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Erik Barrios

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CASTING A WIDER NET: ADDRESSING THE MARITIME PIRACY PROBLEM IN SOUTHEAST ASIA

ERIK BARRIOS*

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

INTRODUCTION

Piracy has posed a threat to all states' maritime interests for nearly as long as people have sailed the oceans.¹ States have long recognized the threat that piracy poses to political and commercial interests, as well as to human safety.² Since pirates operate on the seas, the "great highway of all maritime nations," and since piracy can inflict harm upon all states, international law treats piracy as a universal crime whose perpetrators are subject to punishment by any state that apprehends them.³

* Erik Barrios is an Articles Editor of the *Boston College International & Comparative Law Review*.

¹ See generally ALFRED P. RUBIN, *THE LAW OF PIRACY* 8 (Naval War College Press 1988) (discussing the ancient Roman belief in the "impropriety" of piracy and the threat that piracy might pose to the "new commercial and political order that could not countenance interference with trade in the Mediterranean Sea").

² See Delphine Soulas, *Poverty Stirs Turbulence in Asian Waters; Attacks on Ships Triple Since '93*, WASH. TIMES, Oct. 10, 2003, at A17, at 2003 WL 7720673.

³ See ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES: YEARS 1919-1922, at 165 (Sir John Fisher Williams & H. Lauterpacht eds., 1932); Paul Arnel, *International Criminal Law and Universal Jurisdiction*, 11 INT'L LEGAL PERSP. 53, 60 (1999).

Piracy remains a serious threat to international commerce and safety in modern times, especially in Southeast Asia.⁴ Commercial ships in this region have always been particularly vulnerable to the maritime attacks that characterize piracy due to the narrow waterways and countless small islands that define the region's geography.⁵ Nevertheless, there was a sharp increase in these attacks in the late 1990s following the massive unemployment and political instability caused by the Asian economic crisis.⁶ Indeed, in 2002, Southeast Asian waters played host to approximately 140 attacks.⁷

The explosion of maritime violence in Southeast Asia is reason for serious international concern given the region's significant role in international commerce.⁸ Roughly 45% of the world's commercial shipping moves through the region's waters, and the frequent attacks on commercial vessels passing through the region can hamper international trade and lead to severe economic loss.⁹ Indeed, maritime attacks in the region have caused an estimated \$16 billion in economic loss over the past five years.¹⁰

In addition, the possible links between the maritime attacks, local dissident groups, and terrorist groups such as al Qaeda justifies increased international attention.¹¹ While violent dissident groups have

⁴ See generally Peter Chalk, "Threats to the Maritime Environment: Piracy and Terrorism" Presentation at the RAND Stakeholder Consultation (Oct. 28–30, 2002) (noting the marked increase in piracy since the end of the Cold War, particularly in Southeast Asia); *Pirates In Asia a Growing Threat to Global Trade*, HERITAGE FOUNDATION, June 23, 2000, at <http://www.heritage.org/Press/NewsReleases/NR062300.cfm> (last visited Nov. 20, 2004) (describing attacks to commercial shipping in Southeast Asia); Sonia Kolesnikov, *Piracy Still Rising*, UNITED PRESS INT'L, Apr. 20, 2002, available at LEXIS, News Library (reporting on the continuing rise in the incidents of piracy in Southeast Asia).

⁵ See Ger Teitler, *Piracy in Southeast Asia: A Historical Comparison*, 1 MAST 1, 72 (2002), available at <http://www.marecentre.nl/mast/documents/GerTeitler.pdf> (last visited Nov. 20, 2004).

⁶ Dana Robert Dillon, *Piracy in Asia: A Growing Barrier to Maritime Trade*, Heritage Foundation, HERITAGE FOUNDATION, June 22, 2000, at <http://www.heritage.org/Research/AsiaandthePacific/BG1379.cfm> (last visited Nov. 20, 2004).

⁷ See, e.g., INTERNATIONAL MARITIME ORGANIZATION, REPORTS ON ACTS OF PIRACY AND ARMED ROBBERY AGAINST SHIPS: ANNUAL REPORT 2002, MSC.4/Circ. 32, April 17, 2003, at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D7215/32-b&w.pdf (last visited Nov. 20, 2004).

⁸ See HERITAGE FOUNDATION, *supra* note 4.

