

ReCAAP Special Lecture Part 2

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International Crimes Conventions and the Safety and Security of Maritime Navigation

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Part 1

General Principles of Criminal Jurisdiction of States

Criminal Jurisdiction of States

- States whose legal systems are based on **English Common Law**
 - General Principle: **Territorial**
 - Criminal Law applies to offences in its **territory** and on ships and aircraft registered in its territory
 - If extend to acts committed in foreign territory or on ships & aircraft registered in other States for certain crimes, special legislation is required
- States whose legal systems are based **European Civil Law**
 - General Principles: **Territorial** plus **Nationality**
 - Criminal Law applies to offences in its territory and to the acts of its **nationals** when they are outside its territory

- The international community has established 19 international treaties making certain acts “international crimes”
- Early Conventions all relate to **civil aviation**:
 - 1963 Convention on Offences and Certain Other Acts Committed On Board Aircraft
 - 1970 Convention for the Suppression of Unlawful Seizure of Aircraft
 - 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation
- They were then expanded to cover hostage-taking, crimes against diplomats, nuclear material, shipping, etc.

Part 2

UN Conventions on International Crimes: History and Common Provisions

Key Features of UN Conventions on International Crimes

- The key features in the UN Conventions on International Crimes:
 1. An “**offence**” is defined
 2. All states parties agree to make that offence a crime under their national laws when it is committed -
 - (1) in their **territory**,
 - (2) by their **national** or
 - (3) when the alleged offender is **present in their territory**
 3. If alleged offenders are **present in their territory**, States Parties are obliged to **take them into custody** and either **extradite or prosecute them**

Common Provisions in International Crimes Conventions

1. Defines specific **criminal offence**
2. States Parties must make offence punishable **by serious penalties**
3. Parties must **establish jurisdiction** over the offence if committed by their **national**, in their **territory**, on **ship flying their flag**, and if offender **present in their territory**
5. If alleged offenders are present in territory, must take them into custody and either **Prosecute** or **Extradite**
6. Can use Convention as basis for Extradition if no extradition treaty
7. Provides for **mutual legal assistance** in prosecuting offender

Part 3.

1988 SUA Convention

Historical Background – the *Achille Lauro* Incident

- On 7 Oct 1985, an Italian passenger ship, the *Achille Lauro*, was hijacked by 4 men from the Palestine Liberation Front in the Mediterranean Sea, off the coast of Egypt
- The hijackers had boarded the ship as passengers
- The incident provoked an international debate on whether the hijacking was an act of “piracy” given that only one ship was involved

Definition of Piracy under UNCLOS Article 101

Piracy consists of :

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship . . ., and directed
 - (i) on the high seas against another ship ... or against persons or property on board such ship . . ;
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

Note: “Place outside the jurisdiction of any State” means “an island constituting *terra nullius* or on the shores of an unoccupied territory”

1988 SUA Convention

- Following the 1988 *Achille Lauro* Incident, it was decided to draft a new convention making the hijacking of a ship an international crime
- The international conventions creating international crimes for offences against international aviation were used a model
- The result was the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (1988 SUA)
- It was adopted by the International Maritime Organization (IMO) because it involved the safety of commercial shipping

1) Define the Offence

Article 3

- Any person commits an offence if that person unlawfully and intentionally:
 - 1) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
 - 2) performs an act of violence against a person on board a ship if that act is *likely to endanger the safe navigation of that ship*; or
 - 3) destroys a ship or causes damage to a ship or to its cargo which is *likely to endanger the safe navigation of that ship*; or

2) Create Serious Penalties

Article 5

- Each State Party shall make the offences set forth in article 3 punishable by appropriate penalties which take into account the grave nature of those offences.

3) Establish Jurisdiction if a Link to the Offence

Article 6 (1)

1. Each State Party shall take such measures as may be necessary to **establish its jurisdiction** over the offences set forth in article 3 when the offence is committed:
 - against or on board a **ship flying the flag of the State** at the time the offence is committed; or
 - in the **territory** of that State, including its territorial sea; or
 - by a **national** of that State.

