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**Can a limited purpose maritime and air defence
identification zone
be established over the South China Sea?**

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ABSTRACT:

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.

¹Stuart 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.

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

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.

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);
<i>Jose Bright</i> - 9 February 2011, (Panama registered);
<i>Healthy</i> – 26 January 2011 (St Kitts& Nevis) Pulau Nipa, underway;
<i>Crest Atlas</i> – 26 January 2011 (Singapore) Pulau Nipa, underway;
<i>BS Power</i> – (Singapore), Pulau Nipa, stationary;
<i>LCH 425</i> – 14 February 2011 (Singapore), Pulau Nipa, underway;
<i>SRO III</i> – 14 February 2011, Pulau Nipa, underway;
<i>Barbeel</i> , (Netherlands), Pulau Nipa, underway;
<i>Pacific Hickory</i> , (Dominica) Pulau Nipa, underway;
<i>Poorna</i> , -17 February 2011, (India) Pulau Nipa;
<i>MS Simon</i> – 18 March 2011, (Liberia);
<i>Cape Med</i> – 18 March 2011 (Panama) Pulau Nipa, underway (unsuccessful boarding);
<i>Thor Nereus</i> – 20 March 2011 (Thailand) Pulau Damar, Indonesia, underway;
<i>Han Hui</i> – 2010 (Hong Kong) Pulau Damar, underway;
<i>Marina 26</i> - 22 March 2011, (Indonesia) Pulau Tioman, hijacking;
<i>Asta Callista</i> – 6 February 2010, hijacking, no other info;
<i>Siak Selamat/ PAL Kalimantan</i> – 18 April 2011 (Indonesia and Singapore respectively), TSS Changi, underway;
<i>Lucky Star</i> – January 2011, TSS Changi, underway;
<i>SRO III</i> -March 2011, TSS Changi, underway;
<i>Stanford Alpha/ Kreuz 331</i> – 15 May 2011 (Singapore) TSS;
<i>Dong Jiang</i> – 30 May 2011 (Singapore) Horsburg Light House, underway;
<i>Tirta Samudra XVII</i> (Indonesia), underway;
<i>Shipinco I-2</i> Jun 2011 (Mongolia), Batu Berhanti Buoy, underway;
<i>Asian Gas</i> – 6 June 2011 (Indonesia) Raffles Lighthouse, underway;
<i>Highline 66</i> -24 January 2011 (Malaysia) Pulau Takong Kecil;
<i>SRO III</i> - 27 March 2011(Singapore); <i>Shipinco III</i> -2 June 2011 (Mongolia);
<i>Woodstar/Octopus</i> – 2 July 2011, (Marshall Islands and Republic of Moldova respectively) Pulau Batam/ Horsburg Light House, underway, attempt as boarded partially;
<i>Gas Batam</i> - 8 August 2011 (Singapore), The Brothers' Beacon, Anchored;
<i>Valiant</i> – 26 April 2011, (Singapore), Horsburg Light House, underway;
<i>Yew Choon 3</i> – 23 March 2011, underway;
<i>Ginga Falcon</i> – 9 September 2011, anchored / <i>GM Shine</i> – 11 September 2011, underway (Panama and Singapore respectively), Tanjung Rambut, Pulau Karimun Besar, anchored and

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

underway respectively.

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

1. The correlation between Port State Control (PSC) inspections and attacked pirate ships for a time period of, for eg, five years from 2007 – 2011. The names of ships, their IMO numbers and the nature of pirate attacks they suffered in various locations in the South China Sea with general indications of spots where the incident took place are generally given on the ReCAAP website.
2. Whether any or all of these ships had gone through a PSC inspection, and if so where, before or after their attacks and if so what was the weakness identified by the PSC?
3. If there was a PSC inspection done before the attack, were the deficiencies rectified before it left port?
4. If not was the weakness identified by the PSC the reason why the pirates could attack the ship?

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

Graham studying the effects of recession and sub-standard shipping has concluded that both recession and sub-standard shipping have encouraged piracy:

“More recent attacks against vessels, in 2010-11, in the southern portion of the South China Sea may also have exploited ship vulnerabilities exacerbated by the global recession of 2008. The evidence suggests that sub-standard shipping is more prone to maritime predations. This vulnerability is compounded where ships are loitering for long periods. Bulk carriers, dependent on spot charters, are especially vulnerable during fallow periods...In 2010, 1,411 ships registered under 64 flags were detained for serious deficiencies found during port state control inspections in the Asia Pacific region. The inspection rate, however, has fallen owing to the increasing numbers of ships in the region. Sub-standard ships may pass quickly into new ownership through bankruptcy ‘fire sales’, thus perpetuating the problem. There is limited protection against market forces. ... But rather than awaiting a repeat of 2009, regional port authorities, shipping firms and law enforcement could agree a common approach ahead of any downturn, to minimise the security and safety risks posed by idle and sub-standard shipping. This should include a robust rate of port state control inspections, as well as impressing on masters and owners the importance of seeking safe anchorages and maintaining security standards onboard idle vessels. ...Newer ships are safer against piratical attacks.”⁸

The United Nations Division on Oceans and the Law of the Sea have already agreed that piracy and armed robbery affect safety and security of shipping and therefore, it is an agreed international community interest.

ASEAN

In ASEAN, regional security has received a great deal of attention at three different levels.

The ASEAN States in their Work Programme to Implement the ASEAN Plan of Action to Combat Transnational Crime adopted at Kuala Lumpur on 17 May 2002 decided that both Sea-Piracy and terrorism, not including maritime armed robbery were transnational crimes focusing on information exchange of national laws and regulations and national studies on Piracy and Armed Robbery in ASEAN States. In 2002, the Philippines, Indonesia and Malaysia adopted the Agreement on Information Exchange on the Establishment of Communication Procedures. There are several ASEAN Law Ministers instruments to combat piracy and armed robbery. ASEAN Member States are required to enact criminal laws and rules of procedure and evidence regulating sea-piracy and armed robbery including maritime terrorism provisions into the national legal system provisions for their courts to be seized of the Offences and For Trial by the Rule of Law.

⁸ Source: RSIS Commentaries No. 143/2011 dated 7 October 2011, Shipping Glut Portends Piracy, Safety Risks By Euan Graham.

During the ASEAN Plus Three Summit in Brunei, 2002 Japan proposed setting up of the Regional Agreement on Combating Piracy and Armed Robbery Against Ships in Asia (ReCAAP) which was followed by the ASEAN Regional Forum which adopted a Statement on Cooperation against Piracy and other Threats to Maritime Security when a multilateral shore exercise was hosted by Singapore in January 2007.

On 9 May 2006 in Kuala Lumpur, the first Asean Defence Ministers Meeting (ADMM) which is the highest defence mechanism within ASEAN, focussed on current defence and security issues and challenges faced to achieve trust and confidence and enhance transparency and openness took place. This ADMM established a new sectoral ministerial body within ASEAN to ensure peace and stability in the region and in recognition of the aim of the ASEAN Political-Security Community (APSC) to build a cohesive, peaceful, stable and resilient region with shared responsibility and a dynamic and outward-looking region in an increasingly integrated and interdependent world. In its Preamble it also welcomed the establishment of the ASEAN Defence Ministers' Meeting-Plus (ADMM-Plus), in Ha Noi, Viet Nam, in October 2010 to serve as a robust, effective, open and inclusive component of the regional security architecture, and laid a strong foundation for the ADMM to cooperate with Dialogue Partners from the Plus countries to address common security challenges. There are five Expert Working Groups in ASEAN focusing on maritime security, humanitarian assistance and disaster relief, counter-terrorism, military medicine, and peacekeeping operations, with their respective Workplans as concrete measures to further practical cooperation among ASEAN and Dialogue Partners from the Plus countries.⁹ The ADMM has adopted several instruments, both legally and non-legally binding. Support for legal cooperation in the field of maritime security may be found in these instruments of which the Joint Declaration adopted in Jakarta on 19 May 2011 is highlighted below.

Binding and non-binding Declarations and Statements:

- Joint Declaration of the ASEAN Defence Ministers on Strengthening Defence Cooperation of ASEAN in the Global Community to Face New Challenges, Jakarta, 19 May 2011.
- Chairman's Statement of the First ASEAN Defence Ministers' Meeting-Plus: "ADMM-Plus: Strategic Co-operation for Peace, Stability and Development in the Region," Ha Noi, 12 October 2010.
- Ha Noi Joint Declaration on the First ASEAN Defence Ministers' Meeting-Plus, Ha Noi, 12 October 2010.

⁹Source: Association of Southeast Asian Nations, <http://www.asean.org/18816.htm>, site accessed on 11 October 2011.