⁹ See *id.*

¹⁰ John J. Brandon, *Piracy as Terrorism*, J. COM., June 3, 2003, at <http://www.uscib.org/index.asp?documentID=2153> (last visited Nov. 20, 2004).

¹¹ See Richard Halloran, *What if Asia's Pirates and Terrorists Joined Hands?*, SOUTH CHINA MORNING POST (Hong Kong), May 17, 2003, available at <http://www.uscib.org/index.asp?documentID=2636> (last visited Nov. 20, 2004); See also *Is Terrorism Heading for the High Seas?*, YOMIURI SHIMBUN/DAILY YOMIURI, October 6, 2003, A11, at 2003 WL 5140196.

existed in the region for centuries, the attacks of September 11, 2001 and the subsequent war on terrorism have focused increased attention upon possible links between al Qaeda and dissident groups in countries such as the Philippines, Malaysia, Indonesia, Singapore, and Thailand.¹² Officials in Southeast Asia worry about the increased frequency with which these dissident groups have attacked maritime targets.¹³ Indeed, the International Maritime Bureau (IMB), an organization of the International Chamber of Commerce that tracks incidents of maritime crime throughout the world, reports the emergence in Southeast Asia of a “new brand of piracy” in which the attacks are motivated by political agendas rather than a traditional motive to rob.¹⁴ These attacks are consistent with the theory that terrorists in Southeast Asia have shifted strategies to encompass economic, as well as political and military, targets.¹⁵ Actual attacks by terrorists have thus far been limited to temporary seizures of vessels and crewmen, but officials express concern over the ease with which large vessels such as oil tankers could be hijacked and used as weapons with which to block commercial waterways or attack one of Southeast Asia’s numerous busy harbors.¹⁶ In addition to direct attacks, terrorists may also exploit the region’s maritime shipping activity to facilitate their operations in other parts of the world.¹⁷ For example, authorities suspect that terrorist groups have been using container ships to smuggle weapons, supplies, and even the terrorists themselves.¹⁸

Thus, in addition to the usual concern over the threat to international commerce, apprehension about the possible connection between pirates and terrorists also draws attention to the problem of piracy in Southeast Asia.¹⁹ These magnified concerns highlight the

¹² See James Gomez, *September 11: Asian Perspectives*, 13 IND. INT’L COMP. L. REV. 705, 707 (2003).

¹³ See Halloran, *supra* note 11; YOMIURI, *supra* note 11.

¹⁴ *New Brand of Piracy Threatens Oil Tankers in Malacca Straits*, ICC COMMERCIAL CRIME SERVICES, Sept. 2, 2003, at http://www.iccwbo.org/ccs/news_archives/2003/piracy_ms.asp (last visited Nov. 20, 2004) [hereinafter *New Brand of Piracy*].

¹⁵ Graham Gerard Ong, *Pre-empting Maritime Terrorism in Southeast Asia*, INST. OF SOUTH EAST ASIAN STUDIES VIEWPOINTS, Nov. 29, 2002, at www.iseas.edu.sg/viewpoint/ggonov02.pdf (last visited Nov. 20, 2004).

¹⁶ See *Peril on the Sea*, ECONOMIST, Oct. 4, 2003, at 5; Adam J. Young & Mark J. Valencia, *Conflation of Piracy and Terrorism in Southeast Asia: Rectitude & Utility*, 25 CONTEMP. SOUTHEAST ASIA 1, 32 (2003), at 2003 WL 5140196; YOMIURI, *supra* note 11 (discussing a tanker carrying liquefied petroleum gas as the “likeliest terrorist target”).

¹⁷ See YOMIURI, *supra* note 11 (describing anxieties about terrorists using container ships to smuggle people and explosives around the world).

¹⁸ *Id.*

¹⁹ See *id.*

need for more effective maritime law enforcement in the region, and have led scholars to examine the legal issues that may frustrate efforts to address these maritime attacks.²⁰

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

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

Piracy became a crime under international law as seafaring became prevalent and international trade became a major part of all states’ economies.²¹ Early on, states recognized that piracy posed a threat to trade and the orderly functioning of the international community in general.²² Thus, the international community branded pirates as *hostes humani generis* or enemies of the human race, and treated piracy as one of the few crimes over which universal jurisdiction applied.²³ As such, piracy remains punishable by all nations,

²⁰ See, e.g., Tina Garmon, *International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11*, 27 TUL. MAR. L.J. 257, 259 (2002) (noting that reconciling notions of piracy and terrorism under the law of the sea is inevitable as maritime violence and threats of terrorism increase).

