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INTERNATIONAL LAW OF THE SEA AND NATIONAL  
LEGISLATION ON PIRACY AND TERRORISM  
IN THE STRAITS OF MALACCA  
A Study in Law and Policy

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## ABSTRACT

The issue of piracy and maritime terrorism becomes complicated when it is discussed in relation to the rights of the coastal states regarding the right of passage in straits used for international navigation. One of the issues in this respect is the conflicting interests of littoral states that insist on sovereignty over the sea areas adjacent to their coast and the needs of user states to retain and indeed to have more freedom in navigation while passing through and overflying these straits. The Straits of Malacca is a region where the concepts of respective freedom have been tested.

To further complicate the matter, in law and perceptions, the 11 September 2001 atrocities brought about an urgent need for more radical changes to the existing international law to deal with possible terrorist attacks at sea. This resulted in the rapid adoption under the IMO of the ISPS Code through amendments to the SOLAS Convention 1974. More radical changes affecting the basic rights of freedom of the high seas are taking place in the amendments of the SUA Convention 1988. Against this backdrop, the issue of maritime security and the way in which the littoral states deal with it while maintaining their rights and sovereignty has had fundamental effects in the Straits of Malacca.

The main purpose of this thesis is to trace the legal developments and changes that have taken place in regional and international law since the September 11 atrocities, which have fundamentally affected the question of the littoral states' sovereignty and rights over adjacent maritime zones against the rights of user states and interested maritime powers as applied in new security outlooks and threats of international terrorism. Through case studies to examine fundamentals, this thesis attempts to answer the question as to whether the trend to further 'internationalise' the Straits of Malacca is justified under the international conventions and customary law. The thesis will trace the use of the issue of piratical attacks in the straits, which have enabled third parties to offer security arrangements to the littoral states, and how diplomatic negotiations on this question between the littoral states themselves are compounded by complex historical, legal and political issues and by related organizational structures at national, regional and international levels. These objectives can be achieved only by a rigorous evaluation of the law of the sea with respect to security, accompanied by examinations of actual processes and practices in the form of case studies. A summing up of the evidence so examined is provided in the final chapter of the thesis.

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**ABBREVIATIONS**

<b>ACP</b>	Assistant Commissioner of Police
<b>AMARSECTIVE 2004</b>	Asia Maritime Security Initiative 2004
<b>APMM</b>	Agensi Penguatkuasaan Maritim Malaysia
<b>ARF</b>	Asian Regional Forum
<b>ASEAN</b>	Association of South East Asian Nations
<b>ASP</b>	Assistant Superintendent of Police
<b>ASLP</b>	Archipelagic Sea Lane Passage
<b>ATBA</b>	Areas to be avoided
<b>AJIL</b>	American Journal of International Law
<b>BARS</b>	Background Asia Risk Solutions
<b>Cmdr</b>	Commander
<b>DPP</b>	Deputy Public Prosecutor
<b>DSP</b>	Deputy Superintendent of Police
<b>EEZ</b>	Exclusive Economic Zone
<b>FPDA</b>	Five Power Defence Agreement
<b>GAM</b>	Gerakan Aceh Merdeka
<b>IADS</b>	Integrated Air Defence System

<b>ICJ</b>	International Court of Justice
<b>INMARSAT</b>	International Mobile Satellite Organization
<b>ISWG</b>	Inter-Sessional working Group
<b>IUCN</b>	The International Union for the Conservation of Nature
<b>IMO</b>	International Maritime Organization
<b>IMB</b>	International Maritime Bureau
<b>GUSKAMLABAR</b>	Gugusan Keamanan Laut Barat (Indonesian Navy – Western Front)
<b>ISPS</b>	International Shipping and Port Facility Security Code
<b>JMBRAS</b>	Journal of the Malayan Branch of the Royal Asiatic Society
<b>JIML</b>	Journal of International Maritime Law
<b>Lloyd's JWC</b>	Lloyd's Joint War Committee
<b>MALSINDO</b>	Malaysia, Singapore, Indonesia Joint Coordinated Patrol
<b>MECC</b>	Maritime Enforcement Coordinating Centre
<b>MIMA</b>	Maritime Institute of Malaysia
<b>MLJ</b>	Malayan Law Journal
<b>MMEA</b>	Malaysian Maritime Enforcement Agency
<b>MPA</b>	Marine Protected Area

<b>SPMA</b>	Singapore Port and Maritime Authority
<b>MTSA</b>	Maritime Transportation Security Act, 2002
<b>NAM</b>	Non-Aligned Movement
<b>PDRM</b>	Polis Diraja Malaysia
<b>PRC</b>	Piracy Reporting Centre
<b>PSI</b>	Proliferation Security Initiative
<b>PSSA</b>	Particularly Sensitive Sea Areas
<b>RMN</b>	Royal Malaysian Navy
<b>RMSI</b>	Regional Maritime Security Initiative
<b>ReCAAP</b>	Regional Cooperation Agreement on Combating Piracy And Armed Robbery against Ships in Asia
<b>SEARCCT</b>	Southeast Asia Regional Centre for Counter Terrorism
<b>SUA Convention</b>	International Convention on Suppression of Unlawful Acts against Maritime Navigation 1988
<b>SUA Protocol 2005</b>	The Protocol for the Suppression of Unlawful Acts against Maritime Navigation 2005
<b>SOLAS</b>	International Convention for the Safety of Life at Sea
<b>TNI-AL</b>	Tentera Nasional Indonesia – Angkatan Laut (Indonesian National Armed Forces – Navy)
<b>TLDM</b>	Tentera Laut Diraja Malaysia (Royal Malaysian Navy)

<b>TTEG</b>	Tripartite Technical Expert Group
<b>SWASLA</b>	Malaysian Sea Surveillance System
<b>UN CONVENTION 1982</b>	United Nations Convention on the Law of the Sea 1982
<b>UNCLOS I</b>	First United Nations Conference on the Law of the Sea
<b>UNCLOS II</b>	Second United Nations Conference on the Law of the Sea
<b>UNCLOS III</b>	Third United Nations Conference on the Law of the Sea
<b>UNHCR</b>	United Nation High Commissioner for Refugees
<b>VLCC</b>	Very Large Crude Carrier
<b>WMD</b>	Weapons of Mass Destruction
<b>WMU</b>	World Maritime University
<b>ZOPFAN</b>	Zone of Peace Freedom and Neutrality

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## Chapter 1

### INTRODUCTION

#### 1.1. Introduction

Maritime security has become a major concern for international trade, especially in the last two decades. Two aspects that emanate from a relatively modern aspect of security are sophisticated acts of piracy and maritime terrorism. Piracy in its vernacular sense has its origins in antiquity, and has existed since human discovered the use of sea as a mode of transportation. Under customary international law, piracy *Jure Gentium* is *hostes humani generis* and must be combated by all states. Its seriousness is reflected in a famous quote:

“Pirates are common enemies, and they are attacked with impunity by all, because they are without the pale of the law. They are scorers of the law of nations; hence they can find no protection in that law. They ought to be crushed by us...and by all men. This is a warfare shared by all nations”.<sup>1</sup>

The international law, on the other hand, has no generally accepted definition for piracy, both committed on land or at sea. The difficulties in defining “terrorism” arise from the complexities surrounding the reasons or the intentions as to why “terrorist acts” are committed. This inability to provide a definitive meaning leads to the famous phrase, “One man’s freedom fighter is another’s terrorist”. A leading scholar on the subject suggests that the phrase “reflects genuine doubts about the term” as in the past, there have been strong disagreements as to whether certain movements were or were not terrorists’.<sup>2</sup>

Further discussion on the concept of terrorism is given under Para 1.6 below.

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<sup>1</sup> Alberico Gentili, *De Jure Belli Libri Tres* 1423 (John C. Rolfe trans., William S. Hein & Co., 1995 (1612) as quoted in Tina Garmon, “International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11<sup>th</sup>,” *Tulane Maritime Law Journal*, Vol.27, 2002, page 257.

<sup>2</sup> See an article by Professor Adam Roberts “The Changing Faces of Terrorism”, at [bbc.co.uk/history](http://bbc.co.uk/history) Published online on 27 August 2002.

The terrorist attacks on Washington and New York, on 11 September 2001, shocked the world and served as a stark warning as to the capabilities of the perpetrators to inflict mass destruction in an acknowledged safe environments and areas of prosperity. These attacks were later widely referred to as “terrorist attacks” and the incidents were universally known as the events of “9/11”. These events elicited a global outpouring of sympathy for the United States, which stood at the time, after the demise of the Soviet Union, as the only global superpower. The United States immediately launched what it calls a “war against terror” and under this phrase, two wars were launched against two separate sovereign states. One was on Afghanistan, principally to overthrow the Taleban government that was accused of sheltering Osama bin Laden and his Al Qaeda network (both were blamed for the 11 September attacks). Another was the invasion on Iraq, purportedly to overthrow the Saddam Hussein government for the possession of Weapons of Mass Destructions (WMD), which were or could be instruments of terror.

Against this backdrop, the maritime world made rapid adjustments to strengthen the security of transport by sea against threats by terrorists. The attacks put into perspective the specific vulnerability of ships and ports around the world. The International Maritime Organization (IMO), a specialized agency under the United Nations (UN), took the initiatives for a speedy response to amend two conventions, firstly by introducing the International Ship and Port Facility Security Code (ISPS Code) through an amendment to the International Convention for the Safety of Life at Sea (SOLAS) 1974. This amendment was unanimously adopted by a Diplomatic Conference on Maritime Security, held in London from 9 to 13 December 2002. The second IMO efforts to amend the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988 (SUA Convention) was met with wider reservations by member states. Member states resorted to some compromise before it finally being adopted by the Diplomatic Conference on the Revision of the SUA Treaties in London from 10 to 14

October 2005 in the form of Protocols to the SUA Treaties (the 2005 Protocols). These efforts also represented an updating of legislation which would encompass acts of piracy as they are understood in various zones of the sea which are discussed in the study.

## **1.2. Aims and Scope of Study**

In its most general sense, this research is on the application of the international law of piracy and maritime terrorism to the Straits of Malacca. The study endeavours to uncover the acts of the so-called “piracy” that have been synonymous with the area in the last few hundred years and re-ignited again in the last two decades or so. Although much has been said about the dangers of “piracy” generally in Southeast Asia and in particular in the Straits of Malacca, little ground has been covered in the form of case studies that elucidate the uniqueness of the processes under the term “piracy”. Many comments have been made and articles written on the subject on the basis of media reports on the events of “attacks” in the waters of the region. The vernacular use of the term “piracy” in the contemporary world is popularised, to some extent, by the International Maritime Bureau (IMB), which is a commercial agency devoted to reporting any attacks to vessels at sea or at ports. The findings of the case studies in the thesis will be used to examine such acts in order to ascertain whether they fit into the definition of piracy under prevailing international law.

The interest to pursue doctoral research in this area began immediately after the researcher’s completion of an LL.M. course in the Legal aspects of Marine Affairs in Cardiff University in 1999. In a way, this thesis is a continuation of the researcher’s LL.M dissertation, which was supervised by Professor E.D. Brown and entitled “The Straits Used for International Navigation - With Special Reference to the Straits of Malacca”. The dissertation focuses on the international law of navigation in the straits with a

substantial emphasis on the issue of marine pollution, which was considered in the immediate past, as the most important problem affecting the littoral states. Since then, many developments have taken place, and as this thesis will present, the maritime security issue has overtaken pollution as the single most challenging problem faced by Malaysia and Indonesia. While the issue of compensation was once the main complaint of the littoral states affected by marine pollution from ships, maintaining territorial sovereignty at sea is now the biggest challenge to these coastal states, as these states are now facing attempts from the user states wanting to wield more power to secure untrammelled passage through and over the straits.

The research began in late 2002 and two field studies were conducted in the littoral states of the Straits of Malacca in summer 2004 and again in summer 2005. The need to conduct the relatively shorter second field study in 2005 was to some extent spurred by the after-effects of the devastating Boxing Day Tsunami in December 2004. The tsunami initially had a minimising effect on the number of attacks in the straits, which had seen an unprecedented increase in 2003. There was a lull for about three months, but the attacks resumed in the second quarter of the year, despite active international activities and frequent patrolling by the littoral states. The second field study was directed towards the “success” of enforcement in the straits with the capture of “pirates” in the southern state of Johor and in the waters of Langkawi at the northern tip of the straits. The results of the second field study are incorporated in Chapters 3 and 5.

The research adopts two approaches. The first approach is to identify the rules regarding passage at sea in international law and the impediments to free and safe passage. This approach calls for a critical analysis of the provisions of the UN Convention on the Law of the Sea 1982 (the UN Convention 1982). As law does not arrive out of a vacuum, it is necessary to study the historical background of these rules in order to understand how

they came into being. The second approach is to use empirical evidence, mostly in the form of statistics produced and collated by IMB, the leading agency on this field, on the number of attacks in the Straits of Malacca and its neighbouring area. The study examines figures for a four-year period from 2002 to 2005 and these figures are compared with similar in other parts of the world. In addition, case studies drawn from police investigations, courts and interviews provide the evidence. Fundamental aspects in seeking agreements are observed in the empirical observations and data over the questions of littoral sovereign rights and international user rights when it comes to control on passage of ships and actions against pirates.

### **1.3. The Straits of Malacca**

The Straits of Malacca<sup>3</sup> is situated in the Southeast Asia region. The region itself consists of states which are geographically east of India and south of China. In the northern side of the region is the mainland while island arcs and archipelagos are found in the southern part. The Straits of Malacca is known in Malay as *Selat Melaka* and consists of two straits i.e. the Strait of Malacca and the Strait of Singapore. The Strait of Malacca probably obtained its name from the port of Malacca, the capital of the Sultanate of Malacca in the southern part of the Peninsular which was founded in 1403. Basically, the straits are a narrow stretch of water between the Indonesian island of Sumatra and Peninsular Malaysia, which is shown in Map 1.

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<sup>3</sup> In this study the term “Straits of Malacca” includes the Strait of Malacca, the Strait of Singapore and the Strait of Johor. When used in singular form the Straits of Malacca does not include the other Straits. Throughout this thesis the term “straits” refers to straits in general but the term “Straits” with a capital “S” refers specifically to the Straits of Malacca and Singapore.

