

## ARCHIPELAGIC STATE RESPONSIBILITY ON ARMED ROBBERY AT SEA

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### Abstract

*Recent hijackings to Indonesian ships on the southern waters of the Philippines have raised alarming concerns not only from the involving states but also other countries in the region. Such crimes at sea frequently occur in the area of the coastal states in this case archipelagic states such as Indonesia and the Philippines. This privilege as archipelagic states automatically extends their sovereignty and jurisdiction to enforce their national legislations. As a corollary, responsibility to ensure the security and capacity to protect and supervise territory should be carefully examined when looking at the current situations. This paper examines the responsibility of archipelagic states in the event of sea armed robbery within their jurisdiction.*

**Keywords:** State Responsibility, Armed Robbery. Indonesia, Philippines

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### I. INTRODUCTION

*“To neglect the ocean is to neglect two thirds of our planet.  
To Destroy the Ocean is to kill our planet, a dead planet serves no  
nation”<sup>1</sup>*

On March 26, 2016, two Indonesian-flagged boats, tug boat *Brahma 12* and barge *Anand 12*, had been seized during their voyage from Sungai Puting, South Kalimantan, to Batangas Province, South of the Philippines. They were believed to had been attacked in Tawi – Tawi, part of the Philippines water. The hijackers immediately released the tugboat and detained *Anand 12* together with its 10 crew in an unknown location. The hijackers, who have an affiliation with Abu

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<sup>1</sup> Quotation by Thor Heyerdahl, see: The UN Conference on the Law of the Sea, *Summary Records of Plenary Meetings: 1st Plenary meeting*, 3 December 1973, par. 5.

Sayyaf Group (ASG), demanded US\$ 1.07 million as a ransom. The owner of the boat was agreed to pay the ransom and the Indonesian Government supported the idea in order to ensure the lives of the crews. The Philippines Government rejected the idea. Three weeks later, on April 15, 2016, another two Indonesian-flagged, tug boat *Henry* and Barge *Christi*, were attacked in Cebu, near the Philippines and Malaysian border, when it was heading back to Tarakan, North Kalimantan, Indonesia. During this attack, four crews were taken hostage, one crew was injured and the other five were successfully escaped and saved by Malaysian Maritime Police. Once again, ASG claimed to be responsible for the attack and requested ransom as an exchange and the Philippines Government denied the idea of fulfilling the ransom. These are two incidents as examples that recently took place within the Philippines water. Together with the Philippines, Indonesian water is also known as a dangerous maritime zone for shipping. Most attacks take place not only in Malacca Strait but also Lombok and Makassar.<sup>3</sup> According to the report issued by the International Maritime Bureau (IMB) 46 incidents took place in Indonesian waters<sup>4</sup> and Tommy Koh identified 108 attacks committed within Indonesian waters.<sup>5</sup>

Indonesia and the Philippines are the two states that actively proposed the archipelagic State concept during negotiations prior to the adoption of the 1982 United Nations Convention on the Law of the Sea (UNCLOS). Having the status of archipelagic States, Indonesia and the Philippines, and another 20 States,<sup>6</sup> entitle to use straight baselines as determined by Article 47 of the UNCLOS that allowing any archipelagic States to delimit waters between their archipelagos as their territorial, archipelagic and internal waters. This privilege automatically extends

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<sup>3</sup> Sam Bateman, *Piracy and Armed Robbery against Ships in Indonesian Waters, Indonesia Beyond the Water's Edge*, Indonesia Update Series Research School of Pacific and Asian Studies the Australian National University, Edited by Robert Cribb and Michelle Ford, Institute of Southeast Asian Studies, Singapore, 2009, p. 117.

<sup>4</sup> The IMB report on actual and attempted attacks of piracy and armed robbery, 2011.

<sup>5</sup> Tommy Koh, *Peace at Sea*, Singapore Straits Times, June 3, 2016, [http://www.straitstimes.com/opinion/peace-at-sea?utm\\_source=facebook&utm\\_medium=social-media&utm\\_campaign=addtoany](http://www.straitstimes.com/opinion/peace-at-sea?utm_source=facebook&utm_medium=social-media&utm_campaign=addtoany) accessed on Monday June 6, 2016.

<sup>6</sup> International Law Association, *Baselines under the International Law of the Sea*, Washington Conference, 2014 see Annex I Archipelagic States and Archipelagic Baselines Law and Proclamations.

their sovereignty and jurisdiction to enforce their national legislations. The capacity to protect and supervise territory should be carefully examined when looking at the current situations.