²¹ *Id.* at 259–60.

²² See *id.*

²³ Williams & Lauterpacht, *supra* note 3, at 165.

wherever the perpetrators were found and without regard to where the offense occurred.²⁴

For centuries the international prohibition on piracy existed in varying definitions, but it was not until the international community adopted the Geneva Convention of the High Seas in 1958 that a definition was set forth in a major international instrument.²⁵ UNCLOS, which was signed in 1982 and entered into force in 1994, identically restates the definition established in the Convention on the High Seas.²⁶ According to the definition found in the Convention on the High Seas and UNCLOS, “piracy” consists of (1) illegal acts committed on the high seas (2) for private ends (3) by the crew or passengers of one ship against the crew, passengers, or property onboard another ship.²⁷ The requirement that the acts be motivated for private ends restricts this definition to attacks committed with the intent to rob, and also limits the ability of states to claim universal jurisdiction over politically motivated attacks.²⁸ This requirement reflects the states’ primary underlying concern about interference with commercial shipping and transportation, and underscores the states’ general unwillingness to assert jurisdiction over politically motivated acts that do not have a commercial aspect.²⁹ To date, Indonesia, Malaysia, and the Philippines, the states most heavily impacted by piracy, are parties to UNCLOS and as such are bound by the rights and obligations of the UNCLOS definition of piracy.³⁰ Many writers treat UNCLOS as a codification of the customary international law on piracy and consider all states, whether parties or not, as bound by the UNCLOS definition.³¹

²⁴ *See id.*

²⁵ *See* Convention on the High Seas, Apr. 29 1958, art. 15, 450 U.N.T.S. 11, *available at* <http://www.un.org/law/ilc/texts/hseas.htm> (last visited Nov. 20, 2004) [hereinafter High Seas Convention]; Garmon, *supra* note 20, at 259–63 (discussing the varied applications of piracy law under customary international law and the eventual adoption of the Convention on the High Seas which sought to provide a standard definition of piracy).

²⁶ *See* High Seas Convention, *supra* note 25, art. 15; United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 101, 1833 U.N.T.S. 3, 436 [hereinafter UNCLOS].

²⁷ UNCLOS, *supra* note 26, art. 101.

²⁸ Garmon, *supra* note 20, at 265.

²⁹ *See id.*

³⁰ *See* UN DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, CHRONOLOGICAL LISTS OF RATIFICATIONS OF, ACCESSIONS AND SUCCESSIONS TO THE CONVENTION AS AT 1 NOV. 2004, *at* http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm (last visited Nov. 20, 2004).

³¹ *See* Garmon, *supra* note 20, at 275 (suggesting that the law contained in UNCLOS would apply to non-signatories as well).

Soon after UNCLOS was adopted, it became clear that its conception of piracy did not cover many of the violent crimes committed on the seas.³² On October 7, 1985, four armed stowaways onboard the Italian cruise liner *Achille Lauro*, hijacked the ship and killed one American passenger.³³ The apparent political motivations for the attack, the location of the attack in Egyptian waters, and the fact that the attack originated from the target ship rather than from a separate ship, placed the attack outside the UNCLOS definition of piracy and, presumably, beyond the purview of universal jurisdiction.³⁴ The United States, and other states that may have had an interest in prosecuting the attackers, were apparently left without the authority under international law to do so.³⁵

After the *Achille Lauro* attack, the international community, through the UN and its International Maritime Organization (IMO), promulgated the Rome Convention, which established a legal basis for prosecuting maritime violence that did not fall within the UNCLOS piracy framework.³⁶ The Rome Convention made it unlawful to seize or take control of a ship by force or the threat force, to perform an act of violence against a person on board a ship if it is likely to endanger safe navigation of that ship, to destroy or damage a ship or its cargo if it is likely to endanger safe navigation, to place devices or substances on a ship that are likely to destroy that ship, to knowingly communicate false information to a ship that would endanger safe navigation, and to injure or kill any person in connection with any of the above acts.³⁷ The Rome Convention authorizes and, under certain circumstances, requires party states to establish jurisdiction over the perpetrators, either extraditing the perpetrators to another interested signatory state or prosecuting the alleged offenders themselves.³⁸ The state of which the perpetrator is a national, the state in whose territorial waters the act is committed, and the flag state of the ship against whom the act is committed are all required to take measures neces-

³² See *id.* at 271–72; Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AM. J. INT'L L. 269, 285 (1998).