## Map 1 The Straits of Malacca



The importance of the Straits of Malacca lies in the fact that it forms the main ship route between the Pacific Ocean and the Indian Ocean. Strait of Malacca links the Indian Ocean (Andaman Sea) with the Pacific (South China Sea). Together with the Strait of Singapore, the Straits of Malacca has a length of 600 nautical miles. The width of the Strait of Malacca varies from 8.4 nautical miles in the south to about 140 nautical miles in the north. Its waters are relatively shallow; in the south depth rarely exceeds 37 meters, and with total average about 27 meters. Large vessels are funnelled through a channel of 2 nautical miles. The tidal range varies from 5.8 meters in the south to 2.5 meters in the north. Ships drawing more than 19.8 meters should not use the Strait.

Historically, the Strait of Malacca attained international prominence from approximately the 5<sup>th</sup> century A.D. as a marine corridor between Indian Ocean and the southern coast of Sumatra. Its use in conjunction with the Strait of Singapore in providing a direct transoceanic route into and from the South China Sea came centuries later as modern

Singapore was founded only in 1819. The Strait of Malacca saw a long history of rivalry between the Malay Kingdoms of the Peninsular and the southern Java-based Kingdoms. By the turn of the 8<sup>th</sup> century, the Strait of Malacca was controlled by the Kingdom of Srivijaya from Java before it later fell under the influence of the Sultanate of Malacca from early 15<sup>th</sup> century. The Western dominance over the navigation in the strait began with the fall of Malacca to Portugal in 1511 and to the Dutch in 1641. It grew in importance after the establishment of Singapore by the British in 1819. The establishment of Singapore was due to the need to secure a trade route between Europe and China as an alternative to the Sunda Strait which was controlled by the Dutch.

This historical background of conflicts to secure the straits between local rulers (and also Western powers which controlled the littoral lands for centuries) and the navigational users continued to manifest itself after the states bordering the straits gained independence after World War Two. A study on the conflicts and related negotiations which continue to the present day are included in Chapter 3. It is also useful in this respect to compare regional negotiations in the Straits of Malacca with other straits in the world with comparable complexities. A short comparative study with the Strait of Hormuz, the Strait of Bab el Mandeb and the Strait of Gibraltar in particular is included in Chapter 7.

Before proceeding with the main thrust of the thesis, it is useful to clarify a number of concepts which are used in several parts of the work.

#### 1.4. Sovereignty<sup>4</sup>

As Brown puts it, “the meaning and scope of the principle of sovereignty, one of the fundamental principles of international law, are frequently misunderstood”.<sup>5</sup> In international law, an early attempt to explain the concept of sovereignty was to be found in the *Island of Palmas Case*, Judge Huber says:

“Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state. Developments of the national organizations of States during the last few centuries and, as a corollary, the developments of international law have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.

Territorial sovereignty ... involves the exclusive right to display the activities of a State. This right has as a corollary, a duty: the obligation to protect within the territory the rights of other States, in particular their rights to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfil this duty. Territorial sovereignty cannot limit itself to its negative side, i.e. to exclude the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian.”<sup>6</sup>

The principle of sovereignty is not, however, absolute, as its exercise may be limited by rules of international law, customary or conventional. The principle is laid down in the *SS Wimbledon Case*<sup>7</sup> wherein the Court referred to the limitation upon the exercise of Germany’s sovereignty, established by the Peace Treaty of Versailles, under which the

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<sup>4</sup> For general discussion see, for example, E.D.Brown, *the International Law of the Sea*, Vol.I, Dartmouth, Aldershot, 1994, pages 6-8, 37-40; J.L.Brierly, *The Law of Nations*, 6th. Edn., Oxford University Press, Oxford, 1963, pages 45, 162-163; I.Brownlie, *Principles of International Law*, Oxford University Press, Oxford, 1998, pages 289-299; G.Simpson, *General Powers and Outlaw States: Unequal Sovereigns in International Legal Order*, Cambridge University Press, Cambridge, 2004; J.L.Cohen, “Whose Sovereignty? Empire Versus International Law”, *Ethics and International Affairs*, 18, No.3, 2004.

<sup>5</sup> E.D.Brown, above, page 37.

<sup>6</sup> See Permanent Court of Arbitration (1928), 2 R.I.A.A. 829, page 828, as quoted in Brown, above, page 37.

Kiel Canal had to be kept open to vessels of all nations at peace with Germany.

The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act and abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of a State's sovereignty.

In order to further understand the concept of sovereignty, it would be appropriate to quote the work of Professor Morgenthau in *Politics among Nations*.<sup>8</sup> According to Morgenthau, while sovereignty is synonymous with independence, equality and unanimity, it is not always what it is often believed to be. Sovereignty is not freedom from legal constraint, from regulation by international law of all those matters which are traditionally left to the discretion of the individual nations; it is not equality of rights and obligations under international law, and sovereignty is not actual independence in political, military, economic, or technical matters.

Under these circumstances, Morgenthau argues, sovereignty still exists, but it will cease to exist, at least in theoretical terms, in two circumstances. First, when a nation may take upon itself legal obligations that give another nation final authority over its lawgiving and law-enforcing activities. For example, Nation A will lose its sovereignty by conceding to Nation B the right to veto any piece of legislation enacted by its own constitutional authorities, because in this case, although Nation A is still the lawgiving and law-enforcing authority within its territory, it loses supremacy to Nation B and is no longer sovereign. Second, sovereignty can cease to exist in the loss of what Morgenthau calls "impenetrability" of a nation's territory. In this circumstance, the government of Nation A is superseded as the lawgiving and law-enforcing authority by the government

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<sup>7</sup> (1923-P.C.I.J.) A.I., page 25.

of Nation B, which, through its agents, perform the lawgiving and law-enforcing functions within the territory of A. The government of Nation A, having lost authority altogether within the territory of Nation A, survives only in name and in appearance, while the actual functions of the government are performed by the agents of Nation B.

These points are particularly apposite when it concerns the territorial integrity of straits where foreign governments have certain rights in sea areas which the coastal states regard as their sovereign right and territory. Sovereignty issue will also arise where states concede some jurisdiction on a multinational and regional basis in their territories to combat common problems including piracy. This study arrives at several conclusions as to which states have or should not have, authority over security of the Straits of Malacca under conditions of a global shipping regime and the actions of international pirates and terrorists as these terms are understood in the past and present.

### **1.5. Definitions of Piracy**

Since time immemorial piracy has been regarded as *hostis humani generis*. In the 16<sup>th</sup> century an Italian jurist Gentili wrote:<sup>9</sup>

Pirates are common enemies, and they are attacked with impunity by all because they are without the pale of the law. They ought to be crushed by us and all men. This is a warfare shared by all nations.

Because piracy is a crime with an international character, it is governed by international law. However, since the inception of the UN Convention 1982, the problem of piracy has been fraught with questions of definition.

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<sup>8</sup> Morgenthau, H.J., *Politics Among Nations*, revised by Kenneth W. Thompson, 6<sup>th</sup>. Edn, McGraw-Hill Inc., United States, 1985, pages 330-334.

Piracy is defined in Article 101 as follows:

Piracy consists of any of the following acts:

- (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 or private aircraft, and directed:
  - (i) on the high seas, against persons or property on board such ship or aircraft;
  - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (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 intentionally facilitating an act described in sub-paragraph (a) or (b).

At the same time Article 103 defines a pirate ship or aircraft as:

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of acts referred to in Article 101. The same applies if the ships or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

The IMB whose primary object is to monitor global piracy defines piracy as:

For statistical purposes, the IMB defines piracy and armed robbery as; ‘An act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in the furtherance of that act’. This definition thus covers actual or attempted attacks whether the ship is berthed, at anchor or at sea. Petty thefts are excluded, unless the thieves are armed.<sup>10</sup>

The IMO adopts the UN Convention 1982’s definition of piracy but adds “armed robbery” in its “Draft code of practice for the investigation of crimes of piracy and armed robbery against ships”. The term “armed robbery” against a ship is defined as: “any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy directed against a ship or against persons or property on board such

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<sup>9</sup> A.Gentili, *De Jure Belli Libri Tres* 423 (J. Rolfe trans. 1964).

<sup>10</sup> IMB website, [http://www.iccbo.org/ccs/imb\\_piracy/](http://www.iccbo.org/ccs/imb_piracy/).

ship, within a state's jurisdiction over such ships.”<sup>11</sup>

The Comité Maritime International (CMI) promotes a Model National Law on Acts of Piracy or Maritime Violence that incorporates all the essential elements of the piracy provisions in the UN Convention and the offences prescribed under Article 3 of the SUA Convention 1988. The CMI in its attempt to consolidate the acts of piracy and terrorism introduces a new all-embracing phrase of “maritime violence”. The CMI proposal is given in Appendix 1. There are also more subtle approaches to the definition of pirates which are considered in the context of Chapter 2 issues.

## **1.6. Concepts of Terrorism**

One fundamental difficulty in the analysis of the concepts of contemporary terrorism is the lack of clear and functional definition for such an activity. The existing definitions can be divided into academic and political definition. Alex P. Schmid, by far, provides one of the most comprehensive academic definitions of terrorism. After examining 109 different definitions of terrorism he defines terrorism as:<sup>12</sup>

Terrorism is an anxiety-inspiring method of repeated violent action, employed by (semi-) clandestine individual group or state-actors, for idiosyncratic, criminal or political reasons, whereby - in contrast to assassination - the direct targets of violence are not the main targets. The immediate human targets of violence are generally chosen randomly (targets of opportunity) or selectively (representative or symbolic targets) from a target population, and serve as message generators. Threat and violence-based communication processes between terrorists (organizations), (imperilled) victims, and main targets are used to manipulate the main target (audience(s)), turning it into a target of terror, a target of demands, or a target of attention, depending on whether intimidation, coercion, or propaganda is primarily sought.

In the United Nations the problem was reiterated soon after the 11 September atrocities

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<sup>11</sup> IMO website, <http://www.imo.org>.

<sup>12</sup> Schmid, A.P., and Jongman, A.J., *Political Terrorism*, Transaction Books, New Brunswick, 1998, page 28.

when a Legal Counsel noted in his briefing that serious difficulties continue to exist on the key elements of the future planned comprehensive convention on terrorism, namely, (i) the issue of the definition of terrorisms; (ii) the issue of the relationship of the draft convention to existing and future instruments on international terrorisms; and (iii) the issue of differentiating between terrorism and the right of peoples to self-determination and combat foreign occupation.<sup>13</sup>

An example of a political definition can be found in the United States Code<sup>14</sup> which tends to over-generalise the definition as: “The term terrorism means premeditated, politically motivated violence perpetrated against non-combatant targets by sub-national groups or clandestine agents usually intended to influence an audience.”

L. Weinberg, A. Pedahzur and S. Hirsch-Hoefler in a more recent study examine 73 definitions of terrorism from 55 articles in some leading academic journals and conclude that “*terrorism is a politically motivated tactic involving the threat or use of force or violence in which the pursuit of publicity plays a significant role.*”<sup>15</sup>

Terrorism may be divided into old terrorism and new terrorism. Since 1980s scholars and analysts have argued that “new terrorism” has emerged due to the changes in form and characteristics and point to the prominence of religion as one of its main characteristics. This contradicts the “old terrorism” which was primarily secular in its orientation. Alexander Spencer refutes this and argues that fanatical religious terrorism has existed for thousands of years and the distinction between religiously and politically motivated terrorism is predominantly artificial.<sup>16</sup>

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<sup>13</sup> Briefing of Mr Hans Corell, the United Nations Legal Counsel to the United Nations Security Council on 21 September 2001, obtained from the permanent mission of Malaysia to the United Nations.

<sup>14</sup> See, United States Code, Title 22, Section 2656(d).

<sup>15</sup> Weinberg L., Pedahzur A. & Hirsch-Hoefler S., “The Challenges of Conceptualizing Terrorism”, in *Terrorism and Political Violence*, Vol.16, No.4, (2004), page 786.

<sup>16</sup> Spencer, A., “Questioning the Concept of ‘New terrorism’,” *Peace, Conflict & Development*, Issue 8,

Due to this difficulty the Association of Southeast Asian Nations (ASEAN) has carefully avoided the issue. For the most part, Southeast Asian States have avoided the struggle to define terrorism by defaulting to the ASEAN dictum that “the sovereignty, territorial integrity and domestic laws of each ASEAN Member Country be respected in the fight against terrorism”<sup>17</sup>

It could be predicted from the existing trends that the concepts of terrorism will continue to be disputed in the future due to the complexity of distinguishing it from guerrilla, crime or mad serial killers and the problem of implying a moral or religious judgement to some of the atrocities committed by the perpetrators.

## **1.7. Chapter Arrangement**

The thesis contains 9 chapters. This Chapter 1 introduces the concept of sovereignty and the meanings of piracy both in international law and in vernacular use. Chapter 1 also discusses the meaning of the “terrorism.” The discussion on Hans J. Morgenthau’s work provides a non-legal view from a leading American political scientist. This leads to the caveat in the study that examining law alone is inadequate in the complex geographical and political region of the Straits of Malacca. Hence the need for the study to be multi disciplinary, where legal and policy matters are discussed and examined.

Chapter 2 provides an introduction to the development of the law of the sea from the 15<sup>th</sup> century, referring to the works of Grotius and Selden in the early 16<sup>th</sup> century. This chapter also introduces “*Undang-Undang Laut Melaka*” or the Malacca Maritime Laws, which were codified during the Sultanate of Malacca in the 15<sup>th</sup> century just before the

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January 2006, available from [www.peacestudiesjournal.org.uk](http://www.peacestudiesjournal.org.uk), page 24.

<sup>17</sup> Geragotelis, J.M.L., *Sea Piracy in Southeast Asia: Implication for Countering Maritime Terrorism in the United States*, MA Thesis, Naval Postgraduate School, Monterey, June 2006, page 23.

Portuguese invasion in 1511. This chapter also examines the rights of passage in various parts of the sea, such as the territorial sea, straits used for international navigation, the Exclusive Economic Zone, the Archipelagic State and the High Seas.