## **II. HISTORICAL BACKGROUND ON THE ARCHIPELAGIC STATES**

In 1888, a Norwegian jurist, Aubert, mentioned the territorial waters of archipelagos and caught the attention of the Insititute de Droit International.<sup>7</sup> The special status for archipelagos<sup>8</sup> had not been discussed formally until 1920s. It was the International Law Association<sup>9</sup> as the first international institution that gave consideration of Archipelagic State, which later followed by the American Institute of International Law (1925) and the *Institut de droit International* (1927 and 1928).<sup>10</sup> This concept was continued to be discussed by the International Court of Justice decision with regard to *Anglo – Norwegian Fisheries* case that justified the application of straight baselines to configure an area of waters as internal waters interconnecting Norwegian islands.<sup>11</sup> The decision was delivered on 18 December 1951 justifying the Norwegian action to draw straight baselines to connect its outermost points and include the waters between its islands as its internal waters. The legal basis of the drawing was laid on the 1935 Norwegian Decree. In 1956, the International Law Commission when preparing draft on law of the sea to allow a State with a fringe of islands in the immediate vicinity of its coast to employ straight baselines implemented the adopted concept.<sup>12</sup> Some countries followed the adoption by applying special regimes to

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<sup>7</sup> B.A. Hamzah, *Indonesia's Archipelagic Regime: Implications for Malaysia*, (Butterworth & Co., 1984), p. 31.

<sup>8</sup> Satya N. Nandan and Shabtai Rosenne, *United Nations Convention on the Law of the Sea 1982 : a Commentary*, Center for Oceans Law and Policy, University of Virginia School of Law, Martinus Nijhoff Publishers, Vol. II, 1993, p. 399.

<sup>9</sup> Myron H. Nordquist , *United Nations Convention on the Law of the Sea 1982 : A Commentary*, Volume 2, (Martinus Nijhoff Publishers, 2003), p. 413.

<sup>10</sup> International Law Association, p.18.

<sup>11</sup> International Court of Justice, *Anglo – Norwegian Fisheries* case (United Kingdom v. Norway) (Judgment) (1951).

<sup>12</sup> Satya N. Nandan and Shabtai Rosenne, p. 399.

the archipelagic portions of their territories.<sup>13</sup>

On 17 December 1970, The General Assembly announced to hold a third conference on the law of the sea based on the adoption of Resolution 2750 (XXV). The first session was held in 1973 and the second session in 1974 to deal with substantive issues. The Conference was claimed to be the highest participated conference<sup>14</sup> with 160 States and eleven sessions between 1973-1982. It set up a General Committee, a Drafting Committee, three Main Committees and a Credentials Committee. The Second Main Committee was assigned to discuss the topics of maritime zones, including archipelagos, as well as responsibility and liability for any damages caused to marine environment.<sup>15</sup> The intention of organizing the Conference was to establish an agreed legal basis for the sake of all human kind<sup>16</sup> by adopting an accepted and practicable legal order of the seas and oceans.<sup>17</sup> Given the fact, the law of the sea was a highly complex and difficult area<sup>18</sup> which embracing political, economic, ecological and technological issues<sup>19</sup> security and historical.<sup>20</sup>

The concept of archipelagic States was strongly rejected, especially by the maritime powers, in order to ensure the maritime mobility<sup>21</sup> for unhampered passage through internal waters. The representative of Papua New Guinea, Mr. Siaguru, delivered its State's opinion concerning the aspirations underlined by its neighboring States. However, Papua New Guinea was aware on the issue of archipelagic State responsibility to international society in providing freedom of passage along with its security problem, national unity and resource jurisdiction objectively.<sup>22</sup>

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<sup>13</sup> B.A. Hamzah, p. 31.

<sup>14</sup> The UN Conference on the Law of the Sea, par. 16.

<sup>15</sup> UN Division for Ocean Affairs and Law of the Sea, *Third UN Conference on the Law of the Sea 1973 – 1982*, <http://legal.un.org/diplomaticconferences/lawofthesea-1982/lawofthesea-1982.html> accessed on Thursday, 1 September 2016.

<sup>16</sup> The UN Conference on the Law of the Sea, par. 6.

<sup>17</sup> The UN Conference on the Law of the Sea, par. 8.

<sup>18</sup> *Ibid.*

<sup>19</sup> The UN Conference on the Law of the Sea, par. 16.

<sup>20</sup> Tara Davenport, *The Archipelagic Regime, the Oxford Handbook of the Law of the Sea*, 2015, p. 135.

<sup>21</sup> Tara Davenport, p. 135.

<sup>22</sup> The Third UN Conference on the Law of the Sea, *Summary Records of Meetings of the Second Committee: 36th meeting, Document A/CONF.62/C.2/SR.36*, 12 August

Japan underlined the importance of bringing the elements of ensuring freedom of navigation for international maritime traffic and emphasizing the interests of other Countries by means of providing protection of existing navigational and other rights.<sup>23</sup> Japanese representative, Mr. Ogiso, reiterated the objective criteria of archipelagic States by proposing two requirements, which were the ratio between the water, and the land and the maximum length of baselines should be established.<sup>24</sup> This approach also supported by the United Kingdom.<sup>25</sup> The proposals from each representative were taken into consideration carefully, evidently, the UNCLOS III confirmed categories need to fulfill by every State claiming as archipelagic State. They shall meet minimal requirements as of the ratio between the water and the land area<sup>26</sup> and the maximum length of archipelagic baselines shall not be exceeding 100nm with an exception of 3 per cent of the total number may exceed up to 125 nautical miles.<sup>27</sup>

Indonesia, the Philippines, Fiji and Mauritius<sup>28</sup> were the main supporters of the archipelagic State regime.<sup>29</sup> However, It is said that Indonesia was the first State to raise the issue of archipelagos during the UNCLOS I.<sup>30</sup> During, UNCLOS III, the Indonesian representative, Hasjim Djalal reasserted Indonesia's intention to obtain the legal status of being archipelagic State to maintain Indonesia's unity, political stability, economic, social and cultural cohesiveness and territorial integrity.<sup>31</sup> The intention was referring to claim a special regime for waters between their archipelagos by drawing straight baselines<sup>32</sup> as it considered its

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1974, par. 11.

