



**Council for Security Cooperation in the Asia-Pacific**

# MEMORANDUM 5

## COOPERATION FOR LAW AND ORDER AT SEA

### Executive summary

This memorandum discusses agreed best practices and the scope for cooperation to maintain law and order at sea in the Asia Pacific. It proposes measures that would promote law and order at sea and reduce the incidence of maritime crime. It is concerned with facilitating enforcement of domestic laws at sea and with developing cooperation to enforce domestic laws beyond national jurisdiction in specific cases allowed by international law.

Maritime crime might be defined as a criminal offence connected to the sea or to ships. Many activities fall within this definition and constitute a breakdown in law and order at sea. For the purpose of this memorandum, these include piracy; maritime terrorism, drug trafficking, human smuggling, maritime theft and fraud, illegal fishing and offences against the marine environment.

Maritime jurisdiction and enforcement are extremely complex, particularly in enclosed and semi-enclosed seas where maritime boundaries are not agreed. The exercise of State jurisdiction is governed by important factors such as the location of the offence, the nationality of the vessel(s) involved, the nationality of the victim(s), the nature of the offence and the nationality of the offender. A State's criminal jurisdiction also varies depending on the type of jurisdiction. This might be as a flag State over vessels flying its flag; as a coastal State over waters under national jurisdiction; as a port State exercising jurisdiction over vessels entering its internal waters; as an archipelagic or straits State; as a State of nationality of natural or legal persons engaged in illegal activities; or through the exercise of universal jurisdiction on the high seas as permitted by international law. States have exclusive competence relative to matters within their jurisdiction and their jurisdictional competence varies in different maritime zones.

Much of the breakdown in law and order at sea can be traced to the fact that some flag States are not discharging their responsibility for vessels flying their flags when they commit offences at sea. Difficulties also arise from uncertainties in particular legal regimes, including piracy. These difficulties can only be resolved through some form of agreement between States. This might be through either a multilateral treaty or a bilateral arrangement between neighbouring States.

The memorandum sets out a hierarchy of measures for maritime enforcement cooperation that might be considered at the bilateral (or multilateral) and regional levels. The maintenance and enforcement of law and order at sea in the Asia Pacific depends to a significant degree on cooperation between regional countries, particularly those that are contiguous to the enclosed and semi-enclosed seas of East and Southeast Asia. The memorandum identifies a

number of prospective cooperative measures that would promote law and order at sea and reduce the incidence of maritime crime. Cooperation will be facilitated, however, if regional countries have in place appropriate legislation and institutional arrangements at the domestic level for dealing with maritime crime; are parties to relevant international conventions; and fulfil their obligations with respect to those conventions.

## **Introduction**

### **CSCAP guidelines**

CSCAP Memorandum No. 4 – Guidelines for regional maritime cooperation – includes the following guidelines:

- 16 Parties recognise the importance of cooperation in the maintenance and enforcement of law and order at sea, including the prevention of piracy, drug smuggling, and other crimes at sea, acknowledging the rights of states to enforce their domestic laws at sea to the extent permitted by international law.
17. Parties are encouraged to institute regular meetings to enhance cooperation and coordination in their maritime enforcement activities.

### **Objective**

In pursuance of these guidelines, this memorandum discusses agreed best practices and the scope for cooperation to maintain and enforce law and order at sea in the Asia Pacific. It discusses principles of cooperation and proposes measures that would promote law and order at sea and reduce the incidence of maritime crime. The memorandum is concerned with facilitating enforcement of domestic laws at sea in the region and with cooperation in enforcing domestic laws beyond national jurisdiction in specific cases where international law currently permits it (including situations where universal jurisdiction exists).

### **Background**

Good order at sea permits the free flow of seaborne trade and ensures that nations can pursue their maritime interests and develop their marine resources in an ecologically sustainable and peaceful manner in accordance with international law. It provides for the preservation and protection of the marine environment, including the conservation of species, and ensures that all nations and peoples, including future generations, benefit equitably from the marine environment and the exploitation of its resources.

A breakdown in good order at sea is evident with unregulated pollution of the marine environment, unregulated or illegal fishing (including the use of explosives or chemicals to catch fish), or if other illegal activity occurs at sea. Illegal activity might include piracy; maritime terrorism; maritime theft and fraud; human smuggling; and the shipment of drugs, arms, protected animal and plant species, certain toxic materials and nuclear wastes, as well as the dumping of environmentally harmful and hazardous substances banned under international agreements.

Countries may face difficulties in combating illegal activities at sea due to a shortage of trained personnel, the lack of modern equipment, the obsolescence or inadequacy of much national legislation, and the weak maritime law enforcement capability of national agencies. Even developed countries with sophisticated maritime patrol and surveillance capabilities may have difficulty in adequately policing expanded offshore areas.

The Report of the Secretary-General at the Fifty-third Session of the General Assembly of the United Nations on Oceans and the law of the sea in 1998 noted how the escalation and global reach of organised crime had affected all models of transport, especially maritime transport. Maritime transport constitutes a preferred mode for smuggling illicit goods, such as arms, narcotic drugs, and persons from one country to another, since it may be less detectable than other methods and permits the shipment of large quantities in one consignment. While direct

voyages of vessels from countries of origin or supply to receiving countries are primary threats, circuitous routes may be used, involving transshipment at some intermediate port.

## **Illegal activity at sea**

### **Maritime crime**

Maritime crime might be defined as a criminal offence connected to the sea or to ships.<sup>1</sup> It is frequently transnational by nature with more than one national jurisdiction involved. Most, if not all, associated criminal activities have a land base of some kind. Effective enforcement often relies upon intelligence from shore-based sources as well as cooperation between law enforcement agencies at a domestic level and between law enforcement agencies in different national jurisdictions. There may be no single source or code pertaining to criminal activities at sea and rules and regulations may come from diverse sources. A list of current international conventions related to law and order at sea and maritime crime is at Annex A.