The concepts of transit passage and innocent passage are critically examined, together with the concept of archipelagic sea-lane passage which is important to Indonesia, one of the particularly sensitive littoral states of the Straits of Malacca. Chapter 2 also explains the jurisdiction of littoral States in order to clarify some confusion in the Straits States that the regime of innocent passage is still applicable in the territorial sea in the Straits littoral States. This is because the regime of transit passage now is the only authorised regime applicable in the Straits. The chapter covers new developments that emerged after the conclusion of the Convention and indicate the extent of acceptance of the legal regimes on sea passage in the region. This includes the dissatisfaction of the Strait States due to the minimum authority accorded to them in transit passage. The states may try to exert more control over the Straits of Malacca by using laws relating to the environment and socio-economic issues.

The chapter also shows that piracy was not initially regarded as a vitally important issue. This is reflected in UNCLOS III, where representatives of the littoral states of the Straits of Malacca combined their efforts to reach an international agreement on the juridical status of straits used for international navigation and the introduction of the novel concept of the archipelagic state.

Chapter 3 contains a case study which examines the role of Malaysia a littoral state of the Straits of Malacca in increasing security around the Straits. This is a product of a field study, which was conducted in Malaysia, Indonesia and Singapore in the summer of 2004.

Chapter 4 examines statistical figures on the attacks in the Straits of Malacca for a four-year period from 2002 to 2005. As “piracy” was first linked to terrorism in early 2004, the figures are divided into two phases to determine whether increased patrols by the littoral states influenced by terrorist threats have had any positive effects on the scourge of “attacks” in the straits.

Chapter 5 is devoted to the case study of the *MV Alondra Rainbow* and the *MV Nepline Delima*, in which the modus operandi of the attacks are examined in great detail by using original sources.

As piracy in international law requires international cooperation towards finding a solution, Chapter 6 deals with the works of “competent” international organizations, as enshrined in the UN Convention 1982, in areas of piracy and maritime terrorism. It is universally accepted that the IMO is such an organization. As stated above, two major IMO efforts resulting in new international law rules are the ISPS Code and the SUA Protocol 2005. The researcher attended the SUA Protocol discussions as an observer and as an intern with the IMO during the research period. The researcher also conducted formal interviews with IMO officials and delegates from member States.

Chapter 7 discusses the spatial and organizational structure of coastal state control. Regional efforts to combat “piracy” and terrorism are examined by looking at efforts taken by some regional organizations such as the Asian Regional Forum, the Association of Southeast Asian Nations (ASEAN), the ReCAAP and the Five Power Defence Agreement (FPDA). The problems of maritime regionalism in Southeast Asia are chiefly derived from historical territorial competitions that still affect modern-day states in the form of territorial sovereignty. Chapter 7 concludes that the littoral states have always

managed to solve these issues either through peaceful means, through bilateral negotiations or by reference to the International Court of Justice (ICJ).

Chapter 8 deals with the policy decisions and aspirations of states which incorporate law of the sea which may also be influenced by other factors. There are, it is emphasised, two kinds of security interests i.e. those of the coastal states and those of the flag states. The coastal state is interested primarily in ensuring that foreign ships do not threaten its national security but the major maritime powers are interested in mobility and accessibility in being able to move their warships as expeditiously as possible. Against this backdrop the chapter discusses regional and international policies and considers the SUA Protocol 2005 as a solution to Straits States policy difficulties.

Chapter 9 is the conclusion to the thesis. It summarizes the issues discussed in the previous chapters and again highlights the conflict between the rights of the users States and the littoral States which have appeared prominently throughout the thesis.

### **1.8. Methodology and Influences**

This thesis is based primarily on academic theories, legal instruments, policy decisions and case studies. Case studies are employed to give answers to some questions formulated beyond the scope of legal instruments. The thesis adopts a multidisciplinary approach as it would not be sufficient to look at the pertinent issues just from the legal angle. Having come to international law after serving more than a decade in government legal and judicial offices, the researcher began to realise the distinction between *opinio juris* and State practice and echoes the sentiments of Byers: "...the distinction between international law and international politics, between what states might legally be obligated to do, and what they actually did as the result of a far wider range of pressures

and opportunities”.<sup>18</sup> In one of the early works on international law, a scholar describes the complexity of the subject as follows: “It is true that politics are not law, but an adequate notion of a body of law cannot be gained without understanding the society in and for which it exists, and it is therefore necessary for the student of international law to appreciate the actual position of the great powers of Europe”.<sup>19</sup> The powers of Europe have been much reduced since World War II, but as exhibited by their European counterparts in preceding centuries, the new superpowers still have significant influence over the affairs of smaller, less significant states such as those in the Southeast Asian region. Michael Liefer effectively used the multidisciplinary approach in his study on the Straits of Malacca, Singapore and Indonesia. His book provides an important background to the socio-political complexities of the region during the UNCLOS III negotiations.<sup>20</sup>

All data and information is valid as of 30<sup>th</sup> September 2005, with the exception of Chapter 6, where the researcher feels that it is important to include the Diplomatic Conference of the IMO, which had confirmed amendments to the SUA Convention and its Protocols in October 2005. Nevertheless the thesis has also been updated, in particular, the inclusion of some publications to the end of 2006 and the effects of the SUA Convention and its Protocol to the littoral States’ policy.

For the case studies, the researcher undertook a three-month field study in Malaysia, Singapore and Indonesia, the three littoral states of the Straits of Malacca, during the summer of 2004, followed by another seven-week stint in Malaysia in July-August 2005. Most interviews were conducted in either *Bahasa Melayu* (the Malay language) or *Bahasa Indonesia* (the Indonesian language). These two languages are of the same root

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<sup>18</sup> Byers, M., *Custom, Power and the Power of Rules*, Cambridge University Press, Cambridge, 1999, Page xi.

<sup>19</sup> Westlake, John., *Chapter on the Principles of International Law*, Cambridge University Press, Cambridge, 1894, page 92 as quoted in Byers, above.

and also almost similar and the researcher is aided by his considerable skills in both. Apart from this, the researcher underwent a two-month internship programme in the International Maritime Organization (IMO) in London from March to April 2004. During this period, the researcher attended meetings and interviewed representatives from member countries on issues of piracy and maritime security.

## 1.9. Literature

One of the main problems during the research period was that the issues are very contemporary and there are as yet few scholarly writings on the subject. The research was initiated exactly one year after the 11 September atrocities in Washington and New York, which accelerated reactive legislation and actions. Academic writing in book form takes some time before it reaches evaluations. The researcher initially depended on newspaper reports, internet sources, commentaries and academic seminars to evaluate trends. But by the period 2002-2006 significant works appeared in academic journals and books around the world, and some older textbooks on the Law of the Sea published before 11 September 2001, were still relevant to the discussion. The textbooks in which the researcher takes particular interest are E.D. Brown's *The International Law of the Sea*, (two volumes), 1994, Nandan and Roseanne's *United Nations Convention on the Law of the Sea: A Commentary*, 1995, and B.B. Jia's *The Regimes of Straits in International Law*, 1998. On the topic of the law of piracy, Alfred P. Rubin provides by far the most comprehensive work on the subject in his book *The Law of Piracy*, 2<sup>nd</sup> Edn., 1997. Many excellent views on the issue of navigation in the Pacific regions can be found in Rothwell and Bateman's *Navigational Rights and Freedom and the New Law of the Sea*, 2000.

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<sup>20</sup> Liefer, *International Straits of the World: Malacca, Singapore and Indonesia*, Sijthoff & Noordhoff Alphen aan den Rijn, 1978.

The subject of terrorism is a “hot” topic among academics on both sides of the Atlantic, but maritime terrorism is something different. It is distinguished from piracy in terms of motives. However since the *Santa Maria*<sup>21</sup> incident there have been attempts to regard pirates as terrorists. Gammon is an exception, attempting to reconcile the law of piracy and terrorism. Many recent writings on the issue of maritime security are compiled in two books published by the World Maritime University, Malmo. The university, which operates under the auspices of the IMO, is currently a leading institution on this subject.

Many other references on this subject are taken from legal, maritime and social sciences journals from around the world. Some of the better academic writings on the issues are available online, such as those published by Singapore and Malaysian-based research centres. In Malaysia, there has been a consistent attempt to bring back the global attention to the issue of maritime safety in the Straits of Malacca. Since the end of 2004, a government-funded research centre, the Maritime Institute of Malaysia (MIMA), has shifted its focus from maritime security to maritime safety and the protection of environment in the Straits of Malacca. A comprehensive selection of the papers presented at the institute has been published in late 2006 under the same title, *Building a Comprehensive Security Environment in the Straits of Malacca*, edited by Mohd Nizam Basiron and Amir Dastan. The book highlights the views of the littoral States, the principal user States and the experts on the various issues affecting the Straits.

#### **1.10. Postscript - The Dynamics of Development Which May Impinge on this Research**

It is important to note that since September 2005, there continues to be significant events and developments to this area of study, which, to some extent, could have the potential to alter some of the findings of the research in one way or another. Firstly, the insurgent

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<sup>21</sup> In this incident the passengers of a Portuguese vessel attempted to gain control of the ship in 1961.

group *Gerakan Aceh Merdeka* (GAM), in one of the few positive effects of the Boxing Day tsunami in 2004, agreed to peace talks that paved the way for the surrendering of weapons to the Central Government. In another positive and significant development, Indonesia and Malaysia have agreed to cooperate further to obtain the maritime security in seas under their territorial controls. The longer term successes or otherwise of the dynamic responses can only be speculative.

For example, despite a declining number of attacks reported in the IMB Annual Report 2005 in the Straits of Malacca, the Lloyd's Joint War Committee (Lloyd's JWC) refused to review the risk attached to shipping in the area when the committee issued a new statement on 3 March 2006. The inclusion of the Malacca Strait (excluding the Singapore Strait) as one of the listed areas in Lloyd's JWC's Hull, War, Strikes, Terrorism and Related Perils was first issued on 20<sup>th</sup> June 2005. The area mentioned in the March 2006 policy covers the waters:

On the North Western end, a straight line between Laem Phra Chao (7°45'·5N, 98°18'·5E) and Ujung Baka (5°39'·5N, 95°26'·0E) and on the South Eastern end, a straight line between Tanjung Piai (1°15'·9N, 103°31'·0E) and the light at (0°48'·0N, 103°8'·2E) and continuing there from South Westwards to the Sumatra mainland coast.

The inclusion was lifted off in September 2006. As one example of complexity it will be seen in Chapter 4 an argument put forward regarding this issue; the irony of this policy is that it does not cover the area within the Singapore Strait. The LJWC decision is still debated in the affected littoral states. On 21 March 2006, the Deputy Prime Minister of Malaysia, Dato' Seri Najib Tun Razak, urged international insurance companies to "reconsider their decision to classify the Straits of Malacca as a war zone" because "the statistics do not bear that fact" and "the area is safe from any global terrorism". As long as sea shipping continues to be the most preferred mode of transportation and no geographical changes take place to alter the importance of the navigation through the

straits, it is anticipated that the security of the Straits of Malacca will continue to be highlighted and discussed in the foreseeable future.

On the issue of the Private Security Companies' role in safeguarding private vessels in the Straits of Malacca, the Port Tanjung Pelepas of Johor Bahru has indicated that they too would be joining the business, thus offering a rival to Singapore based-companies. In November 2006 a boat belonging to a PSC was pursued by the Malaysia Maritime Enforcement Agency (MMEA) after the boat in a mysterious circumstances opened fire to an approaching MMEA vessel at night. The matter is still under investigation.

These developments indicate that the issue of "piracy" or security in the Straits of Malacca will continue to attract international attention in the future in varied and complex ways.

## Chapter 2

### RIGHTS AND IMPEDIMENTS TO THE PASSAGE OF MERCHANT SHIPS

#### 2.1. Introduction

This chapter concerns with the rights and freedom between coastal states and users in various zones of the sea. The chapter will endeavour to clarify the issue of the sovereignty of the coastal states and their need to protect the coastal environment and for others to protect themselves from these passages.

Since time immemorial, the sea has been the most important mode of transportation. It was important, therefore, for sea users to know their rights of passage while at sea. The rights of navigation were not easy to establish due to the vastness and remoteness of the oceans, which made enforcement on the high seas in particular by sovereign states almost impossible. Due to the power of prevailing winds and currents, regular fixed routes, which were virtually maritime highways, were favoured both by merchantmen and by the pirates hunting them.<sup>1</sup> In the absence of a modern state system in medieval Europe, even the surrounding seas were often substantially controlled by the pirate forces. There was no meaningful freedom of the seas until bilateral treaties were introduced under which “letters of reprisal to the prior satisfaction of specified conditions and to stamp out piracy” were issued, such as the one issued in the Treaty between King Henry VII of England and

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<sup>1</sup> An example of a global map of such “Winds and Routes” can be seen in Matthew Maury, *The Physical Geography of the Sea*, New York, 1855, as shown in Jan Rogozinski, *Dictionary of Pirates*, The Woodworth, Hertfordshire, 1997, at page xiii.

Archduke Philip of Austria in 1495.<sup>2</sup> Similar “surprisingly extensive” networks of bilateral treaties gradually established the rights of maritime powers in times of peace.<sup>3</sup>

## 2.2. Post-Medieval Views on Navigational Rights in Europe and Southeast Asia

As Brown puts it, “the history of the modern international law of the sea can perhaps be best understood by perceiving it as a continual conflict between two opposing, yet complementary, fundamental principles, territorial sovereignty and the freedom of the high seas.”<sup>4</sup>

National and international lawyers alike have discussed the freedom of navigation at sea extensively since the birth of *Mare Liberum*<sup>5</sup> by the founder of international law<sup>6</sup>, Hugo Grotius<sup>7</sup>, who argued for freedom of the seas for all states. Two decades later, J Selden argued the doctrine of national sovereignty over specific areas of sea in his book *Mare*

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<sup>2</sup> E.D.Brown, *The International Law of the Sea, Vol.I*, Dartmouth, Aldershot, 1994, page 6.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Hugo Grotius, *Mare Liberum* (1609). English translation by Magoffin, (1916). This work was originally written as chap. 12 of *De Jure Praedae Commentarius*, 1604- 1605 (English translation by G. I. Williams and W. H. Zeydel published in 2 vols. As No. 22 in *The Classics of International Law series*, Carnegie Endowment, 1950). See further footnote 9 in Brown, note 2 above, page 12.