<sup>23</sup> The Third UN Conference on the Law of the Sea, par. 14.

<sup>24</sup> The Third UN Conference on the Law of the Sea, par. 15.

<sup>25</sup> The Third UN Conference on the Law of the Sea, par. 19.

<sup>26</sup> Article 47 par. 1 of the The 1982 UNCLOS.

<sup>27</sup> Article 48 par. 1 of the The 1982 UNCLOS.

<sup>28</sup> The Third UN Conference on the Law of the Sea, par.28.

<sup>29</sup> See comments of Jorge R. Coquia at Barbara Kwiatkowska and Etty R. Agoes, *Archipelagic State Regime in the Light of the 1982 UNLCOS and State Practice*, Konsorsium Ilmu Hukum Dep. Pendidikan dan Kebudayaan dan Nederlandse Raad voor Juridische Samenwerking met Indonesie, 1991.

<sup>30</sup> Satya N. Nandan and Shabtai Rosenne, p. 400.

<sup>31</sup> The Third UN Conference on the Law of the Sea, par.1.

<sup>32</sup> Satya N. Nandan and Shabtai Rosenne, p. 400.

land, waters and people as inseparable.<sup>33</sup> The concept was supported by Jorge R. Coquia as he stated the archipelagic State concept is underlining the unity of land, water and people in order to achieve, maintain and preserve the elements of geographical, economic and political entity.<sup>34</sup>

Indonesia had made many attempts in order to enlarge the sea area as their territory.<sup>35</sup> Having the status of archipelagic State, Indonesia controls an area of more than 58% consists of water with the total area of 4.5 million square kilometers.<sup>36</sup> The status establishes Indonesia as the largest Archipelagic State<sup>37</sup> by having 18,108 islands.<sup>38</sup> This concept proposed by Indonesia was reconfirmation of its claim as it had been adopted in the 1957 *Djuanda Declaration* when introducing the concept of *Wawasan Nusantara*.<sup>39</sup> Mochtar Kusumaatmadja whom was challenged at that time to establish a legal basis in preventing Dutch warships sailing through the Java Seas found this concept.<sup>40</sup> The passage made by the foreign ships was possible since the maritime zone beyond three nautical miles was considered as high seas.<sup>41</sup>

The concept was formally implemented by the adoption of Act No 4 of 18 February 1960 in which Article 1 specifies “*Indonesian waters*

<sup>33</sup> The Third UN Conference on the Law of the Sea, par.1.

<sup>34</sup> Barbara Kwiatkowska and Ety R. Agoes, *Archipelagic State Regime in the Light of the 1982 UNLCOS and State Practice*, Konsorsium Ilmu Hukum Dep. Pendidikan dan Kebudayaan dan Nederlandse Raad voor Jurisdische Samenwerking met Indonesie, 1991, p.8.

<sup>35</sup> John G. Butcher, *Becoming an Archipelagic State : the Juanda Declaration of 1957 and the Struggle to Gain International Recognition of the Archipelagic Principle*, Indonesia Beyond the Water’s Edge, Indonesia Update Series Research School of Pacific and Asian Studies the Australian National University, Edited by Robert Cribb and Michelle Ford, Institute of Southeast Asian Studies, Singapore, 2009, p. 33.

<sup>36</sup> John G. Butcher, p. 28.

<sup>37</sup> Jack A. Draper, *the Indonesian Archipelagic State Doctrine and the Law of the Sea : “Territorial Grab” or Justifiable Necessity?*, International Lawyer, Vol.11, No.1, p. 143.

<sup>38</sup> Tara Davenport, p. 139.

<sup>39</sup> The 1957 Djuanda Declaration adopted on 13 December 1957, “... *all waters surrounding, between and connecting the islands constituting the Indonesian State... are integral parts of the territory of the Indonesian State and, therefore, parts of the internal or national waters which are under the exclusive sovereignty of the Indonesian State*”.

<sup>40</sup> John G. Butcher, p. 37.

<sup>41</sup> Jack A. Draper, p. 145.

