

To stimulate South China Sea regional security cooperation in the control of piratical attacks against ships, this paper proposes the establishment of a limited purpose maritime and air defence identification zone over the South China Sea.

The UN responses to maritime security threats, such as piracy and armed robbery in the Gulf of Aden, amongst others, have been addressed by Security Council resolutions proposing unparalleled jurisdiction or “ a series of decisive measures” such as Resolution 1816 (2008) for foreign States in the territorial waters of Somalia. In the South China Sea too, piracy and armed robbery are considered major threats to commercial shipping, though not of the scale and magnitude of “Somalian” piracy. Generally, piracy may to some extent be controlled by enhanced Port State Control inspections as it has been suggested that there is a possible correlation between sub-standard ships and piracy, but where this is not the case, another solution is needed.

To stimulate South China Sea regional security cooperation in the control of piratical attacks against ships, this paper proposes the establishment of a limited purpose maritime and air defence identification zone over the South China Sea.

To do so, the paper concedes and submits arguments as to why such a zone was once considered unlawful and but re-submits that a limited purpose zone such as that proposed could be lawful today.



The paper strives to justify the adoption of this zone to control piracy, as such a course of action could promote freedom of commercial shipping and navigation supplementing flag State jurisdiction and may assist shippers who are not allowed to carry weapons and use force in self-defence against pirates and who cannot exercise universal jurisdiction but without infringing the right of overflight under the 1944 Chicago Convention on Civil Aviation. It would also be a lawful exercise of state responsibility by coastal States as permitted by Article 105 on “A seizure of a Pirate ship or Aircraft”, 1982 LOSC under the principle of universal jurisdiction. The three areas of discussion are first, the incidents of piracy and armed robbery in the South China Sea; second, the legal framework of maritime and air defence identification zones and finally the establishment of a limited purpose South China Sea Maritime and Air Defence Identification Zone. The consequences of littoral States inaction would probably leave shippers, with the sole responsibility of combating piracy occurring on their ships as the threats increase.

1. INTRODUCTION:

There is no significant discussion of the security issue under the 1982 Law of the Sea Convention such as naval warfare or a dedicated set of provisions addressing security threats. [[1\]](#)

However, the Convention makes several references to the security of a coastal State in the following provisions:

- In the territorial sea in respect of innocent passage which a State may take action - Articles 19 (2), including Article 19 (2) (c), 19 (2) (d) and 19 (2) (l), Article 25 (3);

- For the exercise of criminal and civil jurisdiction as found in Article 27 (1) (a – d), 27 (2) – (5), and Article 28 (2) respectively and (3) and provision on warships as in Article 30;

- In the contiguous zone, Article 33 (1);

- In Straits Used For International Navigation: Articles 34 (1) and (2) and for a violation of Article 39, Article 42 (1) (a), and Article 42 (5) whilst being mindful of Article 44;

- Security of an archipelagic State: Article 52(2);

- Security within the EEZ: Article 56 (1) (c), Article 58, and 73, 79 (4);

- Security on the high seas: Article 87 (2), 94 (2), 94 (7), 97, 98, 99, 100, 105, 107, 108, 109, 110, 111, 113, 114, 115, and 119 (3);

- Article 105 which recognizes universal jurisdiction for piracy;

- Protection of the marine environment: Articles 192-196, 197-201, 202, 204, 206, 207 -217, 218, 219, 220 *et al*;

- Marine Scientific Research: As provided by Part XIII; and

- Security of a State party: Article 302.

Article 123, 1982 LOSC calls for cooperation of States bordering enclosed or semi-enclosed seas such as the South China Sea but does not refer to regional security as a collective measure of regional cooperation. This is evident as the Article refers to the coordination of management, conservation, exploration and exploitation of the living resources of the sea; the implementation of their rights and duties with respect to the protection and preservation of the marine environment; the coordination of their scientific research policies and where appropriate joint programmes of scientific research in the area and invitation to other interested States or

international organization to cooperate with them in furtherance of the provisions of this article.

