

ReCAAP Special Lecture
7 July 2021

Piracy and Armed Robbery Against Ships in Asia and 1982 UNCLOS

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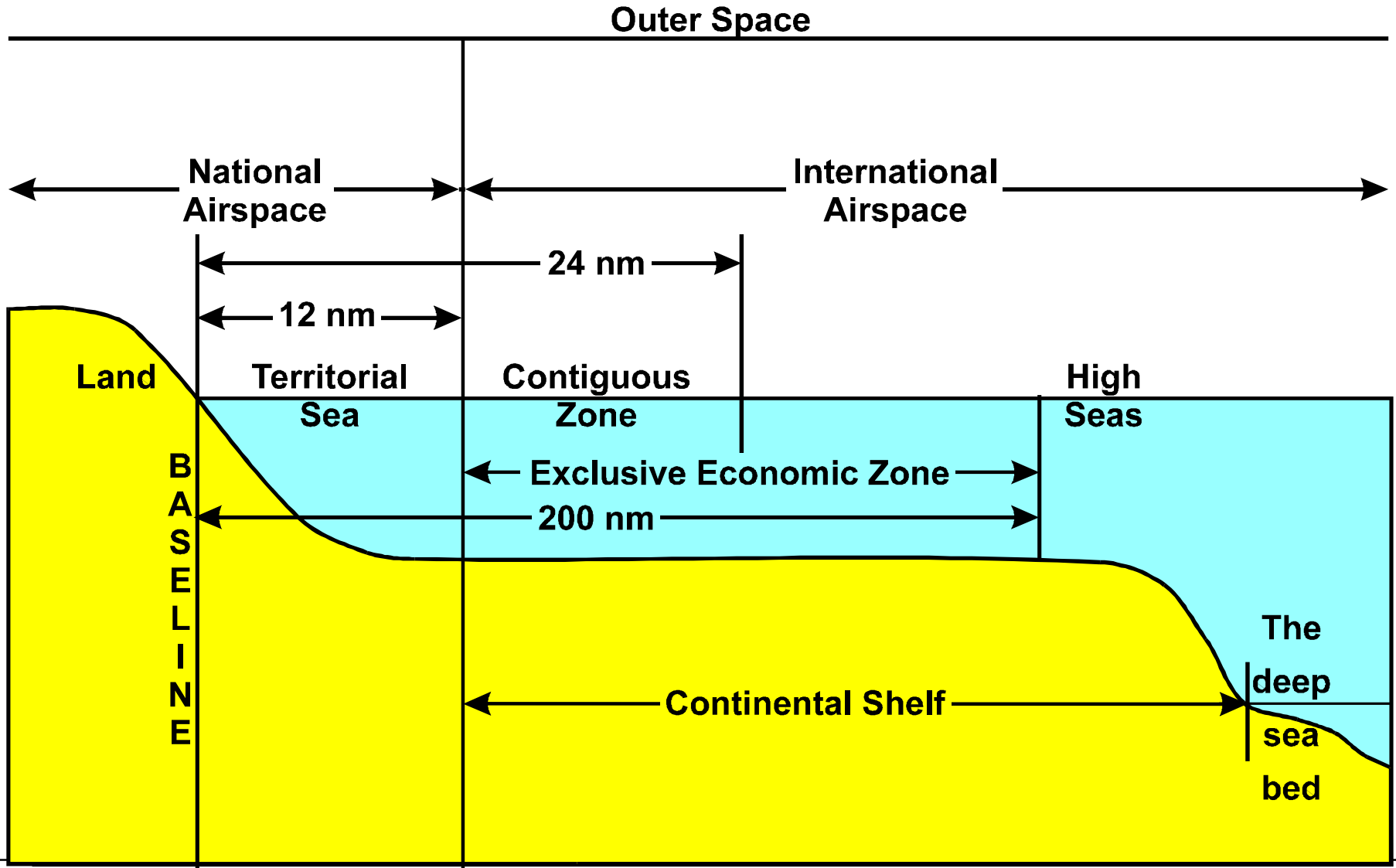
Part 1

1982 UN Convention on the Law of the Sea

Current Status of 1982 UNCLOS

- Adopted in December 1982
- Entered into force in November 1994
- Universally accepted with 168 Parties, including the EU
- All States in Asia are parties except Cambodia, DPR Korea and Iran
- USA is only major State that is not a party, but it accepts and follows the provisions of the Convention as Customary International Law