<sup>6</sup> Professor Brierly while acknowledging that Grotius’s *De jure belli ac pacis* as “one of few books that have won so great reputation” played down Grotius’s reputation as founder of international law because regarded the work as “has been exaggerated in originality and will do less than justice to the writers who preceded him such as Alberico Gentili whose work *De jure belli* which was published in 1588 had some influence on Grotius. See Brierly, *The Law of Nations*, Clarendon Press, Oxford, 1962, pages 25-27.

<sup>7</sup> His real name was Hugo de Groot. Born in Holland in 1583 and died in 1645. He was a lawyer, a historian, a poet as well as a theologian whose great desire was to see the reunion of the Christian Church. He was imprisoned for over two years for supporting the idea of loose federal union of Holland. He escaped with the help of his wife and eventually became ambassador of Sweden at the French Court. He wrote two works on international law, the *De jure praedae* in 1604, and *De jure belli ac pacis* in 1625. In the former, he supported the claim of the Dutch East India Company to capture of a prize from the Portuguese, was never published by him, and was not discovered until 1864. It was then found that a short work which he published anonymously in 1609, the *Mare Liberum*, contending, in opposition to the claim of the Portuguese, that the open sea could not be appropriated by any state, had been written as one of the chapters of the *De jure praedae*. See, J.L.Brierly, *The Law of Nations*, Clarendon Press, Oxford, 1962, at pages 27-28.

*Clausum*.<sup>8</sup> The arguments by writers for and against the doctrine of freedom of the seas were primarily designed to support the political and economic interests of their respective countries.<sup>9</sup>

While the debate by the European powers over freedom of navigation at sea helped the developments of the concepts of the law of the sea and international law in particular, it should be noted that similar developments had already taken place elsewhere. In the Far East, at the height of Malacca's influence as a port-state and a regional empire, the "*Undang-Undang Laut Melaka*" (Maritime Laws of Malacca), largely based on local indigenous *adat* (customs) and Islamic law, was codified and put into practice in the early 15<sup>th</sup> Century.<sup>10</sup> For example, the Maritime Laws of Malacca clearly stated the role of the ship's captain and the crew at sea as follows:

*Bab ini peri mengatakan hukum segala jong dan balok daripada segala nakhoda, karna ia seumpama raja-nya. Bermula akan jurumudi itu; umpama Bendahara ia di dalam jong itu. Adapun jurubatu itu umpama Temenggong; ialah yang memelihara baik dan jahat, mementukan salah dan benar dalam jong dan balok itu. Adapun tukang kanan dan tukang kiri itu umpama sida-sida; shaik ia mengerjakan kerja bersama-sama tukang agong. Bermula akan jurubatu dan gantong layar dan senawi dan tukang sakelian itu terserah di dalam tangan nakhoda. Ada pun segala awak perahu itu sakaliannya terserah di dalam tangan tukang agong. Jikalau tukang agong menyuroh awak, maka tiada ia mahu, dilawannya tukang agong itu, maka disuruhnya palu kepada juru batu dengan tujuh kali palu akan dia tetapi hendak jangan terbuka ketiak syarat memalunya dan lagi hendaklah bersamaan dengan tukang agong; maka dilawannya pula tukang agong itu, maka dipalunya*

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<sup>8</sup> J. Selden, *Mare Clausum* (1635).

<sup>9</sup> See generally T.W Fulton, *The Sovereignty of the Sea* (1911) as quoted by Brown, note 2 above, page 12, footnote 7.

<sup>10</sup> The Maritime law of Malacca consists of 25 legal provisions governing the conducts of seafarers at port and at sea. It was likely to have been codified during the reign of Sultan Mahmud Shah (asc. 1488, d. 1530) after a number of sea captains went to ask Bendahara (Prime Minister) Paduka Sri Maharaja (d. 1510) to approach the Sultan to ratify these laws. For further detailed account of this, see R. O. Winstedt and P.E. De Josselin De Jong (eds.) "The Maritime Laws of Malacca", *JMBRAS*, Vol.XXIX, Part 3, 1956, page 27. See also Anand R.P., *Origin and Development of the Law of the Sea: History of International Law Revisited* Martinus Nijthoff, 1982.

*empat kali akan dia. Sabermula jika awak perahu melawan juga gantong atau senawi, mahu dipalu tiga kali palu akan dia. Demikianlah hukumnya.*

[The captain [Nakhoda] is as a king on board his ship. The steerman [Jurumudi] is as the Prime Minister [Bendahara]. The officer in charge of casting anchor and taking soundings [Jurubatu] is as the chief of police [Temenggong]. The petty-officers in charge at starboard and port [Tukang kanan & Kiri] are as the courtiers [sida-sida]. They co-operate with the chief petty officer [Tukang agong]. All petty officers, boatswains [Gantong layar] and supercargoes [Senawi] are under the captain's command. The sailors [Awak perahu] are under the chief petty officer's command. If a sailor resists a command of his chief petty officer, the Jurubatu shall punish him with seven lashes; but the flogger may not lift his arm above the shoulder. For a second offence, he is punished with four lashes at the fore-hatch. The punishment for insubordination towards a boatswain or supercargo is three lashes].<sup>11</sup>

Although the Maritime Laws of Malacca did not address the issue of freedom of navigation directly, there was a provision on port-state control:

*Sa-bermula, jikalau kena lintang payar, atas nyawa yang banyak, semuanya kena ulor, baik kaya baikpun miskin, baik abdi baikpun merdeheka atau tua ataupun muda, kecil atau besar atau laki-laki atau perempuan, sama juga semuanya kena ulor; tiada lebeh, tiada kurang. Demikianlah adatnya lintang payar itu. Sa-bermula, jikalau di-dalam negeri pun, maka negeri itu huru-hara oleh musoh, maka dikehendaknya kepada segala dagang perahu besar atau perahu kecil, maka memberi adatnya iaitu, tolak senjata namanya, akan ulor: seperti adat lintang payar itu juga tatkala di-laut, demikianlah adatnya tolak senjata di-dalam negeri. Demikianlah adatnya.*

[The penalty for evading a patrol-boat at sea is that all on board the ship, rich and poor, men and women, elderly and children, freemen and slaves pay a fee in lieu of captivity. A country at war can levy a toll from merchant vessels. The levying of this toll is comparable to the enforcing of a blockade by patrol-boats at sea and the penalties the same.]<sup>12</sup>

The Malacca Maritime Laws contained no statements on issues relevant to navigational freedom or its impediments, such as piracy. It can be implied, perhaps, from the period in which the manuscript was written that the captains have relatively unrestricted right to travel at sea, as several far-distanced ports, such as Jawa, Tanjung Pura in Borneo and

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<sup>11</sup> *The Maritime Law of Malacca*, s.1.

<sup>12</sup> *Ibid*, s. 13(a) and (b).

Makassar in Sulawesi, which were outside the Malacca realm, are mentioned. As there was not a single provision that touched on the issue of piracy, it can also be taken that sea voyages by merchant ships were presumed to be relatively safe during the period, or that piratical activities were non-existent, due to the centralised power of the Sultans. It was only after the power of the sultans weakened from the 17<sup>th</sup> century onwards that effective power passed to local princes.

Consequently, as the political power became fragmented, piracy increased after 1600 AD. Some historians also blame the Dutch East India Company, which conquered territories in Indonesia. The Dutch monopolised sea-borne commerce and deliberately destroyed local trade. For income or resistance, piracy was the only career open to Malayan seamen, and rulers encouraged and taxed their raids.<sup>13</sup> Pengiran Anom<sup>14</sup> and Tuanku Abbas<sup>15</sup> were active Malay noblemen who were involved in attacks against the British in the early and middle 19<sup>th</sup> century.

After the codification of the Malacca Maritime Laws, there was a long period of non-development of the maritime law in Southeast Asia, primarily due to the arrival of the

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<sup>13</sup> See, Jan Rogozinski, *Dictionary of Pirates*, note 1 above, page 210.

<sup>14</sup> Pengiran Anom was an illegitimate son of the Sultan of Sambas, Borneo, who was behind the attack on a British ship in 1811. The British attacked and captured Sambas in 1813 but Pengiran Anom escaped, only to become sultan in 1814 and continued to encourage piracy: see Jan Rogozanski, note 1 above, at page 251.

<sup>15</sup> Tuanku Abbas was a brother of the Rajah of Achin (Acheh) in Northern Sumatra who plundered an Indian vessel and imprisoned the owner and crew in 1813. The captives escaped and appealed to the British authorities, who burned Tuanku Abbas's village in 1814. See Jan Rogozanski, note 1 above, page 1. Apparently, Rogozanski committed an error in his dictionary by attributing Achin as a North Borneo territory and Tuanku Abbas as a pirate in the South China Sea. An accurate account is given by A.P.Rubin in *The Law of Piracy*, 2<sup>nd</sup> Edn., Transnational Publishers, Inc., New York, 1997, page 241. Rubin casts doubt on the appropriateness of the British attack on Tuanku Abbas's village because, "In 1808 the chief British official in Malacca seized a ship flying the flag of Achin, a northern Sumatran Malayan sultanate with important political and financial backing from Arab traders, claiming it to be Danish and lawful prize during the Napoleonic Wars. The Achinese authorities in retaliation seized a British ship and a Malayan ship from the British colony of Prince of Wales' Island (Penang), ostensibly under Achinese law in Achin waters. Those seizures were called 'piracies' by the Penang officials." See A.P.Rubin in the *Law of Piracy*, 2<sup>nd</sup> Edn., above, page 242.

Western imperial powers, which controlled sea passage from the early 16<sup>th</sup> century until the Second World War. Probably the only significant treaty that is worth mentioning as regards the right of passage is the Anglo-Dutch Treaty 1824, which effectively partitioned the British and Dutch spheres of control in the Straits of Malacca to safeguard sea passage and to fight piracy, among other things.

It is worth observing that the concept of freedom of passage at sea during this period is coloured by the attempts of the colonial powers to stamp out “piratical activities” in the far-away lands under their hegemony. There was widespread vernacular use of the word “pirate” by the East India Company in the Persian Gulf in the 1820s, which was not in line with the English law.<sup>16</sup> This English vernacular usage has its roots in Roman precedents regarding the organized societies of the Eastern Mediterranean, which were opposed to the extension of Roman power and monopoly at sea. By analogy, this vernacular usage was applied to similar societies that were opposed to the territorial expansion in the Persian Gulf and Malaya. However, by the middle of the 19<sup>th</sup> century, this grossly misrepresented concept among the English public was differentiated from the criminal charge of “piracy” in English law after the judgment in the *Magellan Pirates* case.<sup>17</sup> In Malaya, the British policy on this issue is explained in the celebrated case of *Regina v. Tunkoo Mahomad Saad & Others*.<sup>18</sup>

### 2.3. Modern Developments in International Law

The law of the sea, just like international law as a whole, derives its sources from international treaties and customary law. A considerable majority of the rules governing the

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<sup>16</sup> See detailed discussion in Rubin, note 15 above, pages 255 -264.

<sup>17</sup> Rubin, note 15 above, in particular pages 263-264.

<sup>18</sup> [1840] 2Ky., Cr., page 18. For discussion on this case, see Chapter 3.

right of passage at sea was governed by customary law before the first United Nations Conference on the Law of the Sea (UNCLOS I). It was only after the Second World War in 1945 that these rules were codified. During the second conference (UNCLOS II), leading to the Geneva Convention in 1958, this issue was developed further. Four conventions on the law of the sea were formulated in 1958. These conventions are The Territorial Sea and Contiguous Zone, The High Seas, Fishing and Conservation of Living Resources of the High Seas and The Continental Shelf. All four are collectively known as the Geneva Conventions on the Law of the Sea, 1958.<sup>19</sup> After the Geneva Convention, the following conferences (UNCLOS II and III) pursued the matter to a new height. These conferences later evolved into the most comprehensive work on the law of the sea to date, known as the United Nations Convention on the Law of the Sea, 1982, hereinafter referred to as the UN Convention 1982.<sup>20</sup>

Brown explains the developments of the maritime zones in the last century as follows:

At the end of the second World war, the seas were still divided into only four jurisdictional zones; internal waters, lying landward of the baseline of the territorial sea; the territorial sea, the breadth of which was uncertain but generally considered not to exceed 12 miles at most; the contiguous zone of indeterminate breadth, claimed by only some States and for very limited jurisdictional purposes; and finally, the high seas. Today, five more zones are generally recognised or are in the course of attracting general recognition: the continental shelf, the exclusive fishing zone, the exclusive economic zone, archipelagic waters and the 'Area' beyond the limits of national jurisdiction.<sup>21</sup>

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<sup>19</sup> Brown, *The International Law of the Sea. Vol I*, Dartmouth, 1994, page 9.

<sup>20</sup> The United Nations Convention on the Law of the Sea 1982 has been referred to using different abbreviations by many writers. Throughout this thesis the designation of the UN Convention 1982 will be used to distinguish it from UNCLOS, which is the abbreviated form of the United Nations Conference on the Law of the Sea.

<sup>21</sup> Brown, note 19 above, page 18.

## 2.4. The Zones of the Sea under the UN Convention 1982

Under the UN Convention 1982, the sea is divided into several zones, some of which had already existed since the Geneva Conventions 1958, while others, such as the Archipelagic Waters and the Exclusive Economic Zone, are new creations.

In relation to navigation at sea, while retaining some of the old concepts enshrined in the Geneva Conventions, the UN Convention 1982 brings about some new concepts with regard to passage, such as transit passage in the straits and archipelagic sea lane passage in the archipelagic waters.

Regarding internal waters, Article 8(2) of the UN Convention 1982 provides:

Where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters.

In the absence of a treaty conferring foreign ships' rights of passage to ports, foreign ships enjoy no rights of navigation in internal waters. Churchill and Lowe argue that there are rights of access to ports under international customary law i.e. under special circumstances such as in matters involving ship in distress.<sup>22</sup> According to Brown, the absence of any right of innocent passage is the principal feature that distinguishes internal waters from the territorial sea. However, Article 5(2) of the Geneva Convention and Article 8(2) of the UN Convention 1982 provide the exceptions to this rule i.e. where a straight baseline has been

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<sup>22</sup> See Churchill and Lowe, *The Law of the Sea, 3<sup>rd</sup> Edn.*, Juris Publishing, Manchester University Press, 1999 at pages 61-65.

established as part of a straight baseline system permitted under the Convention and has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage is preserved in those waters.<sup>23</sup>

In the territorial sea, foreign ships enjoy the right of innocent passage, but the coastal state may temporarily suspend that right in limited areas where necessary for its security. Article 17 of the UN Convention 1982 provides:

Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.