*consist of the territorial sea and the internal waters of Indonesia.*<sup>42</sup> Djuanda Declaration was adopted as a reaction to the doctrine of *mare liberum*<sup>43</sup>, which might threaten the sovereignty and security of Indonesia.<sup>44</sup> However despite the threat, Indonesia guaranteed the right of innocent passage of foreign ships<sup>45</sup> by adopting the 1962 Ordinance on Innocent Passage in Indonesian Territorial Waters<sup>46</sup> as long as it does not violate or interfere with the sovereignty and security of Indonesia.<sup>47</sup> Moreover, aware of the strong rejection of this concept, Indonesia immediately ensured the interests of other parties especially its closest neighboring States, in particular with regard to traditional fishing, by seeking mutual acceptable agreement.<sup>48</sup>

The concept introduced by the Philippines was slightly different than the concept proposed by Indonesia. Together with Yugoslavia, during UNCLOS I, the Philippines proposed a draft of articles on archipelagos concept by using straight baselines.<sup>49</sup> It claimed the intended archipelagic waters as internal waters where no innocent passage of foreign ships is recognized.<sup>50</sup> This practice reflected in the implementation, which the Philippines applied prior authorization for warships and nuclear powered ships, thus, the recognition of innocent passage as stipulated in the Philippines Note Verbale to the UN Secretary General as well as to the International Law Commission created confusion.<sup>51</sup> In 1955, the Philippines emphasized its position on waters between its islands, which consists approximately 7100 islands<sup>52</sup> as an integral part of its territorial sovereignty.<sup>53</sup> This position was concluded in a note verbale which stated all waters around, between and connecting different islands belonging to the Philippines Archipelago, irrespective of

<sup>42</sup> Article 1 (1) Act No. 4 of 18 February 1960.

<sup>43</sup> Jack A. Draper, p. 145.

<sup>44</sup> John G. Butcher, p. 33.

<sup>45</sup> The Third UN Conference on the Law of the Sea, par. 6.

<sup>46</sup> B.A. Hamzah, *Indonesia's Archipelagic Regime: Implications for Malaysia*, (Butterworth & Co, 1984), p. 30.

<sup>47</sup> John G. Butcher, p. 40.

<sup>48</sup> The Third UN Conference on the Law of the Sea, par. 5.

<sup>49</sup> Satya N. Nandan and Shabtai Rosenne, p. 400.

<sup>50</sup> Barbara Kwiatkowska and Ety R. Agoes, p. 16.

<sup>51</sup> Barbara Kwiatkowska and Ety R. Agoes, p. 17.

<sup>52</sup> Tara Davenport, p. 139.

<sup>53</sup> The Third UN Conference on the Law of the Sea, par. 57.

their width or dimension, are necessary appurtenances of its land territory, forming an integral part of the national or inland waters, subject to the exclusive sovereignty of the Philippines.<sup>54</sup> Later, the Philippines inserted the concept in its national legislation, Republic Act No. 3046. Moreover, together with Indonesia, the Philippines submitted a proposal consisting general principles of archipelagic States and draft articles on archipelagos.<sup>55</sup> Five principles were proposed by the Philippines. The principles proposed were referring to the status only applies to outlying or oceanic archipelagic States,<sup>56</sup> the baselines shall be limited to archipelago proper,<sup>57</sup> the archipelagic sea lanes shall be established otherwise the waters shall be accessible to all States,<sup>58</sup> when drawing archipelagic sea lanes, archipelagic States shall consider recommendations or technical advice of competent international organizations, the channels customarily used for international navigation and the special features of particular channels and ships,<sup>59</sup> and, the last one, with regard to the implementation of archipelagic States laws and regulations, they shall be consistent with international law.<sup>60</sup> Further, the Philippines also underlined the urgency to protect its national security from intrusion.<sup>61</sup>

Many States, in particular, Australia, the United Kingdom, the United States, Japan and the Netherlands, protested the concept introduced by Indonesia and the Philippines.<sup>62</sup> They argued normal regime of islands should apply to mid-ocean archipelagos.<sup>63</sup> The legal reasoning for the rejection was on the basis of *mare liberum* principle, as the referring waters were part of the high seas. However, the Indonesian and the Philippines officials attempted to obtain support from neighboring countries by concluding maritime boundaries agreements. In case of Indonesia, it concluded 12 maritime boundary treaties between 1969

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<sup>54</sup> John G. Butcher, p. 36.

<sup>55</sup> Satya N. Nandan and Shabtai Rosenne, p. 401.

<sup>56</sup> The Third UN Conference on the Law of the Sea, par. 59.

<sup>57</sup> The Third UN Conference on the Law of the Sea, par. 60.

<sup>58</sup> The Third UN Conference on the Law of the Sea, par. 61.

<sup>59</sup> The Third UN Conference on the Law of the Sea, par. 62.

<sup>60</sup> The Third UN Conference on the Law of the Sea, par. 63.

<sup>61</sup> The Third UN Conference on the Law of the Sea, par. 66.

<sup>62</sup> Jack A. Draper, p. 146.

<sup>63</sup> Tara Davenport, p. 140.