LEGAL REGIMES OF THE OCEANS AND AIRSPACE



Maritime Zones under UNCLOS

Areas under Sovereignty

- Internal Waters
- Territorial Sea
- Archipelagic Waters

Sovereignty

Areas outside of Sovereignty but within national jurisdiction

- Contiguous Zone
- Exclusive Economic Zone
- Continental Shelf

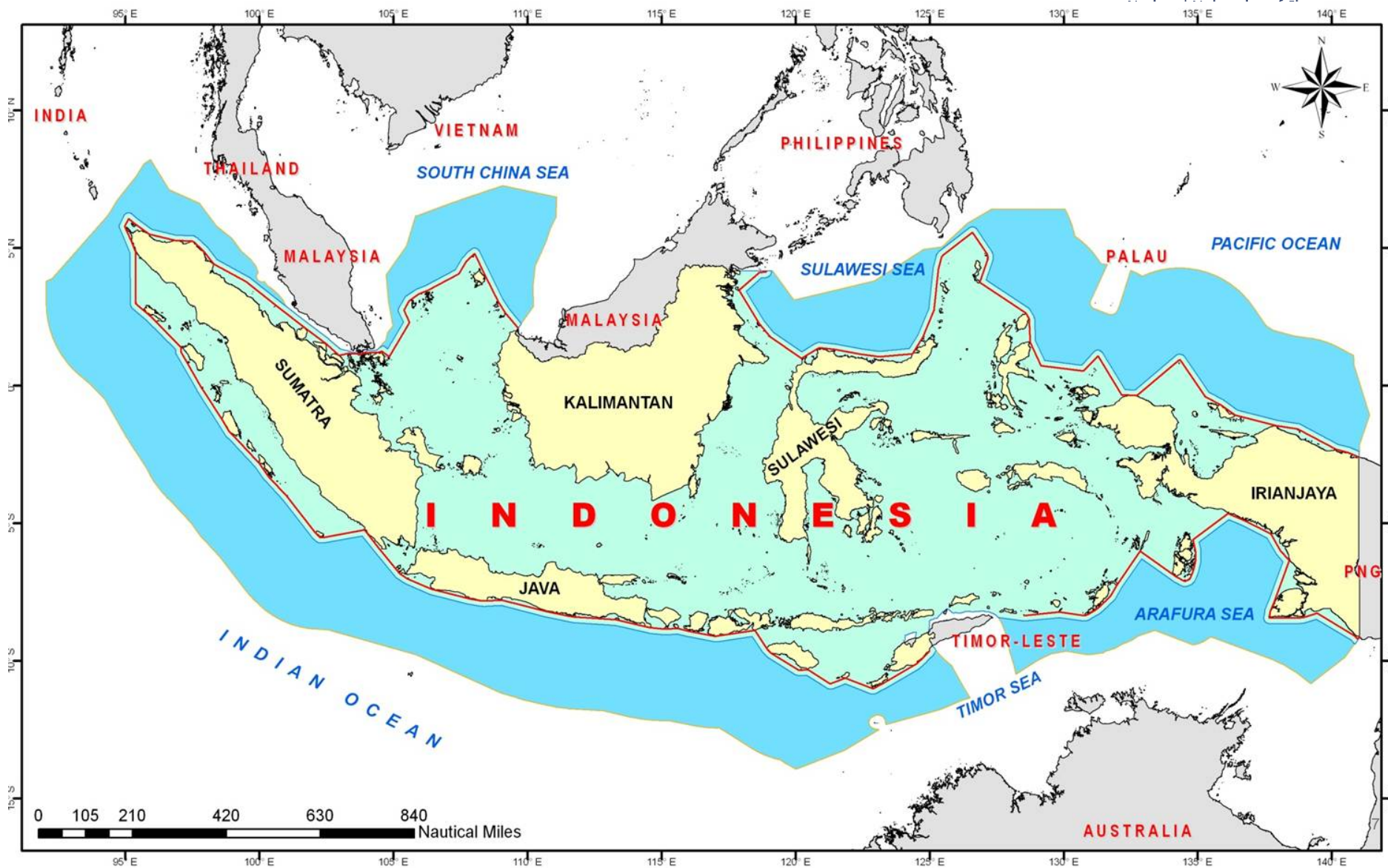
Sovereign Rights & Jurisdiction

Areas Beyond National Jurisdiction

- High Seas
- Deep Seabed (The Area)

Freedom of the Seas

Common Heritage of Mankind



Part 2

Jurisdiction over Ships on the High Seas

Art 92. Exclusive Jurisdiction of Flag State over Ships on the High Seas

- Ships shall sail under the flag of one State only and, *save in exceptional cases expressly provided for in international treaties or in this Convention*, shall be subject to its **exclusive jurisdiction** on the high seas

Art 94. Duties of Flag State – Exercise of Jurisdiction

1. Shall **effectively exercise jurisdiction & control** in administrative, technical and social matters

must maintain Registry and must assume jurisdiction under its internal law

7. Must conduct inquiry if marine casualty or incident of navigation

Art 94. Duties of Flag States - Safety at Sea

- Flag State must take measures to ensure that ships flying its flag conform to “generally accepted procedures and practices for safety at sea”
- This clause means that Flag States must ensure that ships flying its flag comply with major IMO conventions on Safety at Sea
 - 1972 Collision Regulations
 - 1974 SOLAS Convention
 - 1975 STCW Convention
 - etc.

Arts 95-96. Immunity of Warships & Government Ships

- Article 95. **Warships** on the high seas have complete immunity from the jurisdiction of any State other than the flag State.
- Article 96. **Ships owned or operated by a State and used only on government non-commercial service** have complete immunity from the jurisdiction of any State other than the flag State.

Definition of Piracy

Under Article 101, **piracy** consists of :

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

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

Definition of Piracy

Under Article 101, piracy also consists of :

- (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 subparagraph (a) or (b).

Piracy under UNCLOS

- UNCLOS provides that all States have duty to cooperate in the repression of piracy
- Piracy provisions create an **exception** to the general principle that ships on the high seas are subject to the **exclusive jurisdiction of the flag State** and thus cannot be boarded without the flag State's consent
- Warships of all States have a right to seize pirate ships and arrest pirates

Definition of a Pirate Ship

- A ship . . . is considered a pirate ship . . if it is intended by the persons in dominant control to be used for the purpose of committing piracy
- The same applies if the ship . . . has been used to commit any such act, so long as it remains under the control of the persons guilty of that act

Seizure of a Pirate Ship

- On the high seas [or EEZ], **every State may seize a pirate ship** or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board
- The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships or property
- **Note: This clause means the States must have national laws providing a penalty for the offence of piracy**

Issues on Definition of Piracy

1. Definition of piracy only includes acts of a certain level severity
 - “Act of violence or detention”
 - “Act of depredation” – ransacking, laying waste or plundering
 - “Armed robbery” usually means taking something from someone using violence or intimidation, while carrying a dangerous weapon
2. Does not include “attempts” to commit piracy
 - However, the national laws of many States provide that attempts to commit offences (including piracy) under their Penal Code or Criminal Code are also offences

“Private Ends”

- The requirement that acts of piracy must be for “private ends” has been the subject of debate
- Issue is whether attack for “political purposes” is not piracy because “private ends” requires that the attack be for “personal gain”
- The better view seems to be that “private ends” is in contrast to “public ends”, that is, acts that are sanctioned by a State
 - Historically, a “Letter of Marque” was a license issued by the sovereign to fit out an armed vessel and use it in the capture of enemy merchant shipping, thereby authorizing acts which would otherwise have constituted piracy
 - Since they attacks under a Letter of Marque were for public ends, they were not considered to be piracy

Need for National Legislation

- UNCLOS provides no penalty for Piracy
- States must enact legislation making Piracy a crime under their national law and providing a penalty
- A serious problem in combatting piracy is that many States do not have legislation providing the piracy is an offence under their criminal law and providing a penalty for the offence
 - Note: The criminal law in most former British colonies is based on the Indian Penal Code, which had no offence for Piracy
- Another problem is that the national legislation in many States does not clarify whether “attempts” are also offences

Singapore Legislation on Piracy

Penal Code (CAP 224, Singapore Statutes)

Section 130B. Piracy by the law of nations.

(1) A person commits **piracy** who does any act that, by the **law of nations**, is **piracy**.

(2) Whoever commits piracy shall be **punished** with **imprisonment for life** and with **caning** with not less than 12 strokes, but if while committing or attempting to commit piracy he murders or attempts to murder another person or does any act that is likely to endanger the life of another person he shall be punished with **death**.

“Attempts” to Commit Piracy

1. Definition of piracy in UNCLOS does not include “attempts” to commit piracy
2. However, the national laws of many States provide that attempts to commit offences (including piracy) under their Penal Code or Criminal Code are also offences

Singapore Legislation on “Attempts”

Penal Code (CAP 224, Singapore Statutes)

Section 512. Attempts.

(1) A person who **attempts** to commit an offence punishable by this Code or by any other written law with death or imprisonment for life, shall, where no express provision is made by this Code or by such other written law for the punishment of such attempt, be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to fine or to caning.

Part 3

Exceptional Case of Somali Piracy

Security Council & Somali Piracy

- Chapter VII of the UN Charter permits the UN Security Council to take measures if they determine the existence of a threat to peace, breach of peace or act of aggression
- Because of the unique circumstances in Somalia, the UN Security Council used its “Chapter VII” powers and created an exception to the rules on piracy after declaring the situation a “threat to peace”
- The resolutions of the Security Council authorize States cooperating with the Transitional National Government of Somalia to enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea

Limits of Exception on Somalia

- Exception only applies if the Transitional National Government of Somalia has given notice to the UN Secretary-General
- Indonesia and other developing countries who were members of the Security Council insisted that the resolution expressly provided that it as a “one-off” which could not be applied elsewhere or used to create a new rule of customary international law