The meaning of “passage” is given in Article 18 of the UN Convention as follows:

1. Passage means navigation through the territorial sea for the purpose of:
  - (a) traversing that sea without entering internal waters or calling at a roadstead of port facility outside internal waters; or
  - (b) Proceeding to or from internal waters or a call at such roadstead or port facility.
2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.

It should be noted that the definition above is an extension of the meaning of passage given under Articles 14(2) and (3) of the Geneva Convention:

1. Passage means navigation through the territorial sea for the purpose of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters.
2. Passage includes stopping and anchoring, but only insofar as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress.

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<sup>23</sup> Brown, note 19 above, page 40.

The meaning of innocent passage is defined under Article 19(1) and (2) of the UN Convention:

1. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.
2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:
  - (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
  - (b) any exercise or practice with weapons of any kind;
  - (c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
  - (d) any act of propaganda aimed at affecting the defence or security of the coastal State;
  - (e) the launching, landing or taking on board of any aircraft;
  - (f) the launching, landing or taking on board of any military device;
  - (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
  - (h) any act of wilful and serious pollution contrary to this Convention;
  - (i) any fishing activities;
  - (j) the carrying out of research or survey activities;
  - (k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;
  - (l) any other activity not having a direct bearing on passage.

On the contrary, a coastal State may adopt laws and regulations relating to innocent passage through its territorial sea to provide for, *inter alia*, the safety of navigation, preservation of its marine environment and the conservation of the living resources of the sea.<sup>24</sup> Furthermore, the coastal States, when necessary, may designate sea lanes and prescribe

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<sup>24</sup> UN Convention 1982, Article 21(1).

traffic separation schemes.<sup>25</sup> The coastal State shall not impose requirements on foreign ships that have the practical effect of denying or impairing the right of innocent passage.<sup>26</sup>

## **2.5. Passage under Archipelagic Waters Rules**

The concept of archipelagic waters was first introduced by Indonesia and the Philippines during UNCLOS 1 in 1958, but did not get enough support<sup>27</sup>. The concept of archipelagic waters gradually gained widespread acceptance due to the emergence of new archipelagic states as a result of the decolonisation process and the aspirations of these states to achieve national and territorial unity thereafter.<sup>28</sup>

Article 52 of the UN Convention 1982 provides for the right of innocent passage in archipelagic waters, similar to the right of innocent passage in the territorial sea. On the other hand, under Article 53(1), foreign ships enjoy the right of Archipelagic Sea Lane Passage (ASLP). This is a new right conferred by the UN Convention 1982 because prior to UNCLOS III, the concept of archipelagic states and their right over the archipelagic waters was not yet recognised internationally. Article 53 of the UN Convention 1982 also defines Archipelagic Sea Lane Passage as: “The exercise in accordance with the Convention of the rights of navigation and overflight in the normal mode solely for the purpose of continuous,

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<sup>25</sup> *UN Convention 1982*, Article 22.

<sup>26</sup> See Roswell et al, “Innocent Passage in the Territorial Sea: The UNCLOS Regime and Asia Pacific State Practice” in Rothwell and Bateman (Eds.), *Navigational Rights and Freedoms and the New Law of the Sea*, Martinus Nijhoff, 2000, pages 75-76.

<sup>27</sup> After the North Borneo States later joined the Malaysian Federation one commentator regarded their claim for drawing straight baselines across the Sulu and Celebes seas as outrageous because the two countries made overlapping claims to internal waters and Malaysia was affected because of Sabah. See, Hamzah, B.A., “Indonesia Archipelagic Regime: Implication to Malaysia”, 8 *Marine Policy*, 1984, page 33.

<sup>28</sup> Munavver, M., *Ocean State: Archipelagic Regime in the Law of the Sea*, Martinus Nijhoff, 1995. See Chapter 4, pages 146-175.

expeditious and unobstructed transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.”

Article 49 of the UN Convention 1982 defines archipelagic waters. Such waters are neither internal waters nor territorial sea, although they bear a number of resemblances to the latter.<sup>29</sup> Unlike the exclusive economic zone, an archipelagic state has sovereignty over its archipelagic waters, including their superjacent airspace, subjacent seabed and subsoil, and “the resources” contained therein.<sup>30</sup>

There was a lengthy debate in the UNCLOS III on the legal regime of archipelagic waters, as the archipelagic States claimed that the archipelagic waters were identical to internal waters.<sup>31</sup> Ultimately, UNCLOS III agreed on a distinctive and *sui generis* regime for a new concept in international law called “archipelagic waters”, which comprises elements such as the following: there is no right of passage in internal waters within archipelagic waters; there exists a right of innocent passage in archipelagic waters as a whole (outside the internal waters) and in territorial sea encompassing or surrounding the archipelagic waters; and there is a new and more “liberal” right of archipelagic sea lane passage through specifically designated archipelagic sea lanes in archipelagic waters.<sup>32</sup>

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<sup>29</sup> Churchill R.R. and Lowe, A.V. *The Law of the Sea*, Manchester University Press, 1999, page 103.

<sup>30</sup> Kim Young Koo, et al., “The Law of the Sea, Archipelagos and User States: Korea” in Rothwell and Bateman, *Navigational Rights and Freedoms and the New Law of the Sea*, Martinus Nijhoff, 2000, at pages 160-163.

<sup>31</sup> For detailed discussions, see S.N .Nandan and S. Rosenne, *United Nations Convention on the Law of the Sea 1982: A Commentary, Vol.II*, Martinus Nijhoff Publishers, Dordrecht, 1993, pages 463-487.

<sup>32</sup> See the discussions in Warner. R, “Implementing the Archipelagic Regime in the International Maritime Organization” in Rothwell and Bateman (Eds.), *Navigational Rights and Freedoms and the New Law of the Sea*, Martinus Nijhoff, 2000, at pages 174-178.

An archipelagic state may designate sea lanes suitable for continuous and expeditious passage through its archipelagic waters and the adjacent territorial sea<sup>33</sup> and all ships using it enjoy the right of archipelagic sea lane passage in such sea lanes.<sup>34</sup> However, the state has no obligation to designate them. The word “suitable” employed in Article 53 (1) indicates that the archipelagic State has no responsibility to ensure that the passage is safe.

According to Djalal, there was, in fact, a draft during the discussions that included the word “safe”, but an objection was raised, since the word “safe” implied an obligation to provide navigational aids in the sea lanes and therefore imposed certain burdens and obligations on archipelagic States.<sup>35</sup> Recognising this difficulty, the word “safe” was later abandoned and the word “suitable” was considered more appropriate.

In this regard, Djalal has this to say:

It is therefore clear that an argument that the exercise of ASLP is in accordance with the rules of international law is not in strict conformity with this Convention, since there have been no rules of “international law” in the past on this matter. Moreover ASLP is not the same as the right of transit passage in the “straits used for international navigation” because in ASLP navigation and overflight are regarded as the “right” of navigation while in transit passage they are defined as the “freedom” of navigation. There is a difference between the “right” of navigation and overflight and the “freedom” of navigation and overflight. For example, it is possible to have the “right” of navigation and overflight without necessarily having “freedom” to exercise those rights. The exercise of a right implies certain obedience to specific rules while the exercise of freedom may be less so...<sup>36</sup>

Djalal goes on to note:

“Presumably “normal mode” would signify that ships navigate in their “own mode”, meaning that the “normal mode” of a submarine would be to navigate under the surface while aircraft belonging to an aircraft carrier would normally fly above the carrier to protect it. With regard to the differences between “unobstructed” and “shall not be impeded”, there was no clear understanding as to their different

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<sup>33</sup> *UN Convention 1982*, Article 53(1).

<sup>34</sup> *UN Convention 1982*, Article 53(2).

<sup>35</sup> Hasjim Djalal, et al, “The Law of the Sea Convention and Navigational Freedom” in Rothwell and Bateman (Eds.), *Navigational Rights and Freedoms and the New Law of the Sea*, Martinus Nijhoff, 2000, page 5.

<sup>36</sup> Hasjim Djalal, note 35 above, pages 5-6.

meanings, although it is understood that using different terminology would signify describing different situation.”<sup>37</sup>

Further, Article 53(4) of the UN Convention 1982 stipulates that the sea lanes and air routes shall include “all normal passage routes” used as routes for international navigation or overflight through or over archipelagic waters” and “duplication of routes of similar convenience between the same entry and exit points shall not be necessary”.

Djalal<sup>38</sup> argues that it is impossible to designate “all normal passage routes” as ASLP at the same time because it has to be done through careful study, and therefore it is logical that such designation be done in stages. He argues further that since Article 53(5) provides that the sea lanes shall be defined by a series of continuous axis lines and that ships and aircraft in ASLP shall not deviate more than 25 nautical miles to either side of such axis line during passage, and that they shall not get closer to the coasts than ten per cent of the width of the water between the nearest points of the islands bordering the sea lanes, this could only mean that the ASL is not a corridor and the establishment of ASLs does not affect the status and the sovereignty of the archipelagic State over ASLs and their airspace, seabed and subsoil and the resources contained therein.<sup>39</sup>

Although Article 53(9) of the UN Convention 1982 states that the designation and substitution of ASL or the Traffic Separation Scheme (TSS) shall be referred by the archipelagic State to the competent international organization and is silent on whom exactly

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<sup>37</sup> Hashim Djalal, note 35 above, at page 6.

<sup>38</sup> Hasjim Djalal, note 35 above at pages 8-10.

<sup>39</sup> See *UN Convention 1982*, Art 49.

the organization is, it is now generally accepted that it refers to the International Maritime Organization (IMO), London.<sup>40</sup>

Munavvar concludes that the regime for archipelagic waters provided in Part IV of the UN Convention 1984 is a compromise reached between the archipelagic states represented during UNCLOS III and other concerned states in arriving at an equitable and acceptable balance between the interests of archipelagic states and those of other states in archipelagic waters. The regime of archipelagic waters recognises the sovereignty of an archipelagic state over archipelagic waters and secures the interests of the immediately adjacent neighbouring states as well as the navigational interests of the international community within archipelagic waters. Thus, the designation of sea lanes and the establishment of a special regime satisfies the interests of the archipelagic states by giving them the authority to limit navigation by foreign ships that might affect the interests of the archipelagic state, while on the other hand, it attempts to protect the interests of international shipping and navigation by guaranteeing unobstructed passage through archipelagic sea lanes.<sup>41</sup>

## **2.6. Archipelagic Regional Developments**

A very important development has occurred relating to the implementation of Article 47(6) of the UN Convention 1982 which states:

If a part of the archipelagic waters of an archipelagic State lies between two parts of an immediately adjacent neighbouring State, existing rights and all other legitimate interests, which the latter State has traditionally exercised in

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<sup>40</sup> See Warner, R., "Implementing the Archipelagic Regime in the International Maritime Organization" in Rothwell and Bateman (Eds.), *Navigational Rights and Freedoms and the New Law of the Sea*, Martinus Nijhoff, 2000, pages 174-178.

<sup>41</sup> Mohamed Munavvar, *Ocean States: Archipelagic Regimes in the Law of the Sea*, Martinus Nijhoff, Dordrecht, 1995, page 175.

such waters and all rights stipulated by agreement between those States shall continue and be respected.

On 25 February 1982, Indonesia and Malaysia signed the “Treaty Between the Republic of Indonesia and Malaysia Relating to the Legal Regime of the Archipelagic State and the Right of Malaysia in the Territorial Sea and Archipelagic waters as well as the Airspace above the Territorial Sea and Archipelagic Waters and the Territory of the Republic of Indonesia Lying between East and West Malaysia.” This was to solve the problem raised by Malaysia about the envisaged effect of the application of the archipelagic state regime on the unity of Malaysia because the drawing of straight baselines for the territorial sea of the outermost Indonesian islands of Natuna would separate West Malaysia from East Malaysia.

This Treaty also contains a provision explicitly stating Malaysia’s recognition of and respect for Indonesia’s application of the archipelagic state regime; at the same time, Indonesia shall continue to respect existing rights and other legitimate interests that Malaysia has traditionally exercised in the territorial sea, archipelagic waters, and the territory of Indonesia lying East and West of Malaysia. Those rights, however, are defined and regulated in such a way that they would not endanger or undermine the archipelagic state regime and the legitimate interests of Indonesia.

Under the terms of the Treaty, the rights of access and communication of Malaysian ships must be exercised through two designated corridors defined by a series of continuous axis lines in a map, where permissible deviation is ten nautical miles to either side of the axis

lines, provided that the ships shall not navigate closer to the coasts than three nautical miles.<sup>42</sup>

The Philippines, despite signing the UN Convention 1982 on 10 December 1982 and ratifying it on 8 May 1984, made a “Declaration of Understanding”, which states that the concept of archipelagic waters is similar to the concept of internal waters under the Constitution of the Philippines and removes straits connecting these waters with the economic zones or high sea from the rights of foreign vessels to transit passage for international navigation.<sup>43</sup> Faced with strong opposition from the international community, the Philippines later stated in 1988 its intention to harmonize its domestic legislation with the provisions of the Convention.<sup>44</sup>

## **2.7. Rights of Passage through Straits Used for International Navigation**

There have been longer periods of the evolution of jurisdiction in straits before it was concluded by the UN Convention 1982 that all ships and aircraft enjoy the right of unimpeded transit passage through straits used for international navigation.<sup>45</sup> There is no clear definition of the term “straits used for international navigation” except under Article

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<sup>42</sup> N. Wisnomoerti, et. Al., “Indonesia and the Law of the Sea” in Park, Choon Ho and Park, Jae Kyu (Eds) in *The Law of the Sea : Problems from the East Asia Perspective*. The Law of Sea Institute, University of Hawaii, Honolulu, 1987, page 392.