- Joint Declaration of ASEAN Defence Ministers on Strengthening ASEAN Defence Establishments to Meet the Challenges of Non-Traditional Security Threats, Chonburi, 26 February 2009.
- Joint Declaration of the ASEAN Defence Ministers on Enhancing Regional Peace and Stability, Singapore, 14 November 2007.
- Joint Press Release of the Inaugural ASEAN Defence Ministers' Meeting, Kuala Lumpur, 9 May 2006.¹⁰

Joint Declaration of the ASEAN Defence Ministers on Strengthening Defence Cooperation of ASEAN in the Global Community to Face New Challenges, Jakarta, 19 May 2011:

The 5th Meeting of the ADMM that was held in Jakarta, Indonesia, on 19 May 2011 adopted the Joint Declaration of the ASEAN Defence Ministers on Strengthening Defence Cooperation of ASEAN in the Global Community to Face New Challenges for the period 2011-2013 taking cognizance of the emergence of non-traditional security challenges that are more complicated and transnational in nature. The Declaration, amongst others, serves as a basis to focus on regional maritime security cooperation amongst the member States and focuses in paragraph 7 on strengthening “regional defence and security cooperation among ASEAN Member States through concrete and practical cooperation to address defence and common security issues.” Paragraph 8 reaffirms “the ASEAN Member States’ commitment to fully and effectively implement the Declaration on the Conduct of the Parties in the South China Sea, and to work towards the adoption of a regional Code of Conduct in the South China Sea that would further promote peace and stability in the region.” Paragraph 9 reaffirms the importance of regional peace and stability, and freedom of navigation in and overflight above the South China Sea as provided for by universally recognized principles of international law, including the 1982 United Nations Convention on the Law of the Sea (UNCLOS). These instruments focus on developing other mechanisms such as the adoption of a Code of Conduct and do not cater for a legal framework for the ASEAN regional security plan for controlling piracy in the SCS.

Control of Piracy in the Straits of Malacca and Singapore- The MALSINDO Initiative:

The pirates of the Straits of Malacca and Singapore have found the geographical layout of the Straits with its numerous islets and river outlets an ideal route for escape avoiding capture.¹¹ The statistics on piracy in the Straits have varied depending on the definition of piracy adopted by the reporting agency, whether it is the Malaysian Enforcement Coordinating Centre (MECC)/Govt of Malaysia reporting 153 incidents or the International Maritime Bureau (IMB)/ ICC reporting

¹⁰ Source: Association of Southeast Asian Nations, <http://www.asean.org/19538.htm>, site accessed on 11 October 2011.

¹¹ Ramli Hj Nik and Sumathy Permal, Security Threats in the Straits of Malacca” in Ibrahim HM and Hairil Anuar Husin (Eds), Profile of the Straits of Malacca: Malaysia’s Perspective (maritime Institute of Malaysia (MIMA): Kuala Lumpur: 2008) at pp. 190 – 199, p. 190.

182 incidents for the period 1993-2007.¹² On 20 July 2004, the representatives of the navies from Malaysia, Singapore and Indonesia signed the MALSINDO Initiative to combat piracy through coordinated patrols between the three States.¹³ The first multilateral agreement under this Initiative was the Trilateral Coordinated Patrol Agreement of one year duration which saw a total of 17 warships of which seven came from Indonesia, and five each from Malaysia and Singapore, plying the Straits. In addition to the MALSINDO Initiative, there was also the joint aerial surveillance of the littoral States under the multilateral programme called “Eyes in the Sky” (EIS) that was signed into force by the Defence Ministers of Indonesia, Singapore, Thailand and Malaysia’s Deputy Prime Minister on 2 August 2005.¹⁴ As Ramli and Sumathy wrote,

“Commencing in September 2005, it (MALSINDO) features a combined maritime air patrol by the armed forces and maritime enforcement agencies of the littoral States and invited participating nations. EIS is an open arrangement that may involve the participation of other countries on a voluntary basis but to be manned only by personnel from the littoral States.

Nations which are participating in the program, provide their respective air assets to conduct operations involving flight profile, pre-flight administration, operation centres, monitoring and action agencies and communication. Each EIS flight will involve a Combined Mission Patrol Team on board, a Mission Commander in charge of the safe conduct of the mission and the after-flight reports, and observers from each participating nation. The launching of the EIS gives a clear signal to the international community that the littoral States are serious in ensuring safety and security in the straits. This cooperation has proven that the Straits is still a safe place for vessels to pass through, which as a result of these more coordinated and robust enforcement, the number of attacks against vessels has drastically declined.”¹⁵

Previous to this effort, there were four bilateral coordinated patrol agreements per year concluded between Malaysia and Indonesia (MALINDO) and INDOSIN (Indonesia and Singapore). Each warship had jurisdiction in its national waters only.¹⁶ Other efforts to ensure the safety and security of vessels include the operationalisation of the International Ship and Port Facility Security Codes adopted by the IMO in 2004 in all the three States, the real time ship location devices adopted by the Federation of Asian Ship-owners Association, the setting of the Tripartite Technical Experts group (TTEG) on Safety of Navigation in the Straits of Malacca and

¹² *Ibid.* at p. 191.

¹³ *Id.* At p. 195

¹⁴ *Id.* At p. 195

¹⁵ *Id.* At p. 196.

¹⁶ *Ibid.*

Singapore,¹⁷ the US Proliferation Security Initiative (PSI) of 31 May 2003 with eleven coalition partners which is Statement of Intention on the part of the participating States for interdiction of WMD in containers, US Container Security Initiative (CSI) adopted in January 2002.¹⁸ It is important to note that the UN SC has considered the subject of PSI when on 28 April 2004, it unanimously adopted Resolution 1540 on the prevention of the proliferation of WMD to non-State actors. Under this Resolution, coastal states had the right to take all measures consistent with international law to prevent the proliferation of WMD but it did not refer to any principle of interdiction. The Straits of Malacca also received assistance from major maritime powers like the United States, China, India, and user States such as Japan for capacity-building, training of Coast Guards/ maritime enforcement agencies, provision of equipment, providing expertise, information gathering and sharing of intelligence and funding and expertise given to the Southeast Asia Regional Centre for Counter terrorism in Kuala Lumpur established in 2003 by the US.¹⁹ The control of piracy in the Straits of Malacca and Singapore through the MALSINDO Initiative may have some useful lessons for regional cooperation for the control of piracy in the South China Sea.

3. LEGAL FRAMEWORK OF MARITIME AND AIR DEFENCE IDENTIFICATION ZONES

The legality of a maritime and air defence identification zone has varied considerably from the early years of the Cold War where it was perceived as illegal²⁰ to its lawful establishment in present times.²¹ Questions addressed here center on the perceived early illegality of an air

¹⁷ In 2005 after a TTEG-User States forum held in Batam, Indonesia in 2005, six projects for implementation were identified such as removal of wrecks in the TSS of the Straits of Malacca and Singapore and cooperation and capacity-building on hazardous and Noxious Substances (HNS) preparedness and response in the Straits. *Id.*

¹⁸ 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 p. 356-361. The initial ten States are: Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, the UK, and the US.

¹⁹ *Id.*

²⁰ The Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970, Article 7, establishes air piracy as an offence of universal jurisdiction through there is no compulsory provision to extradite an offender. See Ian Brownlie, *Principles of Public International Law*, Seventh Edition, (Oxford University Press: New York: 2008) at pp. 197 and 198 where the learned author stated that: "In so far as these zones represent claims to extra-territorial jurisdiction over nationals they are not necessarily in conflict with general international law, and furthermore, groups of States may co-operate and be mutually obligated to respect such zones by convention. Again such zones may take the form of a lawful aspect of belligerent rights in time of war. Beyond these limits such zones would be incompatible with the status of waters beyond the limit of the territorial sea, at least if they involved the application of powers of prevention or punishment in regard to foreign vessels or aircraft." *Ibid.*

Martin Dixon, *Textbook on International Law*, Sixth Edition (Oxford University Press; The United States: 2007) at pp. 171 and 172; Shabtai Rosenne, *The Perplexities of Modern International Law*, The Hague Academy of International Law (Martinus Nijhoff: Leiden: 2004) at pp.242, 313 and 316; Rebecca M.M. Wallace, *International Law*, Fifth Edition, (Thomson/Sweet and Maxwell: London: 2005) at pp. 111 and 112; Vaughn Lowe, *International Law* (Oxford University Press: Oxford: 2007) at pp. 151-152; Christian J Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press: Cambridge: 2005) at pp. 225-226; and Malcolm Evans, *International Law*, Second Edition, (Oxford University Press: Oxford; 2006).

²¹ However, the Australian experience was protested against. In December 2004, in order to protect herself from terrorism and to protect the oil and gas reserves in the North-West Shelf, Australia claimed a Maritime

defence identification zone, its current legality including state practice and current global maritime trends and responses, and finally, the legal justification for a limited purpose South China Sea Maritime and Air Defence Identification Zone.