Part 4

Piracy in the Exclusive Economic Zone

Maritime Zones under UNCLOS

Areas under Sovereignty

- Internal Waters
- Territorial Sea
- Archipelagic Waters

Sovereignty

Areas outside of Sovereignty but within national jurisdiction

- Contiguous Zone
- Exclusive Economic Zone
- Continental Shelf

Sovereign
Rights &
Jurisdiction

Areas Beyond National Jurisdiction

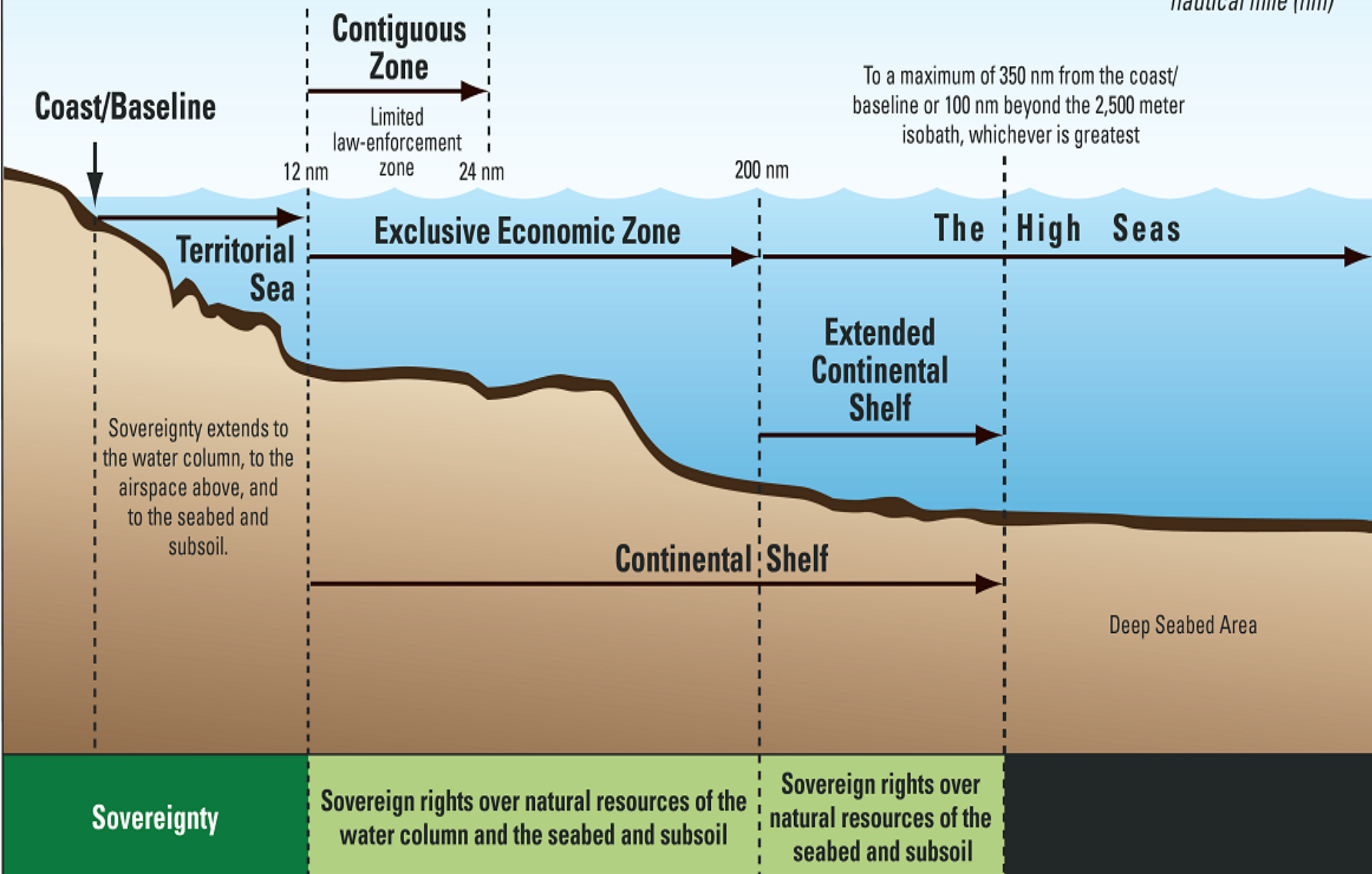
- High Seas
- Deep Seabed (The Area)

Freedom of
the Seas

Common
Heritage of
Mankind

Maritime Zones

nautical mile (nm)



Sovereignty

Sovereign rights over natural resources of the water column and the seabed and subsoil

Sovereign rights over natural resources of the seabed and subsoil

Nature of EEZ Regime

- EEZ is a maritime zone beyond and adjacent to the territorial sea, extending out to 200 nautical miles from the baselines from which the territorial sea is measured
- **EEZ is not part of the high seas**
- **EEZ is not subject to the sovereignty of coastal State**
- EEZ is a **specific legal regime** in which the **rights and jurisdiction of coastal States** and the **rights and freedoms of other States** are set out in UNCLOS.
- Coastal States only have **sovereign rights and jurisdiction** over economic activities and marine scientific research in their EEZ

Overview of EEZ Regime

Article 55 – Specific Legal Regime

Article 56 – Rights, Jurisdiction & Duties of Coastal States

Article 58 - Rights and Duties of Other States

Article 59 – Basis for resolution of conflicts regarding the Attribution of Rights and Jurisdiction in the EEZ

Art. 55 Specific Legal Regime

Article 55. Specific Legal Regime of the Exclusive Economic Zone

- The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the **specific legal regime** established in this Part, under which the **rights and jurisdiction of the coastal State** and the **rights and freedoms of other States** are governed by the relevant provisions of this Convention.

Art. 56(1) – Rights of Coastal State

In the EEZ, the coastal State has:

- (a) **sovereign rights** for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
- (c) **other rights** and duties provided for in this Convention.

Art 56(3). Due Regard Obligation of Coastal States

2. In exercising its rights and performing its duties under this Convention in the EEZ,
the coastal State shall have **due regard** to the rights and duties of other States
and shall act in a manner compatible with the provisions of this Convention.

Article 58(1). Rights of Other States in the EEZ

1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and over flight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.

Article 58(3). Duties of Other States in the EEZ

3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have **due regard** to the rights and duties of the coastal State and **shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.**

Art. 56(2) – Jurisdiction of Coastal State

In the EEZ, the coastal State has:

(b) **jurisdiction** as provided for in the relevant provisions of this Convention with regard to:

- (i) the establishment and use of artificial islands, installations and structures; [Part VI]
- (ii) marine scientific research; [Part XII]
- (iii) the protection and preservation of the marine environment; [Part XII]

Article 58(2). High Seas Rules on Jurisdiction Applicable in the EEZ

2. **Articles 88 to 115** and other pertinent rules of international law **apply to the exclusive economic zone** in so far as they are not incompatible with this Part.

