

ISSUE FOCUS

Finding out the ‘Achilles’ Heels’: Piracy Suppression under International Law and Chinese Law

Manjiao Chi*

Piracy poses a great danger to international security and peace. It is necessary for the international community and individual States to take actions to suppress piracy. Despite international cooperation and existing international antipiracy laws, the international community lacks an effective legal regime to suppress piracy. China has fundamental interests in fighting against piracy and has actively cooperated in accordance with the relevant UNSC resolutions. However, China’s domestic antipiracy laws are defective in their substantive and procedural aspects. Further efforts should be made at both the national and international levels in order to effectively suppress global piracy.

Keywords

Piracy Suppression, UNCLOS, International Antipiracy Law, Chinese Criminal Law

* Associate Professor of International Law, Xiamen University Law School, P.R.C.; Deputy Secretary-General, Administrative Council, Xiamen Academy of International Law. BA, LL.M, Ph.D (Xiamen). Particular thanks are due to Mr. Shaopeng Zhu at Xiamen University Law School for his assistance in collecting the materials for this paper. The author also wishes to thank Prof. Eric Yong Joong Lee of Dongguk University College of Law, Korea and Prof. Congyan Cai of Xiamen University Law School for their unfailing support. The author is solely responsible for the opinions, errors and mistakes contained in this paper. The author can be contacted at chimanjiao@xmu.edu.cn / Address: 422 Siming South Road, Xiamen, 361005 China.

I. Introduction

Piracy has existed as long as maritime commerce, having begun during the Greek and Roman Empires.¹ China and Korea used to be raided by Japanese pirates as early as the 13th century. The height of piracy lasted throughout the 17th and 18th centuries.² Although piracy seemed to diminish from the 19th through most of the 20th century, it has made a strong resurgence in recent decades.³ The level of violence, significant loss of life and property, and danger to international navigation and to the marine environment have made piracy a serious threat to the international peace and security.⁴ According to the International Maritime Organization (“IMO”) and the International Maritime Bureau (“IMB”), piracy poses an increasing level of danger to the international community, particularly in the Gulf of Aden, the Horn of Africa and Southeast Asia.⁵

China and other East Asian countries are not immune from piracy. Acts of piracy against ships have a long history in this region, particularly in Southeast Asia.⁶ The Strait of Malacca is one of the world’s most dangerous maritime ‘choke points’ and hotspot for piracy.⁷ According to one commentator, there are various reasons why piracy is rampant in Southeast Asia: (1) extreme poverty; (2) separatism and extremism of ethnic groups; (3) unstable political circumstances; and (4) weak capacity to counter piracy.⁸ It has also been suggested that, given the geopolitical importance of Southeast Asia, the major regional sea powers including China, as well as the U.S., all have strategic motivation to establish a presence in this region and may use the threats of

¹ Michael Davey, *A Pirate Look at the Twenty-First Century: The Legal Status of Somali Pirates in an Age of Sovereign Seas and Human Rights*, 85 NOTRE DAME L. REV. 1197, 1200-05 (2010); Lucas Bento, *Towards an International Antipiracy Law Sui Generis: How the Dual Nature of Maritime Piracy Enables Piracy to Flourish*, 29 BERKELEY J. INT’L L. 401-406 (2011).

² Jose L. Jesus, *Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects*, 18 INT’L J. MAR. & COASTAL L. 363-364 (2003).

³ *Id.* at 364-365.

⁴ Davey, *supra* note 1, at 1205-07; John Mo, *Options to Combat Maritime Piracy in Southeast Asia*, 33 OCEAN DEV. & INT’L L. 343 (2002).

⁵ For detailed statistics on piracy attacks, see IMO, *Reports on Piracy and Armed Robbery*, available at <http://www.imo.org/OurWork/Security/PiracyArmedRobbery/Pages/PirateReports.aspx>; IMB, *Piracy News and Figures*, available at <http://www.icc-ccs.org/piracy-reporting-centre/piracynewsfigures> (all last visited on Dec. 25, 2011).

⁶ Sam Bateman, *Assessing the Threat of Maritime Terrorism: Issues for the Asia-Pacific Region*, 2 SECURITY CHALLENGES 80 (2006).

⁷ Joyce Dela Pena, *Maritime Crime in the Strait of Malacca: Balancing Regional and Extra-Regional Concerns*, 10 STAN. J. INT’L RELATIONS 1-2 (2009).

⁸ Guo Xinning, *Anti-Terrorism, Maritime Security, and ASEAN-China Cooperation: A Chinese Perspective*, available at www.iseas.edu.sg/tr152005.pdf (last visited on Dec. 20, 2011), at 8.

piracy and terrorism to justify that presence.⁹

Considering the serious danger posed by piracy, the international community faces an urgent need to effectively eliminate piracy. Because piracy occurs on the high seas, it is 'international' in nature. Such nature impliedly requires the international community to bear the primary obligation to protect international peace and security against piracy. In recent years, mainly in response to rampant piracy off the coast of Somalia, the United Nations Security Council ("UNSC") has adopted a series of resolutions, calling upon all States to cooperate to combat piracy.¹⁰ At present, naval escorting by some States seems the most prominent measure of piracy suppression at the international level. Many States have dispatched their naval escorting fleets to the Gulf of Aden and waters off Somalia. As one of the permanent members of the UNSC, China plays an important role to suppress piracy by dispatching naval escort fleets to the Gulf of Aden and the waters off the coast of Somalia.

There are also some States prosecuting captured pirates in domestic courts. Surprisingly, despite all these efforts, piracy remains rampant throughout the world. It is thus necessary to reflect upon current international antipiracy law to see if they are sufficient to suppress piracy, to find what, if any, defects exist, and to seek ways to improve antipiracy laws. Particularly, with respect to China, it is important to understand the nature of Chinese antipiracy laws and to clearly define what should be China's role in suppressing international piracy.

This paper critically analyzes the legal regimes of piracy suppression under international and Chinese law. It is composed of four parts including Introduction and Conclusion. Part II will analyze the current international antipiracy legal regime. Providing a skeletal review of three different bodies of international law that may be applied to piracy, this part will explore the major defects of international antipiracy law and the possible ways of improving it. Part III will deal with China's efforts to suppress piracy from the aspects of both international cooperation and domestic legislation. This part will analyze China's participation in international cooperation of piracy suppression, explore both the substantive and procedural aspects of Chinese antipiracy law, and discuss its defects and possible ways to improve upon these laws. In Conclusion, the author will propose the necessity of establishing an effective international legal regime on piracy suppression because the international community as well as individual States need to take their due responsibility in a coordinated and balanced manner.

⁹ Bateman, *supra* note 6, at 80.

¹⁰ U.N. Doc. S/Res/1816, 1838, 1846, 1851, 1897, 1918, 1950, 2015 & 2020.

II. Current International Antipiracy Laws and Their Major Defects

Although the international community is determined to suppress piracy, current international antipiracy laws are not fully organized to satisfy this consensus. Thus, piracy suppression remains a major challenge to the international community. This part briefly examines the proposition that piracy constitutes *jus cogens* crime under international law. It then explores the current international antipiracy legal regime from both substantive and procedural aspects. Finally, major defects of international antipiracy laws are discussed as well as possible solutions to these defects.

A. Piracy as *Jus Cogens* Crime under International Law

Jus cogens constitutes a “peremptory norm of general international law.”¹¹ It holds the highest hierarchical position among all other norms and principles under international law and is thus non-derogable.¹² Although the term ‘*jus cogens*’ did not take root in international legal discourse until the twentieth century, the principle that certain fundamental norms merit peremptory authority within international law bears a much older pedigree.¹³ It implies that they are not optional, but mandatory rights.¹⁴ An authoritative definition of *jus cogens* has been codified in the 1969 Vienna Convention on the Law of Treaties (“VCLT”). Article 53 of the VCLT defines *jus cogens* as “a norm accepted and recognized by the international community of States as a whole from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

There is no clear agreement, however, as to what crime constitutes a *jus cogens* crime under international law. So far, certain grave crimes violating peremptory norms can be deemed *jus cogens* crimes. According to M. Cherif Bassiouni, three elements should be considered to judge whether a particular international crime has violated *jus cogens*: (1) the historical legal evolution of the crime; (2) the number of States that have incorporated the given proscription in their national laws; and (3) the number of international and national prosecutions for the given crime and how they have been

¹¹ PETER MALANCZUK, *AKELHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW* 57-58 (7th ed. 1997).

¹² M. Cherif Bassiouni, *A Functional Approach to “General Principle of International Law,”* 11 MICH. J. INT’L L. 801-809 (1990).

¹³ Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT’L L. 334 (2009).