Perceived early illegality

The early origins of an Air Defence Identification Zone show that they have been used during the period of the Cold War by some States for purposes of national security. During this earlier period and extending to the eighties, these zones extended over maritime and aerial spaces whose sovereignty did not belong to the claimant States. By maritime and air defence identification zones are meant areas of airspace over land and water in which the ready identification, location and control of civil aircraft are required mainly in the interest of national security. They are to be distinguished from aerial buffer zones on land between neighbouring States which are usually within their land boundary. These zones are then listed and delineated geographically. Besides security, other objectives were considered too such as conservation of the resources of the continental shelf and protection from pollution. To attain these objectives, many States had extended limited aspects of their sovereignty seaward.

The customary international law before the 1944 Chicago Convention on Civil Aviation was that States exercised sovereignty over the airspace above their territory – mostly land and territorial waters that extended up to 3 nautical miles generally from the coastline. An example of such practice is by the United States of America which though it did not ratify the Paris Convention adopted the principle of “Aer Clausum” when Congress asserted sovereignty over US airspace in 1926. The US Air Commerce Act of 1926 states that: “The Congress hereby declares that the Government of the United States has, to the exclusion of all foreign nations, complete sovereignty of the airspace over the lands and waters of the United States, including the Canal Zone.” Notwithstanding the above, the 1944 Chicago Convention on Civil Aviation in Article 12 does not permit States to enact unilateral regulations effective over the high seas. Article 12 reads: “Over the high seas, the rules in force shall be those established under this Convention.”

Thus, the establishment and modification of rules of navigation in the airspace over the high seas is the exclusive domain of international regulation. Under Article 12 of the 1944 CC, ICAO adopts flight rules which are published in Annex 2 – Rules of the Air over the high seas. These

Identification Zone (AMIZ) of 1000 nms or (1850kms). Ships destined for Australian ports would have to identify themselves, their crew, cargo location, destination and ports of call. There were immediate protests from Indonesia and Malaysia saying that this action violated their sovereign rights over their maritime zones. New Zealand too has proclaimed such a zone over the high seas but is unconcerned as the intent is to create a reporting zone whereby ships report to the state before entering its waters. See Gillian Triggs, *International Law: Contemporary Principles and Practices* (LexisNexis Butterworths: Australia: 2006) at p. 329.

Where a ship flies more than one flag and its true state of registry is unclear then any State can exercise jurisdiction over it, see *Molván v AG for Palestine* [1948] AC 351; Arrest warrant of 11 April 2000 (*Democratic Republic of Congo v Belgium*, Preliminary Objections and Merits, Judgment, ICJ Reports 2002 at p. 3. Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para 61. Separate Opinion of President Guillaume, para 5.

rules are to apply without exception, elsewhere they apply to the extent they do not conflict with the rules published by the subjacent State. States that adopt different rules in their sovereign airspace from that prescribed by ICAO are required to report them and they are then appended to Annex 2. Annex 2 is silent on an Air Defence Identification Zone (ADIZ).

Since 1950, an increasing number of States have unilaterally asserted their limited right to control the airspace seaward of their shores. These States have established Air Defence Identification Zones extending in some cases several hundred miles seawards, within which aircraft must identify themselves to the coastal State and follow specified procedures. Failure to comply could well result in sanctions ranging from forced landing at an airfield of the coastal State and event to aerial attack. As far back as 1977, about 12-14 States were maintaining ADIZs extending seawards from their shores: they were Burma, Canada, Iceland, India, Japan, Korea, Oman, Philippines, Sweden, Taiwan, United States of America and Vietnam.

The US was the first Nation to adopt an ADIZ extending over the high seas approximately 300 miles from the coastline. In September 1950, the Congress amended the Civil Aeronautics Act of 1938 to allow the establishment of security provisions regarding civil aircraft whenever the President determined such action to be required in the interest of the national security. Once such a Presidential determination had been made, implementation rested with the Secretary of Commerce. In December 1950 President Truman signed an Executive Order directing the Secretary of Commerce to exercise these powers and seven days later the Secretary adopted the regulations designating certain areas of airspace as ADIZ and prescribed rules applicable within them. The 1950 Regulations replaced an earlier 1938 Act and the 1963 Regulations replaced the 1950 Regulations.²²

²² Today US ADIZ regulations are found in the Code of Federal Register, Parts 99 and 45. Part 99 - Eff. 03/30/2004. Part 45 Amendment No. 45-22 - Eff. 04/27/2001, Part 45 Amendment No. 45-25 - Eff. 11/13/2007. Site visited on http://rgl.faa.gov/Regulatory_and_Guidance_Library/rgFAR.nsf/MainFrame?OpenFrameSet, 29 October 2011.

Sec.99.3-Definitions.

Aeronautical facility means, for the purposes of this subpart, a communications facility where flight plans or position reports are normally filed during flight operations.

Air defense identification zone (ADIZ) means an area of airspace over land or water in which the ready identification, location, and control of all aircraft (except for Department of Defense and law enforcement aircraft) is required in the interest of national security.

Defense area means any airspace of the contiguous United States that is not an ADIZ in which the control of aircraft is required for reasons of national security.

Defense visual flight rules (DVFR) means, for the purposes of this subpart, a flight within an ADIZ conducted by any aircraft (except for Department of Defense and law enforcement aircraft) in accordance with visual flight rules in part 91 of this title.

[Doc. No. FAA-2001-10693, 66 FR 49822, Sept. 28, 2001, as amended at 69 FR 16755, Mar. 30, 2004]

Sec.99.47-GuamADIZ.

(a) *Inner boundary.* From a point 13°52'07" N, 143°59'16" E, counterclockwise along the 50-nautical-mile radius arc of the NIMITZ VORTAC (located at 13°27'11" N, 144°43'51" E); to a point 13°02'08" N, 145°28'17" E; then to a point 14°49'07" N, 146°13'58" E; counterclockwise along the 35-nautical-mile radius arc of the SAIPAN NDB (located at 15°06'46" N, 145°42'42" E); to a point 15°24'21" N, 145°11'21" E; then to the point of origin.

France established her ADIZ in 1956 during the Algerian insurgency against the French Rule. The Zone extended some 70-90 miles from the Algerian Coast over the high seas. The French regulations required filing flight plans that contained information about the purpose of the flight and the identification of passengers and crew aboard the aircraft. Acceptance of the flight plan by French military authorities before the aircraft take-off initiating the flight was required and the regulations expressly authorized French interceptor aircraft to open fire on aircraft entering the zone without having complied with the regulations. Once Algeria gained independence, the zone was abolished. However, there was an incident that took place between France and the USSR before the French ADIZ was abolished. On February 9, 1961 French military aircraft intercepted and fired upon a Soviet civil aircraft carrying the President of the USSR bound for Morocco, while it was over the high seas but within the French ADIZ. The Soviet Statements following the incident clearly challenged the right of States unilaterally to establish identification zones over the high seas.

Canada followed the US example and adopted the Canadian Air Defence Identification Zone (CADIZ) in 1951 which was approximately 100 miles from the coastline. The CADIZ is based upon the statute which limits the powers of the Minister of Transport to the territorial waters of Canada. The Canadian rules too require filing of flight plans and *en route* position reporting for

(b) *Outer boundary.* The area bounded by a circle with a radius of 250 NM centered at latitude 13°32'41" N, longitude 144°50'30" E.

Sec.99.41-General.

The airspace above the areas described in this subpart is established as an **ADIZ**. The lines between points described in this subpart are great circles except that the lines joining adjacent points on the same parallel of latitude are rhumb lines.

Sec.99.7 – Special security instructions.

Each person operating an aircraft in an **ADIZ** or Defense Area must, in addition to the applicable rules of this part, comply with special security instructions issued by the Administrator in the interest of national security, pursuant to agreement between the FAA and the Department of Defense, or between the FAA and a U.S. Federal security or intelligence agency.

[69 FR 16756, Mar. 30, 2004]

Sec.99.43-Contiguous U.S. **ADIZ**.