Note: Articles 88 to 115 include all the high seas provisions on jurisdiction over ships, including:

- Arts 91 and 92 on Nationality of Ships and exclusive jurisdiction of the flag State over ships flying its flag
- Article 94 on Duties of the Flag State
- **Articles 101-107 on Piracy**
- Articles 95 & 96 on Immunity of Warships and Government Ships
- Articles 110-111 on Right of Visit and Right of Hot Pursuit

Conclusions on Piracy in EEZ

1. The high seas piracy rules apply in the EEZ as well as in the high seas
2. Attacks on ships in the EEZ that are “piracy” as defined in Article 101 of UNCLOS are “piracy”
3. **Consequence: the rules on Piracy apply everywhere seaward of the outer limit of any State’s 12 nm territorial sea limit**
4. A warship of any State has the right to arrest pirates anywhere outside any State’s territorial sea limits

Legend

- Archipelagic waters
- Baseline & internal waters claims
- 12-nm territorial sea
- CLCS submissions
- Agreed maritime boundaries

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0 100 200 300

Nautical miles (nm)



Part 5

Attacks in Maritime Zones subject to Sovereignty

UNCLOS & ARAS

- Under UNCLOS and general international law, attacks on ships within **waters subject to the sovereignty of coastal States** (internal waters, territorial sea and archipelagic waters) are governed solely by the laws of the coastal State
- UNCLOS assumes if an attack takes place within a maritime zone subject to a coastal State's sovereignty, it is for the coastal State to take the necessary measures for the repression of the acts committed in maritime zones subject to its sovereignty
- UNCLOS assumes that the coastal State has the exclusive right to exercise police power to arrest ships in maritime zones subject to its sovereignty

Armed Robbery Against Ships

- There is no provision in UNCLOS referring to “Armed Robbery Against Ships” (ARAS)
- ARAS is a term that has been defined by the international community to describe attacks on foreign ships that would constitute piracy as defined in UNCLOS, but which are not piracy because the attacks took place in a maritime zones subject to the sovereignty of coastal States (internal waters, territorial sea or archipelagic waters)

2004 ReCAAP Agreement

- Definition of “ARAS” in the ReCAAP Agreement is almost the same as in Article 101 of UNCLOS except that
 - it applies in “a place within a Contracting Party’s jurisdiction over such offences”, which means in the internal waters, archipelagic waters or territorial sea of a coastal States
 - there is no requirement that two ships be involved
- It has similar provisions as the definition of piracy on voluntary participation, inciting or intentionally facilitating
- It also contains no provision on attempts

ReCAAP Definition vs IMO Definition

- In 2009 the IMO adopted a definition of Armed Robbery Against Ships in Res. A.1025(26), **Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ships** (Dec. 2, 2009).
- The IMO definition of “ARAS” differs from the definition of ARAS in the ReCAAP Agreement in one respect: the IMO definition includes **“threats” of the illegal acts**. It reads as follows:
 - “any illegal act of violence or detention or any act of depredation, **or threat thereof**, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, **within a State’s internal waters, archipelagic waters and territorial sea;**”

Territorial Sea & Archipelagic Waters

- A coastal State has sovereignty in its internal waters, territorial sea and archipelagic waters
- Any “maritime crime” in these zones is governed by the laws of the coastal State
- The coastal State has the **exclusive right to exercise jurisdiction over ships in its territorial sea or archipelagic waters**
- A foreign warship may not arrest a ship in these maritime zones without the express consent of the coastal State
- Right of Hot Pursuit ends when the ship being pursued enters the territorial sea of any State

Passage in Zones under Sovereignty

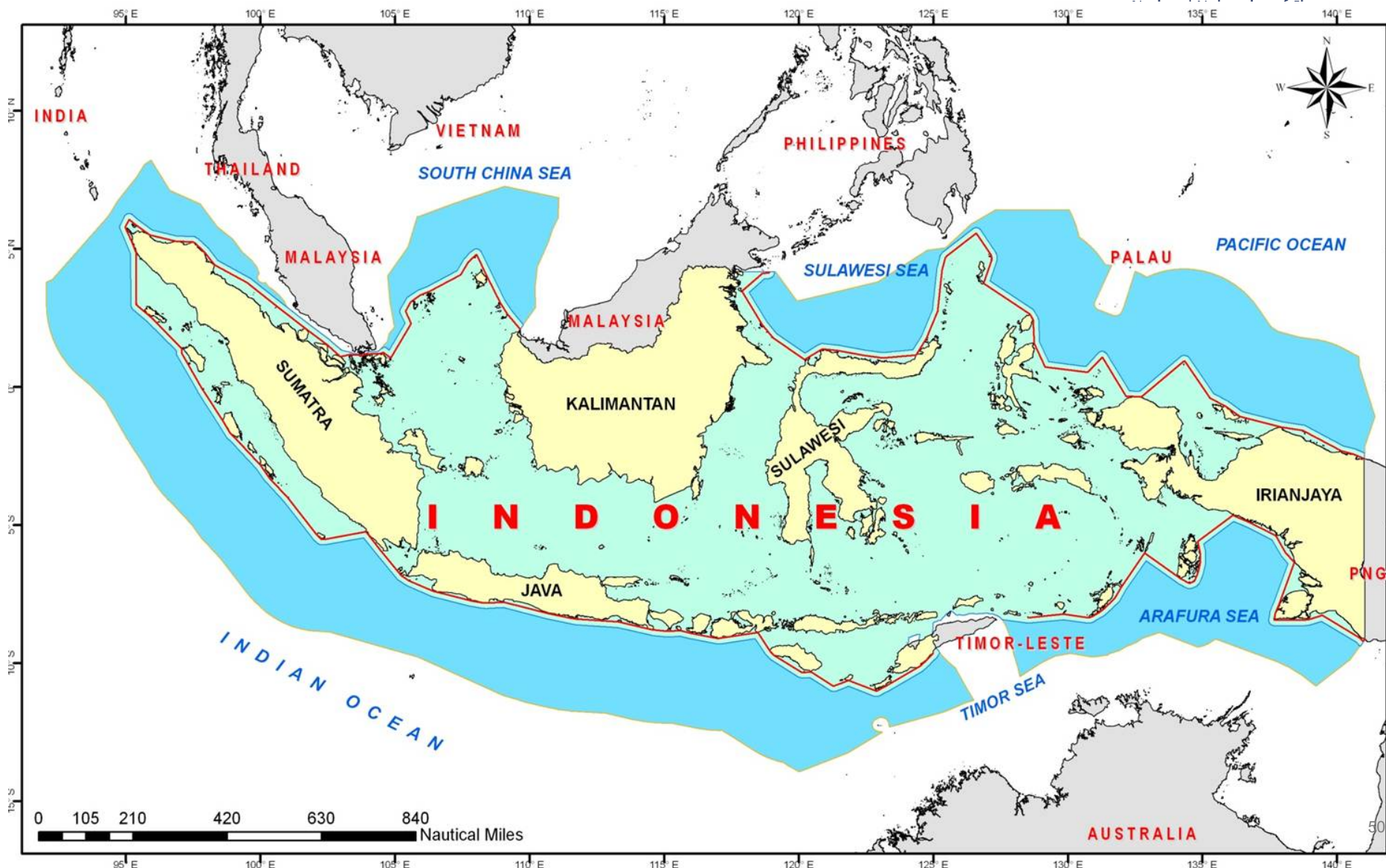
- A State's sovereignty in its Territorial Sea and Archipelagic Waters is subject to the rules of international law with respect to the passage of ships:
 - **Innocent Passage** through Territorial Sea and Archipelagic Waters
 - **Transit Passage** through Straits used for International Navigation
 - **Archipelagic Sea Lanes Passage** through archipelagic waters
- The sovereignty of a State in its Territorial Sea and in its Archipelagic Waters is also subject to other rules of international law