<sup>43</sup> Shearer, I., “Navigation Issues in the Asian Pacific Region” in Crawford J. and Rothwell D.R., *The Law of the Sea in the Asian Pacific Region: Developments and Prospects*, Martinus Nijhoff, Dordrecht, 1991, pages 219-220.

<sup>44</sup> See, José De A. Yturriaga, *Straits Used for International Navigation: A Spanish Perspective*, Martinus Nijhoff 1991, page 323.

<sup>45</sup> See, *UN Convention 1982*, Part III.

37, which explained it as “between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone”.<sup>46</sup>

The UN Convention 1982 also provides an exception to this rule where a:

Strait is formed by an island of a State bordering the strait and its mainland...there exists seaward of the island a route through the high seas or through exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics.<sup>47</sup>

The position of straits under pre-Geneva Convention as well as under the Geneva Convention depended upon whether the waters of the straits were high seas or territorial sea. If they were high seas, foreign ships enjoyed freedom of navigation, free from coastal state control. Conversely, if the strait was comprised of territorial waters of one or more states, then foreign merchant ships and warships enjoyed the right of innocent passage.

The above provision related to warships was formulated from customary international law on straits based on the Corfu Channel Case (Merits).<sup>48</sup> The ICJ said in 1949:

It is, in the opinion of the court, generally recognised and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorisation of a coastal State, provided that the passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.<sup>49</sup>

This decision was later codified in the Geneva Convention on the Territorial Sea and Contiguous Zone 1958, and considered as representing the customary international law.

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<sup>46</sup> See Hasjim Djalal, note 35 above at page 2. See also UN Convention 1982, Art. 37.

<sup>47</sup> *UN Convention 1982*, Article 38(1).

<sup>48</sup> [1949] ICJ Report 1. For discussion see Brown, note 19 above, pages 77-79.

<sup>49</sup> As quoted in Brown, above.

The question of passage through straits was dealt with under Article 15(4) of the Geneva Convention, which states:

There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State.

The question of the internationality of the straits was again subject to a long debate during UNCLOS III. One group argued that the term “international straits” carries the meaning that they actually belong to the international community and not to the coastal states.<sup>50</sup>

The main resistance to the concept of ‘international straits’ came from the littoral States of the Straits of Malacca. During UNCLOS III, Malaysia and Indonesia argued that the Straits were not international. Their main concerns were pollution and maritime safety and the desire to subject the passage of warships to regulation.<sup>51</sup> However, they ultimately conceded to the regime of “transit passage and overflight”. Transit passage was agreed under UNCLOS III in Article 38(2) as “the exercise in accordance with this Part III (Straits Used For International Navigation) of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. However, the requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State.”

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<sup>50</sup> Nandan and Rosenne S., *United Nation Convention on the Law of the Sea 1982: A Commentary*, Martinus Nijhoff Publishers, Dordrecht, 1993, pages 310-348. In particular, see commentary on Article 38.

<sup>51</sup> See, Shearer et al, note 43 above, pages 216-217.

This was agreed with one condition that users of the Straits are to prescribe under-keel clearance regulations,<sup>52</sup> and the rights of strait states to determine traffic separation schemes in conjunction with IMO. Malaysia, Singapore and Indonesia signed a tripartite agreement on 24 February 1977 designating routes, a traffic separation scheme, and other safety and co-operative measures, as well as encouraging voluntary pilotage in certain sections of the Straits.

## **2.8. Clarification of Jurisdiction of Littoral States**

After a long discussion during UNCLOS III, a compromise was finally achieved on clarification of the status of the straits used for international navigation. This was done by identifying their authority rather than their ownership. In the Straits of Malacca the authorised regime of transit passage is now applicable through and over the straits.

The littoral States have limited sovereignty under the transit passage. Even though the southern part of the Strait of Malacca and all of the Singapore Strait are within the territorial sea of the littoral States, the sovereignty of the littoral States is restricted and limited because Article 34 of the UN Convention 1982 provides that the sovereignty and jurisdiction of the States is exercised subject to Part III of the Convention and to other rules of international law.

However, this concept of transit passage is not applicable in archipelagic waters because of the existence of the new regime of archipelagic sea lane passage. In archipelagos, passage

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<sup>52</sup> See, José A. De Yturriaga, note 44 above, pages 180-181.

is considered to be a “right” of navigation, in contrast to the concept of “freedom” of navigation in straits used for international navigation (as previously defined above).

Initially, Indonesia, the proponent of archipelagic waters, only considers the Straits of Malacca to be an international strait because it borders other littoral States, (Malaysia and Singapore), and maintains that other geographical waters in Indonesia fall under the category of archipelagic sea lane passage.<sup>53</sup> The other littoral States while conceding the right of transit passage were concerned over reduction in their direct controls over the right of navigation. However, they managed to get some success in their attempt to safeguard the waterways from possible environmental disaster caused by collisions and oil spills when the IMO approved the Traffic Separation Schemes.<sup>54</sup>

Singapore in particular managed to achieve an insertion into the second sentence of Article 38(2) of UN Convention 1982, widely known as “the Singapore Clause”:

The requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning to a State bordering the strait, subject to conditions of entry to that State.

This may reflect Singapore’s desperate need to maintain its busy international airport, necessitating lateral overflight of the Singapore Strait in the course of landing and take-off.<sup>55</sup>

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<sup>53</sup> Michael Liefer *International Straits of the World: Malacca, Singapore and Indonesia*, Sijthoff & Noordhoff, Alphen aan den Rijn, 1978. For the historical perspectives and the arguments by the littoral States see Chapters 2, 3 and 4 in particular.

<sup>54</sup> Phiphat Tangsubkul, *ASEAN and the Law of the Sea*, Institute of Southeast Asian Studies, Singapore, 1982, at pages 32-34.

<sup>55</sup> Shearer, et al, note 43 above, pages 216-217.

There are several exceptions to the right of transit passage. First, transit passage is not applicable if the strait does not connect two areas of the high seas or exclusive economic zones with one another, as in the case of one leading into the territorial sea or the internal waters of a foreign State.

Secondly, the right of transit passage is excepted in a strait if the strait is formed by an island of a State bordering the strait and its mainland, provided that, “there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics”.<sup>56</sup> A possible example of this exception in the Asia Pacific is the Cheju Strait between the Southwestern coast of the Korean Peninsula and Cheju Island, although this matter is the subject of dispute between Japan and South Korea.

Thirdly, transit passage also does not apply if the strait is not used for international navigation. It has been correctly pointed out “the criteria for such a designation are so inexact as to render the phrase almost meaningless”.<sup>57</sup>

The power of the littoral States making laws to regulate passing ships in practice depends on corresponding regulatory action adopted either by a treaty or the IMO.<sup>58</sup> Article 39(2) stipulates that ships in transit passage have to comply with “generally accepted international regulations, procedures and practices” for safety at sea and the prevention,

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<sup>56</sup> UN Convention 1982, Art. 38(1).

<sup>57</sup> As quoted in Bateman, “The Regime of Straits Transit Passage in the Asia Pacific: Political and Strategic Issues”, in Rothwell and Bateman (Eds.), *Navigational Rights and Freedoms and the New Law of the Sea*, Martinus Nijhoff, 2000, page 96.

<sup>58</sup> Sahrina Shaukat, “The Straits of Malacca: Current and Perspective Interests in the Prevention and Control of Marine Environment Pollution” in Rothwell and Bateman, *Navigational Rights and Freedoms and the New Law of the Sea*, Martinus Nijhoff, 2000, pages 114-115.

reduction and control of pollution from ships. This could only mean that the littoral States in turn have to adopt IMO Conventions, among others MARPOL 1973/78, COLREG 1972, SOLAS 1974, STCW 1995 and Loadlines Convention 1966.

Except for an isolated incident on the closure of Sunda and Lombok Straits, it seems clear that State practices in Southeast Asian countries after the UN Convention 1982 indicate total acceptance of the regime of transit passage. Indonesia, one of the staunchest and most radical supporters of the regime of innocent passage within the Strait-States Group during UNCLOS III negotiations, readily supported the understanding of the application of Article 233 to the Straits of Malacca and Singapore which states. Article 233 states:

Nothing in sections 5, 6, and 7 affects the legal regime of straits used for international navigation. However, if a foreign ship other than those referred to in section 10 has committed a violation of the laws and regulations referred to in article 42, paragraph 1(a) and (b), causing or threatening major damage to the marine environment of the straits, the States bordering the straits may take appropriate enforcement measures and if so shall respect *mutatis mutandis* the provisions of this section.<sup>59</sup>

This is also confirmed in a letter sent by the representative of Indonesia to the President of the Conference on April 29, 1982 in support of a letter from the Malaysian representative to the President of the Conference.<sup>60</sup> Malaysia, which originally advocated the innocent passage regime in the Straits of Malacca, showed willingness to accept the new regime of transit passage by signing the Convention without making any declaratory statement.<sup>61</sup>

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<sup>59</sup> UN Convention 1982, Art. 233. Section 5 of Part XII deals with International Rules and National Legislation to Prevent, Reduce and Control Pollution of the Marine Environment. Section 6 deals with Enforcement and Section 7 on Safeguards.

<sup>60</sup> José A. De Yturriaga, note 44 above, page 326.

<sup>61</sup> José A. De Yturriaga, note 44 page 318.

Malaysia's Foreign Minister, Ghazali Shafie, stated during the last session of the Conference on 9 December 1982 that:

The Convention incorporates also a new concept in relation to Straits used for international navigation; namely, the concept of transit passage. Lying, as we do, on one side of the narrow and shallow Straits of Malacca Malaysia particularly welcomes those provisions in the Convention which seek to ensure the safety of navigation, as well as the protection of the marine environment. In this respect, together with Indonesia and Singapore, our neighbours sharing the Straits of Malacca, we have reached a common understanding with major user States of the Straits on measures that coastal States may adopt in accordance with the relevant provisions of the Convention.<sup>62</sup>

Despite the acceptance of the regime of transit passage, the closure of the Sunda and Lombok Straits due to "Air/Sea Exercise Activity" in September 1988 shows that the position of Indonesia as regards the regime of straits used for international navigation beyond the Straits of Malacca is not entirely predictable. Indonesia later pledged to ensure freedom of international passage through the straits.<sup>63</sup>

Although Indonesia has frequently quoted "principles of international law" or "customary law" when faced with its commitments on the regime of straits under the UN Convention 1982, is also a signatory to the regional treaty on the Southeast Asia Nuclear Weapon-Free Zone Treaty which states:

Nothing in this Treaty shall prejudice the rights or the exercise of these rights by any State under the provisions of the United Nations Convention on the Law of the Sea of 1982, in particular with regards to freedom of the high seas, right of innocent passage, archipelagic sea lane passage or transit passage of ships and aircraft, and consistent with the Charter of the United Nations.<sup>64</sup>

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<sup>62</sup> As quoted in José A. De Yturriaga, note 44 above, page 318.

<sup>63</sup> Statement by Senator Evans at a joint Press Conference with the Indonesian Foreign Minister, as quoted in Bing Bing Jia, *The Regime of Straits in International Law*, Clarendon Press, Oxford, 1998, pages 179-180.

<sup>64</sup> As quoted in Bing Bing Jia *The Regime of Straits in International Law*, Clarendon Press, Oxford, 1998, page 180.

It is felt that the peculiarities and shortfalls of the legal regime in straits used for international navigation will continue to attract the attention of political scientists, international lawyers and government officials, particularly in countries bordering international straits. The law is generally regarded by some coastal states as more favourable to the interests of user states than those of littoral states, many of whom remain dissatisfied with the regime<sup>65</sup> and seek other measures to exercise their authority.

The dissatisfaction with the regime in straits is considered to lead to “a trend towards particularly stringent environmental rules for international straits”.<sup>66</sup> The new rules and regulations introduced by littoral States could include, for example, restrictions on passage by vessels with particular cargoes<sup>67</sup>, marine parks or protected areas with “no go” zones for shipping, and the widespread introduction of mandatory ship reporting and compulsory pilotage.<sup>68</sup> This will be discussed in more detail below under environmental threats (Para 2.15).

## **2.9. Coastal States and the Right of Passage in the Exclusive Economic Zone (EEZ)**

The situation of passage through the Exclusive Economic Zone (EEZ) is less contentious, although there are still some anomalies in coastal state practice. In the exclusive economic zone, all states, whether coastal or landlocked, enjoy the freedoms referred to in Article 87

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<sup>65</sup> See J. Crawford and D. Roswell et al., “Prospects for the Law of the Sea in the Asian Pacific Region” in J. Crawford and D. Roswell, *The Law of the Sea in the Asia Pacific Region*, Martinus Nijhoff, London, 1995 at pages 269-270.

<sup>66</sup> See B.A. Hamzah, and Sahrina Shaukat, et al., “The Straits of Malacca: Current and Perspective Interests in the Prevention and Control of Marine Environment Pollution” in Roswell and Bateman, *Navigational Rights and Freedoms and the New Law of the Sea*, Martinus Nijhoff, London, 2000.

<sup>67</sup> For example, in 1992 Indonesia, Malaysia and Singapore refused to allow the Japanese plutonium carrier, Akatsuki Maru, to pass through the Straits of Malacca. See Bing Bing Jia, *The Regime of Straits in International Law*, Clarendon Press, Oxford, 1998.

<sup>68</sup> See Sam Bateman, et al., in note 57 above.

of the UN Convention 1982, namely freedom of navigation and overflight, laying submarine cables and pipelines, constructing artificial islands, fishing and scientific research.

The freedom of navigation in this zone is, however, subject to the coastal State's jurisdiction relating to pollution and resource control.<sup>69</sup> All high seas provisions which are referred to in Articles 88 to 115 of the UN Convention 1982 apply to the EEZ so long as they are compatible with Part V of the same Convention.<sup>70</sup> Brown, however, points out that a significant minority of States depart from the provisions of the Convention in their national legislation and pose "a threat to freedom of navigation"<sup>71</sup>. The States concerned fall into two groups. The first group consists of States still claiming a 200-mile territorial sea, such as Ecuador and Somalia, and the second comprises States that have claimed an EEZ.<sup>72</sup>

In areas beyond the EEZ, there exists the traditional regime of freedoms of the high seas. The right of navigation for all States, notwithstanding their geographical disadvantages, is confirmed by Article 90 of the UN Convention 1982, based on Article 4 of the 1958 Convention on the High Seas, which provides that "every State, whether coastal or landlocked, has the right to sail ships flying its flag on the high seas". This Article reaffirms a long-standing rule, which is, "one of the essential adjuncts to the principle of the freedom of the high seas."<sup>73</sup> According to Brown,<sup>74</sup> the right to sail ships on the high seas, being a

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<sup>69</sup> Churchill and Lowe, see note 22.