– 1975<sup>64</sup> with Singapore and Malaysia. Indonesia, as mentioned previously, guaranteed the right of innocent passage of foreign ships and other applicable rights such as existing traditional fishing rights shall be preserved through bilateral agreement. Indonesian officials also attempted to obtain supports from international community such as the Asian African Legal Consultative Committee,<sup>65</sup> and by attending the Islamic Nations Conferences.<sup>66</sup>

### **III. ARCHIPELAGIC STATES ACCORDING TO INTERNATIONAL LAW**

Tara Davenport divides the physical characteristics of archipelagos between (1) continental or coastal archipelagos and (2) mid-ocean or outlying archipelagos. She defines mid-ocean or outlying archipelagos as “*groups of islands situated at such a distance from the coasts of firm land as to be considered an independent whole rather than forming part or outer coastline of the mainland*.” Indonesia, the Philippines, Fiji and the Maldives fall under the category of mid-ocean archipelago forming the whole territory of States, differentiating from mid-ocean dependent archipelagos belonging to continental States such as the Faeroe Islands, the Galapagos Islands.<sup>67</sup> Having the status of archipelagic States, the archipelagic waters shall fall under their jurisdiction as contemplated by Article 49 of the UNCLOS which confirms “*the sovereignty of an archipelagic State extends to the waters enclosed by the archipelagic baselines drawn in accordance with Article 47, described as archipelagic waters, regardless of their depth or distance from the coast*”. The sovereignty includes the air above archipelagic waters and the bed and subsoil.<sup>68</sup>

Archipelagic regime considered being the most significant development on the codification of the 1982 UNCLOS.<sup>69</sup> As mentioned above,

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<sup>64</sup> B.A. Hamzah, p. 30.

<sup>65</sup> Tara Davenport, p. 141.

<sup>66</sup> B.A. Hamzah, p. 30.

<sup>67</sup> Tara Davenport, p. 136.

<sup>68</sup> Tara Davenport, p. 148.

<sup>69</sup> Barbara Kwiatkowska & Ety R. Agoes, p. 1.

the Philippines and Indonesia are two among twenty-two States<sup>70</sup> who proclaimed as archipelagic States under the 1982 UNCLOS. The declaration of being archipelagic States is mandatory as decided by the International Court of Justice with regard to the *Qatar v. Bahrain Case*.<sup>71</sup> Archipelagic State defined as constituted wholly by one or more archipelagos and may include other islands<sup>72</sup> while archipelagos covers a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.<sup>73</sup> Tara Davenport divides the article into two components. The primary component consists of “group of islands” and the secondary component that “sets out the criteria for determining whether a group of islands can be considered an archipelago in the legal sense”.<sup>74</sup>

Following the status, an archipelagic State entitles to draw straight archipelagic baselines to joining the outermost points of the outermost islands and drying reefs of the archipelago.<sup>75</sup> The archipelagic baselines must meet required ratio as govern by Article 47 (1) of the 1982 UNCLOS. The ratio between land area and water area within the archipelagic lines shall be more than 1:1 and not less than 1:9. Following the ratio, the 1928 UNCLOS also requires an archipelagic State when drawing lines, each line shall not be exceeding more than 100 nautical miles with the exception of 3 per cent of the total number of lines joining the archipelago. The three per cent may be between 100 – 125 nautical miles. Furthermore, the lines enclosing the archipelago shall follow the general configuration of the archipelago.<sup>76</sup> It may also be drawn to and from low tide elevations with special condition and the lines may not cut off the territorial sea of another State from the high seas or from

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<sup>70</sup> International Law Association, *Baselines under the International Law of the Sea, Washington Conference, 2014 see Annex I, Archipelagic States and Archipelagic Baseline Laws and Proclamations*.

<sup>71</sup> Tara Davenport, p.144.

<sup>72</sup> Article 46 (a) The 1982 UNCLOS.

<sup>73</sup> Article 46 (b) The 1982 UNCLOS.

<sup>74</sup> Tara Davenport, p. 143.

<sup>75</sup> Article 47 (1) of the 1982 UNCLOS.

<sup>76</sup> Article 47 (3) of the 1982 UNCLOS.

its exclusive economic zone.<sup>77</sup>

The 1982 UNCLOS provides obligations for archipelagic States as consequences of their entitlement to draw straight baselines. The most relevant obligations to be discussed are the obligation with respect to the right of any foreign ship to enjoy an innocent passage when passing through, in case no designated archipelagic sea lanes, the archipelagic waters<sup>78</sup> using the normal routes for international navigation<sup>79</sup> and through archipelagic sea lanes.<sup>80</sup> However, the 1982 UNCLOS also reserves the archipelagic States to suspend the passage on the ground of its own security, as long as the suspension is not discriminative,<sup>81</sup> and there is no attached obligation to clarify the reason of suspension<sup>82</sup> as well as the duration.<sup>83</sup>

With respect with transit passage through straits used for international navigation, an archipelagic state may implement its jurisdiction in order to ensure the safety of navigation and to regulate maritime traffic.<sup>84</sup> This is very relevant to the obligation of the State to “...*not hamper transit passage and shall give appropriate publicity to any danger to navigation... within or over the strait of which they have knowledge. There shall be no suspension of transit passage.*”<sup>85</sup> The wording of “*any danger to navigation... within or over the straits of which they have knowledge*” is more likely similar to what is found in the decision of the ICJ with regard to the *Corfu Channel Case*. The Court explicitly expresses their concern, after observing arguments from both parties to the conflict, the Government of the United Kingdom and the Government of Albania. It was said, “... *a State on whose territory of in whose waters an act contrary to international law has occurred may be called upon to give an explanation.*”<sup>86</sup> The Court believed that Albania was not in capacity to lay mines since it only had a few launches or motorboats,

<sup>77</sup> Article 47 (5) of the 1982 UNCLOS.