There are many offences that might fall within this definition of maritime crime and constitute a breakdown in law and order at sea. For the purposes of this memorandum, relevant offences are deemed to comprise:

- piracy;
- maritime terrorism;
- drug trafficking;
- human smuggling;
- maritime theft and fraud (including container crime);
- illegal fishing; and
- offences against the marine environment.

A difficulty with this concept of maritime crime is its segregation from the rest of the body of possible crimes that may be committed in relation to or incidental to the use of the sea. Transnational crimes are difficult to limit to only a maritime classification and maritime fraud may in essence be little different from ordinary fraud were it not for the fact that it somehow involves a maritime activity (e.g. the use of a ship or a sea container). In these cases, it may be more appropriate to deal with the activity through stronger national law enforcement measures rather than through international cooperation.

The categories of offence and illegal activity at sea listed above are described in more detail in Annex B of this memorandum. Principles of jurisdiction and enforcement are discussed in Annex C. An explanation of some of the terms used in this memorandum is at Annex D and the different zones of maritime jurisdiction are described in Annex E.

## **Scope for cooperation**

### **The need for harmonizing maritime laws**

It is clear from the brief survey in this memorandum and its annexes that maritime jurisdiction and enforcement are extremely complex, particularly so in enclosed and semi-enclosed seas where maritime boundaries are not agreed. The difficult jurisdictional issues arising from overlapping and conflicting claims to offshore islands and reefs, EEZs and continental shelves are aggravated by uncertainties in various legal regimes (including piracy). It would clearly be helpful if neighbouring countries could harmonize their national maritime laws as far as possible and agree on particular issues where uncertainty exists at present. For example, the IMO has recently called for an international code to combat piracy and armed robbery against ships. The IMO recognised "a need to harmonize at an international level, procedures for

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<sup>1</sup> It should be noted that this memorandum is concerned with crimes at sea or onboard ships where jurisdiction may be complicated or uncertain. It is not concerned with crimes committed onshore where jurisdiction clearly rests with the coastal or port State.

exercising jurisdiction for investigating reported cases of piracy and armed robbery against ships and the punishment or extradition of suspects of such crimes”.<sup>2</sup>

### **Flag state responsibilities**

Much of the breakdown in law and order at sea can be traced to the fact that some flag States are not discharging their responsibilities in accordance with Article 94 of the 1982 UN Convention on the Law of the Sea (UNCLOS) for vessels flying their flags when they commit offences at sea. This is the case for virtually all categories of maritime crime, but particularly illegal fishing, drug and arms trafficking, offences against the environment and human smuggling. Vessels committing these crimes usually are registered ships under the jurisdiction of a flag State rather than vessels without nationality. A vessel which flies no flag or which uses the flag or two or more States may be assimilated to a ship without nationality and may therefore be detained and investigated by the public ships of other nations on the high seas and presumably, within the exclusive economic zone (EEZ) of other States without the detaining vessels incurring State responsibility.<sup>3</sup>

Regional protocols on flag State responsibilities might be possible, as well as efforts to encourage regional States to ratify the UN Convention on Conditions for Registration of Ships and the Agreement to Promote Compliance with Conservation and Management Measures by Fishing Vessels on the High Seas. Regional protocols might cover respect for the principle of a “genuine link” between the flag State and ships flying its flag,<sup>4</sup> and preparedness to grant consent for investigation of vessels suspected of an offence. Several of the conventions listed in Annex A provide that States may seek the consent of the flag State to conduct an investigation of a vessel suspected of being engaged in a prohibited activity. This might be when the vessel is located on the high seas, in the EEZ of the investigating State but the offence is one to which EEZ jurisdiction does not apply (e.g. drug smuggling, or trafficking of humans), or in the EEZ of a third State.

In these conventions where permission is sought from the flag State to conduct an investigation, it is normally to be granted expeditiously. While this might appear to be a reasonable requirement, the processes involved might delay or hinder the investigation. It may be possible to facilitate expeditious investigation by way of a series of bilateral treaties or a multilateral treaty under the auspices of the major convention granting States reciprocal rights of investigation automatically without the need to seek permission from the flag State. Such an arrangement requires a high degree of trust between the States involved and may need to be preceded by effective confidence-building measures such as intelligence sharing or joint operations by law enforcement agencies.

### **Resolution of areas of uncertainty**

#### ***Terminology and definitions***

Recent developments with piracy have raised some definitional problems. The current definition that restricts piracy to activities occurring on the high seas and by one vessel or aircraft against another vessel or aircraft for private purposes alone, does not recognise the problem of maritime violence and robbery when it arises within the territorial sea of a coastal State or the archipelagic waters of an archipelagic State. In view of heightened regional concern over piracy and because the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Navigation is unsuited to filling the gaps in the UNCLOS anti-piracy

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<sup>2</sup> “Combating piracy and armed robbery against ships – call for international code”, IMO News, No.2, 1999, p.11.

<sup>3</sup> UNCLOS Article 92(2). Since the ship is presumed to be a ship without nationality, presumably the nationality of claim s rule will not be satisfied and the affected State or States will be unable to maintain a claim in international law.

<sup>4</sup> UNCLOS Article 91(1) requires that a genuine link should exist between the flag State and ships granted the right to fly its flag. This was developed to ensure that flag States, particularly those with open registers (i.e. flags of convenience), maintain proper control over the condition and crewing of vessels flying their flags.

regime in the region, a specific anti-piracy agreement might be considered for the region.<sup>5</sup> A first step towards such a convention may be a compilation of national legislative provisions on piracy and an audit of these laws to determine the compatibility of their scope and content.