The area bounded by a line from 43°15'N, 65°55'W; 44°21'N; 67°16'W; 43°10'N; 69°40'W; 41°05'N; 69°40'W; 40°32'N; 72°15'W; 39°55'N; 73°00'W; 39°38'N; 73°00'W; 39°36'N; 73°40'W; 37°00'N; 75°30'W; 36°10'N; 75°10'W; 35°10'N; 75°10'W; 32°00'N; 80°30'W; 30°30'N; 81°00'W; 26°40'N; 79°40'W; 25°00'N; 80°05'W; 24°25'N; 81°15'W; 24°20'N; 81°45'W; 24°30'N; 82°06'W; 24°41'N; 82°06'W; 24°43'N; 82°00'W; 25°00'N; 81°30'W; 25°10'N; 81°23'W; 25°35'N; 81°30'W; 26°15'N 82°20'W; 27°50'N; 83°05'W; 28°55'N; 83°30'W; 29°42'N; 84°00'W; 29°20'N; 85°00'W; 30°00'N; 87°10'W; 30°00'N; 88°30'W; 28°45'N; 88°55'W; 28°45'N; 90°00'W; 29°25'N; 94°00'W; 28°20'N; 96°00'W; 27°30'N; 97°00'W; 26°00'N; 97°00'W; 25°58'N; 97°07'W; westward along the U.S./Mexico border to 32°32'03"N, 117°07'25"W; 32°30'N; 117°25'W; 32°35'N; 118°30'W; 33°05'N; 119°45'W; 33°55'N; 120°40'W; 34°50'N; 121°10'W; 38°50'N; 124°00'W; 40°00'N; 124°35'W; 40°25'N; 124°40'W; 42°50'N; 124°50'W; 46°15'N; 124°30'W; 48°30'N; 125°00'W; 48°20'N; 128°00'W; 48°20'N; 132°00'W; 37°42'N; 130°40'W; 29°00'N; 124°00'W; 30°45'N; 120°50'W; 32°00'N; 118°24'W; 32°30'N; 117°20'W; 32°32'03"N; 117°07'25"W; eastward along the U.S./Mexico border to 25°58'N, 97°07'W; 26°00'N; 97°00'W; 26°00'N; 95°00'W; 26°30'N; 95°00'W; then via 26°30'N; parallel to 26°30'N; 84°00'W; 24°00'N; 83°00'W; then Via 24°00'N; parallel to 24°00'N; 79°25'W; 25°40'N; 79°25'W; 27°30'N; 78°50'W; 30°45'N; 74°00'W; 39°30'N; 63°45'W; 43°00'N; 65°48'W; to point of beginning.

any aircraft that will operate within the coastal ADIZ. The Canadian rules expressly provided that (1) a violation of these Rules will render the pilot of an aircraft liable to in-flight interception by military interception aircraft; (2) the rules are applicable to military aircraft as well as civil aircraft; and (3) the rules apply to all aircraft about to enter the CADIZ so long as the path of flight is “toward the continental land mass of Canada” regardless of whether or not the destination is Canada. There was also a rule of CADIZ which stated that it did not apply to aircraft below 3000 feet.²³

Today, Canadian ADIZ is defined as “Airspace of defined dimensions extending upwards from the surface of the earth within which certain rules for the security control of air traffic apply.”²⁴

²³ ADIZ 602.145

(1) This section applies in respect of aircraft before entering into and while operating within the ADIZ, the dimensions of which are specified in the *Designated Airspace Handbook*.

(2) Every flight plan or flight itinerary required to be filed pursuant to this section shall be filed with an air traffic control unit, a flight service station or a community aerodrome radio station.

(3) The pilot-in-command of an aircraft whose point of departure within the ADIZ or last point of departure before entering the ADIZ has facilities for the transmission of flight plan or flight itinerary information shall

(a) before take-off, file a flight plan or flight itinerary;

(b) in the case of a VFR aircraft where the point of departure is outside the ADIZ,

(i) indicate in the flight plan or flight itinerary the estimated time and point of ADIZ entry, and

(ii) as soon as possible after take-off, communicate by radio to an air traffic control unit, a flight service station or a community aerodrome radio station a position report of the aircraft's location, altitude, aerodrome of departure and estimated time and point of ADIZ entry; and

(c) in the case of a VFR aircraft where the point of departure is within the ADIZ, as soon as possible after take-off, communicate by radio to an air traffic control unit, a flight service station or a community aerodrome radio station a position report of the aircraft's location, altitude and aerodrome of departure.

(4) The pilot-in-command of an aircraft whose point of departure within the ADIZ or last point of departure before entering the ADIZ does not have facilities for the transmission of flight plan or flight itinerary information shall

(a) as soon as possible after take-off, file by radiocommunication a flight plan or flight itinerary; and

(b) in the case of a VFR aircraft, indicate in the flight plan or flight itinerary the estimated time and point of ADIZ entry, if applicable.

(5) The pilot-in-command of a VFR aircraft shall revise the estimated time and point of ADIZ entry and inform an air traffic control unit, a flight service station or a community aerodrome radio station, when the aircraft is not expected to arrive

(a) within plus or minus five minutes of the estimated time at

(i) a reporting point,

(ii) the point of ADIZ entry, or

(iii) the point of destination within the ADIZ; or

(b) within 20 nautical miles of

(i) the estimated point of ADIZ entry, or

(ii) the centre line of the route of flight indicated in the flight plan or flight itinerary.

ESCAT

Plan

(amended 2002/09/24)

602.146 (1) This section applies in respect of aircraft before entering into and while operating within Canadian domestic airspace or the ADIZ.

<http://www.tc.gc.ca/eng/civilaviation/regserv/cars/part6-602-2436.htm>, site accessed on 28 October 2011.

²⁴ See *Designated Airspace Handbook*, Published under the authority of the Minister of Transport, Issue No 226, effective 0901Z 20 October 2011, (Next Issue: 15 December 2011), Caution – The Information in this Publication may be superseded by NOTAM, source of Canadian Civil Aeronautical Data: NAV CANADA, Source of Canadian Military Aeronautical Data: Her Majesty the Queen In Right of Canada, Department of National Defence, Produced by department of National Defence. Published by NAV CANADA.

The main difference between the US ADIZ and the CADIZ was that the American Regulations were applicable only if the civil aircraft had the intention of entering the US territory and the Canadian regulations applied to any aircraft about to enter the path of flight which was towards Canada whether or not the destination was Canada. The legality of ADIZ and CADIZ can be questioned under international law. Under international law, these zones are examined as follows: (1) Article 12 of the 1944 Chicago Convention on Civil Aviation (considered earlier); (2) Article 24 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone (TSC); (3) Article 2 of the 1958 Geneva Convention on the High Seas; (4) Article 3 of the 1958 Geneva Convention on the Continental Shelf; and (5) Articles 87 and 89 of The 1982 Law of the Sea Convention.

Article 24 of the 1958 TSC reads:

1. In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to:
 - (a) prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;
 - (b) punish infringement of the above regulations committed within its territory or territorial sea.
2. The contiguous zone may not extend beyond 12nms from the baseline from which the breadth of the territorial sea is measured.
3. Where the coasts of two or more States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its contiguous zone beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of the two States is measured.

From the above provision it is clear that Article 24 makes no mention of and does not include “Security” as among the purposes for which the coastal states may exercise control in their contiguous zones. Article 16 of the Convention clearly limits security-related jurisdiction to the territorial sea, where impositions of control must be justified by circumstances in which suspension of innocent passage is “essential for the protection of its security.”

Article 2 of the 1958 High Seas Convention provides:

The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by other rules of international law. It comprises, *inter alia*, both for coastal and non-coastal States:

http://www.navcanada.ca/ContentDefinitionFiles/Publications/AeronauticalInfoProducts/DAH/DAH_current_EN.pdf, site accessed on 28 October 2011.

(a) Freedom of navigation; (b) Freedom of fishing; (c) Freedom to lay submarine cables and pipelines and (d) Freedom to fly over the high seas.

These freedoms and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.”

The 1958 Convention on the High Seas is a companion convention to the 1958 TSC which deals with aircraft (freedom to fly over the high seas) and specifically proscribes States from subjecting any part of the airspace over the high seas to their sovereignty.

In Article 3 of the 1958 Continental Shelf Convention, the rights of the coastal States over the continental shelf do not affect the legal status of the superjacent waters as high seas or that of the air space above those waters. Therefore, it could be concluded that the airspace above the continental shelf is free space.

Article 87 of the 1982 LOSC states that the “high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises in sub-paragraph 1, *inter alia*, both for coastal and land-locked States: (a) freedom of navigation; (b) freedom of overflight; (c) freedom to lay submarine cables and pipelines subject to part VI; (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI; (e) freedom of fishing, subject to the conditions laid down in section 2 and (f) freedom of scientific research, subject to Parts VI and XIII. Sub-paragraph 2 provides that “These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas and also with due regard for the rights under this Convention with respect to activities in the area.” Further, Article 88 states that the high seas shall be reserved for peaceful purposes and under Article 89 no State may validly purport to subject any part of the high seas to its sovereignty. Article 58 of the EEZ says that though the Convention has provided for an EEZ of 200 nms (measured from the baselines from which the breadth of the territorial sea is measured), it still guarantees the freedom of overflight as provided in Article 87 of the LOSC. Generally under Article 38 of the LOSC aircraft enjoy the right to transit passage in the straits referred to in Article 37. Last but not least, Article 33, LOSC on the Contiguous Zone makes no mention whatsoever of the legal status of the airspace above its waters.