<sup>78</sup> Article 52 (1) of the 1982 UNCLOS.

<sup>79</sup> B.A. Hamzah, p. 30.

<sup>80</sup> Article 53 (2) of the 1982 UNCLOS.

<sup>81</sup> Article 52 (2) of the 1982 UNCLOS.

<sup>82</sup> B.A. Hamzah, p. 33.

<sup>83</sup> B.A. Hamzah, p. 39.

<sup>84</sup> Article 42 (1) (a) of the 1982 UNCLOS.

<sup>85</sup> Article 44 of the 1982 UNCLOS.

<sup>86</sup> The International Court of Justice, *Corfu Channel case*, 1949, p. 18.

however, in its conclusion, the Court believed Albania, as a sovereign State, exercise its territory exclusively and effectively in Corfu Channel which is part of its territorial water used for international navigation.

#### **IV. ARMED ROBBERY AT SEA**

Maritime security is a significant factor in shipping industry. Natalie Klein classifies maritime security from two dimensions (1) traditional security that refers to border protection and (2) maritime security threats which refers to efforts taken by coastal State in order to decrease number of crimes or activities that may cause injury to other States.<sup>87</sup> Tommy Koh classifies four kinds of threat to peace at sea<sup>88</sup> and they are (1) piracy and other international crimes against shipping, (2) unfaithful interpretation and application of UNCLOS, (3) resorting to force or unilateral actions to enforce one's claims or interests instead of relying on the UNCLOS system of compulsory dispute settlement and (4) illegal fishing. He does not describe what consist of other international crimes against shipping however in his writing he refers to armed robbery of ships pose a serious threat to international shipping and to peace at sea. The United Nations Office on Drugs and Crime (UNODC) has been working to encounter problems related to transnational organized crime such as piracy and armed robbery, illicit trafficking in arms, drug trafficking, human trafficking and illegal, unreported and unregulated fishing.<sup>89</sup>

International Law only recognizes piracy as an unlawful act against ship. Piracy, according to the 1982 United Nations Convention on the Law of the Sea (UNCLOS 1982), falls under the classification of consisting five elements which are (1) illegal acts of violence or detention or any act of depredation (2) the action is carried out on the high seas; (3) the purpose should be for private ends, (4) conducted by the crew

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<sup>87</sup> Natalie Klein, *Maritime Security*, the Oxford Handbook of the Law of the Sea, 2015, p. 582.

<sup>88</sup> Tommy Koh, *Peace at Sea*, Singapore Straits Times, June 3, 2016, [http://www.straitstimes.com/opinion/peace-at-sea?&utm\\_source=facebook&utm\\_medium=social-media&utm\\_campaign=addtoany](http://www.straitstimes.com/opinion/peace-at-sea?&utm_source=facebook&utm_medium=social-media&utm_campaign=addtoany) retrieved on Monday June 6, 2016.

<sup>89</sup> the United Nations Office on Drugs and Crime, UNODC and Piracy, available at <http://www.unodc.org>, accessed in 14 October 2013.

or the passengers of another ship and (5) directed between one ship against another ship.

The high seas element was originally taken from the *canon shot* principle in order to determine the wide of the territorial sea before the adoption of the 1982 UNCLOS. During that time, with the canon shot, the territorial sea might extent approximately three nautical miles. Beyond three nautical miles shall be considered as high seas where no state had jurisdiction to apply its domestic laws and regulations. The case of *MV Faina* and the Vietnamese boat people, which had been hijacked beyond the territorial waters, may be used to scrutinize the application of this requirement. Furthermore, the most phenomenal incident is the hijacking of *Achille Lauro*, an Italian flagged ship was hijacked by four Palestinian nationals, representing the Palestinian Liberation movement, who were on board of the Achille Lauro as passengers. The incident took place off the coast of Egypt. The hijacking of the Malaysian-flagged Suci, which attacked when sailing within the Straits of Malacca in 1996,<sup>90</sup> and the *Crest Jade I* incident in the Strait of Singapore<sup>91</sup> are two incidents took place within the jurisdiction of one out three littoral States of the Straits of Malacca. The *Achille Lauro* incident can also be seen from different perspective as the hijackers requested the Israeli Government to release of fifty Palestinians who were being prisoned in Israel. It is clear that the reason behind the hijacking of Achille Lauro, was not for private end purpose instead of political motivation. Robin Gei and Anna Petrig noted the Somali pirates committed hijacking for political reasoning being the opponent of the Somali Transitional Federal Government.<sup>92</sup>

Armed robbery should be differentiated from piracy. It is not a legal term however it is commonly used in international practice to differ with piracy under the 1982 UNCLOS. The difference between piracy and armed robbery is the geographical element when using the defini-

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<sup>90</sup> Nichlas Dahlvang, *Thieves, Robbers and Terrorists : Piracy in the 21st Century*, Regent Journal of International Law, 2006.