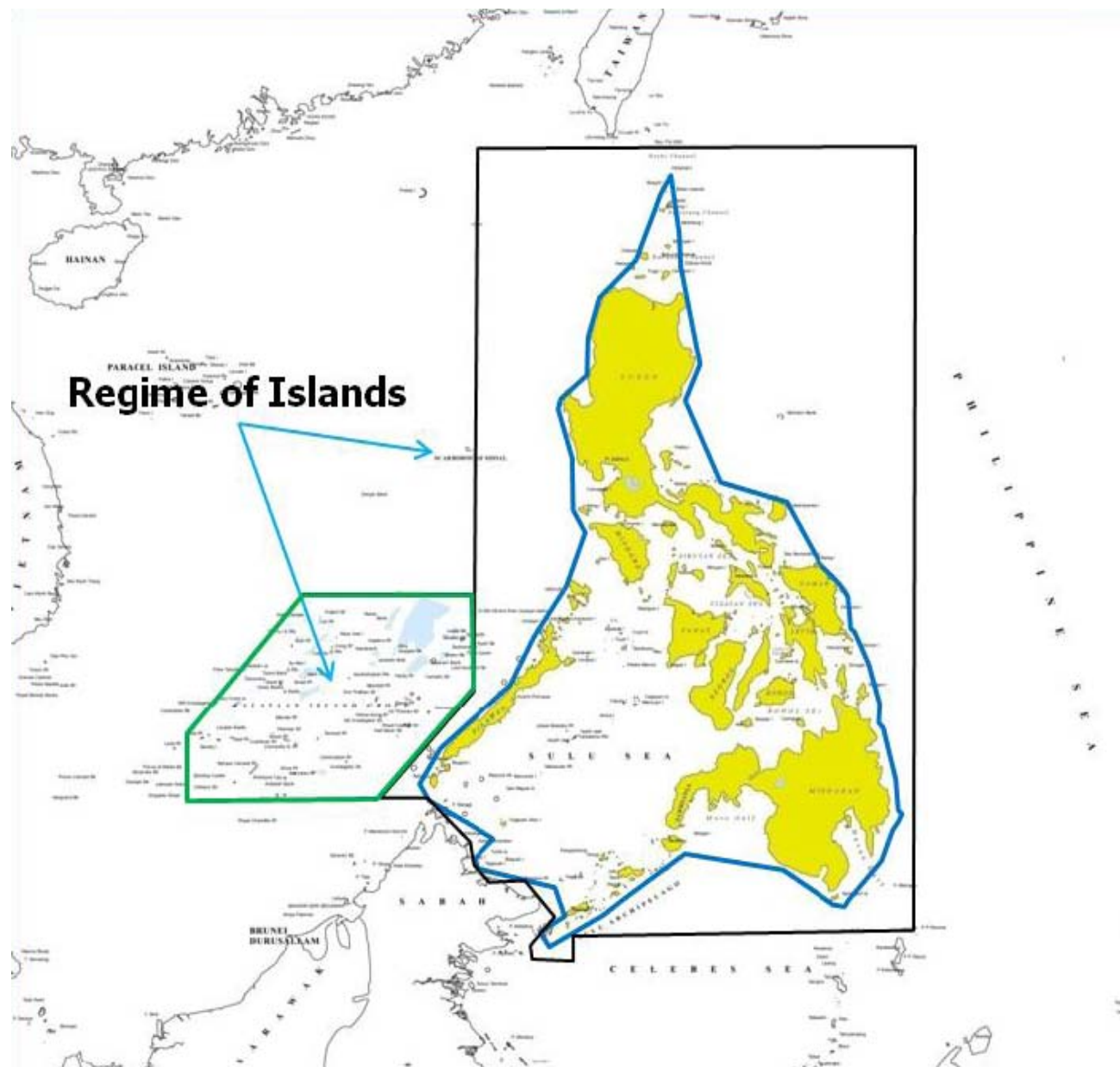
Arrest of Ships in Waters Under Sovereignty

- A ship that has committed an attack on another ship in waters subject to the sovereignty of the coastal State can be arrested by the coast guard of the coastal State
- Foreign ships have a right of continuous and expeditious passage through the waters of the coastal State, but if they engage in activities other than those incident to their right of continuous and expeditious passage, they are subject to the laws of the coastal State

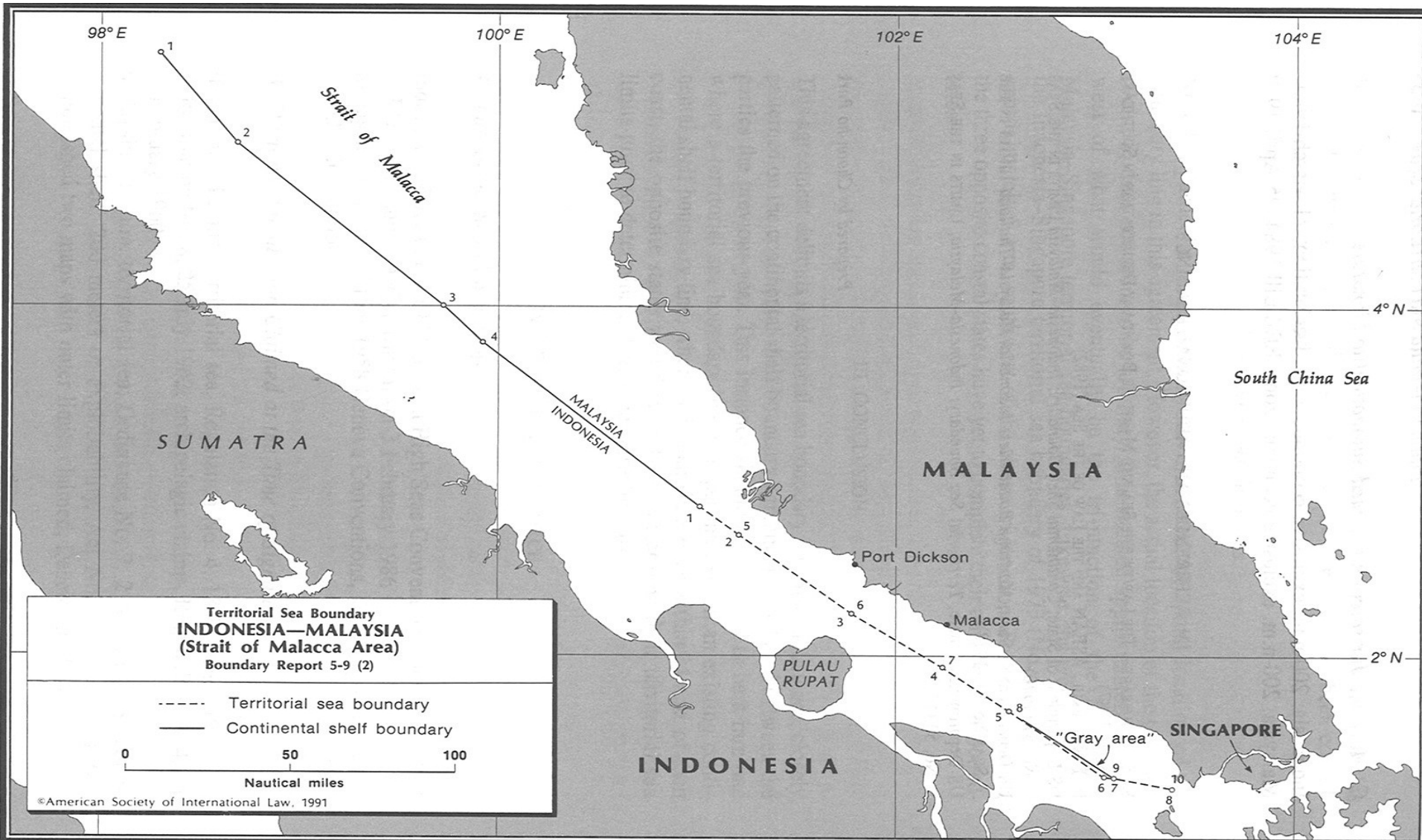
Offences for Attacks in Waters Under Sovereignty

- If the authorities of the coastal State arrest a ship for committing a criminal offence against another ship in waters under its sovereignty, the coastal State will charge them with an offence under its criminal laws
- I am not aware of any State in which there is an offence called “armed robbery against ships”
- However, the criminal law or penal code of every State is likely to have laws providing that it is a criminal offence to board a ship in its waters
- States will also have laws providing for offences if the persons boarding a foreign ship stole property by the threat or use of weapons, used violence against persons on the ship, etc.