Current legality:

The meaning of the phrase “Global Maritime Security Threat” would mean any threat or attempt to infringe the UN Charter, the 1982 Law of the Sea Convention and the IMO/FAO suite of related conventions over and beyond areas of national jurisdiction and in areas where the limits of national sovereignty or jurisdiction have not yet been defined, a violation of the freedom and

safety of navigation, of overflight, abuse of large marine ecosystems, interference with the production of energy from water, currents and winds and with, jurisdiction over artificial islands, installations and structures, exploitation of the seabed including jurisdiction over the archaeological, historical and cultural artefacts on the seabed, internationally recognized lawful uses of the sea, interference with marine scientific research and education, and conduct of criminal activities at sea such as piracy and maritime terrorism. The UNGA Resolution 62/215 on “Oceans and the Law of the Sea” in its Preamble noted with concern “the continuing problem of transnational organized crime and threats to maritime safety and security, including piracy, armed robbery at sea, smuggling and terrorist acts against shipping, offshore installations and other maritime interests, and noting the deplorable loss of life and adverse impacts on international trade, energy security and the global economy resulting from such activities.”²⁵

The UNSC Resolutions on Somalian piracy in the Gulf of Aden, namely, Resolutions 1814 (2008), 1816 (2008), 1838 (2008), 1844 (2008), 1846 (2008), and 1851 (2008), some of which permitted third party flag States to exercise prescriptive and enforcement jurisdiction in Somalian waters for control of piracy and armed robbery. Briefly, the UN Security Council Resolution 1816 (2008) adopted unanimously with Somalia’s consent has condemned acts of piracy and armed robbery against vessels off Somalia’s coast and authorized for six months “All Necessary Means” to repress such acts. These measures, the Resolution added did not affect rights and obligations under the 1982 LOSC. In Resolution 1816 (2008) adopted unanimously, the Council “decided that the States cooperating with the country’s transitional Government would be allowed, for a period of six months, to enter the territorial waters of Somalia and use “all necessary means” to repress acts of piracy and armed robbery at sea, in a manner consistent with relevant provisions of international law.” Somalia consented to this text being incapable of interdicting pirates or patrolling or securing its territorial waters as vessels operated by the World Food Programme and commercial vessels were attacked alike—“all of which posed a threat “to the prompt, safe and effective delivery of food aid and other humanitarian assistance to the people of Somalia”, and a grave danger to vessels, crews, passengers and cargo.”

UNSC Resolution 1851 (2008) was adopted by the Security Council at its 6046th meeting, on 16 December 2008. The Security Council remained seized of the Somalian piracy and armed robbery issue as there was a dramatic increase in the incidents of piracy and armed robbery at sea off the coast of Somalia in the last six months, and by the threat that piracy and armed robbery at sea against vessels posed to the prompt, safe and effective delivery of humanitarian aid to Somalia, and because the pirate attacks off the coast of Somalia have become more sophisticated and daring followed by the expansion in their geographic scope, notably evidenced by the hijacking of the *M/V Sirius Star* 500 nautical miles off the coast of Kenya and subsequent unsuccessful attempts well east of Tanzania. The Preamble reaffirmed the respect for the sovereignty, territorial integrity, political independence and unity of Somalia, including

²⁵ Adopted on 22 December 2007 by the United Nations General Assembly: UN document A/RES/62/215 of 14 March 2008. See also Paragraphs 53 to 79 therein on Maritime Safety and Security and Flag State Implementation.

Somalia's rights with respect to offshore natural resources, including fisheries, in accordance with international law. The Preamble also reaffirmed that international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS), sets out the legal framework applicable to combating piracy and armed robbery at sea, as well as other ocean activities. The UNSC continues to be seized of the Somali piracy and armed robbery crises due to 1. the crisis situation in Somalia; 2. the lack of capacity of the Transitional Federal Government (TFG) to interdict, or upon interdiction to prosecute pirates or to patrol; and 3. the lack of capacity of the TFG to secure the waters off the coast of Somalia, including the international sea lanes and Somalia's territorial waters; followed by 4. the several requests from the TFG for international assistance to counter piracy off its coast: including the letter of 9 December 2008 from the President of Somalia requesting the international community to assist the TFG in taking all necessary measures to interdict those who use Somali territory and airspace to plan, facilitate or undertake acts of piracy and armed robbery at sea, and the letter of 1 September 2008 from the President of Somalia to the Secretary-General of the UN expressing the appreciation of the TFG to the Security Council for its assistance and expressing the TFG's willingness to consider working with other States and regional organizations to combat piracy and armed robbery off the coast of Somalia; and finally, 5. the lack of capacity, domestic legislation, and clarity regarding four matters, namely how to dispose of pirates after their capture; how to take international action against the pirates off the coast of Somalia; how to ensure that pirates are not released without facing justice, and how to apply the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("SUA Convention") in domestic legislation which provides for States Parties to create criminal offences, establish jurisdiction, and accept delivery of persons responsible for or suspected of seizing or exercising control over a ship by force or threat thereof or any other form of intimidation,

The UNSC welcomed the EU and the NATO initiatives in combating Somali piracy. The EU launched Operation Atalanta to combat piracy off the coast of Somalia and the protection of vulnerable ships bound for Somalia, and the North Atlantic Treaty Organization, and other States acting in a national capacity have agreed to cooperate with the TFG to suppress piracy off the coast of Somalia. The UNSC also welcomed recent initiatives of the Governments of Egypt, Kenya, and the Secretary-General's Special Representative for Somalia, and the United Nations Office on Drugs and Crime (UNODC) to achieve effective measures to remedy the causes, capabilities, and incidents of piracy and armed robbery off the coast of Somalia, and emphasised the need for current and future counter-piracy operations to effectively coordinate their activities. Similarly, the UNSC welcomed the report of the Monitoring Group on Somalia of 20 November 2008 (S/2008/769), and noted the role piracy might play in financing embargo violations by armed groups. The UNSC decided to remain seized of the matter under chapter VII of the UNC as it determined that the incidents of piracy and armed robbery at sea in the waters off the coast of Somalia exacerbated the situation in Somalia which continued to constitute a threat to international peace and security in the region.

The IMO's response to global maritime hijacking and terrorism has been the adoption of the 1988 SUA Conventions and 2005 SUA Protocols²⁶ which empower boarding States with powers of enforcement and the 1974 International Convention on Safety of Life at Sea and the International Ship and Port Facility Security Code.²⁷

For the IMO's World Maritime Day theme 2011 to combat piracy 2011 and beyond, the organization adopted a collective response strategy as its central theme called "Piracy: orchestrating the response." This combat exercise would require Governments to act collectively and or individually, with their military forces, shipping companies, ship operators, ships' crews, all playing a crucial part. The IMO's anti-piracy action plan has six major objectives:

- "To increase pressure at the political level to secure the release of all hostages being held by pirates;
- To review and improve the IMO Guidelines to Administrations and seafarers and promote compliance with industry Best Management Practices and the recommended preventive, evasive and defensive measures ships should follow;
- To promote greater levels of support, and coordination with navies;
- To promote anti-piracy coordination and co-operation procedures between and among States, regions, organizations and industry;
- To assist States to build capacity in piracy-infested regions of the world, and elsewhere, to deter, interdict, and bring to justice those who commit acts of piracy and armed robbery against ships; and
- To provide care for those attacked or hijacked by pirates and for their families.²⁸

The above examination reveals two conclusions: first, there seems to be an inescapable conclusion that States are specifically prohibited from any unilateral attempts to adopt ADIZs to regulate air traffic in the airspace beyond their territorial seas and over the high seas for the purpose of "security" where they also ban such traffic and establish no-fly zones in non-territorial areas. Under international law, the question is whether these unilateral claims of limited sovereignty in the airspace over the high seas for special purpose jurisdiction appear have a basis and whether any source in international law can validate the States' claims to partial jurisdiction in the airspace above the high seas for special purpose jurisdiction for protection under conventional or customary international law. It is submitted that this used to be the position even though it can be counter-argued that when ICAO is silent on a given topic, States are not precluded from formulating rules nor is it mandatory that States notify ICAO of such rules. It is the Aeronautical Information Publications (AIPS) issued by States that the existence, extent and, procedures for compliance with respect to ADIZ is announced. The AIPS are the basic source from which commercial and military chart-makers obtain the information needed to

²⁶ See IMO documents LEG/CONF.15/21 and 22

²⁷ See IMO documents, SOLAS/CONF.5/32 and 34 as well as resolution MSC.202 (81) on the long-range identification and tracking of ships system.

²⁸ See IMO website.

prepare aeronautical charts used by pilots and others engaged in flight planning and aerial navigation. The second conclusion is that, due to the global maritime threats today and based on current international law responses to these threats, it is submitted that if a carefully worded document establishing a Limited Purpose Maritime and Air Defence Identification Zone for the control of piracy (Article 105, 1982 LOSC) over the South China Sea is adopted which does not abrogate the rights of overflight, it may be permitted under contemporary international law.