4) Establish Jurisdiction if present in territory

Article 6 (4)

4. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 3 in cases **where the alleged offender is present in its territory** and it does not extradite him to any of the States Parties which have established their jurisdiction in accordance with paragraphs 1 and 2 of this article.

5) Take Into Custody if present in territory

Article 7

- Upon being satisfied that the circumstances so warrant, any State Party in the territory of which the offender or the alleged offender is present shall, in accordance with its law, **take him into custody** or take other measures to ensure his presence
for such time as is necessary to enable any criminal or extradition proceedings to be instituted

6) Extradite or Prosecute

Article 10

- The State Party in the territory of which the offender or the alleged offender is found shall, in cases to which article 6 applies,
if it does not extradite him, be obliged, without exception whatsoever and
whether or not the offence was committed in its territory,
to submit the case without delay to its competent authorities
for the purpose of prosecution, through proceedings in accordance
with the laws of that State.
- Those authorities shall take their decision in the same manner as
in the case of any other offence of a grave nature under the law of
that State.

7) Convention as Basis for Extradition

Article 11

- 2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, the requested State Party may, at its option, **consider this Convention as a legal basis for extradition** in respect of the offences set forth in article 3.

8) Mutual Legal Assistance

Article 12

- State Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences set forth in article 3, including assistance in obtaining evidence at their disposal necessary for the proceedings.

Part 4.

1979 Hostages Convention and 1988 SUA Convention

UN Conventions on Threats to Safety of Maritime Navigation

1. 1979 International Convention against the Taking of Hostages (1979 Hostages)
2. 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988 SUA)

1979 Hostages Convention, Art 1

- Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage-taking") within the meaning of this Convention.

1988 SUA Convention, Art 3

1. Any person commits an offence if that person unlawfully and intentionally:
 - (a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
 - (b) performs an act of violence against a person on board a ship *if that act is likely to endanger the safe navigation of that ship*; or
 - (c) destroys a ship or causes damage to a ship or to its cargo *which is likely to endanger the safe navigation of that ship*;
...
 - (g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in paragraphs (a) to (f)

Hypothetical Problem 1

1. Four Philippine nationals hijack a Chinese Flag Vessel in Malaysia's territorial sea and take 3 Indonesian crew members hostage
2. Hostages taken to island in southern Philippines and ransom payment demanded
3. Vessel and remaining crew released after ransom paid; Chinese & Philippine authorities identify the "pirates" from pictures taken by a hidden camera on the hijacked vessel
4. Two of perpetrators fly to Singapore to gamble at Marina Bay Sands
5. Singapore authorities identify the two perpetrators at immigration at Changi Airport
 - Acts are crimes under both 1988 SUA and 1979 Hostages
 - Which States have jurisdiction to prosecute the "pirates"?
 - What are Singapore's legal obligations and options?

Conclusions on UN Conventions on International Crimes

1. No new grounds for interdicting or arresting ships at sea – authority to board and arrest foreign ships based on presence in territory
2. They establish “quasi-universal jurisdiction” among States Parties based on presence of the offender in territory
3. If offenders present in territory of party, it must take offenders into custody and either prosecute or extradite them
4. The Conventions could can be a very effective tool against the most serious attacks on ships in Southeast Asia, especially the cases involving the abduction of crew in Sulu-Celebes Sea area
5. Cannot be effective unless all of the States in the region become Parties to them and effectively implement and enforce them