¹⁴ M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 L. & CONTEMP. PROBS. 65 (1996).

characterized.¹⁵ Over time, it has been largely established that a limited number of international crimes are *jus cogens* crimes, such as aggression, genocide, crime against humanity, war crime, piracy, slavery and torture.¹⁶

Under international law, recognizing piracy as a *jus cogens* crime is of paramount legal importance. If pirates are recognized as enemies of the human race, instead of ordinary criminals or combatants, States will have a much freer hand in capturing them and are likely to have them prosecuted by either international courts or domestic tribunals. More importantly, such recognition could impose the duty to prosecute or extradite the offenders, the non-applicability of statutes of limitation, application of universal jurisdiction, and deprivation of impunity to the violators.¹⁷

B. Current International Antipiracy Law

Despite the serious dangers posed by piracy, a coherent and coordinated approach to combating and eliminating piracy is lacking.¹⁸ One may easily note that international antipiracy law is insufficient. At the outset, it is necessary to briefly review both the substantive and the procedural aspects of current international antipiracy law.

1. The Substantive Aspects

Theoretically, piracy can be addressed through different branches of international law, such as the law of the sea, international antiterrorism law, and international law on the use of force.

First, piracy can be handled through international anti-terror laws, particularly given the fact that this body of law has received unprecedented and systematic codification in recent years. Although the international community has had difficulty in defining the parameters of global terrorism, the current level of agreement against terrorism is similar to what has been concluded against piracy.¹⁹ In a sense, “terrorists today, like pirates of old, are a threat to all States.”²⁰ It has been strongly proposed that piracy constitutes a form of ‘maritime’ terrorism and should thus be governed by international antiterrorism law.²¹ In this regard, various international treaties should be

¹⁵ *Id.* at 70.

¹⁶ *Id.* at 68.

¹⁷ *Id.* at 65-66.

¹⁸ Jesus, *supra* note 2, at 367.

¹⁹ Steven Swanson, *Terrorism, Piracy and the Alien Tort Statute*, 40 RUTGERS L. J. 161 (2008).

²⁰ Malvina Halberstam, *Terrorism on High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 92 AM. J. INT’L L. 289 (1998).

²¹ Swanson, *supra* note 19, at 77; Rommel Banlaoi, *Maritime Terrorism in Southeast Asia – the Abu Sayyaf Threat*, 58 NAVAL WAR COLLEGE REV. 63 (2005).

applied to piracy suppression, such as the 1979 International Convention against Taking of Hostages, the 1999 International Convention for the Suppression of the Financing of Terrorism, and the 2000 United Nations Convention against Transnational Organized Crime. Despite the merit of such propositions, they have practical defects. Because the current international antiterrorism laws mainly target terrorism occurring within the territories of States, particularly on land territories, it is difficult to apply such laws to the terrorist activities on the high seas, where most pirate activities occur.

Second, piracy may also be governed by the international law on the use of force. Chapter VII of the UN Charter lays down the key rules for collective self-defense actions under international law. According to Chapter VII, the UNSC is authorized to take actions to maintain international peace and security. In the context of piracy, Judge Treves stated:

Self-defense against an armed attack or the threat thereof, either in the questionable framework of the law of armed conflict or in the discussed framework of resort to it against non-State actors, or, more likely, as a self-imposed rule of engagement for police action, seems to be a guiding principle of States the navies of which are engaged in fighting pirates off the coast of Somalia and neighboring States.²²

Applying international law on the use of force against piracy has been confirmed by a series of UNSC resolutions in response to rampant piracy off the coast of Somalia in recent years.²³ In these resolutions, the UNSC often linked the activities of pirates with the notion of a threat to international peace and security and thereby authorized the international community to “take all necessary measures” to combat piracy not only in the territorial waters of Somalia, but also in the mainland of Somalia.²⁴

Last, given that piracy generally occurs on the high seas, it should be governed by the law of the sea. In fact, current international antipiracy law has been established within the framework of the law of the sea. To date, there are a few international conventions regarding piracy, such as the 1958 Convention on the High Seas (“High Seas Convention”), the 1982 United Nations Convention on the Law of the Sea (“UNCLOS”) and the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (“SUA Convention”). In particular, the UNCLOS has elaborated the modern rules against piracy.

²² Tullio Treves, *Piracy, Law of the Sea and Use of Force: Developments off the Coast of Somalia*, 20 EUR. J. INT’L L. 413 (2009).

²³ There are various UN Security Council resolutions dealing with piracy off the coast of Somalia and in the Gulf of Guinea. See UN Security Council Resolutions 1816, 1838, 1846, 1851 and 1897, 1918, 1950, 1976, 2015 and 2020, available at http://www.un.org/depts/los/piracy/piracy_documents.htm (last visited on Dec. 20, 2011).

²⁴ E.g., UN Security Council Resolutions 1816, 1846, 1851 and 1897.

The High Seas Convention is the first international legal measure to provide a comprehensive definition of piracy, which was based on the preparatory work of the UN International Law Commission (“ILC”) and the Draft Convention on Piracy prepared by the Harvard Research in International Law in the 1930s.²⁵ Articles 14 through 21 of the High Seas Convention deal with a broad range of issues relating to piracy suppression, such as international cooperation, the definition of piracy, loss of the national character of pirates, jurisdiction over piracy, and seizure of pirates. These regulations are almost identical to those contained in Articles 100 through 107 of the UNCLOS. The latter is deemed to have established the legal framework for piracy suppression in contemporary international law, many of which are considered to reflect customary international law.²⁶

The *Archille Lauro* incident of 1985 revealed the inherent loopholes of international antipiracy law. It ignited the international community to adopt the SUA Convention to suppress a broader range of maritime terrorist activities and to fill these loopholes.²⁷ The SUA Convention addresses the issue of piracy from a different perspective. With a more specific purpose of suppressing unlawful maritime acts, it contains a comprehensive list of new offences which actually constitute piracy such as the seizure or exercise of control over a ship by force or threat of force or intimidation, an act of violence against a person on board if that act is likely to endanger safe navigation of the ship, destroying or damaging a ship or cargo, destruction or serious damage to maritime navigational facilities, communication of false information and injuring or killing of any persons in connection with any of the above acts.²⁸ The SUA Convention addresses a much broader range of unlawful maritime activities than those recognized as piracy by the High Seas Convention and the UNCLOS. For those reasons, the SUA Convention is deemed to represent a major step forward in advancing international antipiracy law.²⁹

In addition to the above mentioned international conventions, there are regional agreements that impose obligations and responsibilities on signatory States for piracy suppression. For instance, the 2006 Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (“ReCAAP”) is the first regional intergovernmental agreement to promote and enhance cooperation against piracy and armed robbery in Asia. To date, seventeen States have become contracting parties to the

²⁵ Ivan Shearer, *Piracy*, in *ENCYCLOPEDIA OF PUBLIC INT’L L.* (R. Wolfrum ed., online version. June 2008).

²⁶ A.P. RUBIN, *THE LAW OF PIRACY* (2nd ed. 1998), at 334.

²⁷ Halberstam, *supra* note 20, at 270, 291; Helmut Tuerk, *Combating Piracy at Sea: The Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 15 U. MIAMI INT’L & COMP. L. REV. 338-339 (2008).

²⁸ SUA Convention art. 3.

²⁹ It is suggested that the SUA Convention is “sufficiently broad in its geographic application, its definition of offences and its provisions for jurisdiction to permit effective legal actions against those who engage in maritime terrorism.” See Halberstam, *supra* note 20, at 308-309.

ReCAAP, including China.³⁰ It is reported that the ReCAPP “has been operating with some success in Asia” and could be a model for other countries.³¹

2. *The Procedural Aspects*

The jurisdictional issue is the threshold for the procedure of subduing piracy. Under international law, the most important basis for jurisdiction is ‘territory’; each State undoubtedly has legislative jurisdiction over events taking place and persons found within its own territory.³² A State also has territorial jurisdiction over ships flying its flag.³³ However, as piracy occurs on the high seas or off the coasts of States, territorial jurisdiction is often unworkable. In such a case, universal jurisdiction exists to “fill this jurisdictional gap”³⁴ and “to restrict the flag State principle.”³⁵

In practice, universal jurisdiction over piracy means that not only the flag State but other States may also enjoy jurisdiction over piracy. On this point, Malvina Halberstam explains that:

The customary law of piracy can be best understood as an attempt to balance the need for universal jurisdiction against the reluctance of states to permit encroachment on their exclusive jurisdiction. States accepted universal jurisdiction over piracy because pirates (1) attacked the ships of all states indiscriminately and were thus a threat to all states, and (2) were not subject to the authority of any state, and therefore no state could be held responsible for their acts.³⁶

From a historical perspective, piracy has been recognized as a crime under universal jurisdiction.³⁷ It has been also an inspiration for the modern expansion of universal jurisdiction.³⁸ Judge Moore’s dissenting opinion in the *Lotus* Case laid down the legal

³⁰ See *About ReCAAP*, available at <http://www.recaap.org/AboutReCAAPISC.aspx> (last visited on Dec. 30, 2011).

³¹ RAND National Defense Research Institute, *Countering Piracy in the Modern Era: Notes from a RAND Workshop to Discuss the Best Approaches for Dealing with Piracy in the 21st Century*, available at http://www.rand.org/pubs/conf_proceedings/2009/RAND_CF269.pdf (last visited on Dec. 30, 2011), at 2.

