to report piracy incidents that do not involve much loss.

[9] The US law defines piracy as:

> any act of piracy as defined by international law if the perpetrators are found in the United States; any act of murder, robbery, or hostility against the United States or against a United States citizen on the high seas, by a citizen of the United States; and acts by aliens against the United States or its citizens that are defined as piracy in the treaty between the nation that the individual is a citizen of and the United States.

See United States Code, Title 18, 1651–1653; cited in Jack A. Gottschalk et al., Jolly Roger with an Uzi: The Rise and Treat of Modern Piracy (Annapolis, MD: Naval Institute Press, 2000), p. 34.

Definitions of Piracy based on the 1982 UNCLOS, SUA of 1998, IMO, and IMB[10]

UNCLOS 1982	Piracy*:* Art. 101 UNCLOS 1982: 1. Any illegal acts of violence or detention or any act of depredation; 2. Committed for private ends by the crew or the passengers of a private ship or a private aircraft; 3. On the high seas against another ships; 4. Outside the jurisdiction of any States; 5. Voluntary participation: a pirate ship or aircraft; 6. Any act of inciting or of intentionally facilitating an act of piracy; 7. UNCLOS reaffirms the idea of universal jurisdiction (Art. 105).
SUA 1988	SUA expands the type of activity that may be prosecuted while limiting the jurisdictional requirements necessary to prosecute. This treaty defines an *offense* as: 1. Intentionally seizing or damaging a ship or; 2. Attempting to seize or damage a ship. SUA eliminates the motive requirements that UNCLOS contains in its "for private ends" element and SUA expands the UNCLOS definition of piracy because the SUA applies to any ship navigating to, through, or from the territorial seas. Under SUA, a state has jurisdiction over an offense only if it is committed against a ship flying that state's flag, in that state's territory or committed against a national of that state.
IMO (London)	IMO develops initiatives to combat two types of threats: Piracy as defined in UNCLOS, and *armed robbery at sea*. Based on IMO, *piracy can only occur on the high seas*, while *armed robbery at sea* can only occur in territorial waters that are within twelve miles of a nation's coastline.

[10] UNCLOS (United Nations Convention on the Law of the Sea of 1982), SUA (Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 1988), IMO (International Maritime Organization), and IMB (International Maritime Bureau). UNCLOS 1982 and SUA 1988 are international conventions or treaties, *which bind states parties as reflection* of the *pacta sunt servanda* principle, while the IMO and IMB are international institutions that hold important roles with respect to the question of maritime law and piracy.

	IMO encourages states to adopt national law on universal jurisdiction over piracy and suggests that flag state of the victimized ship should take the lead in investigations for piracy incidents. Conversely, the state in whose territorial waters the incident occurs should bear the responsibility to investigate armed robbery at sea.
IMB (Kuala Lumpur)	Piracy*:* IMB adopts a broad definition of *piracy* that includes actual and attempted attacks both when the ship is at anchor or a sea. IMB defines "piracy and armed robbery" as an act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in the furtherance of that act. The IMB's expansive definition affects the number of attacks that the IMB will track. Therefore, not every incident reported to IMB would be considered formal piracy under international law.

UNCLOS 1982	SUA 1988	IMO (London)	IMB (Kuala Lumpur)
Piracy*:* Art. 101 UNCLOS 1982: 8. Any illegal acts of violence or detention or any act of depredation; 9. Committed for private ends by the crew or the passengers of a private ship or a	SUA expands the type of activity that may be prosecuted while limiting the jurisdictional requirements necessary to prosecute. This treaty defines an *offense* as: 3. Intentionally seizing or damaging a ship or;	IMO develops initiatives to combat two types of threats: Piracy as defined in UNCLOS, and *armed robbery at sea*. Based on IMO, *piracy can only occur on the high seas*, while *armed robbery at sea* can only occur in territorial waters that	Piracy*:* IMB adopts a broad definition of *piracy* that includes actual and attempted attacks both when the ship is at anchor or a sea. IMB defines "piracy and armed robbery" as an act of boarding or attempting to board

private aircraft; 10. On the high seas against another ships 11. Outside the jurisdiction of any States 12. Voluntary participation: a pirate ship or aircraft; 13. Any act of inciting or of intentionally facilitating an act of piracy; 14. UNCLOS reaffirms the idea of universal jurisdiction (Art. 105)	4. Attempting to seize or damage a ship. SUA eliminates the motive requirements that UNCLOS contains in its "for private ends" element and SUA expands the UNCLOS definition of piracy because the SUA applies to any ship navigating to, through, or from the territorial seas. Under SUA, a state has jurisdiction over an offense only if it is committed against a ship flying that state's flag, in that state's territory or committed against a national of that state.	are within twelve miles of a nation's coastline. IMO encourages states to adopt national law on universal jurisdiction over piracy and suggests that flag state of the victimized ship should take the lead in investigations for piracy incidents. Conversely, the state in whose territorial waters the incident occurs should bear the responsibility to investigate armed robbery at sea.	any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in the furtherance of that act. The IMB's expansive definition affects the number of attacks that the IMB will track. Therefore, not every incident reported to IMB would be considered formal piracy under international law