### **EEZ**

The EEZ is relatively new concept in international law. While UNCLOS Article 58 makes clear that EEZs should be treated as high seas for the purpose of universal jurisdiction against particular categories of crime at sea, some international instruments have not specified how and whether they should be applied in the EEZ (e.g. the IMO Guidelines on the Trafficking and transport of Migrants at Sea and the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances). Problems with jurisdiction might arise in EEZs. As much of the oceans and seas of the Asia Pacific lie within EEZs, often without agreed maritime boundaries, this is an important area of uncertainty in the region's ability to deal with maritime crime. It would be helpful if regional agreement or a common understanding could be reached that high seas enforcement principles apply in EEZ in respect of offences other than those related to resources and the environment.

## **Prospective cooperative measures**

This section sets out a hierarchy of measures for maritime enforcement cooperation that might be considered at the bilateral (or multilateral) and regional levels. Cooperation will be facilitated, however, if regional countries have in place appropriate legislation and institutional arrangements at the domestic level; for dealing with maritime crime; are parties to relevant international conventions; and fulfil their obligations with respect to those conventions.

### **Bilateral measures**

#### ***Maritime boundary delimitation***

Boundary delimitations between opposite and/or adjacent States are a minimal form of cooperation to achieve law and order at sea. Maritime law enforcement, particularly in enclosed or semi-enclosed seas, is difficult when boundaries between adjacent maritime jurisdictions are not agreed. Regional States should move expeditiously to resolve existing boundary disputes to ensure that jurisdiction might properly be exercised in the applicable zones. If boundaries cannot be resolved, countries should be prepared to enter into some form of provisional arrangements for the maintenance of law and order in the disputed area without prejudice to their positions in the boundary negotiations.

#### ***Border control agreements***

Border control arrangements between neighbouring countries might include the countries agreeing to common measures with respect to certain activities that might occur at sea within the vicinity of their maritime boundaries and cross those boundaries.

#### ***Information exchange and coordination***

While enforcement takes place only within respective territorial jurisdictions, countries are encouraged to exchange information on a voluntary basis and to coordinate their activities (e.g. the bilateral anti-piracy activity in the Straits of Malacca and Singapore).

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<sup>5</sup> A draft regional agreement on cooperative anti-piracy arrangements between neighbouring states was included as Appendix 5 to IMO revised circular MSC/Circ 622?rev 1 (16 June 1999). See <http://www.imo.org/imo/circs/msc/piracy/622rev1.pdf>

### ***Intervention convention***

As large areas of regional oceans and seas are under the jurisdiction of coastal States, consideration might be given to the conclusion of bilateral protocols between neighbouring countries that are parties to the Convention relating to Intervention on the High Seas in Cases of Oil Pollution Damage to extend the Convention to their EEZs. This would facilitate mitigation of the effects of ship sourced marine pollution.

### ***Reciprocal enforcement***

Neighbouring countries might agree to enforcement of each other's laws, rules and regulations in each other's jurisdiction. The Treaty of Niue provides a reciprocal enforcement regime for Pacific island countries.

## **Regional measures**

### ***Piracy***

A specific anti-piracy agreement might be considered for the region. A first step towards such a convention may be a compilation of national legislative provisions on piracy and an audit of these laws to determine the compatibility of their scope and content. Related measures might include whether regional States should consider seeking a redefinition of piracy at international law in respect of each other's vessels and nationals and also whether their national laws on piracy should be harmonised.

### ***Protocol of flag state responsibilities***

Regional protocols on flag States responsibilities might be possible, as well as efforts to encourage regional States to ratify the UN Convention on Conditions for Registration of Ships and the FAO Compliance Agreement. Regional protocols might cover respect for the principle of a "genuine link" between the flag State and ships flying its flag, and preparedness to grant consent for investigation of vessels suspected of an offence. The latter aspect might be covered by a series of bilateral treaties or a multilateral treaty under the auspices of the major convention granting States reciprocal rights of investigation automatically without the need to seek permission from the flag State.

### ***Protocol on EEZ jurisdiction***

It would be helpful if common agreement or understanding could be reached in the region on the application of high seas enforcement principles in the EEZ in respect of offences other than those related to resources and the environment.

### ***Training and education***

Cooperative law enforcement training could lead to common maritime law enforcement procedures that would be extremely beneficial in combating maritime crime. Potential cooperative activities with combating marine pollution include the development of common operating and reporting procedures, training for enforcement professionals, increasing awareness of legal process and obligations, development of enforcement guidelines and collaborative research to identify high risk areas. Cooperative training schemes for fisheries enforcement might include boarding, inspection and arrest procedures and the development of a common understanding of legal norms.

### ***Information and data***

The establishment and availability of the following information and data on a regional basis would facilitate the fight against maritime crime:

- An internet-accessible regional database of national legislation dealing with maritime crime.
- A regional register of vessels that transgress national and international laws.

- The establishment of a web page of information and data related to law and order at sea in the region. This might include, for example, details of cooperative arrangements, status or relevant conventions, etc.

#### ***Harmonization of maritime laws***

Regional cooperation would be facilitated by the harmonization of maritime crime related legislation among regional countries.

#### ***Monitoring operational ship pollution***

A monitoring and surveillance regime, particularly in the enclosed and semi-enclosed seas of East and Southeast Asia, should be considered for the purpose of building up a regional picture of the incidence of operational ship pollution, as well as the processing of evidence to obtain a successful prosecution.