³² John Knox, *A Presumption of Extrajurisdictionality*, 104 AM. J. INT’L L. 351, 356 (2010). See also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 179, ¶ 109 (July 9).

³³ Knox, *Id.* at 356.

³⁴ Eugene Kontorovich & Steven Art, *An Empirical Examination of Universal Jurisdiction for Piracy*, 104 AM. J. INT’L L. 436, 447 (2010).

³⁵ Rüdiger Wolfrum, *Fighting Terrorism at Sea: Options and Limitations under International Law*, available at http://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/doherty_lecture_130406_eng.pdf, at 2 (last visited on Dec.30, 2011).

³⁶ Halberstam, *supra* note 20, at 287-288.

³⁷ Shearer, *supra* note 25.

³⁸ Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, 45 HARV. INT’L L. J. 183-184, 197-207 (2004).

foundation for universal jurisdiction over piracy:

It [piracy] is an offense against the law of nations, and as the scene of the pirates' operation is the high seas, which it is not a right or duty of any nation to police, he is denied the protection of the flag which he may carry, and is treated as an outlaw, as an enemy of all mankind - *hostis humani generis*, whom any nation may in the interest of all capture and punish.³⁹

Judge Moore's opinion received wide acceptance. For instance, it is stated in Oppenheim's International Law that "a pirate has always been considered outlaw, *hostis humani generis*" and that "according to international law, the act of piracy makes the pirate lose the protection of his home state and thereby his national character."⁴⁰ Today, universal jurisdiction over piracy is undisputed.⁴¹ It has been codified in both the High Seas Convention and the UNCLOS.⁴²

C. Major Defects of Current International Antipiracy Law

Despite the codification of customary international law rules against piracy, "there is some difficulty in applying the law of piracy to acts of terrorism even against ships on the high seas."⁴³ As the international community followed the increase of piracy off the coast of Somalia, several issues regarding international antipiracy law emerged. Highly topical issues are related to geographic location, the scope of punishable actions, and the rights and duties of States in apprehending and trying suspected pirates.⁴⁴ The following are the two most outstanding questions.

1. The Narrow Definition of Piracy

One major defect of international antipiracy law lies in the narrow definition of piracy enshrined in relevant international conventions. A typical definition of piracy is provided by Article 101 of the UNCLOS, which is almost identical to the definition

³⁹ Dissenting Opinion by Judge Moore, *Lotus Case* (1927), P.C.I.J. (ser. A), No.10, at 70.

⁴⁰ ROBERT JENNINGS & ARTHUR WATTS, *OPPENHEIM'S INTERNATIONAL LAW* (9th ed. 1992), at 746.

⁴¹ *Id.* at 745-46. See also Kenneth Randall, *Universal Jurisdiction under International Law*, 66 TEX. L. REV. 785, 803-804 (1988); Anthony Sammons, *The "Under-Theorization" of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts*, 21 BERKELEY J. INT'L L. 111, 125-26 (2003); Mark Summers, *The International Court of Justice's Decision in Congo v. Belgium: How Has It Affected the Development of a Principle of Universal Jurisdiction That Would Obligate All States to Prosecute War Criminals*, 21 B.U. INT'L L. J. 87 (2003).

⁴² High Seas Convention art. 19; UNCLOS art. 105.

⁴³ Jennings & Watts, *supra* note 40, at 754.

⁴⁴ J. Ashley Roach, *Countering Piracy off Somalia: International Law and International Institutions*, 104 AM. J. INT'L L. 397 (2010).

contained in Article 15 of the High Seas Convention. Article 101 of the UNCLOS states that:

Piracy consists of any of the following:

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

This definition lays down the ground of international antipiracy law. It consists of several key elements, including *inter alia* (1) the “high seas requirement” (piratical activities must be committed on the high seas); (2) the “two ships requirement” (piratical attack on a ship must originate from another ship or aircraft); and (3) the “private ends requirement” (piratical activities must be for private ends).⁴⁵ These requirements are open to challenge and make the definition problematic in many ways. The loopholes of these requirements have been shown by various cases, such as the *Archille Lauro* and the *Santa Maria* incidents.⁴⁶

First, according to the “high seas requirement,” any illegal acts of violence and detention which are committed within State’s territorial waters and lands are not regarded as piracy under international law.⁴⁷ Such acts are to be dealt with by the jurisdictional States. This requirement excludes many activities out of piracy under international law. For examples, piracy activities are rampant both off the coast of

⁴⁵ IMO, *Piracy: Elements of National Legislation pursuant to the United Nations Convention on the Law of the Sea*, 1982, LEG 98/8/1, Feb. 18, 2011, at 4-5.

⁴⁶ See generally Halberstam, *supra* note 20, at 286-287; L. Green, *The Santa Maria: Rebels or Pirates*, 37 BRIT. Y. B. INT’L L. 503 (1961); ROBIN GEIS & ANNA PETRIG, *PIRACY AND ARMED ROBBERY AT SEA: THE LEGAL FRAMEWORK FOR COUNTER-PIRACY OPERATIONS IN SOMALIA AND THE GULF OF ADEN* (2011), at 62; Tracey Madden, *An Analysis of the United States’ Response to the Achille Lauro Hijacking*, 8 B.C. THIRD WORLD L.J. 137-148 (1988).

⁴⁷ Here, it is helpful to be reminded that, according to Article 58(2) of the UNCLOS, the provisions regarding piracy suppression contained therein shall also be applied to the Exclusive Economic Zone (“EEZ”). This is the logical concomitant to Article 58(1) of the UNCLOS, pursuant to which various aspects of the high seas freedom set forth in Article 87 of the UNCLOS shall also be applied to the EEZ. For further discussion on this issue, see Roach, *supra* note 44, at 398.

Somalia and within its territorial waters and mainland. Acts of piracy in Southeast Asia also occur within territorial waters or ports; pirates often rob ships at anchor or berthed.⁴⁸ However, these piracy activities cannot be classified as piracy within the scope of the UNCLOS, because they fail to meet the “high seas requirement.” As Dana Dillon has observed, “only 122 reported pirate attacks, or 27 percent of actual and attempted attacks against vessels, took place on the high seas in 2003, while the rest of the attacks occurred in ports and territorial waters well inside the jurisdiction of a State.”⁴⁹

Second, the “two ships requirement” was intended to codify customary law; if only one ship is involved in the activity, then the flag State should have jurisdiction and such activity should not be deemed as piracy.⁵⁰ On this point, when presenting the elements of definition of piracy to the ILC, the Rapporteur has stated that: “A simple act of violence on the part of crew or passengers does not constitute itself the crime of piracy, not at least as far as international law is concerned . . . [t]hey are pirates only when the revolt is directed, not merely against the master, but also against the vessel, for the purpose of converting her and her goods to their own use.”⁵¹ Judge Jesus has also confirmed that, after carefully examining the relevant provisions of the UNCLOS and its *travaux préparatoires*, “the piracy definition does not and was not supposed to contemplate the one-ship situation.”⁵²

The loopholes of this requirement can be best explained by the *Santa Maria* case and the *Achille Lauro* Case. In the former case, the Portuguese ship, *Santa Maria*, was seized by its own captain and other crew members for the purpose of overthrowing the Dictator Salazar of Portugal. Portugal had asked the U.S., the Netherlands and the U.K. to search and capture the ship in accordance with “the well-defined terms of international law governing piracy and insurrection on board ship.” The U.S. State Department, after capturing the ship, announced that it “had acted under international laws against piracy.”⁵³ The positions of the U.S. and Portugal raised a serious challenge to the definition of piracy, because the “two ships requirement” was obviously not satisfied.⁵⁴ For the same reason, it is also argued that the U.S. response in the *Achille Lauro* Case was inconsistent with the two ships requirement, because the hijackers did not board the ship from another private ship.⁵⁵

Third, the “private ends requirement” was originally designed to distinguish ‘piracy

⁴⁸ Dana Dillon, *Maritime Piracy: Defining the Problem*, 25 SAIS REV. 155-157 (2005).

⁴⁹ *Id.* at 156.

⁵⁰ Halberstam, *supra* note 20, at 285-286.

⁵¹ [1955] 1 Y.B. INT’L L. COMM’N, at 42.

⁵² Jesus, *supra* note 2, at 376-377.

⁵³ Halberstam, *supra* note 20, at 286.

⁵⁴ Green, *supra* note 46, at 503.