³³ Halberstam, *supra* note 32, at 269.

³⁴ See, e.g., UNCLOS, *supra* note 26, art. 101.

³⁵ See *id.*

³⁶ See Halberstam, *supra* note 32, at 295.

³⁷ Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, art. 3, 1678 U.N.T.S. 221, at http://www.unodc.org/unodc/terrorism_convention_maritime_navigation.html (last visited Nov. 20, 2004) [hereinafter Rome Convention].

³⁸ *Id.* arts. 6, 10(1); Halberstam, *supra* note 32, at 295–96.

sary to establish jurisdiction over the offenses.³⁹ Furthermore, a party state is permitted to exercise jurisdiction if the victim is a national of the state, if the perpetrator's habitual residence is in the state, or if the act was committed in an attempt to compel the state to do, or abstain from doing, any act.⁴⁰

To date, Indonesia, Malaysia, and the Philippines, the states with the largest maritime presence and with the greatest potential to be affected by incidents of maritime violence covered by the Rome Convention, have neither ratified, nor even signed it.⁴¹ Unlike UNCLOS, there is no assumption that non-signatories would be bound by the terms of the Rome Convention; it is clearly not a reflection or codification of customary international law, but rather a relatively recent departure from it.⁴²

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

A. *The Limits of UNCLOS*

The definition of piracy contained in UNCLOS excludes many of the types of maritime attacks that currently occur in Southeast Asia.⁴³ In particular, UNCLOS requires that a crime occur on the high seas in order to be punishable as piracy.⁴⁴ However, the majority of maritime attacks in Southeast Asia occur within a state's territorial waters.⁴⁵ Under UNCLOS, only the states in whose territorial waters the attacks occurred would be permitted to prosecute the offenders.⁴⁶ Assuming such a state is willing to act, its efforts would be limited by UNCLOS rules regarding "hot pursuit" as applied to Southeast Asia's geography.⁴⁷ UNCLOS provides that a state may commence pursuit of an offending ship within its territorial waters, and continue into in-

³⁹ See Rome Convention, *supra* note 37, art. 6.

⁴⁰ See *id.*

⁴¹ See INTERNATIONAL MARITIME ORGANIZATION, STATUS OF CONVENTIONS, at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D8068/status.xls (last visited Nov. 20, 2004) [hereinafter STATUS OF CONVENTIONS].

⁴² See Garmon, *supra* note 20, at 271.

⁴³ See, e.g., *id.* at 267 (noting how the UNCLOS definition is restricted to piracy taking place on the high seas and most incidents of piracy occur within territorial or port waters).

⁴⁴ See UNCLOS, *supra* note 26, art. 101.

⁴⁵ See INTERNATIONAL MARITIME ORGANIZATION, *supra* note 7, annex 2.

⁴⁶ Garmon, *supra* note 20, at 264; see UNCLOS, *supra* note 26, art. 101.

⁴⁷ See UNCLOS, *supra* note 26, art. 111.

ternational waters so long as the pursuit is uninterrupted.⁴⁸ The right of hot pursuit ends, however, as soon as the fleeing ship enters its own or a third state's territorial waters.⁴⁹ These limitations on the states' ability to pursue offenders are especially problematic in insular Southeast Asia, where the islands of multiple countries are densely packed within relatively small areas.⁵⁰ With little international water separating neighboring states, fleeing ships can quickly escape into the territorial waters of another state and avoid capture and prosecution if the neighboring state is unwilling to act.⁵¹

The requirement that an attack be motivated by private and material ends further limits UNCLOS' applicability to Southeast Asia.⁵² Since UNCLOS excludes attacks that are politically motivated, it excludes acts of maritime terrorism that have become increasingly common in the region.⁵³ Thus, maritime crimes committed by regional dissidents, including kidnappings of crewmen to put pressure on regional governments and environmental attacks involving hijacked oil tankers, are not punishable as piracy under UNCLOS.⁵⁴

The two-vessel requirement imposes a third limitation on the UNCLOS piracy provision's usefulness.⁵⁵ UNCLOS requires that perpetrators stage an attack from one vessel against the crew or passengers of another vessel in order for the attack to qualify as piracy.⁵⁶ Thus, an attack on a ship committed by its crew, its passengers, or stowaways likely would be excluded even though the social and economic harm would be identical to an attack that satisfied all of the UNCLOS elements.⁵⁷

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See Zou Keyuan, *Enforcing the Law of Piracy in the South China Sea*, 31 J. MAR. L. & COM. 107, 111 (2000) (stating that most, if not all, of the South China Sea is located within the exclusive economic zone of one country or another).