<sup>70</sup> *UN Convention 1982*, Article 58(2).

<sup>71</sup> E.D.Brown, note 19 above, at page 236.

<sup>72</sup> E.D.Brown, note 19 above.

<sup>73</sup> ILC, as quoted by Nandan. Full citation here please

<sup>74</sup> E.D.Brown, page 286, but he also argued that the freedom is not absolute and is subject to the 'due regard' rule. See further arguments at page 293.

right under international law, is one enjoyed by subjects of international law and, through them, by ships to which they have accorded the right to fly their flags. However, it should be noted that, with the introduction of the EEZ regime in the UN Convention, the geographical scope of the high seas has been greatly reduced. Nevertheless, ships retain their high seas rights of navigation in the EEZ (Article 58).

## **2.10. The Special Issue of Passage of Warships**

It is particularly important to understand the rights of passage of warships because of the sensitivity of the issue in the eyes of the coastal States, when the passage involves the territorial sea and especially the territorial straits. As far as the territorial sea is concerned, State practice before the Geneva Convention was not uniform in relation to the question of whether warships had a right of innocent passage in the territorial seas of other States. The major maritime powers asserted that there was such right, whereas other States claimed the right of passage is subject to the requirement of prior authorisation.<sup>75</sup>

In 1910, the United States Secretary of State Elihu Root argued against the right of innocent passage by warships in the *North Atlantic Coast Fisheries Arbitration case* (1910),<sup>76</sup> stating that, “warships may not pass without consent into this zone, because they may threaten. Merchant ships may pass and re-pass because they do not threaten.” However, this statement was made by the United States during a time when it was not yet a major naval power.

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<sup>75</sup> Shearer et al., “Navigational issues in the Asia Pacific Region” in J.Crawford and D.Rosthwell, *The Law of the Sea in the Asia Pacific Region*, Martinus Nijhoff, London, 1995, page 205.

<sup>76</sup> Permanent Court of Arbitration (1910), 11 R.I.A.A. 167, page 198.

Brown, after a lengthy examination on this matter, summarise the present position of the right of passage of warships in the territorial sea into five propositions:

1. Under the Geneva Convention on the Territorial Sea and Contiguous Zone, 1958, parties do not have the right to demand that foreign warships must obtain prior permission for, and/or give prior notification of, their innocent passage through the territorial sea.
2. Reservations purporting to preserve the right of coastal States to make such demands are almost certainly void as being incompatible with the object and purpose of the treaty.
3. Under the UN Convention, parties have no right to subject innocent passage by foreign warships to such demands.
4. The rules of the UN Convention on this matter have not been excluded or modified by either the Conference President's statement of 26 April 1982 or declarations made by the States on signature, ratification or accession.
5. It has to be stressed, however, that the position of non-parties to these treaties remains less clear under international customary law. There has been a significant degree of opposition to the conventional rules since UNCLOS I and that opposition has been reflected in a body of consistent State practice. In a study published in 1985 it was reported that no less than 29 states require warships to obtain permission prior to entering the territorial sea, while one of these 29 and another 8 States require prior notification. It is notable that only 11 of these 29 States are to be found among the sponsors of the two proposed amendments to article 21 of the UN Convention. Clearly, UNCLOS III has done little to settle this controversy.<sup>77</sup>

However, the position is quite settled on passage through territorial seas constituting Straits. In the *Corfu Channel Case (Albania/UK)* (1949)<sup>78</sup>, the International Court of Justice declared that in peacetime, warships had the right of innocent passage through straits used for international navigation without the requirement of authorisation by the State within whose territorial waters the strait was situated. This position was adopted in the Geneva Convention and it was put to rest in the UN Convention, where the right of non-suspendable innocent passage through straits was transformed into a more precisely defined right of transit passage and overflight, which, enjoying a separate Part of its own in

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<sup>77</sup> E.D.Brown, note 19 above, page 72.

<sup>78</sup> *Corfu Channel Case (Albania/UK)*, I.C.J. Reports 1949, page 4, page 28.

the text (Part III), does not suffer from the ambiguity as to the meaning of “all ships” encountered in Part II, section 3, which repeats the words of the 1958 text. Moreover, the understanding of the UNCLOS III was that military and other state aircraft shared the right of overflight of straits under the transit passage regime.<sup>79</sup>

In the war against terrorism, waged by the United States and its allies, the military uses of the sea have again come under close scrutiny. There is a well-defined body of laws pertaining to war at sea, deriving in part from conventions, notably those drafted by The Hague Peace Conference of 1907, and in part from customary law. These laws recognised and regulated such traditional belligerent rights as the right to visit and search neutral merchant ships on the high seas in order to intercept contraband goods destined for the enemy and the right to maintain a close and effective blockade of enemy ports.<sup>80</sup> However, the nature of war against terrorism is somewhat different from that of normal war. For instance, there is a delicate situation regarding how to determine what constitutes “warlike” activities at sea and what justifies blockade during undeclared war. Suspicion alone is not enough to justify a naval ship to intercept and search a merchant ship flying the flag of a sovereign state. These issues will be dealt with in a subsequent chapter.

### **2.11. New Developments in Rights of Passage**

Since the conclusion of the UN Convention 1982, there have been some developments as to the practice of the littoral States in Southeast Asia vis-à-vis the regime of transit passage and archipelagic waters. One such development is the closure of the Sunda and Lombok

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<sup>79</sup> Shearer, see note 75, page 207.

<sup>80</sup> Churchill and Lowe, see note 22 page 422.

Straits which put the concept of ASLP through archipelagic waters was put to the test. This act provoked severe criticisms from the United States and other maritime powers such as Japan, Australia and the EC countries. Indonesia, as a ratifying State of the UN Convention 1982, was expected to adhere to its provision and it was clear that under transit passage, all ships have the right to unimpeded passage. As a signatory of the UN Convention, Indonesia was clearly obliged to refrain from acts that would defeat its object and purpose unless they made clear that they did not intend to proceed to ratification. This is repugnant to the Vienna Convention on the Law of Treaties<sup>81</sup> which provides:

Article 18

*Obligation not to defeat the object and purpose of a treaty prior to its entry into force*

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

- (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to treaty; or
- (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

A question arises as to whether countries that are not parties to the UN Convention can invoke the provisions of the Convention to their benefits. The United States, as well as some other maritime powers, though not signatories to the UN Convention, argued that the strait regime under Part III of the Convention has evolved into international customary norms and therefore feel that they have the same rights enjoyed by member States of the UN Convention as far as the regime of transit passage is concerned. A number of

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<sup>81</sup> Prof. Brownlie commented, "The Vienna Convention is the outcome of the work of the International Law Commission and two sessions of the United Nations Conference on the law of Treaties held in 1968 and 1969. The Convention is not simply declaratory of general international law, since in part it involves the progressive development of the law. However, particular articles reflect the existing rules or practice." See, Ian Brownlie (Ed.), *Basic Documents in International Law*, 4<sup>th</sup> edition, Clarendon, Oxford, 1995, page 388.

commentators rejected this view.<sup>82</sup> Indonesia later apologised, stating that the closure decision was taken without consultation with its Department of Foreign Affairs, and offered assurance that it would not happen again.<sup>83</sup> The incident, which had happened before the coming into force of the UN Convention in 1994, probably explains that the status of the transit passage regime was not clear then and there were no precedents prior to that.

## **2.12. Direct Involvement of Foreign States in Passage Controls against Pirates and Terrorists**

The concern of the strait states has continued over who has the duty and right to take action against attacks on ships in straits. In this issue the question of monitoring and conducting measures against pirates such as boarding foreign flag vessels becomes particularly sensitive. The statistics compiled by the IMB indicate an alarming trend in modern and sophisticated ways of attacking merchant ships plying the straits of Malacca and South China Sea.<sup>84</sup> With some coordinated patrols by the littoral States of the Straits of Malacca, the number of piracy and piratical activities in the Straits seem to have been significantly reduced, but the same cannot be said of other volatile areas in the South China Sea and the southern Philippines waters.<sup>85</sup> This has prompted the United States to issue a statement on the importance of making all the waterways safer for navigation by United States patrol. India too, of late, has shown commitment to patrol the Straits of Malacca.<sup>86</sup>

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<sup>82</sup> José A. De Yturriaga, note 44 above, see arguments at pages 308-311.

<sup>83</sup> José A. De Yturriaga, note 44 above, page 327.

<sup>84</sup> See IMB Piracy Reporting Centre, Kuala Lumpur (2002).

<sup>85</sup> See for example, Abyankar, J. "Maritime Crime", in *Contemporary Issues in Maritime Security*. WMU Publications, Malmö, 2005, pages 227-237.

<sup>86</sup> Refer to statement by Admiral Dennis Blair, Commander in Chief, United States Pacific Command on November 29, 2001 at [http://www.pacom.mil/speeches/sst2001/011129\\_pressconference.htm](http://www.pacom.mil/speeches/sst2001/011129_pressconference.htm). Retrieved on 4 January 2003.

As a direct result of the 11 September terrorist atrocities in New York and Washington, there was a marked increase on the perception of maritime powers regarding enforcement of security in maritime activities. This includes the issue of freedom of ships and how to enforce jurisdiction on ships. This also leads to the inevitable linking of piracy in the light of terrorism and not as piracy *per se*. These unfortunate events have provided an opportunity for some quarters with vested interests to bypass the complexities of the piracy definition in the UN Convention 1982.

It is clear that in the wake of these atrocities, many countries have resorted to unilateral actions outside the well-entrenched principles of international law. As the war against terrorism is an undeclared war, it is not clear whether international law can now recognise this state of war in the light of the 1928 Kellogg-Briand Pact<sup>87</sup> and Article 2(4) of the United Nations Charter, which states: “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations.”<sup>88</sup>

Can an act of intercepting, boarding and searching a merchant ship suspected of being bound for terrorism covered by article 51 of the United Nations Charter on the right to use force in exercise of the inherent right of self defence?. This will certainly raise another question as to whether the threat is proximate enough to justify the use of force in self-defence.

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<sup>87</sup> This is a Treaty signed at Paris on 27 August 1928 between the United States and other Powers providing for renunciation of war and as an instrument of national policy. Specifically the treaty outlawed war between France and the United States. It was later ratified by the United States Senate in 1929 and in the next few years 46 nations signed similar agreement committing them to peace. It was named after the French Foreign Minister, Aristide Briand, who was a great supporter of international pacifism through the League of Nations and Frank Kellogg, the United States Secretary of State.

<sup>88</sup> Can be accessed at <http://www.un.org/aboutun/charter>.

Not long after the 11 September 2001 atrocities, other terrorist attacks occurred in Southeast Asia, such as the Al Qaeda-linked Bali bombings in December 2002 and the Marriott Hotel bombings in Jakarta a year later. Unrelated and prolonged separatist insurgencies in the Southern Philippines and the Province of Aceh in Indonesia have been pointed out as possible breeding grounds for terrorists. Although these incidents are not linked to the maritime industry, they nevertheless sparked provocative statements from Australia that it would use pre-emptive strikes in third world countries in Southeast Asia to prevent future terrorist attacks to Australia or her people.<sup>89</sup> Such was the political scenario before the whole terrorism spectrum was connected to the security of navigation in the Straits of Malacca. This assertion of pre-emptive action also came in the wake of terrorist attacks in other parts of the world which disabled the *USS Cole* and the French VLCC *Limburg*.<sup>90</sup>

This situation called for more immediate legal provision and related actions on security of shipping in straits in particular.

### **2.13. New Maritime Security Measures**

Hawkes defined maritime security “as those measures employed by owners, operators, and administrators of vessels, port facilities offshore installations, and other marine organizations or establishments to protect against seizure, sabotage, piracy, pilferage, annoyance or surprise”.<sup>91</sup> Mejia differentiates it from maritime safety which is defined as

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<sup>89</sup> See “Asia Outraged at Howard’s terror call”, CNN.com/world on December 1,2002 at <http://asia.cnn.com/2002/WORLD/asiapcf/auspac/12/01/australia.terror.un/index.html>. Retrieved on 20 January 2003.

<sup>90</sup> See *Lloyd’s List*, February 18, 2003.

<sup>91</sup> K.G.Hawkes, *Maritime Security*, Centreville, Md.: Cornell Maritime Press, 1989.

“those measures employed by the owners, operators and administrators of vessels, port facilities, offshore installations and other marine organizations or establishments to prevent or minimise occurrence of mishaps or incidents at sea that may be caused by substandard ships, unqualified crew, or operators’ error”.<sup>92</sup>

The term “maritime security” was adopted by the IMO to signify its importance after the September 11 tragedy and a maritime security conference was held in December 2002. William A. O’Neil, Secretary General of the IMO insisted that there was no room for delay for the implementation of the security measures adopted by the organization, saying “because of the worldwide escalation of acts of terrorism, there can be no doubt of the wisdom, for all parties concerned, of starting to put in place without delay all the necessary infrastructure, such as the legislative, administrative and operational measures, that will be needed to give effect to the decisions of the Maritime Security Conference...” and “it is important that this is done methodically and systematically and as soon as possible, without waiting for the entry-into-force date of 1 July 2004”.<sup>93</sup>

On 13 December 2002, at the end of the Maritime Security Conference, the IMO passed a resolution that introduced Chapter XI-2 of the International Convention for the Safety of Life at Sea (SOLAS) 1974. The intent of this chapter is to introduce an International Ships and Port Facilities Security (ISPS) Code which can be summarised as establishing a framework for international maritime security. Singh and Blades likened the Code as

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<sup>92</sup> M.Q.Mejia, “Defining Maritime Violence and Maritime Security,”in P.K.Mukherjee, M.Q. Mejia, and G.M.Gauci (Eds.), *Maritime Violence and Other Security Issues at Sea*, WMU Publications, Malmo, 2002.