⁵⁵ Madden, *supra* note 46, at 144.

activities' from "sheer politically motivated violent activities," because it is an important factor when determining coverage under a policy of marine cargo insurance. However, this requirement lacks precision as a legal test. As Judge Jesus noted, "there are gray areas that make it difficult to distinguish an act for private ends from an act in pursuit of a politically-motivated one."⁵⁶ Judging from its plain meaning, the term 'private' could be quite broad; it is difficult to tell precisely whether a given act is for private ends or not. Neither the High Seas Convention, nor the UNCLOS provides a clear definition of this requirement. According to Harvard Research in International Law, on which the UNCLOS' piracy provisions were based, private ends can be theft or the desire for gain, but it could also be translated into "acts of personally motivated hatred or sheer vengeance."⁵⁷

The private ends requirement also seems somehow obsolete because it excludes many "new types of piracy activities" which are for political and other ends. In addition, this requirement also excludes acts of violence and depredation exerted by environmentally-friendly groups or persons, acts to destabilize a government or to cause unrest and terror to blackmailing a government or for religious or ethnic grounds, and acts for liberation movements or insurgents — some of which are typical forms of terrorist activities.⁵⁸ In recent years, evidence shows that piratical activities for non-private ends are getting popular. As mentioned, the hijackers of the *Archille Lauro* were reported to be members of Palestinian Liberation Front ("PLF"), a faction of the Palestinian Liberation Organization ("PLO"), who required then Israel to release fifty Palestinian prisoners.⁵⁹ The hijackers of the *Santa Maria* were seeking to overthrow the Portuguese dictatorship. Recently, it has also been reported in Indonesia that pirates will seize ships and take hostages for ransom in order to fund their political activities.⁶⁰

2. The Inadequacy of Piracy Prosecution

Effective piracy suppression requires military, legislative and judicial efforts as a whole. Deterring piracy from recurring on the high seas by resorting to military presence or use of force is insufficient to eradicate piracy; bringing pirates to justice is indispensable. However, to date, the situation of piracy prosecution at both international and national levels appears unsatisfactory for the following reasons.

⁵⁶ Jesus, *supra* note 2, at 379.

⁵⁷ See Harvard Research in International Law, *Draft Convention Draft on Piracy*, reprinted in 26 AM. J. INT'L L. (SUPPL.) 789 (1932).

⁵⁸ Wolfrum, *supra* note 35, at 3; Halberstam, *supra* note 20, at 282-83.

⁵⁹ The United States and some scholars regarded the seizure as piracy, but others opposed to such characterization. See Halberstam, *supra* note 20, at 269-70 & 282.

⁶⁰ S. McMillan, *Piracy: An Old Menace RE-emerges*, 27 NEW ZEALAND INT'L REV. 21 (2002).

First, the international community lacks a special tribunal dedicated to the prosecution of pirates. Consequently, piracy prosecution largely relies on individual States. On the one hand, piracy is ironically one of those few international crimes that received the earliest and widest recognition. On the other hand, the international community has already established several special criminal tribunals for prosecuting individuals liable for war crimes, crimes against humanity and genocide, such as the International Criminal Court (“ICC”), the International Criminal Tribunal for Rwanda (“ICTR”) and the International Criminal Tribunal for Former Yugoslavia (“ICTY”). Today, the increase in acts of piracy warrants an international antipiracy tribunal as piracy may be considered a “crime against humanity.”

Second, although universal jurisdiction over piracy has been established under international law, the High Seas Convention and the UNCLOS only established permissive jurisdiction but not obligatory jurisdiction over piracy, which cannot hold individual States responsible for prosecuting pirates. Specifically, both Article 19 of the High Seas Convention and Article 105 of the UNCLOS provide that contacting States *may* “seize the ship or aircraft,” “arrest the persons,” “seize the property on board” and “determine the action to be taken.” [Emphasis added] These provisions are discretionary in nature. On this point, J. Ashley Roach has insightfully pointed out that:

This article [Article 105 of the UNCLOS], like all of the piracy provisions save Article 100 [of the UNCLOS], is discretionary - ‘may’ - and does not expressly limit the set of states that may cooperate in suppressing a particular act of piracy; nor does it expressly set forth any priority among the affected states, such as the flag state of the pirated vessel, the state(s) of nationality of the crew of the pirated vessel, the state of nationality of the pirates, the state(s) of nationality of the cargo interests, or the flag state of the warship that seized the pirate ship.⁶¹

Because there is not an international legal regime to effectively bring pirates to justice, individual States are expected to play the major role in prosecuting pirates. In other words, piracy prosecution should, and in fact does, rely on efforts at the national level. For this reason, it has been suggested that international antipiracy law is ‘unique.’ Bento has maintained:

From a statutory perspective, maritime piracy occupies a unique place in international law. This is because, under the UNCLOS, pirates are arrested and captured on the high seas for committing a crime that is international by nature, but they are then punished and prosecuted by domestic laws and courts.⁶²

⁶¹ Roach, *supra* note 44, at 403.

⁶² Bento, *supra* note 1, at 429.

Meanwhile, the UNSC, in its resolutions, highlighted that States should bear their due share in piracy suppression either individually or collectively. The UNSC has called upon States to take steps under their national laws to combat piracy.⁶³ The General Assembly has also asked States to cooperate with the IMO to “facilitate the apprehension and prosecution of those who are alleged to have committed acts of piracy.”⁶⁴ In order for domestic courts to effectively prosecute piracy, it is necessary for the State to have political willingness, to allocate economic and judicial resources, and, most of all, to establish a sound domestic legal framework.

Several States have tried Somali pirates in their domestic courts. A Dutch court tried five Somali pirates in early 2009.⁶⁵ A U.S. court sentenced a Somali pirate to thirty years in jail in 2010 for attacking a U.S. warship off the coast of Somalia.⁶⁶ More recently, the Supreme Court of Korea upheld a ruling by a Busan district court, sentencing one Somali pirate to life in prison for hijacking a freighter and attempting to murder the Korean captain, and four other pirates to twelve to fifteen years in jail for their participation in the act of piracy.⁶⁷

From 2008 to 2009, Kenya became a primary destination for the prosecution of pirates captured off the coast of Somalia.⁶⁸ Kenya’s piracy prosecution was largely due to the international calling rather than a measure taken on its own initiative. In response to the UNSC Resolution 1851, Kenya concluded agreements with the U.K., the U.S., the EU and Denmark to prosecute suspected pirates captured by these States.⁶⁹ Although it has been argued that the lack of a nexus between non-national pirates captured by third States on the high seas provides significant challenges to justifying universal jurisdiction over pirates in Kenya,⁷⁰ the Kenyan courts have justified the piracy prosecutions as authorized under Kenya’s Penal Code, supplemented by Article 101 of the UNCLOS.⁷¹

⁶³ S.C. Res. 1950, ¶ 13, U.N. Doc. S/RES/1950 (Nov. 23, 2010); G.A. Res. 65/37, ¶ 86, U.N. Doc. A/65/37 (Dec. 7, 2010).

⁶⁴ G.A. Res. 64/71, ¶ 73, U.N. Doc. A/64/71 (Mar. 12, 2010).

⁶⁵ Bruno Waterfield, *Somalia Pirates Embrace Capture as Rout to Europe*, TELEGRAPH, May 19, 2009, available at <http://www.telegraph.co.uk/news/worldnews/piracy/5350183/Somali-pirates-embrace-capture-as-route-to-Europe.html> (last visited on Dec. 20, 2011).

⁶⁶ BBC, *US Court Sentences Somali Pirate to 30 Years*, available at <http://www.bbc.co.uk/news/world-us-canada-11871563> (last visited on Dec. 20, 2011).

⁶⁷ Joo-yeon Bae, *Supreme Court Upholds Life Sentence for Somali Pirate*, available at http://world.kbs.co.kr/english/news/news_Po_detail.htm?No=86943&id=Po (last visited on Dec. 20, 2011).

⁶⁸ Jeffrey Gettleman, *Rounding up Suspects, the West Turns to Kenya as Piracy Criminal Court*, N.Y. TIMES, Apr. 24 2009, at A8.

⁶⁹ James Gathii, *Kenya’s Piracy Prosecutions*, 104 AM. J. INT’L L. 434 (2010).

⁷⁰ James Gathii, *Jurisdiction to Prosecute Non-National Pirates Captured by Third States Under Kenyan and International Law*, 31 LOY. L.A. INT’L & COMP. L. REV. 363-364 (2009).

⁷¹ Gathii, *supra* note 69, at 434.

However, since late 2009, Kenya has declined to accept any more piracy suspects from non-Kenyan naval forces because Kenya felt it was “shouldering more than its fair share of the burden in prosecuting piracy.”⁷² Consequently, the UNSC adopted a resolution to call upon States to criminalize piracy in their domestic laws and to propose the creation of a regional or international antipiracy tribunal.⁷³

There are many reasons that explain why States are reluctant or unable to prosecute pirates in their domestic courts. The first reason is that States neither show strong political intention, nor have well-arranged domestic laws to prosecute pirates.⁷⁴ This is particularly true for States which either have little interests in seaborne trade, or are non-coastal States. The recent refusal of Kenya to prosecute pirates from non-Kenyan naval forces clearly shows that the sustainability of piracy prosecution by domestic courts could be seriously challenged due to the limited resources of the hosting State(s).