⁵¹ See *id.*

⁵² See Garmon, *supra* note 20, at 265.

⁵³ See *id.*

⁵⁴ See *id.*; ECONOMIST, *supra* note 16, at 5.

⁵⁵ See Halberstam, *supra* note 32, at 287 (noting how a perpetrator of maritime violence could be caught on the high seas, have the motivation found to be for "private ends," yet still fail to qualify as a pirate because he did not act from one ship against another").

⁵⁶ See UNCLOS, *supra* note 26, art. 101.

⁵⁷ See Halberstam, *supra* note 32, at 286-87.

B. *The Limits of the Rome Convention*

The Rome Convention was meant to fill these gaps left by the UNCLOS definition of piracy.⁵⁸ In particular, the Rome Convention covers acts occurring in territorial waters and acts motivated for political ends, as well as eliminating the two-vessel requirement.⁵⁹ While the Rome Convention would empower Southeast Asian states to act more decisively in responding to maritime attacks, none of the states in Southeast Asia that are especially hard-hit by these attacks, namely the Philippines, Malaysia, and Indonesia, have signed it.⁶⁰

The unwillingness of the region's large insular states to join the Rome Convention can be explained in large part by the characteristic jealousy with which Southeast Asian states guard their political and territorial sovereignty.⁶¹ States in this region view the Rome Convention's obligations concerning the extradition or prosecution of maritime criminals as an affront to their sovereignty because these provisions prescribe how states should deal with matters concerning their own territorial waters.⁶² The unwillingness to participate in the Rome Convention deprives the states in Southeast Asia of an important legal framework for dealing with the acts of maritime violence that do not fall within the UNCLOS definition of piracy.⁶³

Even if the major insular states in Southeast Asia were to join to the Rome Convention, the Convention has shortcomings that prevent it from completely covering all the acts excluded by UNCLOS.⁶⁴ Although the Rome Convention's definition of piracy covers attacks that do not fall within the UNCLOS definition, the Rome Convention's provisions are only applicable within the jurisdictions of states party to it.⁶⁵ Arguably, the scope of criminal attacks embraced by the Rome Convention's definition of piracy includes acts that are not considered *ergo omnes*, and therefore do not provide for universal jurisdiction.⁶⁶ The acts within the Rome Convention's definition of piracy are only punishable by the states that are party to the treaty, only if the perpetra-

⁵⁸ See Zou Keyuan, *Part V: Piracy, Ship Hijacking and Armed Robbery in the Straits*, 3 SING. J. INT'L & COMP. L. 524, 532 (1999).

⁵⁹ See *id.*; Rome Convention, *supra* note 37, at art. 3.

⁶⁰ See Keyuan, *supra* note 58, at 532; STATUS OF CONVENTIONS, *supra* note 41.

⁶¹ See Young & Valencia, *supra* note 16 at 32.

⁶² See *id.*

⁶³ See Keyuan, *supra* note 58, at 532.

⁶⁴ See Garmon, *supra* note 20, at 272-73.

⁶⁵ See *id.*

⁶⁶ See *id.*

tors or victims are nationals of a party state, and only if the offending acts take place in a party state's territorial waters or the offending vessel was scheduled to navigate through such waters.⁶⁷ Furthermore, the decision by the parties to enforce the Rome Convention is ultimately discretionary.⁶⁸ Even though a party may be obligated by the terms of the Rome Convention to act in response to an offense, the Convention does not provide for any sanctions against parties who fail to fulfill their treaty obligations.⁶⁹ Thus, if a party authorized or obligated by the Rome Convention to act declines to do so, the purported attack may go unpunished and the other party states may have no recourse against that non-conforming state.⁷⁰

Thus, even if all relevant Southeast Asian states were to become party to the Rome Convention, the limitations of the Rome Convention and UNCLOS leave a regulatory gap through which certain acts of maritime violence could slip by unpunished.⁷¹ Terrorist acts occurring on the high seas, for instance, would fall outside of both the UNCLOS and Rome Convention frameworks.⁷²