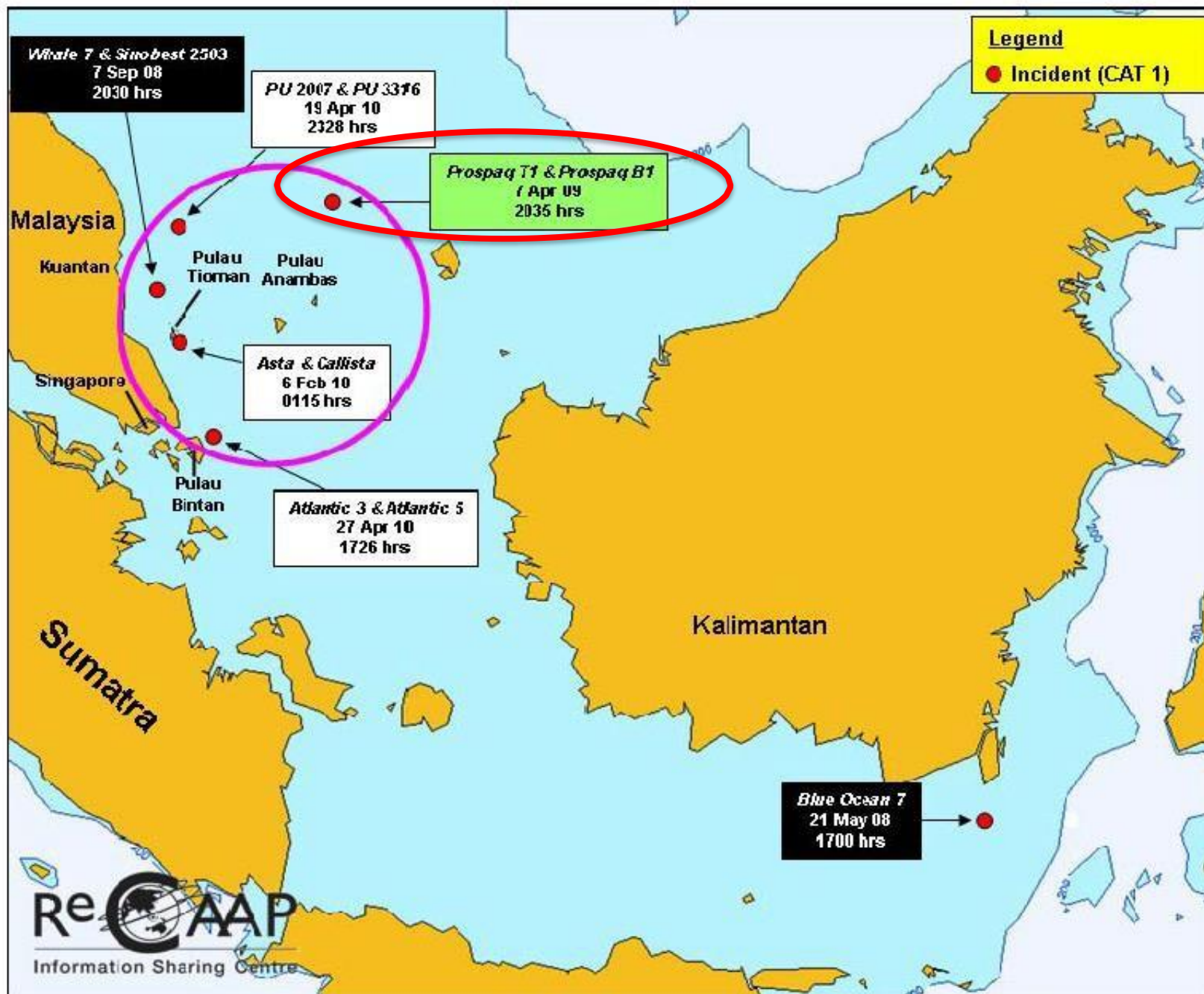
Part 5.