The second reason lies in the gap between domestic law and international law. Although many States are parties to the UNCLOS, the Convention does not require them to enact domestic antipiracy laws that align with its provisions, nor does it provide model laws for States.⁷⁵ The UNCLOS is based on the presumption that States have adequate domestic legislation to prosecute pirates.⁷⁶ However, such presumption does not exist in reality because many States do not have sufficient domestic antipiracy law. The legislative gap can be sensed from various aspects: (1) when domestic laws fail to criminalize piracy, piracy activities can only be charged as other crimes; (2) when domestic laws fail to establish obligatory jurisdiction over piracy, domestic courts are sometimes reluctant to prosecute pirates; and (3) when domestic courts exercise such jurisdiction in accordance with domestic procedural law due chiefly to the ‘dualist doctrine’ between international and municipal law. Criminal procedural laws of many countries set forth strict requirements for domestic courts to exercise universal jurisdiction. Thus, it is unsurprising to observe that recent empirical study has shown that States often seem unable or unwilling to prosecute pirates by exercising universal jurisdiction.⁷⁷ Consequently, the gap between domestic and international antipiracy laws seriously paralyzes States in effectively prosecuting pirates. It has been suggested by the RAND National Defense Research Institute that:

⁷² *Id.* at 435.

⁷³ S.C. Res. 1918, U.N. Doc. S/1918 (Apr. 27, 2010).

⁷⁴ Peter Chalk, Laurence Smallman & Nicholas Burger, *Countering Piracy in Modern Era*, available at <http://www.rand.org> (last visited on Dec. 20, 2011), at 1.

⁷⁵ Bento, *supra* note 1, at 422.

⁷⁶ Martin Murphy, *Piracy and the UNCLOS: Does International Law Help Regional States Combat Piracy?*, in *VIOLENCE AT SEA: PIRACY IN THE AGE OF GLOBAL TERRORISM* (Peter Lehr ed. 2007), at 166.

⁷⁷ Kontorovich & Art, *supra* note 34, at 436.

There is an appreciation of the need for national governments to enact and enforce domestic laws congruent with the responsibilities imposed by international agreements such as the United Nations Convention on the Law of the Sea and the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation. At present, there is no single point of reference that details which states actually have the necessary laws and statutory provisions to execute their obligations under these two accords, and this is certainly something that could be usefully addressed.⁷⁸

The third reason why States are unable to prosecute piracy is that the strict procedural requirements contained in the criminal procedural laws of many States pose potential barriers against effective piracy prosecution. Lack of evidence is a common problem, particularly when pirates are not captured by a prosecuting state's navy or crew members. For instance, Russia once hoped to prosecute Somali pirates but could not identify them in the end because the Russian crew members had secured themselves in a safe-room during the attack and did not see the pirates' faces.⁷⁹ If no conclusive evidence can be generated, it can be very difficult to prove that armed men on a boat on the high seas are pirates and it becomes unlikely that criminal charges will be brought.⁸⁰ For this reason, the so-called "catch-and-release policy" has become a common practice among naval forces of many countries.⁸¹ Unless States revise their criminal procedural law to allow more lenient evidentiary rules to be applied in piracy prosecution, such results seems unlikely to be changed.

3. *Improving Current International Antipiracy Law*

As shown above, the current international antipiracy law has both substantive and procedural defects. To sum up, at the international level, the major defects are the narrow definition of piracy and the lack of an international antipiracy tribunal; at the national level, there is a lack of domestic antipiracy legislation and ineffective piracy prosecution by domestic courts. Given the increasing seriousness of piracy, there is an urgent need for both the international community and individual States to improve the international legal system against piracy.

⁷⁸ RAND National Defense Research Institute, *Countering Piracy in the Modern Era: Notes from a RAND Workshop to Discuss the Best Approaches for Dealing with Piracy in the 21st Century*, available at http://www.rand.org/pubs/conf_proceedings/2009/RAND_CF269.pdf (last visited on Dec. 30, 2011), at 2.

⁷⁹ Bento, *supra* note 1, at 411-412.

⁸⁰ Eugene Kontorovich, "A Guantanamo on the Sea": *The Difficulty of Dealing with Pirates and Terrorists*, 98 CALIF. L. REV. 263-264 (2010).

⁸¹ Carrie Johnson, *Fighting Piracy at Sea and In Court*, NAT'L PUB. RADIO, Feb. 26, 2011, available at <http://m.npr.org/news/front/134063231> (last visited on Dec. 30, 2011); *Cf.* Bento, *supra* note 1, at 411.

As insightfully stated by Judge Wolfrum, the narrow definition of piracy only covers “a small segment of violence on the high seas.”⁸² Due chiefly to the three requirements mentioned above, the legal threshold is too high for many maritime violent activities to qualify as piracy, although these activities may pose no less danger to international navigational safety. Now, two major methods can be adopted by the international community to cure these defects.

One way is to expand the definition of piracy in international law. The expansion of the definition could carry extra legal significance considering the fundamental and constructive role of the definition. In fact, a broadened definition of piracy has been provided by the IMB. According to the IMB definition, piracy refers to “an act of boarding or attempted boarding with the intent to commit theft or any other crime and with the intent or capability to use force in furtherance of that act.”⁸³ The IMB definition not only overcomes the distinctions between the high seas and territorial waters, but is also broad enough to include any attack or attempted attack on a ship, whether it is anchored, berthed or at sea. This definition does have some legal basis derived from definitions in domestic laws as well as authoritative legal cases and opinions.⁸⁴ However, given all of the merits, it is still open to question as to whether and to what extent this definition could be recognized by international law.⁸⁵ Moreover, if the international community accepts the broadened definition of piracy, Article 111 of the UNCLOS should be amended to permit hot pursuit of suspected pirate vessels by foreign naval air and sea vessels into territorial waters with notification to and approval from the relevant authorities.⁸⁶

Another solution is that the UNSC should address the issue on behalf of the international community; this seems more acceptable in practice. As Judge Treves has observed, since Resolution 733 of 1992, the UNSC, invoking Chapter VII of the UN Charter as regards the situation in Somalia, has routinely stated that rampant piracy constitutes or continues to constitute a threat to international peace and security.⁸⁷ With these resolutions, the international community was authorized to suppress piracy activities off the coast of Somalia, within its territorial waters and mainland through the use of force. In these cases, it does not matter if the piracy activities in question meet the requirements set forth by the UNCLOS, as long as the UNSC regards them as a threat to

⁸² Wolfrum, *supra* note 35, at 5.

⁸³ IMB, *Piracy and Armed Robbery against Ships*, ANNUAL REPORT (Jan. 1–Dec. 31, 2007).

⁸⁴ Edward Eadie, *Definitions of piracy, particularly that of the International Maritime Bureau*, available at <http://www.austlii.edu.au/au/journals/MarStudies/2001/16.html> (last visited on Dec. 20, 2011).

⁸⁵ Dillon, *supra* note 48, at 160.

⁸⁶ *Id.*

⁸⁷ Treves, *supra* note 22, at 400–401.

international peace and security. Because the UNSC resolutions would often appear as an 'urgent response' to grave security concerns, however, they cannot be deemed as a sustainable and routine way for piracy suppression.

Obviously, both methods break the boundary of the definition of piracy contained in the UNCLOS. However, as the UNCLOS remains the core of the current international antipiracy law, it remains to be seen whether these methods can receive wider international recognition. At present, a more urgent need is to make the UNCLOS compatible with State practice and the other related instruments in order to create clear legal guidelines for addressing piracy.⁸⁸

Piracy suppression not only lies in fighting against pirates at sea, but it also depends on effective prosecution of pirates. However, for various legal and practical reasons, States are often reluctant or unable to prosecute pirates in their domestic courts, in spite of the universal jurisdiction over piracy. Further, even if domestic courts exercise jurisdiction over piracy, they have to overcome various procedural barriers and allocate enormous economic and judicial resources to fulfill this task. As implied by the Kenyan experience, piracy prosecution in domestic courts could be burdensome for many countries. Indeed, obligating a few States to prosecute piracy in their domestic courts would, to a certain extent, require them to shoulder the obligation of piracy suppression for the international community as a whole. This is unfair and unsustainable for these nations. Current international antipiracy law fails to provide sufficient incentives for individual States, particularly those which are neither directly nor heavily affected by piracy, to fully engage in piracy suppression. Such situation calls for not only more unified criminal laws and procedural laws at the national level, but also establishing an international antipiracy tribunal.

III. China and Piracy Suppression

China has a pressing obligation and can receive great benefits by suppressing piracy as follows: (1) China bears international (treaty) obligation to suppress piracy since it has ratified the SUA Convention and the UNCLOS on August 20, 1991 and June 7, 1996, respectively;⁸⁹ (2) China bears a moral obligation to maintain international peace and

⁸⁸ Ryan P. Kelley, *The UNCLOS, but No Cigar: Overcoming Obstacles to the Prosecution of Maritime Piracy*, 95 MINN. L. REV. 2317 (2011).

⁸⁹ For the status of the SUA Convention, see SUA 2005 and Montreal Convention, available at <http://cns.miis.edu/inventory/pdfs/apmsuamontreal.pdf>; For the status of the UNCLOS, UNTS, available at <http://treaties.un.org> (all last visited on Dec. 20, 2011).

security as one of the five permanent members of the UNSC; (3) China as a major trading power has great interests in the safety of seaborne trade; and (4) China's ships have suffered severely from piratical activities in recent years. To effectively suppress piracy, China needs to not only actively participate in international cooperation, but also enhance its domestic criminal law.