IV. ANALYSIS IF THE CASE OF MV SINAR KUDUS OF INDONESIA

Facts of the MV Sinar Kudus Incident

At 7.30 on 16 March 2011, Indonesian-flagged cargo carrier MV Sinar Kudus (Holy Light) was pirated by Somali pirates approximately 320 nautical miles northeast of the island of Socotra in Somali seas at 07.30 on 16 March 2011. The MV Sinar Kudus was on its way from Sulawesi, Indonesia, to Suez, Egypt, when it was attacked by the pirates. Details of the attack were not available at first but initial reports from the crew stated that 30 to 50 pirates had boarded and taken control of the vessel. The MV Sinar Kudus had an all-Indonesian crew of 20. The hijacked ship, with its crew now held as hostage, was quickly turned around by the pirates to carry out mother-ship operations and further attacks. The attack was reported to military authorities.

The government of Indonesia had planned to engage in both negotiations and acts to suppress in response to the Somali pirates. The pirates promised to release the Indonesian vessel and its crew if the government paid a ransom. After the ransom was delivered to the pirates, the Indonesian military troops pursued the pirates. Four pirates were killed in the shootout that occurred during the night on 5 January 2011.

‘The event after the hostages' release. The pirates did not at once leave the MV Spirit. There were 35 pirates on board. At point A them down a bit, at point B they were down slightly, at point C down again, so the system’, Indonesian National Armed Forces (the TNI) Spokesman Rear Admiral Iskandar Sitompul told the AFP news agency. According to Iskandar, it was a pirate strategy. Three military staff guarded the ship down to the sea for some time afterward. Once the last group of pirates were removed from the boat with a wooden boat, the military elite forces pursued the pirates. They carried out the pursuit after making sure all the hostages were in a safe condition. ‘We chased by sea rider and helicopters and the ship was overtaken’, the Admiral explained.

During the course of the pursuit on the high seas, there was a shootout between the military elite forces and Somali pirates. As a result, four pirates were killed, while no military personnel was hurt. ‘The operation was carried out by a joint team of personnel from the TNI, Army Special Forces, and Marines)’, the Admiral said. After the shootout ended, the TNI escorted MV

Sinar Kudus to the port at Wa Salala, Oman. The ship was checked before it continued on to Rotterdam, the Netherlands.

The efforts of the TNI in pursuing the ship and confronting the pirates should be appreciated by both the Indonesian and international public. The TNI's efforts resulted in the defeat of the act of the pirates and the release of the vessel and its crew. From a legal perspective, it could be argued that the fact that only local forces – the TNI – endeavoured to combat the pirates and release the ship is an issue of concern. This is particularly true when one notes that the situation was in contradiction with the rules of international law and a number of Security Council resolutions.

Universal Jurisdiction and Piracy as a Jure Gentium International Crime

Firstly, the pirate is a *hostis humanis generis* (enemy of humankind), and piracy is considered a *jure gentium* international crime. It follows that global cooperation between nations in the form of multilateral efforts is necessary to prevent and punish these acts. As stated in Article 100 of the 1982 UNCLOS, all states shall co-operate in the repression of piracy. Article 105 of the UNCLOS suggests that every state has the right to seize a pirate. These Articles provide a basis for the application of universal jurisdiction by all states, which is in contrast to the suppression of the pirates over the MV Sinar Kudus by only the Indonesian Armed Forces. Kontorovich stated:

> ... courts around the world have relied on universal jurisdiction with increasing frequency to justify proceedings against alleged perpetrators of human rights offences in foreign countries. The doctrine of universal jurisdiction holds that a nation can prosecute offences to which is has no connection at all – the jurisdiction is based solely on extraordinary heinousness of the alleged conduct. According to the doctrine, any nation can prosecute universal offences, even over the objection of the defendants' and victims' home states. Examples of universal jurisdiction include Belgium's indictment of Israeli Prime Minister Ariel Sharon for alleged responsibility for war crimes' committed by Christian Arab against Muslim Arabs in Lebanon

and the conviction by German and Swiss courts of Serbian official who committed war crimes against Bosnia Muslims. [11]