Attacks on Ships in SE Asia & UN Conventions on International Crimes

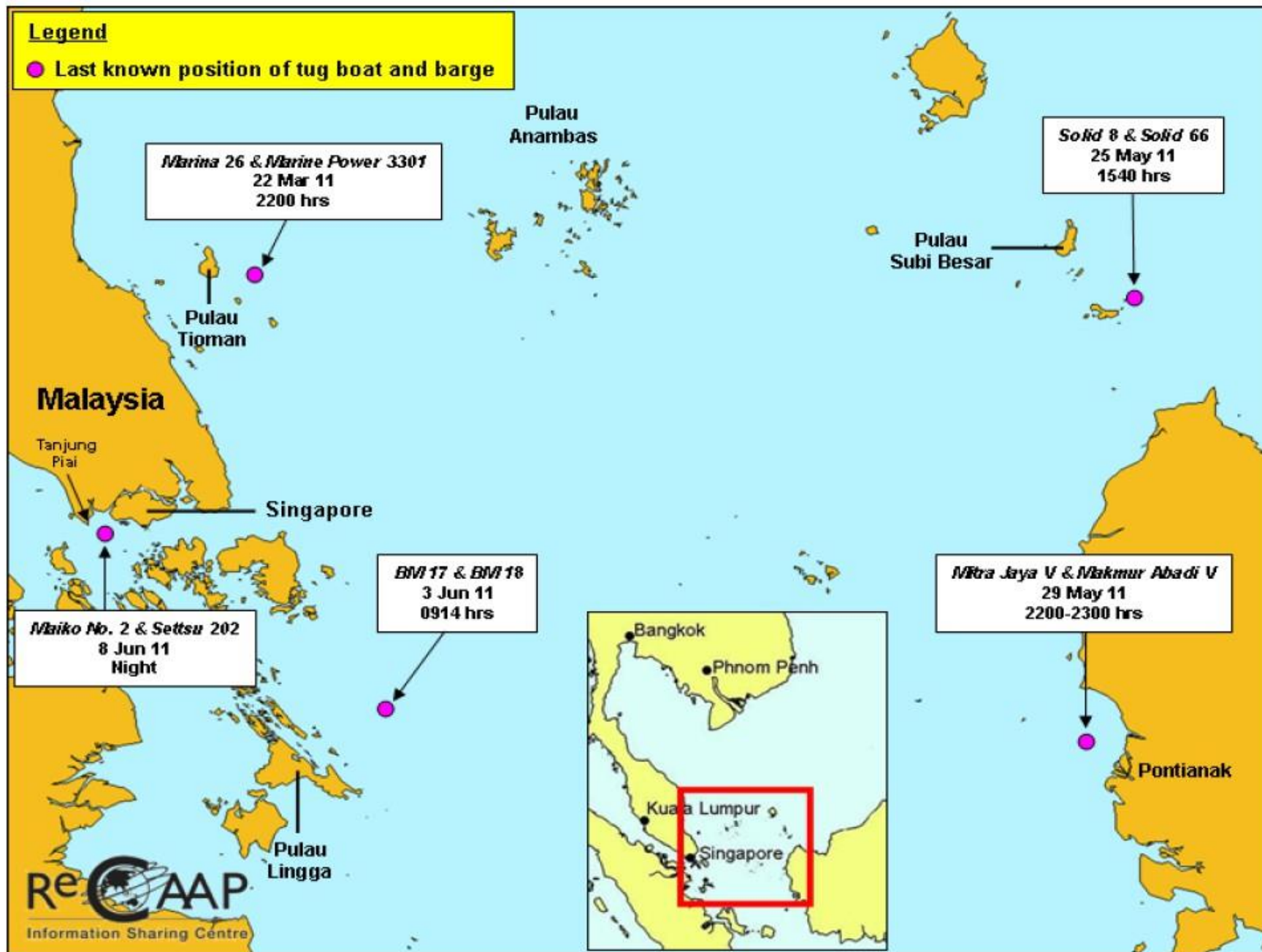
ReCAAP Special Report of 2011 on Hijacked / Missing Tugboats & Barges

- A total of **five incidents of hijacking and missing tugboats** towing barges were reported to the ReCAAP ISC and its Focal Points during the period March – June 2011.
- **ReCAAP Report:** of the five incidents, three were incidents of **hijacking**, of which **one was an incident of piracy** and **two were incidents of armed robbery against ships** .
- **My Analysis:** One could have been **piracy**; all the incidents would be **offences under 1988 SUA**





Location of incidents of hijacking between 2008 and 2010



Location of incidents of hijacking and missing vessels during March-June 2011

Abduction of Crew from Ships in the Sulu-Celebes Sea

- 2017 ReCAAP Special Report on Abducting of Crew from Ships in the Sulu-Celebes Sea and Waters off Eastern Sabah
- Incidents involving the abduction of crew from ships in the Sulu-Celebes Sea and waters off eastern Sabah were first reported in March 2016.