<sup>91</sup> The International Maritime Organization, Reports on Acts of Piracy and Armed Robbery against Ships, May, London, 2013.

<sup>92</sup> Robin Gei and Anna Petrig, *Piracy and Armed Robbery at Sea : the Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden*, Oxford University Press, 2011.

tion adopted by the International Maritime Organization (IMO). It has been adopting many resolutions in connection to piracy and armed robbery. In 1983, the IMO adopted its first resolution with regard piracy and armed robbery<sup>93</sup> which was Resolution A.545 (13) on the Measures to Prevent Acts of Piracy and Armed Robbery Against Ships as a response of the increasing number of attacks against ships.<sup>94</sup> It suggests governments to take all necessary measures in order to prevent and suppress piracy and armed robbery and urges them to take them as a matter of the highest priority including to strengthened security measures.<sup>95</sup> Given the fact IMO has adopted at least four other important resolutions concerning piracy and armed robbery before adopting Resolution A.1025 (26),<sup>96</sup> the resolution defined armed robbery 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”, this definition includes “any act of inciting or of intentionally facilitating an act described...”*<sup>97</sup>

This is similar the definition as adopted in the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (RECAAP):

Armed robbery against ships means any of the following acts (a) any illegal act of violence or detention, or any act of depredation, committed for private ends and directed against a ship, or against persons or property on board such ship, in a place within a Contracting Party’s jurisdiction over such offences; (b) any act of voluntary participation in the operation of a ship with knowledge of facts making it a ship for armed robbery against ships; (c) any act of inciting or of intentionally

<sup>93</sup> Captain J. Ashley Roach, *IMO Policies and Actions Regarding Piracy, in Navigating Straits Challenging for International Law*, Edited by David D. Caron and Nilufer Oral, a Law of the Sea Institute Publication, Brill Nijhoff, 2014, p. 243.

<sup>94</sup> Preamble of Resolution A. 545 (13).

<sup>95</sup> Preamble of Resolution A. 545 (13), point 1.

<sup>96</sup> Captain J. Ashley Roach, p. 244.

<sup>97</sup> The International Maritime Organization, Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ship, Annex to Resolution A1025 (26), adopted in 2 December 2009.

facilitating an act described in subparagraph (a) or (b).<sup>98</sup>

The idea of adopting a definition of armed robbery at sea is to cover for incidents that cannot be covered by the 1982 UNCLOS. The IMO considered attacks against ships are becoming more violent and regular even though sometimes they are not reported to the coastal State in order to take action on it. However, many States do not consider the IMO resolutions as binding instruments.

## **V. PRACTICES OF INTERNATIONAL LAW ON STATE RESPONSIBILITY**

A breach of an obligation is subject to responsibility.<sup>99</sup> Charles de Visscher, as quoted by James Crawford,<sup>100</sup> concluded State responsibility as the primary element under international law to uphold the equality of States principle. This quotation is supported by the Permanent Court of International Justice (PCIJ) stipulates explicitly that State responsibility should be established “*immediately between the two States*”.<sup>101</sup> Further, the International Court of Justice (ICJ) also had discussed State responsibility in many cases, for example, in its Advisory Opinion of the *Reparation for Injuries* case,<sup>102</sup> it confirms the failure to fulfill a treaty obligation has also been confirmed which entails international responsibility.

According to the International Law Commission Articles, a consequence of committing an internationally wrongful act can't be limited either to reparation or to a sanction since it will give rise to various

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<sup>98</sup> Article 1 (2) of The RECAAP.

<sup>99</sup> James Crawford, *State Responsibility : the General Part*, Cambridge Studies in International and Comparative Law, 2013, p. 3.

<sup>100</sup> James Crawford, Allain Pellet and Simon Olleson, *The Law of International Responsibility : Oxford Commentaries on International Law*, Oxford University Press, 2010, p.4.

<sup>101</sup> James Crawford, *the International Law Commission's Articles on States Responsibility : Introduction, Text and Commentaries*, Cambridge University Press, 2002, p. 77.

<sup>102</sup> The International Court of Justice, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p. 174.

types of legal relations, depending on the circumstances.<sup>103</sup> For instance, in the *Barcelona Traction* case, the ICJ confirmed that a distinction should be made between the obligations of a State towards the international community as a whole, and those arising *vis a vis* another State in the field of diplomatic protection. The Articles also provides that an internationally wrongful acts shall consist either act and/or omission that is (1) attributable to the State under international law and (2) constitutes a breach of an international obligation.<sup>104</sup> These two elements can be found in the *Phosphates in Morocco* case, later confirmed in the *Diplomatic and Consular Staff* case, which says that “*act being attributable to the State and described as contrary to the treaty rights of another State*”.