A. China's Participation in International Cooperation of Piracy Suppression

Current international law provides that piracy as such shall not occur in areas subject to State sovereignty, but only on the high seas. For such a reason, it would be practically difficult for any individual State to be responsible for piracy suppression. The 'international' or 'extraterritorial' nature of piracy necessitates international cooperation to effectively combat piracy. International cooperation has recently been highlighted because pirates have been organized in a more complex level and acquired better equipment, arms and intelligence.⁹⁰ Both the High Seas Convention and the UNCLOS focus on the importance of international cooperation for piracy suppression, although neither provides for concrete cooperation regimes.⁹¹ Despite the differences between these Conventions, it is fair to recognize that under international law, States are required to take necessary and feasible efforts to cooperate to combat piracy, while the implementation shall be decided by the States themselves or the relevant international organizations, such as the UNSC or the IMO.

In the past, China actively cooperated with the international community combating piracy. Although Chinese law does not contain provisions clearly enunciating how China should participate in international cooperation, the Central People's Government of China has, on various occasions, clarified the purpose and scope of China's participation in global piracy combating. China's dispatching its naval force to the Gulf of Aden and Somali waters is a typical example of its participation.

Since civil war broke out in 1991, the security situation in Somalia has severely deteriorated. In the beginning of the 21st century, piratical activities became violent off the Somali coast, territorial waters, and mainland. Considering the volume of China's maritime trade, the worsening maritime security in the Gulf of Aden seriously threatens Chinese ships and their crew members. In recent years, piratical activities against Chinese ships and crew members in that area have been rising.⁹² To respond to Somali

⁹⁰ Dillon, *supra* note 48, at 160.

⁹¹ High Seas Convention art. 14; UNCLOS art. 100.

⁹² See A Chinese Fishing Ship Hijacked by Somali Pirates Off Coast of Kenya (available only in Chinese), XINHUA NEWS AGENCY, available at http://www.gov.cn/jrzq/2008-11/14/content_1149527.htm (last visited on Dec. 20, 2011).

piracy, the UNSC adopted a series of resolutions to call upon States to “take all necessary measures” to combat piracy to maintain international peace and security.⁹³

China, as one of the permanent members of the UNSC, actively takes part in combating global piracy. Upon the approval of the Central Military Commission of the Community Party, China’s first naval escort fleet, composed of three warships and around 800 crew members, was dispatched from Hainan Province to the Gulf of Aden on December 26, 2008.⁹⁴ This expedition was the first time in centuries that China’s navy undertook a mission on the high seas.⁹⁵ China has dispatched 10 naval escort fleets to the Gulf of Aden and Somali waters, some of which have already returned after completing their missions.⁹⁶

As stated by Huang Huikang, Director-General of the Department of Treaty and Law of the Ministry of Foreign Affairs, the legal basis for China combating piracy in the Gulf of Aden and the waters off the coast of Somalia are the relevant UNSC resolutions and the consent of Somalia.⁹⁷ China’s Defense Ministry has, on various occasions, relied on the relevant resolutions to justify its naval escort actions:

Chinese warships’ escorting operations off Somali coast are reasonable and legitimate. . . . To maintain the security and stability of the Gulf of Aden and the waters off the Somali coast, the UNSC passed Resolutions 1816, 1838, 1846 and 1851 in succession, empowering all countries to “take all necessary and proper measures to put a stop to pirating operations and maritime armed plunder in the territory of Somali within 12 months in pursuant to Chapter VII of The UN Charter.”⁹⁸

It must be mentioned that, despite its active participation, China also sets the limit for its naval escorting activities in the Gulf of Aden. The main purposes, according to the Defense Ministry of China, are “to escort and save the ships that are released or attacked by the pirates” and “to conduct intelligence communication, mutual visits of

⁹³ UN Security Council Resolutions 1816(2008), 1846(2008), 1897(2009), and 1950(2010).

⁹⁴ Ministry of National Defense of the People’s Republic of China, *Chinese Naval Fleet Sails into Strait of Malacca*, available at http://eng.mod.gov.cn/Photos/2008-12/30/content_3091101.htm (last visited on Dec. 19, 2011).

⁹⁵ See *Chinese Navy Heads for Somalia Today, the Largest Scale Naval Expedition since the 15th Century* (available only in Chinese), GLOBAL TIMES, available at <http://mil.news.sina.com.cn/2008-12-26/1201536502.html> (last visited on Dec. 19, 2011).

⁹⁶ See *The 10th Naval Escort Fleet Left for the Gulf of Aden and Somali Waters Yesterday* (available only in Chinese), PEOPLE’S LIBERATION ARMY DAILY, available at <http://mil.news.sina.com.cn/2011-11-03/0632672042.html> (last visited on Dec. 19, 2011).

⁹⁷ Huikang Huang, *Fighting Somali Pirates by Naval Escort: Legal Basis and Judicial Procedure* (available only in Chinese), 22 ANN. CHINA MAR. L. 1-7 (2011).

⁹⁸ Ministry of National Defense of the People’s Republic of China, *Commentary: Chinese Warships’ Escorting Operations off Somali Coast Are Reasonable and Legitimate*, available at http://eng.mod.gov.cn/Opinion/2008-12/22/content_4024543.htm (last visited on Dec. 19, 2011).

commanders, joint escort, joint military rehearsal and onboard inspection.”⁹⁹ China’s Foreign Minister, Yang Jiechi, also clearly mentioned that China’s purpose for overseas naval escorting operations is limited to safeguarding maritime security in the Gulf of Aden and waters off the coast of Somalia. He added:

We care about and contribute our share to freedom of navigation and safety in the international shipping lanes of other regions. A case in point is the Gulf of Aden and waters off the Somali coast.¹⁰⁰

China has clarified its intention to normalize such naval escort activities and the long term commitment to global piracy suppression. The spokesperson of the Defense Ministry of China has clearly stated that: “China will continue to dispatch naval escort squads to the Gulf of Aden and Somali waters” and that “China will further boost cooperation with international escort missions in accordance with the spirit of the United Nations Security Council.”¹⁰¹ More recently, it is even reported that China is considering establishing a supply base in Seychelles for its naval fleet of escort missions.¹⁰²

It is fair to say that China’s participation in global piracy suppression has been very helpful to the international community in maintaining maritime security in the Gulf of Aden and elsewhere. That is also an important contribution to international peace and security. China’s active participation is not only an implementation of the relevant UNSC resolutions, but it also shows China’s sincerity in enforcing its international obligation of piracy suppression in accordance with the UNCLOS and other applicable international legal rules.

B. China’s Domestic Antipiracy Law

Despite China’s active participation in international cooperation on piracy suppression, China does not have special domestic laws against piracy. Rather, pertinent rules that

⁹⁹ Ministry of National Defense of the People’s Republic of China, *Press Conference of the Ministry of Defense of China under the Auspice of Spokesperson Mr. Geng Yansheng*, available at <http://military.people.com.cn/GB/16451409.html> (available only in Chinese) (last visited on Dec. 19, 2011).

¹⁰⁰ Ministry of Foreign Affairs of the People’s Republic of China, *Remarks by Foreign Minister Yang Jiechi at the ARF Foreign Minister’s Meeting*, available at <http://www.fmprc.gov.cn/eng/zxxx/t842183.htm> (last visited on Dec. 19, 2011).

¹⁰¹ Ministry of National Defense of the People’s Republic of China, *China to Continue Sending Naval Escort Squads to Somali Waters*, available at http://eng.mod.gov.cn/Press/2011-12/01/content_4320923.htm (last visited on Dec. 19, 2011).

¹⁰² Ministry of National Defense of the People’s Republic of China, *Chinese navy may dock in Seychelles, other countries for supplies*, available at http://eng.mod.gov.cn/TopNews/2011-12/12/content_4326174.htm (last visited on Dec. 19, 2011).

may be applied to piracy are mainly found in the Criminal Law of the People's Republic of China ("CCL"),¹⁰³ and the Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China (hereinafter EEZ Law).¹⁰⁴

1. The Substantive Aspects of Chinese Antipiracy Law

The substantive aspects of Chinese antipiracy law consist of the definition of piracy, the criminalization of piracy, and the nature and extent of penalties for piracy.

At the international level, according to the statistics of the UN Division for Ocean Affairs and the Law of the Sea, many countries have adopted domestic antipiracy laws.¹⁰⁵ For instance, the U.S. Constitution, Article I, § 8, cl. 10, provides that Congress has the power "to define and punish piracies and felonies committed on the high seas, and offenses against the Law of Nations." Utilizing this authority, the U.S. Congress has enacted legislation addressing piracy for over 200 years.¹⁰⁶ Japanese law takes a clearer stance on piracy suppression. According to the Law on Punishment of and Measures against Acts of Piracy of Japan, piracy is clearly defined as "acts committed for private ends on the high seas or territorial sea as well as internal waters of Japan by the crew or the passengers of a ship (except for warships and other government ships)."¹⁰⁷ Such definition is much broader than that provided by the High Seas Convention and the UNCLOS, because it clearly includes piracy acts committed within the territorial sea and internal waters of Japan.