Abduction of Crew from Ships in the Sulu-Celebes Sea

- A total of 22 incidents comprising 13 actual incidents and 9 attempted incidents had been reported to the ReCAAP ISC in 2016 and 2017.
- A total of 58 crew had been abducted; and as of 31 March 2017, 37 crew had been released and 21 crew are still being held in captivity.





Sulu Sea is within the Archipelagic Waters of the Philippines

Celebes Sea is bordered by:

- Territorial Sea of Malaysia
- Archipelagic Baselines and Territorial Sea of Philippines
- Archipelagic Baselines and Territorial Sea of Indonesia
- There is EEZ with undefined boundaries in Celebes Sea

UN Conventions and Incidents of Abduction of Crew

- If ships were attacked outside territorial sea limits, the incidents would be **Piracy**
- All the incidents would be offences under the **1988 SUA Convention**
- If crew were abducted, they would also be offences under the **1979 Hostages Convention**
- If the all three coastal States were parties to either **1979 Hostages** or **1988 SUA**, and the perpetrators entered the territory of one of the States, the authorities in that State would have an obligation to **take them into custody** and either **prosecute or extradite** them, no matter where the attacks took place

Status of the Conventions

- **1979 Hostages**
 - 176 Parties
 - all ASEAN Member States except Indonesia & Timor Leste
- **1988 SUA:**
 - 167 Parties
 - all ASEAN Member States except Indonesia, Malaysia, Timor Leste and Thailand

SE Asia and UN Conventions on International Maritime Crimes

- If all the States in Southeast Asia were parties to 1979 Hostages and 1988 SUA, the region would have additional valuable tools to combat serious attacks on commercial shipping
- These conventions do not change in any way the rule in 1982 UN Convention on the Law of the Sea on jurisdiction over ships
- Therefore, they are not a threat to any State's sovereignty or national interests

Part 5

2005 SUA Protocol

USS Cole, Yemen, 12 Oct 2000

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World Trade Center, Sep 11, 2001

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Limburg, Gulf of Aden, 6 Oct 2002

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2005 Protocol Background

- One of several measures by IMO to enhance maritime security after the 9/11 attack on the World Trade Center in New York
- IMO Assembly adopted Resolution 924 requesting revision of existing legal measures
- US proposed a new protocol to 1988 SUA Convention
- IMO Legal Committee took more than 3 years to agree on the text

2005 Protocol Background

- Speculation in 2001 was that the US would try to negotiate a protocol that would create a new exception to the principle on the exclusive jurisdiction of the flag
- Speculation that the US wanted the right to board ships suspected of carrying WMD without obtaining the consent of the flag State
- Article 92 of UNCLOS -- save in exceptional cases provided for in international treaties or in this Convention

2005 SUA Protocols



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- The 2005 Protocol was adopted at an International Diplomatic Conference organized by the IMO in London from 10-14 October 2005
- At the same time, the 2005 Platforms Protocol was adopted, updating the 1988 Platforms Protocol

Scope of 2005 Protocol

1. It updates maritime offences to address the threat of maritime terrorism
2. New boarding provisions provide procedures for boarding & search of suspect vessels in “seaward of the outer limit of the territorial sea” (i.e., on high seas or in EEZ) but only with the consent of the flag state
3. Updates 1988 SUA in light of provisions in more recent UN terrorist conventions

Scope of 2005 Protocol

4. Provides an additional tool to combat the proliferation of WMD as called for in UN Security Council Resolution 1540 of 2004
5. Intended to be consistent with existing conventions and customary international law, including international law on human rights of accused persons
6. New provisions recognize need to protect ships and seafarers as well as the marine environment