4. IF A CAREFULLY WORDED DOCUMENT ESTABLISHING A LIMITED PURPOSE MARITIME AND AIR DEFENCE IDENTIFICATION ZONE FOR PIRACY CONTROL (ARTICLE 105, 1982 LOSC) OVER THE SOUTH CHINA SEA IS ADOPTED WHICH DOES NOT ABROGATE THE RIGHTS OF OVERFLIGHT IT MAY BE PERMITTED UNDER CONTEMPORARY INTERNATIONAL LAW

Before dealing with the main features of this zone, a number of preambular important points need to be borne in mind on the scope of the South China Sea Maritime and Air Defence Identification Zone. It is not to establish a no-fly zone neither is it to prevent flights between and across the airspace of neighbouring States which are not already prohibited, if any. Great caution has to be exercised in the use of force in maritime enforcement of universal jurisdiction for piracy because in the unanimous adoption by the 25th Session (Extraordinary) of the ICAO Assembly on 10 May 1984 of Article 3 *bis* of the 1944 Chicago Convention, the Contracting States have recognized that ‘every State must refrain from resorting to the use of weapons against civil aircraft in flight.’ Annex 2, ICAO, *Foreword* provides for flight over the high seas:

It should be noted that the Council resolved in adopting Annex 2 in April 1948 and Amendment 1 to the said Annex in November 1951, that the Annex constitutes Rules relating to the flight and manoeuvre of aircraft within the meaning of Article 12 of the Convention. Over the high seas, therefore, these Rules apply without exception.

On November 15, 1972 when adopting Amendment 14 to Annex 2 relating to authority over aircraft operating over the high seas, the Council emphasised that the amendment was intended solely to improve safety of flight and to ensure adequate provision of air traffic services over the high seas. The Amendment in no way affects the legal jurisdiction of States of Registry over their aircraft or the Responsibility of Contracting States under Article 12 for enforcing the Rules of the Air.

For flight over the high seas, the State of Registry of the aircraft is the appropriate authority and for flights elsewhere, the state having sovereignty over the territory overflown. Besides these issues, of equal concern is the relationship between ASEAN and this zone, followed by Lessons from the MALSINDO Operations with the Eyes in the Sky Approach.

Type of zone

The South China Sea Maritime and Air Defence Identification Zone (SCS-MADIZ) should be a zone of limited purpose, scope and duration included within a legal framework such as a maritime and air defence identification council, or a Code of Conduct²⁹ or a multilateral treaty³⁰ and if it should fulfill some distinctive features such as, positive perception of cooperation by a significant political constituency, more benefits than costs to States members participation, recognition of the emergence of piracy as a crisis situation for the emergence of a political will to address the issue, reasonable expectations of progress, clear objective and function, and clear scope of operation.³¹ It should be clearly stated that the purpose is not to abrogate the rights of overflight over the high seas.

Principle and Goals

The main principle underlying this zone should be that, “The territorial sovereignty and sovereign integrity of every claimant should be equally recognized in the regime...”.³² Mark J Valencia *et al* point out that any multilateral regime for the South China Sea should include the following goals and the appropriate goal to control piracy in the present case would be “6.To ensure safe navigation and prevent piracy, drug smuggling, poaching, purposeful pollution, and other illegal activities.”³³

Littoral States of SCS vested with ultimate responsibility

In the establishment of such a zone, the existing ASEAN framework should also be considered together with other ASEAN Partners. Professor Sam Bateman addressing the issue of cooperation in the context of the South China Sea points out that any cooperative mechanism adopted in ASEAN must include China as ignoring China’s position would only spell doom:

“A cooperative management regime is the only solution. The only acceptable framework for such a regime would be a web of provisional arrangements covering cooperation for different functions and perhaps even with different areas for each function. These functions include development of oil and gas resources, fisheries management, marine safety, marine scientific research, good order at sea, and preservation and protection of

²⁹ For Follow-Up Action for the realization of the Declaration of the Conduct of Parties in the South China Sea, see UNGA A/59/127, 6th July 2004 - “Confidence Building Measures in the regional and sub-regional context.” For updates on the three bilateral customs, immigration, quarantine and security meetings with special focus given to security within the region, see *Ibid* at pp.10-11: “(b) Maritime security: There are poor communication linkages between law enforcement agencies. The threats on ships, port facilities and the environment can be reduced or prevented through implementation of the International Ship and Port Facility Security Code and the Code of Practice on Security in Ports.”

³⁰ Mark J Valencia, Jon M Van Dyke and Noel A Ludwig, *Sharing the Resources of the South China Sea* (University of Hawai’i Press: Honolulu: 1997) at pp. 199-201.

³¹ *Ibid.*

³² Mark J Valencia *et al*, Note 30 at 202.

³³ Mark J Valencia *et al*, Note 30 at 203.

the marine environment. Furthermore any agreement or plan along these lines developed by ASEAN members that ignores the position of China is doomed to failure. Discussion of this functional approach must be on the agenda to prevent the South China Sea from simmering away as a major obstacle to regional stability.”³⁴

This instrument should also call upon, under Article 105-1982 LOSC, regional and international organizations that have the capacity to do so, to take part actively in the fight against piracy in the SCS waters and assist the SCS littoral States to apprehend, arrest and prosecute pirates who belong to other nationalities and to uphold the implementation of the 1988 SUA while upholding all principles of human rights and humanitarian laws.³⁵ The SCS-MADIZ may require the assistance of the maritime and aviation departments in several coastal State jurisdictions and may be required to prepare a monthly report on this matter for the UN Sec–Gen.³⁶ It may also be feasible to create a coordinating centre for information received in the various coastal State jurisdictions³⁷ and to collaborate with the shipping and insurance industries, and with the IMO to

³⁴ Source: RSIS Commentaries No. 136/2011 dated 29 September 2011: Managing the South China Sea: Sovereignty is not the Issue. By Sam Bateman

³⁵ *Id.* (off the coast of Somalia to conclude special agreements or arrangements with countries willing to take custody of pirates in order to embark law enforcement officials (“shipriders”) from the latter countries, in particular countries in the region, to facilitate the investigation and prosecution of persons detained as a result of operations conducted under this resolution for acts of piracy and armed robbery at sea off the coast of Somalia, provided that the advance consent of the TFG is obtained for the exercise of third state jurisdiction by shipriders in Somali territorial waters and that such agreements or arrangements do not prejudice the effective implementation of the SUA Convention).

³⁶ *Id.* (off the coast of Somalia to establish an international cooperation mechanism to act as a common point of contact between and among states, regional and international organizations on all aspects of combating piracy and armed robbery at sea off Somalia’s coast; and recalled that future recommendations on ways to ensure the long-term security of international navigation off the coast of Somalia, including the long-term security of WFP maritime deliveries to Somalia and a possible coordination and leadership role for the United Nations in this regard to rally Member States and regional organizations to counter piracy and armed robbery at sea off the coast of Somalia are to be detailed in a report by the Secretary-General no later than three months after the adoption of resolution 1846).

³⁷ *Id.* (off the coast of Somalia to consider creating a centre in the region to coordinate information relevant to piracy and armed robbery at sea off the coast of Somalia, to increase regional capacity with assistance of UNODC to arrange effective shiprider agreements or arrangements consistent with UNCLOS and to implement the SUA Convention, the United Nations Convention against Transnational Organized Crime and other relevant instruments to which States in the region are party, in order to effectively investigate and prosecute piracy and armed robbery at sea offences).

(In response to the letter from the TFG of 9 December 2008, encouraged Member States to continue to cooperate with the TFG in the fight against piracy and armed robbery at sea, noted the primary role of the TFG in rooting out piracy and armed robbery at sea, and decided that for a period of twelve months from the date of adoption of resolution 1846, States and regional organizations cooperating in the fight against piracy and armed robbery at sea off the coast of Somalia for which advance notification has been provided by the TFG to the Secretary-General may undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea, pursuant to the request of the TFG, provided, however, that any measures undertaken pursuant to the authority of this paragraph shall be undertaken consistent with applicable international humanitarian and human rights law.

Called on Member States to assist the TFG, at its request and with notification to the Secretary-General, to strengthen its operational capacity to bring to justice those who are using Somali territory to plan, facilitate or

continue to develop avoidance, evasion, and defensive best practices and advisories to take when under attack or when sailing in the SCS. Finally, SCS littoral States should endeavour to make their citizens and vessels available for forensic investigation as appropriate at the first port of call immediately following an act or attempted act of piracy or release from captivity.³⁸ Irrespective of the number of collaborating States or organizations, the ultimate responsibility for the SCS-MADIZ rests with the littoral States of the SCS.