#### ***Joint enforcement***

Joint or coordinated enforcement may be either temporary (with ad hoc arrangements for a specific type of incident under special conditions) or permanent in character, possibly with a separate institutional body manned by representatives of the member countries and acting autonomously of national enforcement agencies. This would be facilitated by the development of a range of confidence-building measures including those discussed above that allow regional States to develop joint operations against international crime in both national maritime zones and on the high seas.

## **Conclusion**

The maintenance and enforcement of law and order at sea in the Asia Pacific depends to a significant degree on cooperation between regional countries, particularly those that are contiguous to the enclosed and semi-enclosed seas of East and Southeast Asia. This memorandum had identified a number of prospective cooperative measures that would promote law and order at sea and reduce the incidence of maritime crime in the region. The memorandum is intended to be a policy-relevant document that recognises the nature of illegal activity at sea in the region and establishment of jurisdiction and enforcement at sea.

#### **List of annexes**

- A Relevant International Conventions
- B Illegal Activity at Sea
- C Jurisdiction and Enforcement
- D Explanation of Terms
- E Maritime Zones of Jurisdiction

### RELEVANT INTERNATIONAL CONVENTIONS

#### Framework

- United Nations Convention of the Law of the Sea 1982.

#### Drug trafficking

- The Single Convention on Narcotic Drugs of 1961.
- The Convention of Psychotropic Substances of 1971.
- United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988.

#### Maritime terrorism

- Convention for the Suppression of Unlawful Acts Against the Safety of Navigation, 1988.
- Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 1988.

#### Illegal fishing

- Convention for the Prohibition of fishing with Long Driftnets in the South Pacific, 1989.
- Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region, 1992.
- Agreement to Promote Compliance with Conservation and Management Measures by Fishing Vessels on the High Seas, 1993.
- Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 1995.
- Convention on the Conservation of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, 2000.

#### Marine pollution

- International Convention for the Prevention of Pollution from Ship, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78).
- Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (as amended), 1972 (London Convention), as modified by the 1996 Protocol.
- Convention Relating to Intervention on the High Seas in Case of Oil Pollution Damage (Intervention Convention).

#### Shipping

- International Convention for the Safety of Life at Sea (SOLAS), 1974.
- International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW), 1978.
- United Nations Convention on Conditions for Registration of Ships, 1986.
- Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal, Basel, 1989.
- International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS), 1996.
- International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships, 1952.

#### Containers

- Customs Convention on Containers, 1972 and Protocol of Signature.

#### Trade

- Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973 (CITES Convention).
- Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970.

#### Biodiversity

- Convention on Biological Diversity, 1992.

#### Trafficking in Humans

- Convention against Transnational Organised Crime and Protocols, 2000.

## **ILLEGAL ACTIVITY AT SEA**

### **Piracy**

The number of acts of piracy and armed robbery (actual and attempted) against ships reported by the International Maritime Bureau (IMB)<sup>6</sup> in 2000 was 469, an increase of 169 (56.3%) over 1999. By far the greatest concentration of these incidents was in Southeast Asia (242 incidents) with 119 of these occurring in Indonesian waters, 21 in Malaysian waters and 75 in the Malacca Straits.

Key words in the definition of piracy in Article 101 of the 1982 UN Convention on the Law of the Sea (UNCLOS)<sup>7</sup> are high seas and for private ends. Theoretically this means that any incident elsewhere than on the high seas (including the exclusive economic zone (EEZ) through the application of UNCLOS Article 58) is not an act of piracy. Thus most of the incidents in Asia Pacific are not “piracy” in an international legal sense, because they occur in the internal waters, the territorial sea, or archipelagic waters of a State. The expression for private ends excludes acts of political terrorism from the definition of piracy.

A third prerequisite of piracy is that two ships (or aircraft) need to be involved (i.e. the piratical act is committed by the crew or passengers of one ship or aircraft against another ship or aircraft). Thus the hijacking of a passenger ferry by terrorists is not “piracy” if the terrorists were travelling onboard as passengers. Similarly, the seizure of a vessel by crew members (or even stowaways) would not constitute “piracy” in an international legal sense. These other crimes where another ship or aircraft is not involved remain under the jurisdiction of the flag State of the subject vessel.

To overcome these definitional limitations and to facilitate the collection of data, the IMB has adopted the following broad definition:

Piracy is an act of boarding any vessel with the intent to commit theft or any other crime and with the intent or capability to use force in the furtherance of that act.

This wider definition, which has no status in international law, covers all acts regardless of the location of the vessel. It includes not only act against vessels underway but also against vessels alongside in port or at anchor.

### **Maritime Terrorism**

Following the hijacking of the passenger liner Achille Lauro and the murder onboard of an American citizen by Palestinian terrorists in 1985, maritime States under the auspices of the International Maritime Organisation (IMO) drafted and approved the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (“SUA”) in 1988 (the Rome Convention). The purpose of this convention was to close the gap in the system of law and order at sea created by the limited definition of piracy. A protocol to the Convention extends its application *mutatis mutandis* to offences committed on fixed platforms on the continental shelf (the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf) (“SUAPROT”).

The Rome Convention extends coastal State enforcement jurisdiction beyond the territorial limits, and in particular circumstances, allows exercise of such jurisdiction in an adjacent

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<sup>6</sup> The data in this paragraph is from the ICC International Maritime Bureau, Piracy and Armed Robbery Against Ships – Annual Report for the Period 1 January – 31 December 2000, January 2001.

<sup>7</sup> UNCLOS Article 101 defines piracy as:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or passengers of a private ship or aircraft, and directed
  - (i) on the high seas, against another ship or aircraft, or against persons or property on board the ship or aircraft;
  - (ii) against a ship, aircraft or property outside the jurisdiction of any State;
- (b) 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;
- (c) any act of inciting or of intentionally facilitating an act described in sub-paragraph (a) or (b).