1988 SUA & 2005 Protocol



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- State must be party to 1988 SUA before it can become a party to the 2005 Protocol
- State must be a party to the 1988 Platforms Protocol before it can become a party to the 2005 Platforms Protocol

Status of 2005 Protocol



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- Adopted: 14 Oct 2005
- Entered into Force: 28 July 2010
- States Parties: 55 as of July 2025
- **No States from Asia are parties**
- Several major flag States are parties: Panama, Marshall Islands, Greece
- Western developed States parties: USA, France, Germany, Netherlands, Spain, Portugal, Norway, Sweden
- New Zealand and several Pacific Island States are parties

New Offences - 3 Categories

1. Using ship (or platform) as a weapon
2. Illicit transport by sea of WMD, their delivery systems or related materials
3. The transport of terrorists on ships

Transport of Terrorists

- New Article 3^{ter} makes it an offence to unlawfully and intentionally transport a “terrorist” on board a ship when intending to assist that person to evade criminal prosecution
- “terrorist” is not used or defined – but the provision applies to the transport of persons who have committed an offence under any of the UN “terrorist conventions”
 - The list includes all the UN Terrorist Conventions, including 1988 SUA and 1979 Hostages

Transport Offences

- Provisions on transport of WMD materials and transport of terrorists were amended several times to ensure that innocent seafarers and masters were not made criminals
- Provisions on transport require specific “knowledge and intent”

Boarding Provisions Art 8bis

- 2005 Protocol establishes a detailed set of procedures in Art 8bis that are designed to facilitate the boarding of a vessel suspected of being involved in a SUA offence
- Boarding can only take place :
 1. beyond the outer limits of the territorial sea (high seas or EEZ) and
 2. with the express consent of the flag state

Boarding, Article 8*bis* (5)

1. Whenever . . . “the requesting Party” encounter a ship flying the flag or displaying marks of registry of the first Party located seaward of any State’s territorial sea,
and the requesting Party has reasonable grounds to suspect that the ship or a person on board the ship has been, is or is about to be involved in the commission of an offence . . . ,
and the requesting Party desires to board

(a) it shall request, in accordance with paragraphs 1 and 2
that the first

Party confirm the claim of nationality, and

Boarding, Article 8*bis* (5)

- (b) if nationality is confirmed,
the requesting Party shall ask the first Party (hereinafter referred to as “the flag State”) for authorization to board and to take appropriate measures with regard to that ship which may include stopping, boarding and searching the ship, its cargo and persons on board,
and questioning the persons on board in order to determine if an offence set forth in article 3, 3bis, 3ter or 3quater has been, is being or is about to be committed, and

(c) the flag State shall either:

- (i) **authorize the requesting Party to board** and to take appropriate measures set out in subparagraph (b), **subject to any conditions** it may impose in accordance with paragraph 7; or
- (ii) conduct the boarding and search **with its own law enforcement or other officials**; or
- (iii) conduct the boarding and search **together with the requesting Party**, subject to any conditions it may impose in accordance with paragraph 7; or
- (iv) **decline to authorize** a boarding and search.

The requesting Party shall not board the ship or take measures set out in subparagraph (b) without the express authorization of the flag State.

Boarding Provisions – Use of Force

- Use of force shall be avoided except :
 1. when necessary to ensure the safety of its officials and persons on board or
 2. where the officials are obstructed in the execution of authorized actions
- Any use of force shall not exceed the minimum necessary and reasonable in the circumstances

Boarding Provisions – Protections for Flag States

1. There can be no boarding and search without the express authorization of the flag state
2. If flag state does authorize boarding, it may impose conditions
3. If conditions imposed, no additional measures may be taken without the express authorization of the flag state
4. If boarding and search are authorized by the flag state, the flag state has the right to retain jurisdiction over the detained ship and cargo and the persons on board