Legal Scope and Geographical Coverage:

The instrument setting out the SCS-MADIZ should condemn and deplore all acts of piracy by the law of nations in the South China Sea under Articles 100-107, 1982 LOSC.³⁹ The main purpose is to deter piracy in the South China Sea under Article 105, 1982 LOSC, notwithstanding the maritime claims of States therein. It is not to establish no-fly zones, and not to prevent flights between and across the airspace of neighbouring States which are not already prohibited if any, but to set out maritime and aerial enforcement of universal jurisdiction for the control of piracy bearing in mind the successful MALSINDO operations of the Malacca and Singapore Straits with the Eyes in the Sky (EIS) approach. The enforcement action would call in for identification of ships and aircraft in the SCS-MADIZ and where necessary by deploying naval vessels and military aircraft (this term is not used in air law but state aircraft), and through seizure and disposition of boats, vessels, arms and other related equipment used in the commission of piracy in the SCS for which there are reasonable grounds for suspecting such use.⁴⁰ The justification for a limited purpose SCS-MADIZ may be found in the principle of universal jurisdiction over piracy which includes the presence of aircraft in its definition through

undertake criminal acts of piracy and armed robbery at sea, and stresses that any measures undertaken pursuant to this paragraph shall be consistent with applicable international human rights law).

³⁸ *Id.* (Waters off the coast of Somalia, and further urged States to make their citizens and vessels available for forensic investigation as appropriate at the first port of call immediately following an act or attempted act of piracy or armed robbery at sea or release from captivity).

³⁹ UNSC Resol 1851(2008) (off the coast of Somalia; 8. Welcomed the communiqué issued by the International Conference on Piracy around Somalia held in Nairobi, Kenya, on 11 December 2008 and encouraged Member States to work to enhance the capacity of relevant states in the region to combat piracy, including judicial capacity; 9. notes with concern the findings contained in the 20 November 2008 report of the Monitoring Group on Somalia that escalating ransom payments are fuelling the growth of piracy in waters off the coast of Somalia, and that the lack of enforcement of the arms embargo established by resolution 733 (1992) has permitted ready access to the arms and ammunition used by the pirates and driven in part the phenomenal growth in piracy).

⁴⁰ *Ibid.* (off the coast of Somalia, in particular, consistent with this resolution, resolution 1846 (2008), and international law, by deploying naval vessels and military aircraft and through seizure and disposition of boats, vessels, arms and other related equipment used in the commission of piracy and armed robbery at sea off the coast of Somalia, or for which there are reasonable grounds for suspecting such use; 10. Affirmed that the authorization provided in this resolution apply only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of Member States under international law, including any rights or obligations under UNCLOS, with respect to any other situation, and underscores in particular that this resolution shall not be considered as establishing customary international law, and affirmed further that such authorizations have been provided only following the receipt of the 9 December 2008 letter conveying the consent of the TFG; 11. Affirmed that the measures imposed by paragraph 5 of resolution 733 (1992) and further elaborated upon by paragraphs 1 and 2 of resolution 1425 (2002) shall not apply to weapons and military equipment destined for the sole use of Member States and regional organizations undertaking measures in accordance with paragraph 6 above).

increased maritime and aerial identification and enforcement against piracy for ships underway and at anchor. This may be considered lawful under the 1982 LOSC, the IMO Conventions and for purposes of insight by extrapolating from UNSC Resolutions on Somalian piracy, in addition to the existing Asia-Pacific Port State Control mechanism.

Resolution 1851 (2008), adopted by the Security Council at its 6046th meeting, on 16 December 2008, cannot be repeated elsewhere, however, the littoral States bordering the South China Sea and other international organisations, not just ASEAN States, could establish a limited purpose SCS-MADIZ based on concerns that several incidents of piracy are continuing to take place in SCS striking at the heart of freedom of navigation for commercial shipping.⁴¹ Such an instrument shall respect the sovereignty, territorial integrity, political independence and unity of the littoral States bordering the SCS and the flag States involved in commercial shipping whose ships have suffered acts of piracy. The establishment of this zone should be based on the unanimous decision of the SCS littoral States which states that this is necessary⁴² and should unanimously decide to undertake this initiative titled “The Establishment of a Limited Purpose South China Sea Maritime and Air Defence Identification Zone for the Control of Piracy (SCS-MADIZ).”⁴³ The Limited Purpose SCS-MADIZ is established notwithstanding the territorial claims of the States in the South China Sea covering the high seas of the South China Sea.⁴⁴

⁴¹ Resolution 1851 (2008), Adopted by the Security Council at its 6046th meeting, on 16 December 2008, (*unlike the crisis situation in Somalia*).

⁴² *Id.* (unlike the several requests from the TFG for international assistance to counter piracy off its coast:

- including the letter of 9 December 2008 from the President of Somalia requesting the international community to assist the TFG in taking all necessary measures to interdict those who use Somali territory and airspace to plan, facilitate or undertake acts of piracy and armed robbery at sea, and
- the 1 September 2008 letter from the President of Somalia to the Secretary-General of the UN expressing the appreciation of the TFG to the Security Council for its assistance and expressing the TFG’s willingness to consider working with other States and regional organizations to combat piracy and armed robbery off the coast of Somalia.)

⁴³ *Id.* (In the case of the Somalia, the UNSC welcomed the EU and the NATO initiatives in combating Somalian piracy. The EU launched Operation Atalanta to combat piracy off the coast of Somalia and the protection of vulnerable ships bound for Somalia, and the North Atlantic Treaty Organization, and other States acting in a national capacity have agreed to cooperate with the TFG to suppress piracy off the coast of Somalia. The UNSC also welcomed recent initiatives of the Governments of Egypt, Kenya, and the Secretary-General’s Special Representative for Somalia, and the United Nations Office on Drugs and Crime (UNODC) to achieve effective measures to remedy the causes, capabilities, and incidents of piracy and armed robbery off the coast of Somalia, and emphasised the need for current and future counter-piracy operations to effectively coordinate their activities. Similarly, the UNSC welcomed the report of the Monitoring Group on Somalia of 20 November 2008 (S/2008/769), and noted the role piracy might play in financing embargo violations by armed groups. The UNSC decided to remain seized of the matter under Chapter VII of the UNC as it determined that the incidents of piracy and armed robbery at sea in the waters off the coast of Somalia exacerbated the situation in Somalia which continued to constitute a threat to international peace and security in the region).

⁴⁴ Tullio Scovazzi, *The Mediterranean Action Plan*, at p. 6.

The permissibility of the regime, which unlike the Mediterranean Sea fisheries zone or the ecological protection zone, needs to be established in international law. Tullio Scovazzi argues that these Mediterranean Sea regimes are permitted in international law because:

Further, the zone could draw on Ship Vulnerability Issues from the Somalian piracy experience and it could assist in tackling the issue of Substandard ships; enable passage through Internationally Recommended Marine Electronic Highways at Full Sea Speed; identify High Risk Areas designated by the Best Management Practice Guidelines; require registration with a Maritime Security Center and Aerial Security Center, provide for the minimum Speed of Ships; require the observation of the requirements of the International Safety Management Code of SOLAS particularly for language of the crew whereby a working language is needed for the ship; provide for Enhanced Port State Control and if considered necessary undertake based on IMO guidance the recruitment of armed or unarmed security guards or personnel. Guidance may also be provided in the following IMO documents, BMP 4 is a non-IMO document:

- BMP 4 Best Management Practices for Protection against Somalia Based Piracy;⁴⁵
- MSC.1/Circ.1405 Rev.1 Revised Interim Guidance to shipowners, ship operators, and shipmasters on the use of privately contracted armed security personnel on board ships in the High Risk Area;
- MSC.1/Circ.1406 Rev. 1 Revised interim recommendations for flag States on the use of privately contracted armed security personnel on board ships in the High Risk Area;
- MSC.1/Circ.1408 on Interim Recommendations for port and coastal States regarding the use of privately contracted armed security personnel on board ships in the High Risk Area.⁴⁶

Based on the Somalian experience, this zone could benefit, if the littoral States agree, from the participation of various regional and international organizations such as Naval/Military Forces/Law Enforcement Organisations; IMO; Combined Maritime Forces (CMF); EU NAVFOR (The European Union Naval Force); INTERPOL; The U.S. Navy Maritime Liaison Office; Maritime Security Centre Horn of Africa (MSCHOA); NATO Shipping Centre (NSC); Operation Ocean Shield; The UK Maritime Trade Operations (UKMTO).⁴⁷

“Some coastal States have established beyond the territorial sea *sui generis* zones, such as a fishing zone or an ecological protection zone. While neither of them is mentioned in the UNCLOS, they are not prohibited either. They include some of the rights that can be exercised within the exclusive economic zone. This sort of fragmentation of rights is compatible with international law, for the simple reason that the right to do less can be considered as implied in the right to do more (*in maiore stat minus*).” P.6

⁴⁵ Source: Best Management Practices for Protection against Somalia Based Piracy: <http://www.imo.org/MediaCentre/HotTopics/piracy/Documents/1339.pdf>, accessed site on 11 October 2011.