In contrast to these laws, Chinese law neither expressly criminalizes piracy, nor provides a clear definition of piracy. According to Article 3 of the CCL, "for acts that are explicitly defined as criminal acts in law, the offenders shall be convicted and punished in accordance with the law; otherwise, they shall not be convicted or punished." Thus, it is unlikely for piratical activities to be prosecuted and punished as piracy as such under the CCL. The weakness in Chinese law naturally raises the issue of whether piratical activities are punishable under the CCL, and if so, what should be the applicable criminal sanctions.

¹⁰³ Adopted by the 2nd Session of the Fifth National People's Congress on July 1, 1979 and revised at the 5th Session of the Eighth National People's Congress on Mar. 14, 1997.

¹⁰⁴ Adopted by the 3rd Meeting of the Standing Committee of the Ninth National People's Congress of the People's Republic of China on June 26, 1998.

¹⁰⁵ See *National Legislation on Piracy*, available at http://www.un.org/depts/los/piracy/piracy_national_legislation.htm (last visited on Dec. 25, 2011).

¹⁰⁶ R. C. Mason, *Piracy: A Legal Definition*, available at <http://www.fas.org/sgp/crs/misc/R41455.pdf> (last visited on Dec. 25, 2011), at 1.

¹⁰⁷ See Outline of the draft Anti-Piracy Measures Law: Law on Punishment of and Measures against Acts of Piracy, available at http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/JPN_anti_piracy.pdf (last visited on Dec. 25, 2011).

As to the first concern, it should be noted that a mere weakness in the law would not necessarily lead to the inapplicability of the law to piracy activities, or leave such activities unpunished under Chinese law. Although the CCL contains no clear definition of piracy, it does provide a broad definition of crime:

A crime refers to an act that endangers the sovereignty, territorial integrity and security of the State, splits the State, subverts the State power of the people's democratic rule and overthrows the socialist system, undermines public and economic order, violates State-owned property, property collectively owned by the working people, or property privately owned by citizens, infringes on the civil rights, their democratic or other rights, and any other act that endangers society and is subject to punishment according to law.¹⁰⁸

It is suggested that contemporary maritime piracy attacks tend to fall within three broad categories: (1) opportunistic hit and run attacks, which often occur while vessels are at anchor or berthed; (2) kidnap for ransom, typically the master and chief engineers are taken off underway vessels; and (3) ship hijacking, either for the value of the ship and/or the cargo.¹⁰⁹ Almost all of these forms of piratical activities would fall within the broad definition of crime under the CCL without the need for further explanation, as they inevitably violate private property and infringe on the rights of the citizens. Thus, although Chinese law does not criminalize piracy, piratical activities are nevertheless punishable under the CCL as other forms of crimes.

Merely holding piratical activities punishable is not sufficient. China's failure to criminalize piracy itself could lead to further ambiguities as to how various piratical activities should be classified under the CCL. There is no fixed answer to this question. However, the CCL does provide 'alternatives.' Although a given piratical activity cannot constitute piracy as such, it may constitute various other forms of crimes according to the elements it demonstrates. In practice, *e.g.*, acts of piracy often involve a broad range of acts, such as killing or physical injury of crew members, robbery or damage to the ship, aircraft or cargo on board, and acts of hijacking or kidnapping. All of these acts, if sufficiently serious, would amount to crime under the CCL separately or collectively. Here, it is neither necessary nor possible to list each and all of the possible crimes under the CCL that piratical activities may constitute. Two general types of crimes are discussed here as they are most closely connected with piratical activities: crimes endangering public security and crimes of property violation.

¹⁰⁸ CCL art. 13.

¹⁰⁹ James Kraska & Brian Wilson, *The Pirates of the Gulf of Aden: The Coalition Is the Strategy*, 45 STAN. J. INT'L L. 247-249 (2009).

On the one hand, if the act of piracy results in hijacking a ship or aircraft and physical injury or death of crew members, it may amount to various crimes endangering public security and fall under Article 122 of the CCL, which provides that:

Whoever hijacks any aircraft by means of violence, coercion or by any other means shall be sentenced to fixed-term imprisonment of not less than 10 years or life imprisonment; any hijacker who causes serious injury to or death of any other person or serious damage to the aircraft shall be sentenced to death.

On the other hand, if the piracy activity results in serious property loss, it may amount to various crimes of property violation and fall under Article 263 of the CCL, which provides that:

Whoever robs public or private property by violence, coercion or other methods shall be sentenced to fixed-term imprisonment of not less than three years but not more than 10 years and shall also be fined; whoever falls under any of the following categories shall be sentenced to fixed-term imprisonment of not less than 10 years, life imprisonment or death and shall also be fined or sentenced to confiscation of property: . . . (2) robbing on board the means of public transportation; (or) . . . (5) causing serious injury or death to another person in the course of robbery.

As the CCL does not clearly criminalize piracy, a given piratical activity must be “deconstructed according to law” into various elements in order for the court to decide what crime(s) such activity could constitute. It should be noted that under Chinese law, a piratical activity may be charged and punished as more than one crime, and the pirates may be subject to harsher punishments. As Article 69 of the CCL lays down:

For a criminal who commits several crimes before a judgment is rendered, unless he is sentenced to death or life imprisonment, his term of punishment shall be not more than the total of the terms for all the crimes but not less than the longest of the terms for the crimes, depending on the circumstances of the crimes.

2. The Procedural Aspect of Chinese Law of Piracy

The crime of piracy is subject to universal jurisdiction. In general, China’s attitude towards universal jurisdiction is complicated.¹¹⁰ Although the Chinese government and scholars seem somehow reluctant to recognize universal jurisdiction as a general manner, they do actually recognize that piracy shall be subject to universal

¹¹⁰ Lijiang Zhu, *The Chinese Universal Jurisdiction Clause: How Far Can It Go?*, 52 NETH. INT’L L. REV. 85 (2005).

jurisdiction.¹¹¹ On this point, Ms. Guo Xiaomen, Counselor and Legal Advisor of the Chinese Mission to the UN, has clarified China's position in this regard:

First, the so called 'universal jurisdiction' is only an academic concept with no universally accepted precise definition. . . . In accordance with relevant rules of international law, states can exercise jurisdiction over such crimes as piracy that occurred on the high seas.¹¹²

Simply recognizing universal jurisdiction over piracy does not guarantee that pirates would be effectively prosecuted. Internationally, and contrary to the expectations of many, a recent empirical study conducted by Eugene Kontorovich and Steven Art suggests that domestic courts, at least prior to the outbreak of piracy of the coasts of Somail, rarely exercised universal jurisdiction in prosecuting pirates.¹¹³ When commenting on such situation, they have stated that:

The rarity of UJ [universal jurisdiction] prosecutions for piracy suggests that the adoption of UJ treaties and the internalization of UJ norms do not in themselves translate into prosecution. However, the increase in UJ prosecutions as a result of the ongoing Somali piracy crisis suggests some factors that contribute to greater use of universal jurisdiction. The Somali piracy outbreak caused the major powers of the world to devote far greater enforcement resources to apprehending the criminals, a necessary condition for applying universal jurisdiction.¹¹⁴

Chinese law would recognize not only universal jurisdiction, but also other forms of jurisdiction, such as territorial jurisdiction, personal jurisdiction and protective jurisdiction. Thus, Chinese courts may have ample legal bases to exercise jurisdiction over piracy as follows.

First, although Chinese law fails to expressly grant universal jurisdiction to Chinese courts to prosecute piracy, it does clearly refer to the relevant international conventions

¹¹¹ It has been proposed by a Chinese commentator that "so far only universal jurisdiction over piracy has been accepted in international law. There is no "pure universal concern jurisdiction" over other crimes yet." See Sienho Yee, *Universal Jurisdiction: Concept, Logic and Reality*, 10 CHINESE J. INT'L L. 503 (2011). However, various international law scholars have noticed that, more recently, "universal jurisdiction has been asserted over many human rights offenses. The expansion in universal jurisdiction' scope has been accompanied by an increase in states' willingness to use it." See e.g. Kontorovich, *supra* note 38, at 184.

¹¹² Permanent Mission of the People's Republic of China to the UN, *Statement by Ms. Guo Xiaomei, the Counselor and Legal Adviser of the Chinese Mission to the UN on Scope and Application of the Principle of Universal Jurisdiction at Sixth Committee of the 66th Session of the General Assembly*, available at <http://www.china-un.org/eng/hyyfy/t867268.htm> (last visited on Dec. 25, 2011).

¹¹³ Kontorovich & Art, *supra* note 34, at 436-438.

¹¹⁴ *Id.* at 438.

on this point. In this aspect, Article 9 of the CCL clearly provides that:

This Law shall be applicable to crimes which are stipulated in international treaties concluded or acceded to by the People's Republic of China and over which the People's Republic of China exercises criminal jurisdiction within the scope of obligations prescribed in these treaties, it agrees to perform.