1970 Indonesia-Malaysia Territorial Sea & Continental Shelf Boundary



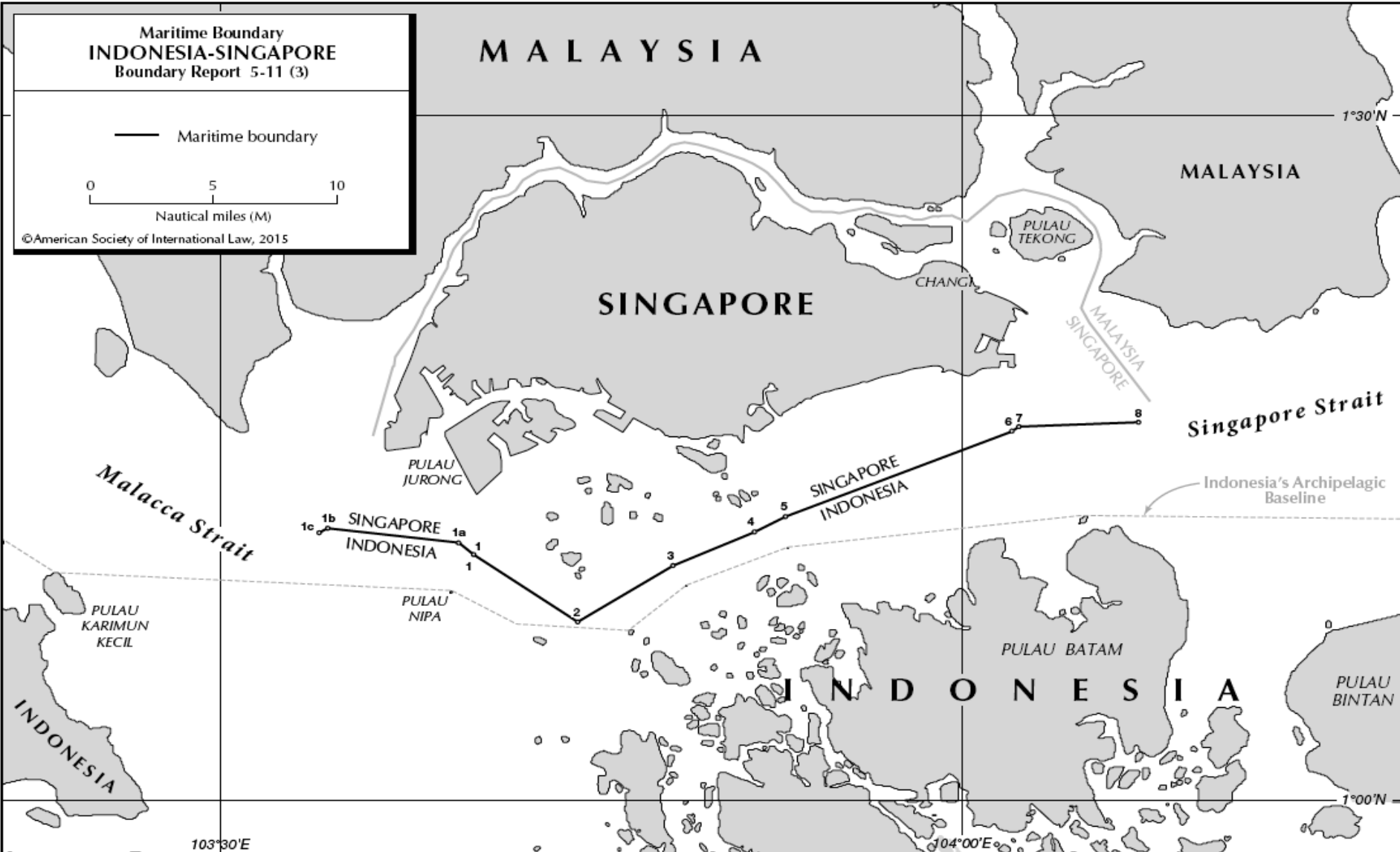
Indonesia-Singapore Territorial Sea Boundary

Maritime Boundary
INDONESIA-SINGAPORE
Boundary Report 5-11 (3)

— Maritime boundary

0 5 10
Nautical miles (M)

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Part 6

Incidents that are neither Piracy nor ARAS

Issues on Severity of the Acts

Definition of piracy only includes acts of a certain level severity

- “Act of violence or detention”
- “Act of depredation” – ransacking, laying waste or plundering
- “Armed robbery” usually means taking something from someone using violence or intimidation, while carrying a dangerous weapon

Issues on Severity of the Acts

1. Piracy does not seem to include incidents where perpetrators are not armed with dangerous weapons
2. Piracy does not seem to include incidents in which perpetrators do not use force or intimidation while carrying dangerous weapons
3. Piracy does not include incidents whereby persons board a moving vessel and commit “petty theft” of spare parts, stores or valuables from the ship
 - Such incidents would not be piracy even if the perpetrators carried arms – it is only piracy under Article 101 only if it is “an illegal **act of violence** or detention, or any act of depredation”

Policy supporting a Strict Interpretation

1. It can be argued that the definition of piracy should be given a strict interpretation because of the implications on jurisdiction
2. Piracy is the **ONLY exception** to the principle that ships on the high seas are subject to the **exclusive jurisdiction of the flag State**
3. The general principle is that foreign ships on the high seas cannot be boarded and perpetrators arrested for crimes unless the boarding State obtains the express permission of the flag State
 - This principle applies to ships involved in the slave trade, drug trafficking and even maritime terrorism
 - The **Right of Visit** permits the boarding of a foreign ship to verify the flag in certain circumstances, but it does not allow arrest of the captain or crew without the consent of the flag State

Jurisdiction over Offences that are neither Piracy nor ARAS

- If the acts take place in the ports, internal waters, territorial sea or archipelagic waters, they are governed by the **coastal State's criminal law** (territorial principle of jurisdiction)
- If the acts take place on a ship that is seaward of the outer limit of the territorial sea (EEZ or high seas), they would be governed by the **laws of the flag State** of the ship that is boarded (exclusive jurisdiction of the flag State)
- In addition, the criminal laws of the **State of nationality of the perpetrators** will apply if that State extends its criminal laws to the acts of its nationals outside its territory (nationality principle of jurisdiction)

Unlawful boarding on high seas that is not Piracy

- If a ship on the high sea is unlawfully boarded by persons from another ship for the purpose of committing theft, but the act does not constitute piracy as defined in Article 101, the incident would be governed by the laws of flag States of the two ships
- No foreign warship could intervene without the express consent of the flag State
- Although such a boarding may not constitute piracy, it may nevertheless endanger the safety of navigation and the personal safety of crew members