III. TOWARD A MORE HISTORICALLY ACCURATE PIRACY FRAMEWORK

Scholars have proposed two solutions to provide for more effective legal coverage of the forms of maritime violence that occur in Southeast Asia.⁷³ First, as suggested by Tina Garmon, the UNCLOS definition could be revised to include acts motivated by political objectives.⁷⁴ This expansion would provide for increased jurisdiction over maritime terrorism on the high seas and would allow UNCLOS and the Rome Convention to work together more cohesively, "extending a blanket of enforcement jurisdiction" over all types of maritime violence.⁷⁵ However, Garmon's proposal seemingly would be ineffective in Southeast Asia, where none of the major insular states are party

⁶⁷ See *id.*; Rome Convention, *supra* note 37, art. 6.

⁶⁸ Garmon, *supra* note 20, at 273.

⁶⁹ See Rome Convention, *supra* note 37, art. 16 (providing a forum for dispute resolution between parties regarding issues arising out of the interpretation or application of the Convention, but providing no specific sanctions).

⁷⁰ Garmon, *supra* note 20, at 273.

⁷¹ *Id.* at 275.

⁷² See *id.*

⁷³ See Garmon, *supra* note 20, at 275; Timothy H. Goodman, "Leaving the Corsair's Name to Other Times:" *How to Enforce the Law of Sea Piracy in the 21st Century Through Regional International Agreements*, 31 CASE. W. RES. J. INT'L. L. 139, 158 (1999).

⁷⁴ See Garmon *supra* note 20, at 275.

⁷⁵ See *id.*

to the Rome Convention.⁷⁶ Even if the UNCLOS party states were to agree to expand the definition of piracy to include politically motivated acts, Southeast Asia's lack of participation in the Rome Convention leaves many violent acts uncovered by the proposed definition.⁷⁷ For example, without the Rome Convention, Garmon's expanded UNCLOS definition would not consider maritime attacks as "piracy" unless they occurred on the high seas or involved at least two vessels.⁷⁸

The second proposed solution suggests the use of regional treaties to combat piracy and other forms of maritime violence.⁷⁹ A regional approach, as opposed to exclusive reliance on the broad-based UNCLOS, would allow smaller groups of states to create and enforce anti-piracy measures tailored to the unique situations of a given region.⁸⁰ One example of a regional piracy initiative, suggested by Timothy Goodman, would designate joint patrol areas to coordinate the policing of the region's waters by the signatories' naval and police forces, and would employ uniform extradition procedures among the party states.⁸¹ A regional approach remains consistent with the purposes of UNCLOS, which permits two or more parties to conclude agreements that modify its provisions (effective only as between those concluding parties) so long as the modifications are not incompatible with UNCLOS' object and purpose, and do not affect the enjoyment of other parties' rights or obligations under the convention.⁸² Furthermore, regional agreements would make it easier to enforce the treaty obligations between the states.⁸³ Although UNCLOS requires that states cooperate to the fullest extent possible in order to repress piracy, the large number of party states makes it difficult to ensure that all states are meeting their obligations.⁸⁴

In Southeast Asia, however, the concept of regional cooperation has always been problematic.⁸⁵ As mentioned previously, the Southeast Asian states generally guard their territorial and political sover-

⁷⁶ See STATUS OF CONVENTIONS, *supra* note 41.

⁷⁷ See *id.*; Garmon, *supra* note 20, at 275.

⁷⁸ See Garmon, *supra* note 20, at 275.

⁷⁹ See Goodman, *supra* note 73, at 156–57.

⁸⁰ See *id.* at 157–58.

⁸¹ See *id.* at 159–60.

⁸² *Id.* at 158.

⁸³ See *id.* at 156–57.

⁸⁴ Goodman, *supra* note 73, at 156–57.