Liability of Boarding State

- The Boarding State is liable for damage, harm or loss attributable to them when :
 1. The grounds for such measures prove to be unfounded
 2. The measures are unlawful or exceed those reasonably required

Boarding Provisions – Protections for Shippers

The Boarding State must:

1. Take due account of the need not to endanger the safety of life at sea
2. Take due account of the safety and security of the ship and its cargo
3. Take reasonable steps to avoid a ship being unduly detained or delayed

Boarding Provisions – Protections for Shippers

The Boarding State must:

4. Take due account of the need not to prejudice the commercial and legal interests of the flag state
5. Take into account the dangers and difficulties involved in boarding a ship at sea
6. Advise master of intention to board and afford him the opportunity to contact the owner & the flag state

Boarding Provisions – Other Protections

1. Boarding state must ensure that all persons on board are treated in accordance with international human rights law
2. Boarding state must ensure that any measure taken with regard to the ship and its cargo is environmentally sound under the circumstances

2005 Protocol – Optional Declarations

- State can submit declaration to IMO authorizing boarding and search of ships flying its flag if it fails to respond to request to verify flag within 4 hours
- State can submit declaration to IMO authorizing boarding and search of ships flying its flag

Conclusions on 2005 SUA

- Likely to be ratified by more States if there is an incident involving shipment of WMD by sea
- The Boarding Provisions in Article 8*bis* were based on the Drug Conventions and US bilateral agreement under the US Proliferation Security Initiative
- However, the safeguards in Article 8*bis* are far more extensive
- Boarding Provisions in 2005 SUA Protocol can be viewed as example of “best practice” that could be used as a model for regional agreements

Part 8.

Conclusions

1988 SUA & 1979 Hostages

1. 1988 SUA can be an additional tool in combatting piracy and serious attacks on ships in SE Asia
2. Some incidents in Sulu/Celebes Sea area were offences under both the 1979 Hostages Convention and the 1988 SUA Convention
3. If attacks treated as offences under the UN Conventions, it lessens the importance of where the attack took place
4. It is not helpful to refer to the relevant conventions as Conventions on “Counter-Terrorism” because they include crimes committed by common criminals, without any terrorist motive

5. If all States parties to ReCAAP would ratify 1979 Hostages and 1988 SUA and implement into their domestic law, it would give the authorities in the States the legal basis for cooperating to combat serious crimes against international shipping in a manner that :
- is completely consistent with 1982 UNCLOS; and
 - will not jeopardize or compromise in any way their sovereignty and jurisdiction in waters subject to their sovereignty

2005 SUA Protocol

7. It is in the interests of **all States** to ratify and effectively implement the **2005 SUA Protocol**
8. States in South Asia, Southeast Asia and East Asia have been remiss in not ratifying the **2005 SUA Protocol**
9. An unfortunate truth is that the ratification of UN Conventions, especially IMO Conventions, is often “disaster driven”
10. If States will ratified and implemented the 2005 SUA Protocol they would have the tools necessary to prevent a major terrorist incident - such as the intentional sinking of a supertanker or container ship in a major shipping choke point such as the Straits of Malacca and Singapore

Why Have More States not Ratified 2005 SUA Protocol ?

- 2005 SUA Protocol is an IMO Convention
 - Lead agency in most States for IMO Conventions is the Transport Ministry Marine Department
 - Delegates from most States to the IMO are not security experts
- Many States feared that the Convention would give powerful States like the USA the right to interfere with commercial shipping
- By the time the Convention was debated at the IMO, the threat of terrorism against shipping had decreased

Revival of interest in 2005 SUA Protocol



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- Interest in 2005 SUA has not increased even after attacks by Houthi rebels against commercial ships in the Red Sea
- If there is a major terrorist incident that closes shipping in an international choke point such as the Straits of Malacca and Singapore or the Suez Canal, there is likely to be a revival interest in the 2005 SUA Protocol
- Conclusion: unfortunately, the development of the law by the IMO is often “disaster driven”



Thanks for Your Attention!
Questions & Comments, Please

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