ReCAAP Agreement and Minor Offences

- The ReCAAP Agreement calls for cooperation in addressing the threat to commercial shipping from Piracy and ARAS
- However, the majority of the incidents recorded by ReCAAP appear to be minor offences that are **neither Piracy nor ARAS**
- Nevertheless, these minor incidents also pose a potential threat to the safety of the ship that is boarded as well as a threat to the personal safety of the seafarers on the ship that is boarded
- Therefore, ReCAAP also monitors and reports on these incidents

Part 6

Importance of the Location of Incidents

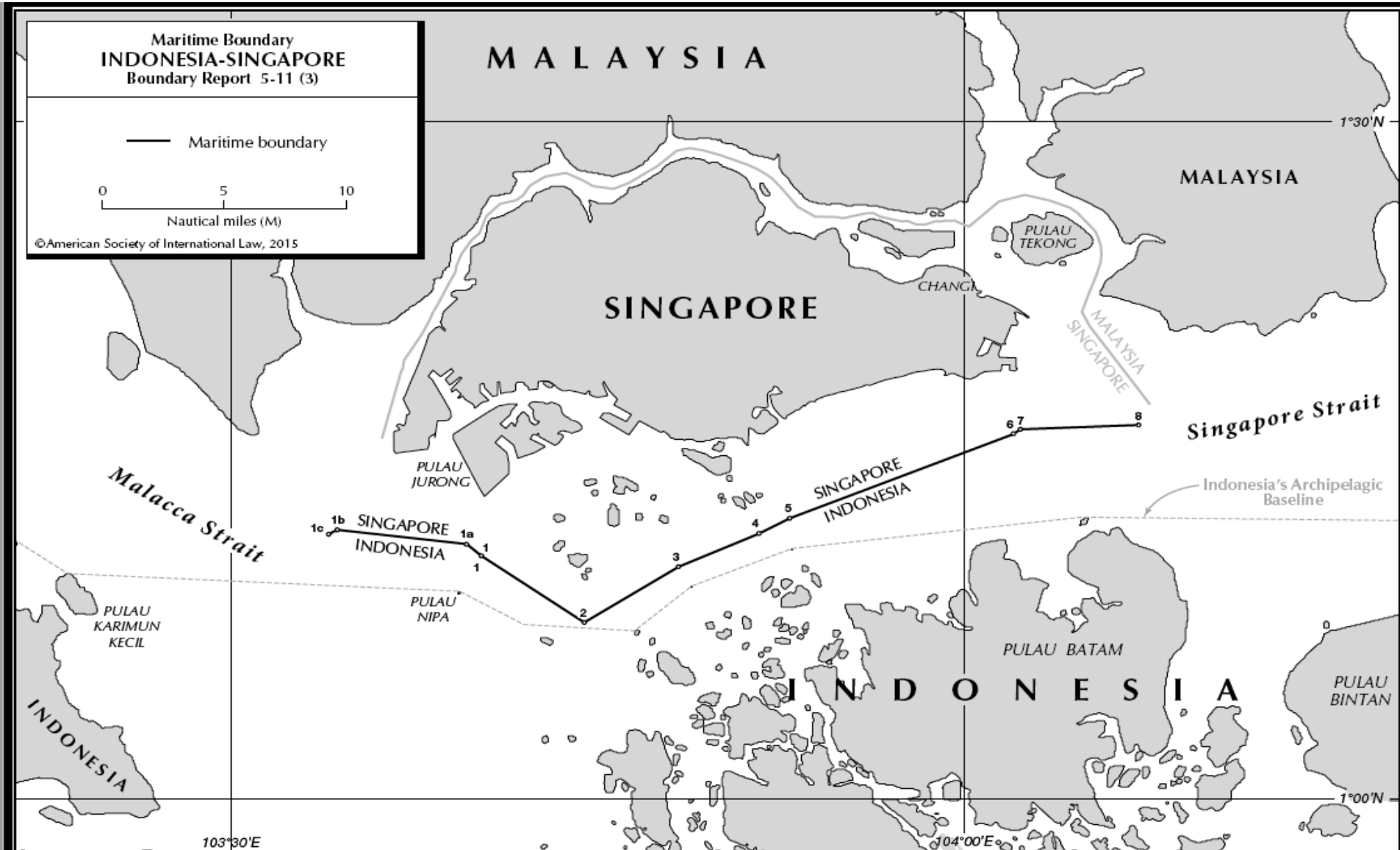
Importance of Location

- It should be clear that under 1982 UNCLOS, the location of an incident involving an attack on a ship, or an unauthorized boarding is critically important
- For example, the location of the 12nm territorial sea limits is critically important because it determines whether the incident is governed by:
 - the rules on high seas jurisdiction
 - the laws of the coastal state in whose territorial sea or archipelagic waters it took place
- From the perspective of ReCAAP, it determines whether a serious incident is classified as Piracy or as Armed Robbery Against Ships

Undefined Territorial Sea Boundaries

- There are some areas in Southeast Asia where the territorial sea boundaries have yet to be defined by boundary agreements. Examples are:
 1. Area surrounding Pedra Branca and Middle Rocks
 2. Area between southern Johor Coast and Bintan Island
 3. Areas in Sulu-Celebes Sea
- “Bad guys” sometimes intentionally engage in illegal activities in these undefined areas
- Another area of uncertainty is the territorial sea surrounding islands over which two or more States claim sovereignty

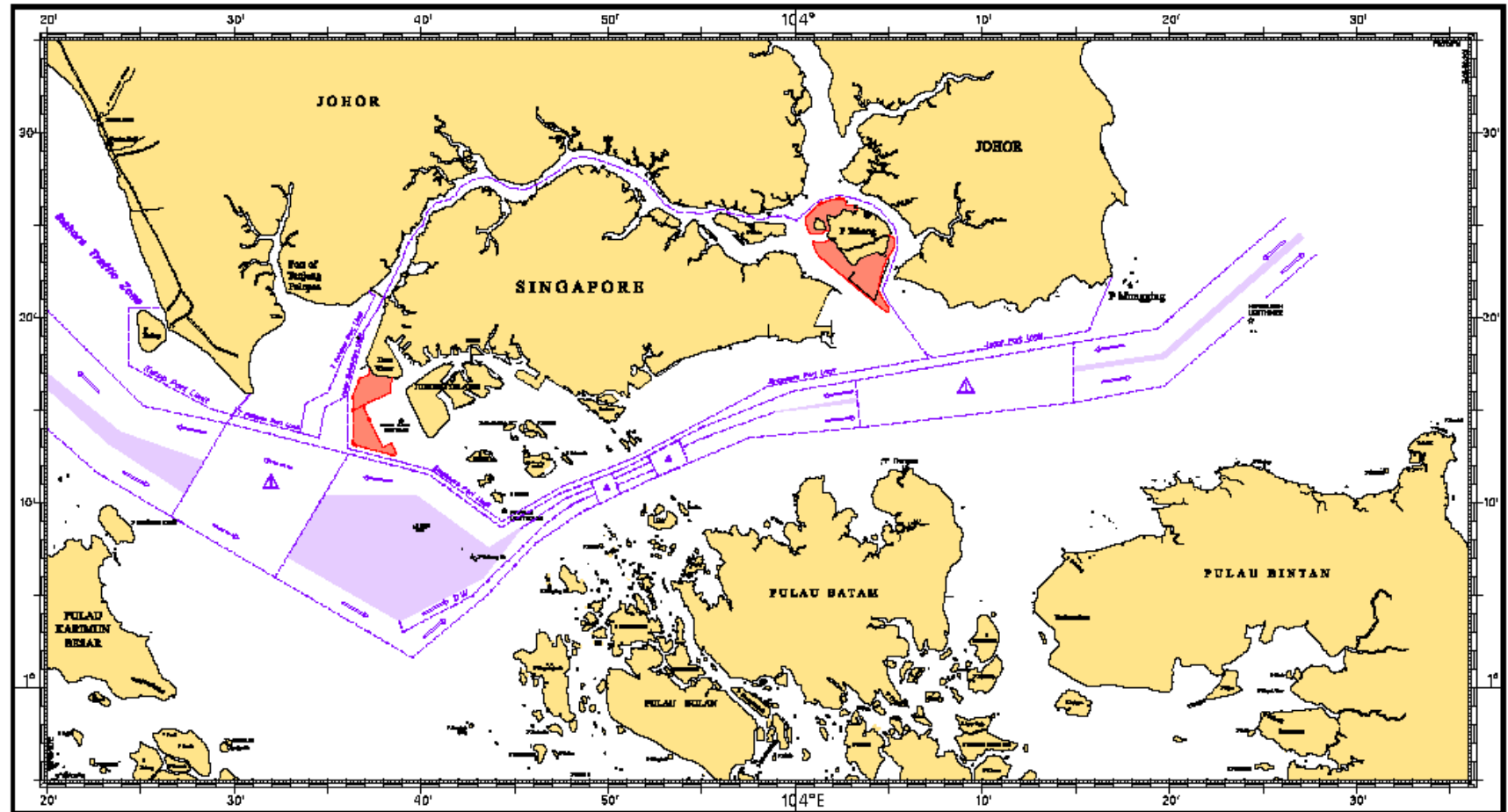
Indonesia-Singapore Territorial Sea Boundary