The Princeton Principles on Universal Jurisdiction

The Princeton Principles on Universal Jurisdiction[12] outlines 14 principles on the effective application of universal jurisdiction. It expound on the concept of universal jurisdiction:

1. Universal jurisdiction is criminal jurisdiction based solely on the nature of the crime without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim or any other connection to the state exercising such jurisdiction;
2. Universal jurisdiction may be exercised by a competent and ordinary judicial body of any state in order to try a person duly accused or committing serious crimes under international law;
3. A State may rely on universal jurisdiction as a basis for seeking the extradition of a person accused or convicted of committing a serious crime under international law… provided that it has established a prima facie case of the person's guilt and that the person sought to be extradited will be tried or the punishment carried out in accordance with international norms and standards on the protection of human rights in the context of criminal proceedings;
4. In exercising universal jurisdiction or in relying upon universal jurisdiction as a basis for seeking extradition, as state and its judicial organs shall observe international due process norms including but not limited to those involving the rights of the accused and victims, the fairness of the proceedings, and the independence and impartiality of the judiciary;
5. A state shall exercise universal jurisdiction in good faith and in accordance with its rights and obligations under international law.

[11] Eugene KONTOROVICH, 'The Piracy Analogy Modern Universal Jurisdiction's How Foundation', *Harvard International Law Journal*, Winter 2004, Volume 45, Number 1, 2004.

[12] These principles were developed as a result of cooperation between Princeton University's Program in Law and Public Affairs, the Woodrow Wilson School of Public and International Affairs, the International Commission of Jurists, the American Association for the International Commission of Jurists, the Urban Morgan Institute for Human Rights, and the Netherlands Institute of Human Rights.

These principles, which may be taken as expert opinion, also emphasise the fact that piracy is one of seven serious crimes under international law. The seven serious crimes are piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide, and torture.

Security Council Resolutions on Piracy

The Security Council has linked the piracy off the coast of Somalia with the notion of a threat to international peace and security. Since Resolution 733/1992, the Council has routinely invoked Chapter VII of the UN Charter in regard to the situation in Somalia. The Security Council has stated that such situation constitutes or continues to constitute 'a threat to international peace and security' as stated in Security Council Resolution 1814 of 15 May 2008. In what would be its first resolution dealing specifically on the issue of piracy off the coast of Somalia, the Security Council stated that it had 'determine[d] 'that such piracy' exacerbate[s] the situation in Somalia which to constitute a threat to international peace and security in the region'. The declaration made in approving the Resolution by the Chinese Minister of Foreign Affairs at the Security Council meeting held at the level of foreign ministers on 16 December 2008 clearly shows a particular viewpoint and approach. This approach suggests that the long-term delay in the settlement of the Somali issue is posing a serious threat to international peace and security, while the rampant piracy off the Somali coast has worsened the security situation in Somalia. It nonetheless achieves the objective that action against piracy off the Somali coasts be conducted within the framework of Chapter VII of the UN Charter.[13]

The Security Council has released some resolutions that have implications for the subject of piracy. These include Resolution 1816 of 2 June 2008, Resolution 1846 of 2 December 2008, and Resolution 1851 of 18 December 2008. These resolutions (especially paragraph 7 of Resolution 1816) state key principles pertaining to piracy. For example, there is the idea that certain states are authorised to enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such actions

[13] Chapter VII of the UN Charter: Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression: Article 39*:* 'The Security Council shall determine the existence of any threat to the peace or act of aggression and shall make recommendations or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security'.

permitted on the high seas with respect to piracy under relevant international law. There is also the concept that certain states can use, within the territorial waters of Somalia and in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery at sea. This resolution gives legal effect to the concept that the rules of international law concerning piracy on the high seas are applicable also to territorial waters, *inter alia*; and permit pursuit from the high seas into these waters. It also clarifies that states acting under these rules within the territorial waters of Somalia may use 'all necessary means'.

The resolution inspired French troops in their pursuit of pirates into the Somali mainland on 11 April 2008, into Somalia territory, for a piracy operation against the passengers of French cruise ship *Le Ponant*. It was an effort that was perceived as successful as it resulted in the capture of 6 pirates and the recovery of the portion of the ransom paid. Resolution 1851 added on 16 December 2008 an authorization to conduct 'all necessary measures that are appropriate in Somalia for the purpose of suppressing acts of piracy and armed robbery at sea. The expression 'in Somalia' as stated by Resolution 1851, while not explained in the preamble paragraphs, clearly emphasised that armed forced action conducted by certain states could be conducted in Somalia beyond Somali waters and on the Somalian mainland.