State's territorial sea.<sup>8</sup> Furthermore, it justifies exercise of jurisdiction on the basis of flag State jurisdiction, the territorial principle, the nationality principle, passive personality principle, the protective principle and habitual residence within the enforcing State.<sup>9</sup> Where applicable, the Convention places an obligation on a party either to extradite the perpetrator of a terrorist act or to prosecute itself. Thirty-three States are now parties to the Convention but relatively few of these are in the Asia Pacific.

In recognition of international actions being taken to combat violence at sea, UN General Assembly Resolution A/RES/54/31 (18 January 2000) urged States to<sup>10</sup>:

- cooperate fully with the IMO;
- take all necessary and appropriate measures to prevent and combat piracy and armed robbery at sea, including through regional cooperation, and to investigate or cooperate in the investigation of such incidents; and
- become parties to SUA and SUAPROT.

### **Drug Trafficking**

Drug trafficking, regardless of the mode of transport, has been the subject of long standing international convention. The first drug control bodies, springing from the opium trade, were established over seventy years ago.<sup>11</sup> The three major multilateral drug treaties are listed in Annex A. they have been widely ratified, reflecting the general concern of countries with drug trafficking. The Single Convention on Narcotic Drugs of 1953 established the international framework for international control of the drug trade, but generally relied upon national jurisdiction for enforcement against illicit activities. The later conventions supplemented and refined the earlier ones but the 1988 UN Convention Against Illicit Traffic in narcotic Drugs and Psychotropic Substances (the 1988 Vienna Convention) was the first to deal specifically with drug trafficking by sea. UNCLOS Article 108 provides for cooperation between States in respect of the illicit traffic in narcotic drugs or psychotropic substances on the high seas.

The 1988 Vienna Convention provides the means by which States can take enforcement action in international waters. The ability to act on the high seas in cooperation with flag States to suppress the traffic of illicit drugs has the potential to be a major deterrent to traffickers. Article 17 of the Convention provides the framework, in the absence of treaties, under which States may act when confronted by the traffic of illicit drugs on the high seas. Parties to the Convention are to cooperate to the fullest extent possible to suppress illicit traffic by sea, in conformity with the international law of the sea. At the time of becoming a party to this Convention, each party is to designate an authority or authorities to receive and respond to requests for cooperation.

In 1998, the UN adopted General Assembly Resolution S-20/4 on "Measures to enhance international cooperation to counter the world drug problem". Part C Section VI of the resolution addresses "illicit traffic by sea" and recommends that States, inter alia, negotiate and implement bilateral and multilateral agreements to enhance cooperation in combating the illicit drug traffic by sea in accordance with Article 17 of the 1988 Convention, promote regional cooperation in maritime drug law enforcement by means of bilateral and regional meetings; cooperate with other States through multilateral training seminars; and promote common maritime law enforcement procedures through the use of the maritime drug law enforcement training guide of the UN International Drug Control Programme.<sup>12</sup>

### **Human Smuggling**

Human smuggling by sea has increased significantly in the Asia Pacific in recent years. The UN Annual Report on Oceans and the law of the sea in 1998 described illegal trafficking in persons as "a reckless exploitation of people in distress, and thus is a reprehensible form of international crime".<sup>13</sup> The UN Convention against Transnational Organised Crime was adopted by the UN General Assembly in November 2000 with a protocol against trafficking in persons, especially women and children.

States may exercise jurisdiction over vessels suspected of human smuggling if they infringe the immigration laws for which their contiguous zone has been established<sup>14</sup> or if they enter the territorial

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<sup>8</sup> Rome Convention, Art.4.

<sup>9</sup> Rome Convention, Art.6.

<sup>10</sup> [http://www.un.org/Depts/los/54\\_31.htm](http://www.un.org/Depts/los/54_31.htm)

<sup>11</sup> For more information, refer to the Report of the International Narcotic Control Board available at <http://www.incb.org>.

<sup>12</sup> OCEANS AND LAW OF THE SEA: REPORT OF THE SECRETARY GENERAL, United Nations Doc. A/53/456, 5 October 1998, at para.126.

<sup>13</sup> Report of the Secretary-General, loc.cit., supra note 2 at para.134.

<sup>14</sup> UNCLOS Article 33.

sea en route to a destination within the State.<sup>15</sup> A problem arises, however, if the vessel is merely on passage through a State's territorial sea to a third State. In such a case, only an extended reading of UNCLOS Article 27 might suffice if it could be argued that the mere presence of such a vessel in the territorial sea affects the peace and good order of the coastal State. Furthermore, if a vessel involved in trafficking persons is not flying a flag or can otherwise be assimilated to a vessel without nationality, it may be boarded on the high seas by the warships of any nation.<sup>16</sup>

The IMO has adopted an instrument entitled Interim Measures for the Combating of Unsafe Practices Associated with the Trafficking or Transport of Migrants by Sea<sup>17</sup> which is designed to promote awareness and cooperation among contracting Governments. Actions under these guidelines are primarily the responsibility of flag States but if a State believes that a foreign ship is engaged in unsafe practices on the high seas it may request authorisation from the flag State to board the ship; inspect and carry out a safety examination; and if evidence is found that the ship is engaged in unsafe practices, take appropriate action with respect to the ship, person and cargo onboard, as authorised by the flag State. A request for such authorisation should be granted "expeditiously". When a ship is found to be engaged in unsafe practices, the detaining State is to report its findings immediately to the authorising flag State and consult on the further actions to be taken after filing a report.<sup>18</sup>

### **Maritime Theft and Fraud**

Maritime fraud may take many forms, including the use of fraudulent documentation for cargoes, ship registration and crew certification; charter party fraud leading to the deviation of cargoes that shippers thought were being legitimately shipped; "phantom ships" where ships disappear with their entire cargo; and various forms of container crime. Maritime theft includes pilfering where dishonest crew members or cargo handlers remove some of the contents of a package or cargo.