The attribution, as the subjective element, shall refer to an act or an omission which the Articles do not clearly defined, however, the ICJ has made several references as a standard in defining either act or omission. The ICJ found it was more difficult to determine the coverage of omission thus it was decided to have a more dynamic definition by analyzing on case by case basis. In the *Corfu Channel* case, the unawareness of the Albanian government on the existence of mines in its territorial waters and failed to notify other State was considered sufficiently enough as an action. On the other hand, on the basis of *Diplomatic and Consular Staff* case, the ICJ considered the absence of the Iranian government, to take appropriate steps in order to protect the integrity of the US Embassy from Iranian protesters, amounted to an omission.

When a State committed a wrongful conduct, the Permanent Court of International Justice, in its decision in the *Factory at Chorzow* case, confirmed as follow:

*“The essential principle contained in the notion of an illegal act... is that reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation that would, in all probability, have existed if that act had not been committed”*<sup>105</sup>

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<sup>103</sup> James Crawford, *the International Law Commission's Articles on States Responsibility : Introduction, Text and Commentaries*, Cambridge University Press, 2002, p. 79.

<sup>104</sup> Article 2 of the 2001 ILC Articles on States Responsibility.

<sup>105</sup> The Permanent Court of International Justice, *Factory at Chorzow* case (Germany



The decision requires a State to put its action to an end and to make reparation as if the action had not been committed. This principle was supported by Grotius who admitted if a State had been injured by another State, the latter state shall be responsible to make reparation.<sup>106</sup> Series of events and the capacity to supervise a State territory can be reviewed from the *Trail Smelter* case when a Canadian company, CMSC, was believed to run an activity that caused damages to the State of Washington, part of the United State territory. The first complaint of the *Trail Smelter* case, submitted by the J.H. Stroh (Stroh Farm), was settled by compensation, however, the compensation arguably settled all damages. Later, proven by the inability of the CMSC to control the flow of the fumes it produced which caused more damages, the United States Government officially submitted a complaint to the Government of Canada through diplomatic channel. The submission was made on the basis of the 1909 Convention on Boundary Waters signed by the U.S. and Great Britain. The International Joint Commission delivered its recommendation underlining the liability of the Canadian Government to provide the U.S. Government compensation. Further, the Commission also recommended the Canadian Government to take any necessary measures to prevent and reduce the impact of Sulphur fumes emission discharged by the smelting plants. The measures included installing and operating sulphuric acid unit in the area of the plants. The *Corfu Channel* case is also a good example when trying to analyze the knowledge of a State concerning its capacity to control its own territory. It was the first case ever settled by the ICJ, adjudged the responsibility of the Albanian Government for the damage caused to *Volage* and *Saumarez*, two British-flagged warships. The Albanian Government claimed they had no knowledge on the existence of the mines and it had no international obligation to notify the warships on the existing danger to prevent damages, thus, it claimed no responsibility toward the damages. This argument was taken carefully by the ICJ and found no law, at that time, had been discussed with regard to State responsibility. Further, the British representative argued the existence of the mines laid within the territorial waters of Albania would had not been possible without the knowledge of the Albanian authority given the fact the loca-

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v. Poland) (jurisdiction).

<sup>106</sup> James Crawford, Allain Pellet and Simon Olleson, p. 5.

tion was 500 meters away from the Albanian Coast

## **VI. CONCLUSION**

The 1982 UNCLOS provides a legal basis for archipelagic States to enclose the waters between islands as an integral part of their sovereignty. They entitle to apply its jurisdiction within archipelagic waters. Given the authority to supervise large area of territory does not all the time in line with the capacity to control provided by many incidents committed within their territory. Indonesia and the Philippines, as two of twenty-two States declared as archipelagic States, are in questions with the increasing number of incidents as reported by the IMB. The most phenomenon cases were recently took place upon Indonesian flagged ships that had been hijacked by the Philippines liberal movement, ASG. Abu Sayyaf is recognized as a dangerous liberation group who most likely hijacked ships for ransom. International law has not discussed the existence of armed robbery at sea and there is no universally accepted definition, however, the number of armed robbery against ships is increasing. The fact that the only different element between piracy and armed robbery is the only location where the action is committed.

As mentioned in previous paragraphs, during the negotiation, the maritime powers one of primary concerns was the freedom of movement at sea as well as the responsibility of archipelagic States in providing freedom of passage along with its security problem. The 1982 UNCLOS provides rights and obligations of archipelagic States however it is silent in discussing States responsibility when States failed to perform their obligations. However, the 1982 UNCLOS is also silent in providing clear interpretation whether there are obligations of archipelagic States to bear the responsibility whenever unlawful acts carry out within its sovereignty. One of the elements of State responsibility is the action should be attributable and there is a breach of international obligations. As a consequence, in questioning archipelagic States responsibility, it is mandatory to find international obligation under international law especially the 1982 UNCLOS as the primary source of international law, in particular, the law of the sea

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