⁸⁵ See Phillip Day, *Security in a Straitjacket?: Why It's So Hard to Make a Key Asian Waterway Safe from Terror*, WALL ST. J., June 13, 2002, at A5, available at 2003 WL-WSJ 3970564.

eignty with extreme jealousy.⁸⁶ It is unlikely that Southeast Asian states would accept terms that would, for instance, allow neighboring naval forces to operate within their own territorial waters.⁸⁷ As one official in Southeast Asia noted, “it would be very nice if [multilateral cooperation] could happen, but the issue of sovereignty in these countries [is] such that it won’t happen soon . . . [i]t’s a very, very sensitive issue.”⁸⁸ Indeed, the limited efforts at cooperation in combating piracy in the past have been colored by the preoccupation with sovereignty.⁸⁹ Southeast Asian countries have attempted joint patrols in the past, but their effectiveness has been limited by caveats preventing one state from operating in the territorial waters of another.⁹⁰ Thus, although the states in the region, through the Association of Southeast Asian Nations (ASEAN), have paid lip service to preventing maritime attacks more effectively,⁹¹ and although news reports indicate that the ASEAN states are currently working towards implementing a new anti-piracy pact, it remains uncertain whether such steps will lead to meaningful cooperation that will effectively combat piracy in the region, or whether such measures will be largely diluted.⁹²

Rather than attempting to expand the UNCLOS definition or create problematic regional agreements, the legal perspective from which states view the concept of piracy should be adjusted.⁹³ As stated previously, the UNCLOS would exclude many of the maritime attacks in Southeast Asia from its concept of piracy.⁹⁴ Nevertheless, these excluded attacks would inflict the same degree of damage on international trade,

⁸⁶ *Id.*

⁸⁷ See Young & Valencia, *supra* note 16, at 32, 38–39.

⁸⁸ Day, *supra* note 85 (quoting Pootengal Mukundan, Director of the International Maritime Bureau).

⁸⁹ See Young & Valencia, *supra* note 16, at 38.

⁹⁰ See *id.* at 38–39 (describing the “hands off” policy underlying a joint patrol agreement between Indonesia, Malaysia, and Singapore).

⁹¹ See ASSOCIATION OF SOUTHEAST ASIAN NATIONS, ARF STATEMENT ON COOPERATION AGAINST PIRACY AND OTHER THREATS TO MARITIME SECURITY, at www.aseansec.org/14837.htm (last visited Nov. 20, 2004).

⁹² See *Asia to Roll out Anti-Piracy Pact, October*, BORNEO BULL., Nov. 19, 2004, at <http://www.brunet.bn/news/bb/fri/nov19w4.htm> (last visited Nov. 20, 2004); *Asian Countries to Sign Anti-Piracy Pact in October*, ASIA PULSE, September 22, 2003, at 2003 WL 64286644.

⁹³ See generally Garmon, *supra* note 20, at 273 (discussing broadening the definition of piracy); Goodman, *supra* note 73, at 156–57 (discussing regional piracy charters and accords); Halberstam, *supra* note 32, at 272–76 (discussing the customary international law of piracy).

⁹⁴ See Garmon, *supra* note 20, at 267.

which is the primary motivation for treating piracy as *ergo omnes*.⁹⁵ Thus, the UNCLOS definition is too narrow to be considered the authoritative definition of piracy under customary international law.⁹⁶

The actual practice of states and the writings of jurists in past centuries indicate that customary international law on piracy encompassed a broader scope of activity than the restrictive definition found in UNCLOS.⁹⁷ When the international community first attempted to codify international piracy law, no clear consensus as to the meaning of piracy could be derived from the writing of jurists or the practice of states.⁹⁸ While many scholars supported the restrictive view of piracy ultimately adopted in UNCLOS, and while many acts considered to be piracy fell neatly within this definition, the actual practice of many states reflected a conception of piracy that covered a broad range of activities that had an adverse effect upon states' maritime interests.⁹⁹ For example, the Norman Vikings in Western Europe and the Barbary Corsairs of the Mediterranean were considered pirates, yet much of their activity took place on coasts and territorial waters.¹⁰⁰ British authorities in the 19th century cited piracy law as a justification to pursue maritime bandits led by local nobility in the Malay Peninsula, even though the acts of banditry occurred within territorial waters and were politically motivated.¹⁰¹ English courts upheld this broad reading of piracy law, and held that "piracy is any armed violence at sea which is not a lawful act of war."¹⁰² U.S. courts have also been willing to apply the law of piracy broadly.¹⁰³ The U.S. Supreme Court has held that to bring an act within the scope of piracy it is not necessary for either actual plunder or an intent to plunder (*i.e.*, a private end) to exist; if one "sinks or destroys an innocent merchant ship, without any other object than to gratify his lawless appetite for mischief," it is as much an act of piracy as an act of robbery on the high seas.¹⁰⁴ In 1937, during the Spanish Civil War, nine states, including Bulgaria, Romania, and the USSR, treated acts of submarine warfare against merchant

⁹⁵ *See id.*

⁹⁶ *See id.*

⁹⁷ *See, e.g.*, Halberstam, *supra* note 32, at 272–73.