There are many ways that containers can be used fraudulently including:

- substituting cargo with contraband (i.e. goods imported or exported illegally);
- mixing bogus shipments in a container of multiple shipments;
- packaging legitimate cargo at the front of the container with contraband or nothing at the back;
- secreting contraband in legitimate cargo;
- shipping empty containers with hidden compartments containing contraband; and
- shipping a suspect container by one shipping company to a transit port where it is transferred to another shipping company to mask the country of origin.

The sheer volume of container traffic in the Asia Pacific makes systematic inspection virtually impossible. Refrigerated containers with thick insulation offer particular advantages for concealing contraband but are rarely searched by customs officers for fear of damaging the frozen contents. Searching containers on a random basis is an extremely difficult task and it is necessary to rely on timely intelligence and profiling ports, shippers, cargo receivers, freight forwarders, etc for evidence of container crime.

### **Illegal Fishing**

Illegal fishing may occur in contravention of either coastal State legislation or an international treaty. A State is competent within its internal waters, territorial sea, archipelagic waters and EEZ to adopt legislation for exploiting, conserving and managing its fisheries. States are also competent to enforce these rules and most regional countries do so with considerable vigour. A State's jurisdiction over its fisheries is co-extensive with the boundary of its EEZ but a fish stock may straddle the high seas and a State's EEZ (straddling stocks) while other stocks may migrate between different EEZs and areas of high seas (highly migratory stocks).

In 1995 the UN adopted the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.<sup>19</sup> Under this Agreement, States are required to exercise jurisdiction over vessels flying their flag and engaged in illegal fishing regardless of where an offence takes place.<sup>20</sup> Furthermore, in order to implement the Agreement effectively, regional and sub-regional fisheries management organisations are required to establish reciprocal boarding and inspection procedures among member States for the high seas areas covered by relevant regional fisheries management regimes.

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<sup>15</sup> UNCLOS Article 27.

<sup>16</sup> UNCLOS Article 92(2).

<sup>17</sup> IMO, MSC/Circ.896, 16 December 1998

<sup>18</sup> Ibid., para.14

<sup>19</sup> (1995) 34 ILM 1542. Hereafter "Fish Stocks Agreement"

<sup>20</sup> Fish Stocks Agreement Article 19(1)(a)

The Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, concluded in September 2000, implements the provisions of the UN Fish Stocks Agreement in the Western and Central Pacific Ocean. Many distant water fishing nations in the Asia Pacific participated in the negotiation of this Convention and are likely to ratify it. The enforcement measures stipulated by the Convention include:

- imposition of flag State responsibilities;
- imposition of responsibilities with respect to nationals;
- requirements for exchange of information and evidence to secure prosecution;
- mechanisms for cooperative boarding and inspection of fishing vessels;
- Port State enforcement;
- the use of observers; and
- the mandatory use of satellite monitoring systems by all vessels that fish in the Convention area.

Possible solutions to the problems of illegal fishing include bilateral initiatives, regional cooperation with surveillance and monitoring, Port State controls, the more effective discharge of Flag State responsibilities, and the introduction of satellite monitoring. The wide ratification and entry into force of the Fish Stocks Agreement will strengthen the legal basis for such actions. Cooperative training schemes (covering boarding, inspection and arrest procedures) and the development of a common understanding of legal norms in fisheries enforcement are areas where regional cooperation might assist effective implementation of such measures.

### **Environmental Offences**

Coastal States have extensive powers under UNCLOS and other international treaties to assume criminal jurisdiction, concurrently with the flag State, over environmentally deleterious events such as pollution by dumping and pollution from vessels. This is exclusive jurisdiction in cases of pollution in their internal waters, territorial, archipelagic waters and EEZs. Events on the high seas that may be detrimental to a coastal State's environment may also be the subject of enforcement jurisdiction by the coastal State. The Conventions listed in Annex A that are of particular note in this context are MARPOL 73/78, the Intervention Convention and the London Convention.

Jurisdiction under MARPOL and the London Convention is based on a mix of flag State and port State control. Under MARPOL, States are entitled to exercise jurisdiction for the prohibited events over vessels flying their flag or which operate "under the authority" of a State party. A port State may inspect vessels to ensure that they hold certificates and may prevent a ship from sailing if it does not. Parties to MARPOL are enjoined to cooperate in the detection of violations and enforcement of the Convention and any vessel in port to which MARPOL applies may be inspected for the purpose of verifying whether or not it has discharged a harmful substance in violation of the law.

The intervention Convention is specifically designed to permit States to take action beyond their national jurisdiction when events on the high seas threaten the maritime environment within their national jurisdiction. States are entitled to take such measures on the high seas as are necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interest from pollution or the threat of pollution of the sea following a maritime casualty. Before taking action in such circumstances, however, a State must, inter alia, consult with other affected States, particularly the flag State of the vessel or vessels involved, unless the situation is one of such urgency in which case prior notification or consultation is not necessary.

Operational pollution from ships arises as a result of ballasting to maintain the stability of a tanker after it has discharged its cargo, and from cargo tank washing to prepare tanks for a new and possibly different type of cargo or prior to maintenance. Both these operations can result in the discharge of oily sludge into the sea in contravention of MARPOL. Due to the number of tankers using regional waters and the lack of adequate deterrence to illegal discharges, the incidence of this type of offence is probably high in the Asia Pacific, particularly in East Asian waters where tanker traffic is very high. MARPOL requires all parties to cooperate in detecting ship violations. However, most violators are not caught because countries generally do not have the resources to patrol the seas properly and, if an oil slick is discovered, it is difficult to build sufficient evidence to link it to a particular ship. Regional cooperation, particularly in the enclosed and semi-enclosed seas of East Asia, could cover a monitoring and surveillance regime to build up a regional picture of the incidence of operational ship pollution, as well as the processing of evidence to obtain a successful prosecution.