However, this rule found within Resolution 1816 which allows certain states (states with nationals who are the victims of Somali pirates) to enter the territorial waters of Somalia for the purpose of repressing acts of piracy and use all necessary means to repress acts of piracy[14] appears to be in contradiction with Article 111 of the UNCLOS. Article 111 of the UNCLOS elaborates the right of hot pursuit 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 of that State. Such pursuit must be commenced 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, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time

[14] The Resolution also explicitly states that the state may act 'within the territorial waters of Somalia in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law'.

when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone. If the foreign ship is within a contiguous zone, as defined in article 33, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.

2. The right of hot pursuit shall apply mutatis mutandis to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal State applicable in accordance with this Convention to the exclusive economic zone or the continental shelf, including such safety zones.
3. 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.
4. Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship is within the limits of the territorial sea, or, as the case may be, within the contiguous zone or the exclusive economic zone or above the continental shelf. 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.
5. 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.
6. Where hot pursuit is effected by an aircraft:
   a. The provisions of paragraphs 1 to 4 shall apply mutatis mutandis;
   b. The aircraft giving the order to stop must itself actively pursue the ship until a ship or another aircraft of the coastal State, summoned by the aircraft, arrives to take over the pursuit, unless the aircraft is itself able to arrest the ship. It does not suffice to justify an arrest outside the territorial sea that the ship was merely sighted by the aircraft as an offender or suspected offender, if it was not both ordered to stop and pursued by the aircraft itself or other aircraft or ships which continue the pursuit without interruption.

7. The release of a ship arrested within the jurisdiction of a State and escorted to a port of that State for the purposes of an inquiry before the competent authorities may not be claimed solely on the ground that the ship, in the course of its voyage, was escorted across a portion of the exclusive economic zone or the high seas, if the circumstances rendered this necessary.
8. 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.

The right of hot pursuit is deemed to be justified by Article 111 of the UNCLOS if the hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal have good reason to believe that the ship has violated the laws and regulations of the state. Piracy is not only a violation of the laws and regulations of the coastal state, but also a violation of international law and a *jure gentium* as international crime and *hostis humanis generis* that is subject to the application of universal jurisdiction. Hot pursuit must be commenced 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. However, piracy is always on the high seas, not in those waters within the national sovereignty of a state, so the violation concerned does not refer to piracy, but the national law violation of the state such as illegal fishing or marine pollution by foreign ships. If the violation by foreign ship is within a contiguous zone, as defined in Article 33 of the UNCLOS, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.[15]

The rights of hot pursuit shall apply *mutatis mutandis* to violations in the exclusive economic zone or on the continental shelf including safety zones around continental shelf installations of the coastal state. And also the most important is that the right of hot pursuit cease as soon as the ship pursued enters the territorial sea of its own state or that of a third state. This means that

[15] Article 33 of the UNCLOS 1982 states:

> 1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to: (a) prevent infringement of its customs, fiscal, immigration, or sanitary laws, and regulations within its territory or territorial sea; (b) punish infringement of the above laws and regulations committed within its territory or territorial sea. 2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of territorial sea is measured.

every state shall respect national sovereignty of other states in terms of national violations as stated by Article 111 of the UNCLOS. This is to be contrasted with violations in the context of piracy which is subject to universal jurisdiction where all states shall cooperate to suppress the pirate. The right of hot pursuit may be exercised only by warships or military aircraft or other ships or aircraft that are clearly marked and identifiable as being on government service and authorised to that effect. This is logically possible because warships or military aircraft has a considerable amount of arms to pursue and/or use force against pirates. In term of piracy, the suppression of the crime must use warship or military aircraft as was used by the French Army in the case of ship *Le Ponant* and also by the Indonesian Armed Forced in the case of MV Sinar Kudus.

Resolutions passed by the Security Council as mentioned above have legal effect and when the Council uses the term 'decide', the resolutions have the highest degree of compelling, binding force as stated by Article 25 of the UN Charter:

> … the Members of the UN agree to accept and carry out the decisions of the Security Council in accordance with the Charter", and also stressed by Article 103 of the Charter reads that "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

This suggests that resolutions of the Security Council have more binding force than the 1982 UNCLOS in the piracy context and if there is conflict between the two international sources. Therefore, the suppression of piracy, whether committed by Somali pirates or other countries pirates, should become the responsibility of all Member States of the United Nations. Yet, in MV Sinar Kudus, the question remains as to why only Indonesia acted to suppress the pirates and protect the rights of the crew and the vessel owner.