⁹⁸ RUBIN, *supra* note 1, at 321.

⁹⁹ *See* Halberstam, *supra* note 32, at 273–74.

¹⁰⁰ *See* RUBIN, *supra* note 1, at 307.

¹⁰¹ *Id.* at xiii.

¹⁰² *See* Halberstam, *supra* note 32, at 273 (citing *In Re Piracy Jure Gentium*, 1934 App. Cas. 586, 598, *reprinted in* 3 BRIT. INT'L L. CASES 836, 842 (1965)).

¹⁰³ *Id.* at 273–74.

¹⁰⁴ *Id.* (citing *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 232 (1844)).

ships as piracy, notwithstanding the fact that such attacks reflected no intent to rob and often took place in territorial waters.¹⁰⁵ The wide range of activity treated as piracy indicates a conception of piracy under customary international law that was broader and more flexible than the definition established by UNCLOS.¹⁰⁶ Historically, states recognized that a wide variety of activity could cause the type of harm that justified treating piracy as a universal crime.¹⁰⁷

Thus, given the flexible manner in which piracy law has been applied previous to its adoption, UNCLOS should not be seen as having codified existing international law.¹⁰⁸ Rather, UNCLOS presented a significant departure from what the international community accepted as piracy.¹⁰⁹ As such, UNCLOS would be binding upon the countries that signed it, but would not reflect the customary international law binding upon the international community as a whole.¹¹⁰ While it is true that the provisions of a treaty can gradually gain such wide acceptance that they become part of customary international law,¹¹¹ the fact that UNCLOS only gathered enough signatures to enter into force in 1994 weighs against such an argument in this case.¹¹²

Thus, certain crimes that do not fall within UNCLOS should still be considered piracy.¹¹³ Southeast Asian states should be able to prosecute acts of maritime terrorism that would not otherwise satisfy the requirements of the UNCLOS framework, and those states could justify their actions by citing to the long existing customary practices of other states.¹¹⁴ Given such legal authority, the actions of Southeast Asian states taken against piracy would not be dependent upon their participation in any treaty, as all states may rely upon customary in-

¹⁰⁵ See Halberstam, *supra* note 32, at 280 (discussing the conclusion of the Nyon agreement of 1937); RUBIN, *supra* note 1, at 295.

¹⁰⁶ See Halberstam, *supra* note 32, at 273.

¹⁰⁷ See generally *id.* (arguing that piracy has historically been seen as any act of violence, committed at sea or close to the sea, by persons not acting under proper authority).

¹⁰⁸ See Halberstam, *supra* note 32, at 283; Samuel Pyeatt Menefee, *Anti Piracy Law in the Year of the Ocean, Problems and Opportunity*, 5 ILSA J. INT'L & COMP. L. 309, 313–14 (1999); RUBIN, *supra* note 1, at 322 (discussing the new, narrow definition of piracy as *de lege ferenda*).

¹⁰⁹ See *id.*

¹¹⁰ See Halberstam, *supra* note 32, at 283; Menefee, *supra* note 108, at 313–14; RUBIN, *supra* note 1, at 322.

¹¹¹ See RUBIN, *supra* note 1, at 322.

¹¹² See *id.*

¹¹³ See Halberstam, *supra* note 32, at 273.

¹¹⁴ See *id.*

ternational law when responding to attacks that threaten their maritime interests.¹¹⁵

Southeast Asian states can respond to more incidents of maritime violence through reference to pre-UNCLOS customary international law than is currently possible relying solely upon UNCLOS as a legal basis.¹¹⁶ Given the concerns for piracy's effect upon both international trade in Southeast Asia and the possible link between pirates and Southeast Asian terrorist groups, the international community would likely embrace a broader construction of international piracy law.¹¹⁷

CONCLUSION

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

¹¹⁵ See Garmon, *supra* note 20, at 273.

¹¹⁶ See *id.* at 273.

¹¹⁷ See Young & Valencia, *supra* note 16, at 43.