But all littoral States should promote the peaceful uses of the sea under Articles 300 and 301. Therefore, this paper argues that it is legally justified to establish a limited purpose maritime and air defence identification zone over the South China Sea under Article 105, 1982 LOSC for controlling piracy through the principle of universal jurisdiction as it would supplement flag States efforts and assist shippers who do not carry weapons and use force in self-defence against the pirates.

Article 105 reads:

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. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property subject to the rights of third parties acting in good faith.”

To defend this proposition, this paper argues that the maritime and air defence identification zones of the Cold War period considered unlawful then is justified today for the control of piracy under Article 105, 1982 LOSC and generally in the wake of current global maritime threats such as terrorism and responses under current international law. This is followed by a consideration of the basic features of an acceptable legal regime that is acceptable to the regional community in accordance with the rule of law. Armed robbery, which is not defined under the 1982 LOSC but under IMO A Resolution 1025(26), takes place in areas of state sovereignty such as territorial seas, straits used for international navigation and archipelagic waters. This has been excluded from the present recommendation as the issues of state sovereignty are still in limbo in the South China Sea.

2. INCIDENTS OF PIRACY AND ARMED ROBBERY IN THE SOUTH CHINA SEA

At the IMO, in the first quarter of 2011, 214 incidents of piracy and armed robbery were reported. In 2010, the IMO received 489 reports of piracy and armed robbery against ships as

opposed to 406 incidents in 2009 which represents an increase of 20.4% from the figure for 2009. Areas where five or more incidents have occurred are referred to as “areas most affected” in 2010 and the South China Sea was highlighted as one such area in particular. Other areas were East Africa, the Indian Ocean, the Far East, particularly, West Africa, South America and the Caribbean. Civilian casualties resulted in two crew members being killed and 30 crew members being injured/assaulted, and 1,027 crew members taken as hostages or were kidnapped. Fifty-seven vessels have been hijacked, and one vessel is still unaccounted for. [2]

There are many regional security threats in the South China Sea such as threats (non-traditional) to the environment to more traditional concerns over piracy and other criminal activities, to political considerations and perhaps even to clashes between major powers in the world’s busiest sea lanes of communication a vital artery for international trade. [3] The incidents of piracy and armed robbery of ships and crew in the South China Sea are alarming, for in 2011, there were more than 30 incidents of piracy and armed robbery in the South China Sea, as shown in Table 1.