### JURISDICTION AND ENFORCEMENT

#### Jurisdiction

The exercise of State jurisdiction over maritime crime is governed by several critical factors. These include:

- the location of the offence;
- the nationality of the vessels(s) involved;
- the location of the vessel involved after the offence is committed;
- the nationality of the victim(s);
- the nature of the offence; and
- the nationality of the offender.

The limits of a State's criminal jurisdiction are governed, to a substantial degree, by reference to the particular zone in which the offence occurs. Maritime zones comprise Internal Waters, Archipelagic Waters, Territorial Sea, Straits Used for International Navigation, Contiguous Zone, EEZ, Continental Shelf and High Seas. A brief description of each of these zones is included in Annex E.

A State's criminal jurisdiction also varies depending on the type of jurisdiction being exercised. This may be:

- as a flag State over vessels flying its flag;
- as a coastal State over waters under national jurisdiction but as a general proposition, the jurisdiction of a coastal State over its maritime zones diminishes as the distance of the zone from the coast increases;
- as a port State whereby a State exercises jurisdiction over vessels entering its internal waters to enter port and has the right to deny access to such waters if international law or its domestic laws are not observed;
- as an archipelagic or straits State in accordance with the relevant regime in UNCLOS;
- as a State of nationality of natural or legal persons engaged in illegal activities; and
- through the exercise of universal jurisdiction on the high seas in respect of certain categories of offence in Part VII of UNCLOS (this may also extend to EEZs of third States through UNCLOS Article 58).

#### Enforcement Concepts

##### *Hot Pursuit*

The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing States, and may only be continued if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone. If the foreign ship is within a contiguous zone, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.

The right of hot pursuit applies *mutatis mutandis* to violations in the EEZ or on the continental shelf, including safety zones around continental shelf installations, of the coastal States and regulations applicable in accordance with UNCLOS to the EEZ or the continental shelf, including such safety zones. The right of hot pursuit ceases as soon as the ship pursued enters the territorial seas of its own State or of a third State.

Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship is within the limits of the territorial seas, or, as the case may be, within the contiguous zone or the EEZ or above the continental shelf. The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance that enables it to be seen or heard by the foreign ship. The right of hot pursuit allows for full powers of boarding, search and arrest as if the intercepted vessel had been within the jurisdiction of the coastal State.

Hot pursuit may be undertaken only by warships or military aircraft, or by other ships or aircraft clearly marked and identifiable as being on government service and authorised to that effect. Where hot pursuit is effected by an aircraft like provisions apply and the aircraft giving the order to stop must itself actively

pursue the ship until the ship or another aircraft of the coastal State arrives to take over the pursuit, unless the aircraft is itself able to arrest the ship.

### ***Constructive Presence***

The doctrine of constructive presence is another means by which a coastal State's jurisdiction might be extended. Jurisdiction is based on the presence of boats from a mother ship acting illegally within a particular zone while the mother ship is lying outside the zone. In such cases, the mother ship is deemed to be constructively present for the purposes of exercising criminal jurisdiction and may come within coastal State jurisdiction. UNCLOS Article 111 recognises that the doctrine of constructive presence in that hot pursuit by a ship or aircraft may be employed against a foreign ship when one of its boats is within the applicable zone. This includes in Article 111(4) when "the ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship is within the limits of the territorial sea, or, as the case may be, within the contiguous zone or the exclusive economic zone or above the continental shelf". It may be problematic whether "or other craft" for the purpose of the doctrine of constructive presence includes a helicopter but State practice and commonsense suggest that it should. Differing views also exist as to whether the ship has to be specifically a mother ship (i.e. it is carrying, towing or escorting the craft that enters the zone) or could be any other craft "working as a team".

Hot pursuit and constructive presence are important means of jurisdictional extension but they are unsatisfactory as the only bases for direct action when a State has evidence of an offence committed by a vessel fleeing from one of its maritime zones and now on the high seas. This evidence is likely to be available as a result of advances in surveillance and satellite technology but coastal States are very limited in the action they can take once the offending vessel leaves their jurisdiction.

Increasingly, regional fisheries treaties established under the framework of the Fish Stocks Agreement will provide for states to take enforcement action on the high seas in respect of in zone violations, and will facilitate regional cooperation to enforce fisheries laws.

### ***Problems of Exclusive Jurisdiction***

Since jurisdiction is an aspect of sovereignty, any transgression by another State in an area which is within the domestic jurisdiction of another State will constitute a violation of international law. States have exclusive competence relative to matters within their jurisdiction, and as we have seen, a State's jurisdictional competencies vary in the different maritime zones. Cutting across the territorial aspect of maritime jurisdiction, however, is the jurisdiction of the flag State in accordance with UNCLOS Article 94 in respect of vessels flying its flag. The problems that might arise can only be resolved through some form of agreement between States. This might be through either a multilateral treaty or a bilateral arrangement between States, such as might be included in a joint resource development zone.

## EXPLANATION OF TERMS

The following terms are explained for the purposes of this memorandum and no separate legal status is intended for the terms.

**Contraband.** In its primary sense, the term means goods the import or export of which are prohibited by ban or edict, and indicates a prohibited trade.

**Construction Presence.** A foreign ship which is located on the high seas is considered to be constructively present within the territorial seas, contiguous zone, exclusive economic zone or above the continental shelf of the coastal State when other craft are plying between it and the relevant zone and are reasonably believed by the authorities of the coastal State to have violated the laws and regulations of that State.