The Security Council has expressed its grave concern about piracy and armed robbery against vessels in the waters off the coast of Somalia; it determined that piratical incident exacerbated the situation in Somalia and the World because the crime constituted a threat to international peace and security. The Council urged '[s]tates whose naval and vessels and military aircraft operate on the high seas and airspace off the coast of Somalia to be vigilant to acts of piracy and

armed robbery at sea', and 'to cooperate with each other, with the IMO and, as appropriate, with the relevant regional organizations in connection with and share information about acts of piracy and armed robbery in the territorial waters and on the high seas off the coast of Somalia and to render assistance to vessels threatened by or under attack by pirates or armed robbers in accordance with relevant international law. This was the first time that the Security Council had placed the issue of piracy and armed robbery at sea on its agenda, treating it as a matter threatening international peace and security in the same manner used for addressing other most serious crimes such as aggression, crimes against humanity, war crimes, or even genocide.

A Duty of Multilateral Action against Piracy?

Based on the principles laid out in the United Nations Charter, UN Members are obliged to implement the Security Council resolutions as highlighted above. The Members have the duty to contribute to the maintenance of international peace and security by providing material support for the actions undertaken by the Security Council. This support may include armed forces, assistance and facilities including assistance and facilities to suppress pirates. The principles in the Charter suggests that it is not the sole responsibility of a state (such as Indonesia in MV Sinar Kudus) to take action to suppress pirates, release the ship, and pay the ransom requested by the pirates. The solitary effort of Indonesia without assistance from other states in the international communication is in stark contradiction to the Security Council resolutions. Therefore, the Security Council, which passes many resolutions concerning the suppression of pirate around the world, should be responsible for combating piracy and prosecuting pirates in accordance with national laws of states. This is because the crime of piracy is subject to the application of universal jurisdiction. Universal jurisdiction gives rise to criminal jurisdiction based solely on the nature of the crime without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim or any other connection to the state exercising such jurisdiction as outlined above by the Princeton Principles on Universal Jurisdiction of 2001. It is also highlighted by the fact that Permanent Members of the Security Council have a veto right; as such, Permanent Members should lead in efforts to suppress pirates because the crime of piracy is a serious threat to international peace and security.

V. CONCLUSION

The definitions of piracy as defined in Articles 100 to 107 of the 1982 UNCLOS is rather narrow as these definitions include only action on the high seas and action undertaken by one ship against another ship. Hence, forms of violence conducted in the territorial sea of a state or undertaken without the involvement of two ships (such as the violent taking of control of a ship by members of its crew or passengers) are not included in these. However, piracy *jure gentium* is an international crime and pirates considered to be *hostis humanis generis.* Article 100 of the UNCLOS states that all states shall co-operate to the fullest possible extent in the suppression of piracy on the high seas or in any other place outside the jurisdiction of any State. The broader definition of piracy has now been expanded upon by the IMO and the International Maritime Bureau, and in the SUA Convention and the Security Council resolutions as examined in the discussion above. However, it can be argued that the definitions do not hold serious weight. This is because piracy – whether it occurs on high seas or in the form of armed robbery within the jurisdiction of states in exclusive economic zones or territorial seas – is a serious international crime that requires all states to act to suppress and punish these acts. Ultimately, such efforts would be for the purpose of making international peace for all states and people, as well as for the safety of international navigations and trade.

In the case of MV Sinar Kudus, the vessel was pirated on 16 March 2011, but the ship and its 20 hostages had to wait until 1 May 2011 to be released by a competent authority of Indonesia. The serious measures to suppress the pirates carried out on a unilateral basis by Indonesia must be appreciated by international and national public, as they resulted in the release of the ship and its cargo, and saved the crew. Again, it must be noted that Indonesia alone acted to release the ship and its crew and pay a ransom to the Somali pirates, and it could be argued that this suppression by a solitary state is not strictly in conformity with the 1982 UNCLOS and Security Council resolutions highlighted in the discussion above. The UNCLOS and Security Council resolutions stated that the suppression of Somali pirates should involve all states to co-operate in the repression of piracy. However, a cooperative effort between states was not initiated by the Security Council in the MV Sinar Kudus incident. One would suggest that the Security Council should actively initiate multilateral action to suppress piracy; for example, by maintaining a dedicated team of special armed forces to suppress and use force against acts of piracy in order

to ensure the safety and prosperity afforded by peaceful seas to international navigation and trade.

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