TABLE 1: Incidents of Piracy and armed Robbery in the South China Sea 2011

<i>Torm Clara</i>	- 13 January 2011 (Danish registered);
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<i>Jose Bright</i>	- 9 February 2011, (Panama registered);
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<i>Healthy</i>	- 26 January 2011 (St Kitts & Nevis) Pulau Nipa, underway;
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<i>Crest Atlas</i>	– 26 January 2011 (Singapore) Pulau Nipa, underway;
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<i>BS Power</i>	– (Singapore), Pulau Nipa, stationary;
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<i>LCH 425</i>	– 14 February 2011 (Singapore), Pulau Nipa, underway;
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<i>SRO III</i>	– 14 February 2011, Pulau Nipa, underway;
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<i>Barbeel,</i>	(Netherlands), Pulau Nipa, underway;
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<i>Pacific Hickory</i>	, (Dominica) Pulau Nipa, underway;
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<i>Poorna,</i>	-17 February 2011, (India) Pulau Nipa;
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<i>MS Simon</i>	– 18 March 2011, (Liberia);
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<i>Cape Med</i>	– 18 March 2011 (Panama) Pulau Nipa, underway (unsuccessful boarding);
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<i>Thor Nereus</i>	– 20 March 2011 (Thailand) Pulau Damar, Indonesia, underway;
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<i>Han Hui</i>	- 2010 (Hong Kong) Pulau Damar, underway;
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<i>Marina 26</i>	- 22 March 2011, (Indonesia) Pulau Tioman, hijacking;
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<i>Asta Callista</i>	- 6 February 2010, hijacking, no other info;
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<i>Siak Selamat/ PAL Kalimantan</i>	- 18 April 2011 (Indonesia and Singapore respectively), TSS Changi, underway;
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<i>Lucky Star</i>	- January 2011, TSS Changi, underway;
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<i>SRO III</i>	- March 2011, TSS Changi, underway;
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<i>Stanford Alpha/ Kreuz 33</i>	- 15 May 2011 (Singapore) TSS;
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<i>Dong Jiang</i>	- 30 May 2011 (Singapore) Horsburg Light House, underway;
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<i>Tirta Samudra XVII</i>	(Indonesia), underway;
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<i>Shipinco I</i>	-2 Jun 2011 (Mongolia)	Batu Berhanti Buoy, underway;
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<i>Asian Gas</i>	- 6 June 2011 (Indonesia)	Raffles Lighthouse, underway;
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<i>Highline 66</i>	-24 January 2011 (Malaysia)	Pulau Takong Kecil;
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<i>SRO III</i>	- 27 March 2011 (Singapore)	<i>Shipinco III</i>	-2 June 2011 (Mongolia);
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<i>Woodstar/Octopus</i>	- 2 July 2011, (Marshall Islands and Republic of Moldova respectively)	Pulau B
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<i>Gas Batam</i>	- 8 August 2011 (Singapore)	The Brothers' Beacon, Anchored;
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<i>Valiant</i>	- 26 April 2011, (Singapore)	Horsburg Light House, underway;
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<i>Yew Choon 3</i>	- 23 March 2011,	underway;
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<i>Ginga Falcon</i>	- 9 September 2011, and	<i>Cherishine</i>	- 11 September 2011, underway;
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The 1982 LOSC definition of piracy is also adopted by The Regional Agreement on Combating Piracy and Armed Robbery Against Ships in Asia (ReCAAP). The RECAAP Analysis for 2011 states that there are two groups of pirates at work here, those attacking vessels at anchor and taking engine spares and ship equipment such as life buoys and those attacking vessels underway taking personal belongings. ReCAAP Annual Statistics for 2008 shows that in the South China Sea, there were four (4) actual incidents of piracy with two attempts and seven incidents of armed robbery off Pulau Tioman of which there were: CAT I – 1; CAT II – 5 and CAT III – 1. The ReCAAP Information Sharing Centre (ISC) does not hold data on Port State Control as it is not within their mandate, hence the website does not carry such correlation data at www.recaap.org. The ReCAAP website for 2011 does not carry the ship's IMO number either where it is involved in an incident.

[4]

However, the report for 2008 carries this information. The correlation between piracy and hijacking, sub-standard ships and old ships both underway and at anchor and port state control, that sub-standard ships and old ships are more likely to be hijacked than newer quality vessels needs to be publicly documented. Some evidence pointing in this direction may be gathered from the pirate attack on the

Rak Arikana

which was a 30 year old, 5992 gross registered tonnage and reportedly slow vessel of 6.5 knots operational speed.

[5]

Changes in ownership of the vessel ending up with less responsible owners are also part of the problem.

[6]

There is also the human cost of piracy as seen in the Case of Captain Kumar which prompts the following research questions:

[7]

(continuing)

Read full text of this paper [here](#)

[1] Stuart Kaye, "Freedom of Navigation in a Post 9/11 World: security and Creeping Jurisdiction" in David Freestone, Richard Barnes and David Ong (Eds), *The Law of the Sea Progress and Prospects* (Oxford University Press: Oxford; 2006) at pp. 356-361.

[2] *Source*: Interim guidance on use of privately contracted armed security personnel on board ships agreed by IMO Maritime Safety meeting, Maritime Safety Committee (MSC), 89th session: 11 to 20 May 2011, Briefing: 27, May 20, 2011.

[3] Chris Rahman and Martin Tsamenyi, "A Strategic Perspective on Security and Naval issues in the South China Sea" *ODIL* 41: 315-333, 2010.

[4] Personal email correspondence between ReCAAP and Mary George, 4th October 2011.

[5] *Source*: No. 58/2011 dated 15 April 2011: *The Hijacking of the MV Zirku: A Case Study in Shipping Security*

By Sam Bateman.

[6] *Ibid.*

[7] *Source*: RSIS Commentaries No. 130/2011 dated 7 September 2011: *Sub-standard Ships and Human Costs of Piracy: The case of Captain Prem Kumar*, By Sam Bateman