Traffic Separation Scheme in Singapore Strait



SINGAPORE STRAIT - PORT LIMITS AND TRAFFIC SEPARATION SCHEME



Prepared by Hydrographic Dept. IHO & Fed. US CA 51676 Issue 1340 010

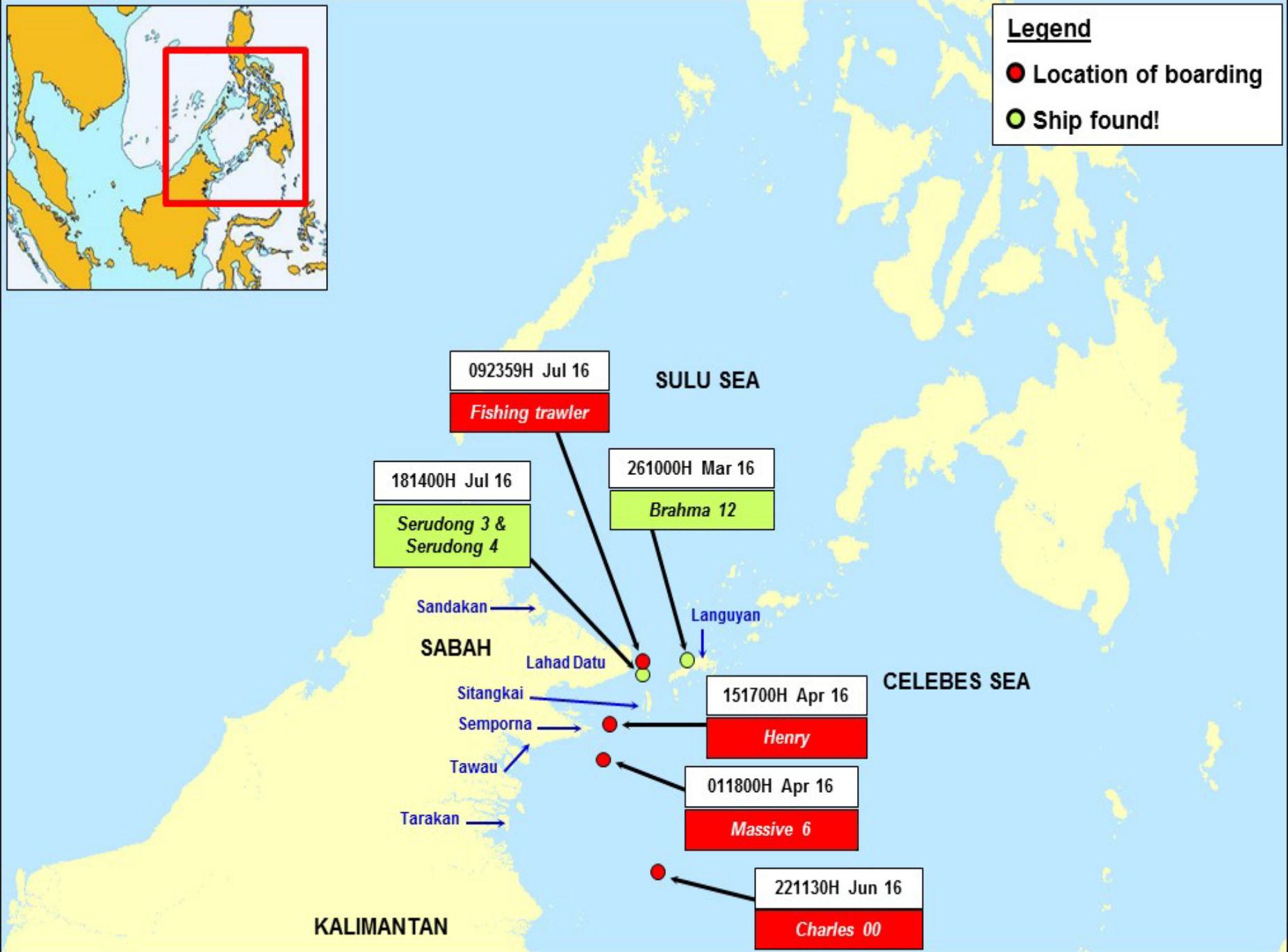
RECAAP Report: *Location of Siphoning Incidents 2011- Mid July 2014*





Legend

- Location of boarding
- Ship found!



Sulu-Celebes Sea

CIL



Part 8

Conclusions

Conclusions

1. Piracy is serious offence involving attacks on ships seaward of the territorial sea of any State (High Seas or EEZ)
2. Warships of all States have the right to seize pirate ships and try the pirates in their national courts, but they must have an offence for piracy under their national law and provide for a penalty
3. Less serious offences against ships seaward of the territorial sea are governed by the flag State's law
4. There is no offence called "armed robbery against ships" under international law or under the national laws of most States
5. Any attack on or boarding of ships in maritime zones under the sovereignty of a coastal State is within the exclusive jurisdiction of that State

Conclusions

6. Given that the exact location of incidents is critically important to determining which State or States have jurisdiction over the offence, it would be helpful if ReCAAP reports included the location
7. Most incidents reported in the ReCAAP Reports do not meet the seriousness of either Piracy or ARAS
8. Since any unauthorized boarding of a moving ship is a potential threat to the safety of maritime navigation as well as to the personal safety of crew members, ReCAAP should also report such incidents
9. ReCAAP parties and observers could cooperate by reviewing their national legislation on piracy and on offences against ships flying their flag or in waters under their sovereignty

Thanks for your attention!
Questions & Comments, Please

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