⁴⁶ Source: The IMO, <http://www.imo.org/MediaCentre/HotTopics/piracy/Pages/default.aspx>, site accessed on 11 October 2011.

⁴⁷ MSC.1/Circ.1339, 14 September 2011.

It should also be noted that the implementation of the legal regime of the SCS-MADIZ within the municipal law framework of States requires corresponding changes to be made in the national laws of States parties. Finally, States Parties should agree on the temporal and the fiscal scope of the Zone.

5. COUNTER-ARGUMENTS

There may be some counter-arguments to the establishment of such a zone over the South China Sea such as the stated views of members of UNSC Resolutions with regard to Somalian piracy and armed robbery crises that the terms of the UNSC Resolutions should not extend to areas beyond the Gulf of Aden; that Article 123, 1982 LOSC does not refer to regional security as a collective measure of regional cooperation; that there are limits on the use of force in maritime enforcement of universal jurisdiction for piracy; that there is only limited state practice on the use of ADIZ; and the possibility/ probability or likelihood that MADIZ may be used for any other illegal purpose. However, the present proposal is made under Article 105 which expressly authorizes the principle of universal jurisdiction.

Views of Members of the UNSC resolutions with regard to Somalian piracy and armed robbery crises

UNSC Resolution 1816 (2008) is *sui generis* in nature and applies only to the situation in Somalia and does not affect “the rights and obligations under the Law of the Sea Convention, nor be considered as establishing customary international law, the Council also requested cooperating States to ensure that anti-piracy actions they undertake do not deny or impair the right of innocent passage to the ships of any third State.” The resolution urges greater vigilance amongst flag States of naval vessels and military aircraft on the high seas and for greater coordination amongst those States using commercial routes off the Somalian coast to prevent attacks and hijacking of vessels together with Somalian government cooperation. This effort goes further as the resolution calls for cooperation amongst all States, the IMO and appropriate regional organizations to assist vessels attacked by pirates.

Several delegates expressed their viewpoints at this unique enforcement action Resolution. The Indonesian delegate pointed out that the draft Resolution had to be consistent with international law particularly the 1982 LOSC and the text should not become a basis of CIL for the repression of piracy and armed robbery at sea. This meant that this Resolution should only apply to the territorial waters of Somalia based upon her prior consent. This resolution was not to be used as a basis for modification, rewriting or redefining the Convention in any forum: “ Ample safeguards were needed.” Therefore, it was correct that the paragraph of the Resolution (para 9) stated that “the authorization provided in this resolution ... shall not affect the rights or obligations or responsibilities of Member States under international law, including any rights or obligations under the Convention, ... and ... it shall not be considered as establishing customary international law” as “existing laws and norms not be violated when taking steps against illegal

or criminal acts. ... the request and consent from the Somali Government served as the legal basis for the Council to formulate appropriate responses within the parameter of international law, in particular the Law of the Sea Convention. The principles of respect for sovereignty and territorial integrity enshrined in the Charter had to be espoused by the Council at all times. In exercising its mandate in the maintenance of international peace and security, it was possible to do so without having to challenge the integrity of international law. Those two objectives were mutually reinforcing and not exclusive. As it stood now, the text had accommodated those two fundamental principles... . Those were about consistency with the Law of the Sea Convention and the specific situation of piracy and armed robbery off the coast of Somalia. After all, the text, first and foremost, was about Somalia. It was about how the Council, together with the international community, could assist Somalia to fight the crime. The text would ensure that Somalia would be the beneficiary of common efforts.” The Council then unanimously adopted resolution 1816 (2008).

Vietnam said that it was fully committed to fight against piracy under international law and the 1982 LOSC but cautioned that the resolution should not be interpreted in any other way other than the specific and designated purpose as the resolution did not permit any action in any other maritime area or in any other manner contrary to the 1982 Law of the Sea Convention. Libya pointed out that the Resolution was for a specific purpose only: to control “acts of piracy in the maritime areas under jurisdiction of Somalia.” South Africa distinguished piracy from international peace and security: that the Somalian situation had constituted a threat to international peace and security and not the piracy at sea in itself which was a symptom of the larger problems in Somalia such as the political, security and humanitarian situation there. The Resolution had to respect and be in accord with the Law of the Sea Convention which was the platform for inter-State cooperation to control piracy. South Africa had welcomed the adoption of resolution 1814 (2008) last month where the Council considered sending a peace-keeping operation at the appropriate time to take over from the African Union Mission in Somalia, once there was progress in the political process and improvement in the security situation on the ground.

China pointed out that she had always respected the sovereignty, independence and territorial integrity of States and supported the national reconciliation process in Somalia which was trying to achieve peace after 17 years of conflict. China found that the UNSC acted positively with great prudence as “the issue of piracy was closely related to the rights and obligations in the oceans”. In this case, the Resolution was applicable in the peculiar Somalian context only where international assistance should serve to facilitate combating piracy under the 1982 LOSC and by avoiding negative consequences and conflicts with other existing international laws. This was not to be expanded to other regions. When related problems crop up, these would require international cooperation as “piracy should not be seen as a stand-alone issue, but as an

expression of the situation in the country. The international community should focus on removing the root causes of the current situation in Somalia.”

Other counter –arguments relate to Article 123, 1982 LOSC that it does not refer to regional security as a collective measure of regional cooperation, or that there are limits on the use of force in maritime enforcement of universal jurisdiction for piracy which has already been addressed, that there is limited state practice on the use of ADIZ, or the probability, possibility of likelihood that the MADIZ may be used for any other illegal purpose. The counter-counter-argument to these would be that this is a limited purpose zone established to operationalise Article 105, 1982 LOSC to address threats to commercial shipping and navigation.

CONSEQUENCES IF SCS-MADIZ NOT ESTABLISHED AND WAY FORWARD

An immediately apparent consequence if the SCS-MADIZ is not established is that the incidents of piracy could continue to rise in the SCS and shippers will continue to face hardship as they are not permitted to carry arms and use force in self-defence and they are not conferred universal jurisdiction.⁴⁸ Efficacy of flag States also should not be less than optimal but unfortunately as the incidents of piracy show, they are sub-optimal. The littoral states will be in breach of the 1982 LOSC obligations if they do not act. By taking the necessary actions, the littoral States are only exercising their lawful responsibilities as coastal states individually and collectively for the regional good and to promote the peaceful uses of the sea under Articles 300 and 301 of the 1982 LOSC. It also overcomes the lack of capacity in flag States and of littoral States to singularly secure their maritime zones in the SCS and the lack of a provision on regional cooperation within Article 123, 1982 LOSC and provisions of the 1944 Chicago Convention mentioned earlier.⁴⁹ State responsibility compels the SCS littoral States to take such action as they have prescriptive and enforcement universal jurisdiction individually and jointly to tackle these issues as conferred by the 1982 LOSC.⁵⁰

The way forward may lie in the establishment of the SCS-MADIZ, which involves not only the law of the sea rules but also the law of airspace and the cooperation of various agencies in the two sectors in all the SCS littoral States. To operationalise the effort, the littoral States could rely, if legally workable, on the ASEAN Defence Ministers Meeting as the platform for

⁴⁸ *Ibid.* (unlike the lack of capacity of the Transitional Federal Government (TFG) to interdict, or upon interdiction to prosecute pirates or to patrol).

⁴⁹ *Id.* (unlike the lack of capacity of the TFG to secure the waters off the coast of Somalia, including the international sea lanes and Somalia’s territorial waters).

⁵⁰ *Id.* (in Somalia there was the lack of capacity, domestic legislation, and clarity about:

- how to dispose of pirates after their capture,
- how to take international action against the pirates off the coast of Somalia,
- how to ensure that pirates are not released without facing justice, and
- how to apply the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (“SUA Convention”) in domestic legislation which provides for States Parties to create criminal offences, establish jurisdiction, and accept delivery of persons responsible for or suspected of seizing or exercising control over a ship by force or threat thereof or any other form of intimidation).

constructive action as it involves not only ASEAN member states but also its defence and security partners on strategic issues affecting the region and can engage the support of the establishment of the ADMM-Plus Experts' Working Groups (EWGs) or the ASEAN Maritime Forum (AMF) in addressing common security challenges.

7. CONCLUSIONS

This paper considered the setting up of a Limited Purpose Maritime and Air Defence Identification Zone over the South China Sea under Article 105, 1982 LOSC for the control of piracy and to send out a strong signal to the perpetrators that there are “Eyes in the Sky” involving tremendous regional and perhaps extra-regional collaboration in tackling these problems. The paper traced the earlier illegality of an ADIZ but also advanced an argument for its current legality. Some “curable” weaknesses in the argument were identified and finally, it pointed the way forward and the consequences of inaction on the part of the littoral States bordering the South China Sea.