**Flag of Convenience.** A flag of a State other than his own to which a ship-owner transfers the registration of his ship for tax reasons or in order to avoid the safety or crew employment provisions required of ships sailing under the flag of his own country.

**Flag State.** A flag State is a State which grants vessels using international waters, regardless of type and purpose, the right to fly its flag and, in so doing, gives the ships its nationality. There must exist a genuine link between the State and the ship (UNCLOS Article 91(1)) and the State shall issue ships granted the right to fly its flag documents to that effect (UNCLOS Article 91(2)).

**Hot Pursuit.** The right of a coastal State, if it has good reason to believe that a foreign ship has infringed its laws and regulations while passing through its maritime zones, to pursue that ship and apprehend it even on the high seas. Hot pursuit is exercised in accordance with the provisions of UNCLOS Article 111. The most important elements of valid hot pursuit are its conduct without interruption, and its immediate commencement while the alleged infringing vessel or its accessory boats are still within the relevant maritime zone of the coastal State.

**Human Smuggling.** The intentional procurement for profit of the illegal entry of a person into and/or illegal residence of a person in a State of which the person is not a national or a permanent resident.

**Maritime Terrorism.** The use of violence at sea or to a ship or fixed platform for political ends, including any use of violence for the purpose of putting the public or any section of the public in fear.

**Nationality Principle.** The legal relationship attaching to membership of a nation resulting typically from birth or naturalisation. The term generally implies duties of allegiance and protection by the State and should not be confused with nationality as meaning membership of a certain nation in the sense of race.

**Passive Personality Principle.** The assumption of criminal jurisdiction by a State on the grounds that the victim of a crime, although situated outside its territory at the time of the offence, is its national.

**Port State Control.** The right of a state which is party to a memorandum of understanding to prevent a vessel from leaving port on the grounds that it does not satisfy the requirements of the Safety of Life at Sea (SOLAS) Convention.

**Protective Principle.** The assumption of criminal jurisdiction by a State on the grounds that an offence committed outside its territory is regarded as injurious to national well-being or security.

**Public Ship.** A warship or other vessel clearly marked and identifiably as being on government service and authorised to that effect, and used only on government non-

commercial service. Such vessels have complete immunity from the jurisdiction of any State other than the flag State.

**Territorial Principle.** The concept in international law that a Sovereign ought not to engage in jurisdictional acts outside the limits of his territory.

## MARITIME ZONES OF JURISDICTION

**Internal Waters.** The waters lying on the landward side of territorial sea baseline drawn in accordance with UNCLOS. The coastal State exercises full sovereignty over internal waters.

**Territorial Sea.** The outer limit of the territorial sea is to be no more than 12 nautical miles (nm) seaward of the baseline. A State has sovereignty over the territorial sea with the one qualification that it must allow the right of innocent passage of foreign vessels. Article 19 of UNCLOS sets out the activities that constitute non-innocent passage but questions of interpretation and jurisdiction could arise with respect to some of these activities.

**Archipelagic Waters.** These are the waters within archipelagic baselines drawn in accordance with Article 47 of UNCLOS. Archipelagic waters come under the full sovereignty of the archipelagic State with the exceptions of the rights of innocent passage and requirements that archipelagic sealanes passage be allowed to foreign ships and aircraft.

**Contiguous Zone.** This is a zone contiguous to the territorial sea which may not extend more than 24nm from the territorial sea baseline. Article 33 of UNCLOS allows coastal States to exercise controls necessary to prevent the infringement of their customs, fiscal, immigration or sanitary laws and regulations within their territorial sea or to punish the infringement of such laws and regulations committed within their territorial sea.

**Straits Used for International Navigation.** A special regime applies when a strait used for international navigation is wholly or in part contained within the territorial sea of one or more States. This is the regime of straits transit passage which allows a right of passage through the strait to all ships and aircraft. Like archipelagic sealanes passage, this passage shall not be impeded and the right of passage cannot be suspended.

**Exclusive Economic Zone (EEZ).** The EEZ is an area adjacent to the territorial sea which cannot extend more than 200nm measured from the territorial sea baseline. In the EEZ, coastal States have sovereign rights for the purpose of exploiting, conserving and managing the living and non-living resources. Coastal States also have jurisdiction, as provided for in the relevant provisions of UNCLOS, in relation to the establishment of artificial islands, installations and structures; marine scientific research, and the protection and preservation of the marine environment.

**Continental Shelf.** This is defined by Article 76 of UNCLOS as the sea-bed and subsoil of the submarine areas adjacent to the territorial sea of a coastal State. Ordinarily the continental shelf cannot extend beyond 200nm measured from the territorial sea baseline. In cases where the coastal State has a long continental margin, the legal continental shelf may extend up to 350nm from the territorial sea baseline. The coastal State has sovereign rights over the non-living resources and living resources of sedentary nature on its continental shelf.

**High Seas.** These are all parts of the sea that are not included within the EEZ, territorial sea, internal waters or archipelagic waters or any State. No State may validly purport to subject any part of the high seas to its sovereignty. A flag State may exercise jurisdiction over vessels flying its flag on the high seas and all States may exercise jurisdiction with regard to specific universal crimes (i.e. piracy, slavery, and unauthorised broadcasting). Rights of visit by warships or vessels “clearly marked and identifiable as being on government service” may be exercised on the high seas in specified circumstances for these universal crimes and if a ship is without nationality or suspected as being of the same nationality as the visiting ship. Some aspects of high seas jurisdiction may extend to the EEZ. The jurisdiction of a coastal State may be extended to the high seas by the application of the right of hot pursuit and the doctrine of constructive presence.