Considering that China is a contracting party to the UNCLOS which recognizes universal jurisdiction over piracy, Article 9 of the CCL impliedly grants Chinese courts universal jurisdiction to prosecute piracy. In fact, the CCL is the first Chinese legislation that clearly recognizes universal jurisdiction, though it does not provide any specific rules for exercising such jurisdiction.

Second, territorial jurisdiction can be used by Chinese courts to prosecute piracy where the act occurred within its territory or on board its ships. Article 6 of the CCL provides that:

This Law shall also be applicable to anyone who commits a crime aboard a ship or aircraft of the People's Republic of China.

This provision reflects the traditional 'flag ship' principle. In addition, according to the EEZ Law, China may also exercise jurisdiction over the establishment and use of artificial islands, installations and structures, marine scientific research, and the protection and preservation of the marine environment in the EEZ¹¹⁵ and on the continental shelf.¹¹⁶ Because the EEZ and continental shelf may be overlapped with the high seas, it is possible for Chinese courts to prosecute piracy occurring on the high seas, even pursuant to its territorial jurisdiction.

Third, piracy committed by Chinese nationals even outside Chinese territory may be prosecuted by Chinese courts by exercising personal jurisdiction. Article 7 of the CCL provides:

This Law shall be applicable to any citizen of the People's Republic of China who commits a crime prescribed in this Law outside the territory and territorial waters and space of the People's Republic of China; however, if the maximum punishment to be imposed is fixed-term imprisonment of not more than three years as stipulated in this Law, he may be exempted from the investigation for his criminal responsibility.

¹¹⁵ EEZ Law art. 3.

¹¹⁶ *Id.* 4.

Finally, if piracy against Chinese people committed by foreigners occurred outside China's territory, it may also be subject to the jurisdiction of Chinese courts by exercising protective jurisdiction. Article 8 of the CCL provides:

This Law may be applicable to any foreigner who commits a crime outside the territory and territorial waters and space of the People's Republic of China against the State of the People's Republic of China or against any of its citizens, if for that crime this Law prescribes a minimum punishment of fixed-term imprisonment of not less than three years; however, this does not apply to a crime that is not punishable according to the laws of the place where it is committed.

3. Major Defects of Chinese Antipiracy Law

The above sections discuss both the substantive and the procedural aspects of Chinese antipiracy law. Although Chinese antipiracy law seems to provide a sound legislative framework for piracy suppression, it is still defective. From a substantive perspective, Chinese antipiracy law is fragmented, mainly due to the failure of the CCL to criminalize piracy. From a procedural perspective, although the CCL provides various jurisdictional alternatives to prosecute piracy, there are various practical difficulties to exercise these types of jurisdiction.

The fragmentation of Chinese antipiracy law on the substantive aspect gives rise to concerns over the sufficiency of Chinese law for piracy suppression. As mentioned, a piratical activity cannot be punished as piracy under the CCL. Rather, it can only be punished as murder, hijacking, endangering public security or/and various forms of property crimes. Although a piracy activity may well be charged and punished for more than one crime, 'deconstructing' a piracy activity in accordance to its various criminal elements remains a difficult task for the courts. This could be particularly true since no reported piracy case has been prosecuted in China, and there are neither clear rules nor precedents to follow.

A follow-up concern would be whether the criminal penalties provided by the CCL are proportional to the severity of piracy. Piracy is a felony; it deserves punishment matching its severity. In general, the CCL is quite severe in punishing various forms of crimes which piracy may constitute, such as murder, hijacking, robbery or kidnapping. There are certain typical elements of piracy, however, which may not qualify for matching punishment under the CCL. For instance, depredation of property on board is a typical form of piracy under the UNCLOS.¹¹⁷ Pursuant to the CCL, however, mere depredation of property, particularly when the property is not economically valuable, is

¹¹⁷ UNCLOS art. 101.

often not treated as a grave crime and thus would not invoke harsh punishment. In such a case, Chinese law would be insufficient for piracy suppression.

Chinese antipiracy law also contains various procedural defects. One typical defect is seen in using universal jurisdiction. Chinese law contains no specific rules for courts to exercise universal jurisdiction. However, one commentator has suggested that China is competent to exercise universal jurisdiction over a particular international crime only if: (1) such crime prescribed in the international convention concluded or acceded to by China has been criminalized in the Chinese law; and (2) China is required by the said international convention to exercise universal jurisdiction over such crime.¹¹⁸ In light of such requirements, local courts may find it impossible to exercise universal jurisdiction because Chinese law fails to criminalize piracy.

China's failure to criminalize piracy also poses difficulties in exercising protective jurisdiction over pirates. As required under Article 8 of the CCL, there are two conditions for Chinese courts to exercise protective jurisdiction: (1) the crime shall be subject to a minimum punishment of fixed-term imprisonment of no less than three years under Chinese law; and (2) the crime must also be punishable according to the laws of the place where it is committed. In light of such requirements, if a foreign State fails to criminalize piracy, Chinese courts would be unable to exercise protective jurisdiction over the piratical activities committed by the nationals of that State. In fact, China has already been confronted with such difficulty. As has been suggested by some Chinese scholars, Chinese courts cannot prosecute Indonesian pirates by exercising protective jurisdiction because neither Chinese law nor Indonesian law criminalizes piracy.¹¹⁹

Another typical concern in the procedural aspect relates to the extradition of suspected pirates, which could be an obligation under the SUA Convention.¹²⁰ According to the general practice, one of the key considerations for extradition is the double criminality requirement, which essentially means that a certain act must qualify for crime in both jurisdictions of the requesting and the requested State for the suspect to be extradited.¹²¹ Although it is not required that the name by which the crime is described or the scope of the liability shall be the same in the two States to qualify for the double criminality requirement, the failure of Chinese law to criminalize piracy does constitute a serious impediment. It can thus be imagined that China would encounter

¹¹⁸ Zhu, *supra* note 110, at 106.

¹¹⁹ Jun Liu & Jinping Zhang, *Study on the Southeast Asian Pirate Problem* (available only in Chinese), 3 SOUTHEAST ASIAN AFFAIRS 85, 89 (2007).

¹²⁰ SUA Convention art. 10(1).

¹²¹ Ivan Shearer, EXTRADITION IN INTERNATIONAL LAW 137 (1971). See also Sharon Williams, *The Double Criminality Rule and Extradition: A Comparative Analysis*, 15 NOVA. L. REV. 581 (1991).

difficulties when seeking to extradite suspected pirates to or from China, although the suspected pirates may be extradited for other crimes.

Given the substantive and procedural aspects of Chinese antipiracy law, it has been submitted by Zou Keyuan that Chinese antipiracy law is “still immature and in need of improvement. The same is also true with respect to [China’s] efforts to arrest and punish pirates.”¹²² Such defects call for revisions of law which should at least include criminalization of piracy, providing an up-to-date and operable definition of piracy, and setting up operable procedural rules for piracy prosecution. In this regard, various international conventions and foreign domestic laws are useful references for China.

IV. Conclusion

Piracy not only poses great danger to navigation safety, but it also seriously threatens international peace and security. Due to the extraterritorial nature of piracy, effective piracy suppression relies on the cooperation between the international community and individual States. It also depends on both international law and domestic laws. Although, according to the relevant UNSC resolutions, some States have sent naval escorting fleets to the waters off the coast of Somalia, merely keeping pirates away is not sufficient to eradicate piracy. What the international community fails to accomplish is to bring pirates to justice.

There is an urgent need to improve the current legal regime for piracy suppression. Both legislative and judicial efforts need to be made. Also, such efforts must be made at both international and domestic levels. From a legislative perspective, current international antipiracy law is defective mainly due to the narrow definition of piracy, which excludes various forms of maritime terrorist activities from being qualified as piracy. At domestic level, it is necessary for individual States, particularly those which are prone to be affected by piracy, to adopt or revise their domestic laws. From a judicial perspective, the international community faces a dilemma; although piracy often falls beyond State jurisdiction, the prosecution of pirates largely relies on municipal courts due to the absence of an international antipiracy tribunal. However, for complicated political, economic and legal reasons, piracy prosecution by municipal courts often seems less effective than expected.

China suffers immensely from piracy and has fundamental interests in suppressing

¹²² Keyuan Zou, *Enforcing the Law of Piracy in the South China Sea*, 31 J. MAR. L. & COM. 115 (2000).

piracy. China has actively cooperated by sending its naval escort fleets to the Gulf of Aden in accordance with the relevant UNSC resolutions. However, Chinese antipiracy law is immature and cannot meet the practical need for piracy suppression, not only because China fails to criminalize piracy, but also because Chinese law contains various potential procedural barriers for Chinese courts to prosecute pirates.

Due to the limitation of the current international antipiracy law and the lack of international antipiracy tribunal, piracy suppression still relies chiefly on individual States. In this sense, it is fair to say that an effective international legal regime for piracy suppression has not been established yet. The establishment of such regime necessitates military, legislative and judicial measures in an integrated manner at both international and domestic levels. At the international level, up-to-date international antipiracy law and an international antipiracy tribunal are needed. At the domestic level, enhanced cooperation among States and improvement of domestic antipiracy laws are required. It remains to be seen how the international community and individual States can handle this problem satisfactorily.