<sup>93</sup> *IMO News*, Issue 1, 2003.

“effectively the maritime equivalent of the current treaties developed to ensure international aviation security standards”.<sup>94</sup>

At IMO, after the 11 September incident it was realised that new measures had to be taken to complement the provision of the UN Convention 1982, as it was perceived by the shipping industry that terrorism at sea was very much a real threat rather than a possibility. A drastic step was taken to deal with this issue by introducing the International Ship and Port Security Code (ISPS Code) protocol through SOLAS, which had been in force since July 1, 2004. The Code introduced special measures to enhance maritime safety under Chapter XI-2 of the SOLAS Convention.<sup>95</sup> Looking at the new protocol, a strong possibility is envisaged that it could encounter some operational and implementation problems, given the fact that many port States would not be able to meet the requirements as a result of financial constraints as well as overriding concerns on the question of sovereignty of the flag States.

The legislation embodied in treaties and codes relating to security at sea and in port is aimed at three unlawful acts namely piracy, terrorism and armed robbery. The relationship in law between these acts is now considered. These are not necessarily the same, although they have tended to be interchangeable in reports and statistics to the consternation of some states, lawyers and courts.

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<sup>94</sup> R. .Singh and A. Blades, “Security Principles”, *Seaways*, November 2003.

<sup>95</sup> See further discussion on this issue in Chapter 6.

### 2.13.1. Piracy

As shown in Chapter 1 there have been several definitions of piracy. There is no doubt that the definitions have created confusions among international lawyers and commentators alike. Brown commented that Article 101 of the UN Convention 1982 identifies three types of “acts” which may constitute piracy. First, it refers to (i) any illegal acts of violence, *or* (ii) any illegal acts of detention, *or* (iii) any act of “depredation”, a term which covers plundering and pillaging. To constitute piracy, such acts must be committed for private ends. Secondly, Article 101 refers to 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. Thirdly, it refers to any act of *inciting or of intentionally facilitating* one of the above “acts”.<sup>96</sup> It should also be noted that under Article 101, piracy takes place only within the high seas or in waters outside the jurisdiction of a particular Coastal State. Adding further to the confusion, Article 101 remains silent as to incidents happening within the territorial sea and contiguous zone.

The definition of Article 101 is based on the 1958 Geneva Convention which, in turn, has its roots from the Harvard Research Draft (1932).<sup>97</sup> The Harvard Draft was prepared for expediency but despite that it was a very comprehensive study of the subject. The main question asked in the study was: “What significance does piracy have in the law of nations?”<sup>98</sup>

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<sup>96</sup> See E.D. Brown at note 2 above, page 301.

<sup>97</sup> Harvard Research in International Law, “Draft Convention on Piracy”, *American Journal of International Law*, Suppl. No. 26, 1932, page 743.

<sup>98</sup> B.H. Dubner, “Human Rights and Environmental Disaster – Two Problems That Defy the Norms of the International Law of Piracy”, *Syracuse Journal of International Law & Commerce*, Vol. 23, Spring 1997, page 19.

Dubner in analysing the Harvard Draft highlighted the thinking behind the Draft and pointed out among others, “the reason for limiting the definition of piracy to the high seas was due to the fact that the crime, as defined in the treaty, interfered with international shipping on the high seas and if this interference occurred in territorial waters, the coastal state could resolve this situation by enacting its own municipal legislation” and “ the researchers of the Harvard Draft obviously thought that the crime of piracy was *passé* at best. They believed that for the sake of expediency the Draft Convention should refer only to private piracy acts and should not contain political crimes, thus setting aside the problems of insurgency versus belligerency as well as the various acts of terrorism. The researchers did not include all customary law in existence at the time of the preparations of the draft convention and my impression from reading the Harvard Research Draft and the subsequent conventions that contain the piracy material is that they probably thought that the proposed articles were something most nations would agree upon at a future convention”.<sup>99</sup>

Dubner comments further, “They believed that piracy was not a crime against mankind, in part, simply because there was no international tribunal at that time with jurisdiction over private persons. They preferred the municipalities to pass legislation dealing with the crime of piracy, so that if piracy did occur on the high seas (and I assume territorial waters), the littoral state would simply enforce the legislation. Again, this was all written in 1932, and sometimes when legislation is written, the reason for its writing becomes paramount and truly does not convey the actual thoughts of the parties involved. Be that as it may, the drafters certainly did not include terrorism”.<sup>100</sup>

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<sup>99</sup> B.H. Dubner, note 98 above, pages 19-20.

<sup>100</sup> B.H. Dubner, note 98 above, page 20.

Dubner's correct comments were shared by other commentators; one of whom has this to say:

“The drafters of the Montego Bay Convention failed to draft a definition of piracy which would meet the political and social needs of the late twentieth century. The drafters gave no attention to acts of violence committed on the high seas for public ends and thus they ignored the growing threat that organized insurgents, national liberation organizations and their splinter groups, informal groups and isolated individuals would attack and seize ships on the high seas.”<sup>101</sup>

Developments after the coming into force of the UN Convention 1982 indicated that the criticisms towards the effectiveness of Article 101 are not without basis and many other international bodies have come up with their own definition of piracy to supplement the deficiency of Article 101 as well as to suit their needs.

As piracy is a crime under both the municipal law of individual States and under international law, definitions of piracy under municipal law of leading nations are worth considering further since it has a bearing on the attitudes of user states.

In the United States piracy is defined as “Whoever, on the high seas, commits the crime of piracy as defined by the law of nations and is afterwards brought into or found in the United States, shall be imprisoned for life”.<sup>102</sup>

The United Kingdom appears to adopt the UN Convention's definition in the Merchant Shipping and Maritime Security Act 1997, Chapter 28 where it is clearly stipulated that “for purposes of any proceedings before a court in the United Kingdom in respect of piracy,

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<sup>101</sup> See, Constantinople, G.R., “Towards a New Definition of Piracy: The Achille Lauro Incident”, *Virginia Journal of International Law*, Vol. 26:3, 1986, page 752.

<sup>102</sup> Sweeney, J.M., “Piracy”, in *The Guide to American Law*, Vol. 3, West Publishing Co., 1984, page 206.

the provisions of the United Nations Convention on the Law of the Sea 1982 that are set out in Schedule 5 shall be treated as constituting part of the law of nations.” The definition of piracy in Articles 101, 102 and 103 of the UN Convention 1982 is taken word for word in Schedule 5 of the said Act. This lack of coherence in the definition of piracy prompted a senior IMB officer to remind that “the definition should not be used as an excuse to avoid taking action”.<sup>103</sup>

Coastal States to the Straits of Malacca feel that the piracy activities in the Straits and the adjoining waters are alarming enough to call for a redefinition of the term “piracy”. The move to redefine it has been initiated due to the changed nature of piracy since its heyday in the 17<sup>th</sup> and 18<sup>th</sup> centuries,<sup>104</sup> and the introduction of the 1982 United Nations Convention which has resulted in nearly all sea areas being claimed or enclosed in Southeast Asia, leaving practically no “high seas” in the region.

Thus, when the IMB produced what appeared to coastal states as inflated statistics based on its own definition of piracy, Beckman proposed a new way of using a matrix classifying incidents of piratical attacks according to five parameters to be used including on the extent of seriousness of individual incidents.<sup>105</sup> The proposed matrix was based on number of factors i.e. types of weapons employed, treatment of crew, value of property stolen and level of threat to safety of marine navigation. By reclassifying the IMB data from 1998 to 2000 using the proposed matrix, Beckman concludes that the number of piracy incidents in the Straits of Malacca, the Malaysian waters and Southeast Asian waters has been grossly

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<sup>103</sup> P. Mukundan, speech delivered at Associated Parliamentary Group Meeting, House of Lords, 23 June 2003.

<sup>104</sup> Rubin, *The Law of Piracy*, note 15 above, pages 215-306.

<sup>105</sup> Robert C. Beckman, “Combating Piracy and armed Robbery against Ships in Southeast Asia: The Way Forward”, *Ocean Development & International Law*, No. 33, 2002, pages: 317-341.

exaggerated. Beckman suggested further that by using the matrix, acts of piracy can be divided into 3 categories: “piracy”, “serious piracy” and “very serious piracy”.

In *Re Piracy Jure Gentium*<sup>106</sup> (1934) the Privy Council observed that the definition of piracy had gradually broadened to bring it into “consonance with situations either not thought of or not in existence when the older jurisconsultants were expressing their opinions.” Though the Privy Council realised that the definition of piracy should not be expended too broadly, it did support the expansion of piratical acts to include any acts of violence committed in time of peace on the high seas.<sup>107</sup>

The definition of piracy in the case above poses a delicate problem to common law countries of Southeast Asia namely Malaysia, Singapore and Brunei because the case law is still good and binding by reason of the doctrine of *Stare Decisis*. Though they are all signatories to the UN Convention 1982, as far as the application of the law of piracy is concerned it precedes the UN’s provision if it is not adopted by the States. So far none of these countries have adopted the definitions contained in Article 101 in their municipal laws. Pirates in these States are dealt with according penal provisions of the criminal law. In Malaysia for example, the relevant penal provisions are to be found in Sections 392 (robbery), 395 (gang robbery) and 396 (gang-robbery with murder) of the Penal Code.<sup>108</sup>

The only country in Southeast Asia which has national legislation on piracy similar to those provisions of the UN Convention 1982 is Thailand which promulgated the Act relating to

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<sup>106</sup> 49 Lloyd’s L.R. 411, 420.

<sup>107</sup> See Constantinople, Constantinople, G.R., “Towards a New Definition of Piracy: The Achille Lauro Incident”, *Virginia Journal of International Law*, Vol. 26:3, 1986, page 731.

<sup>108</sup> Penal Code (F.M.S. Cap. 45, Revised 7 August 1997)

the Prevention and Suppression of the Crime of piracy on 29 December 1991. The irony is that, Thailand, unlike her other Southeast Asian neighbours is not a signatory of the UN Convention 1982. Except in some detailed points Section 4 of the Act adopts the definition of Article 101 of the UN Convention 1982. The Act confers the naval officers with powers to check the ship which is suspected of piracy; visit and search; make preliminary investigation and detain the vessel and the crew. (Sections 6-13). In respect of jurisdiction over piracy cases the Criminal Court (Bangkok) has jurisdiction to try offences under the Act unless the investigation was conducted within the territorial jurisdiction of a provincial court in which case, the case is to be tried by that provincial court (Section 14). The punishment for each piratical act under the Act varies according to the severity of the offence and if the pirate committed murder in the commission of piracy he is liable to capital punishment (Section 24).<sup>109</sup>

### **2.13.2. Maritime Terrorism**

The seizure of the *Santa Maria* by Henrique Galvao in 1961 in the name of General Delgado who was elected President but denied power by the incumbent Salazar Government of the Portuguese Republic is generally accepted as the first incident of maritime terrorism in recent history. The incident highlighted the differences between an act of piracy, terrorism, and rebellion. For fear that the act of hijacking of the *Santa Maria* could render the hijackers as pirates *jure gentium* and Galvao could be treated *hostis humani generis*, which would result in interference of American or British warships, General Delgado lobbied the British and American Governments not to label the incident as

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<sup>109</sup> Quoted in N. Sulaiman, Legal Regulation and Suppression of the Crime of Piracy, LL.M thesis, IIUM 1998, pages 48-52.

piracy but rather “an appropriation of Portuguese transport by Portuguese for Portuguese political objectives.”. He succeeded as the hijacking was widely considered as an act of protest against the Salazar dictatorships rather than an act of piracy and Galvao was subsequently offered political asylum in Brazil.<sup>110</sup>

However the relationship between piracy and terrorism really came to light and triggered swift international response after the hijacking of the *Achille Lauro* on 7 October 1985.<sup>111</sup> In the incident, the *Achille Lauro*, an Italian-flag cruise ship, was seized while sailing from Alexandria to Port Said. The hijackers, members of the Palestine Liberation Front had boarded the ship in Genoa, posing as tourists. They held the ship’s crew and passengers hostage, and threatened to blow up the ship if a rescue mission was attempted. When their demands had not been met by the following afternoon, the hijackers shot Leon Klinghoffer, a Jew of U.S nationality who was partly paralysed and in a wheelchair, and threw his body and wheelchair overboard. The drama ended with the *Achille Lauro* sailing back to Egypt and the terrorists being loaded onto an Egyptian aircraft which was later forced to land in Italy by American warplanes. During the highly complex negotiations that ensued, the US request for custody of the terrorists was denied and the terrorists later escaped to Yugoslavia.<sup>112</sup>

The nature of this incident clearly is not piracy according to the norm of international law, one being it was hijacked by her crew an ingredient of an action mounted from another

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<sup>110</sup> See Mukherjee and Mejia, “Legal Framework of Maritime Security in International Law” a paper presented at the 30<sup>th</sup> *Pacem in Maribus Conference*, 29 October 2003, Kiev, Ukraine.

<sup>111</sup> However, there were earlier mentions on this, see for e.g. J. Sundberg, ‘Piracy and Terrorism’, 20 *De Paul Law Review*, Vol. 60, 1971 at page 337. See also A.P. Rubin, “Terrorism and Piracy: A Legal View”, *An International Journal*, No.117, 1979, at IV-332 and VI-14, 42.

<sup>112</sup> See Malvina Halberstam, “Terrorism on the High Seas: The *Achille Lauro*, Piracy and the IMO Convention on Maritime Safety”, *AJIL*, Vol.82, No.2, April 1988, page 269.

vessel is absent. But the effect it caused to the international community was swift. As a direct result the IMO established an Ad Hoc Preparatory Committee, open to all states, to consider a Convention for the Suppression of Unlawful Acts Against the safety of Maritime Navigation, based on a draft submitted by Austria, Egypt and Italy. This initiative later evolved into a major international convention on piracy known as the SUA Convention or the Rome Convention 1988. This Convention, however, met with a lukewarm response. Up to 2002 only 72 countries adopted it and in Southeast Asia none has ratified it by that period.<sup>113</sup> The reasons for this poor support are discussed again in Chapter 8 in the context of policy decisions of Malaysia and Indonesia. Sufficient to say at this point is the Convention contains many provisions which compromise 'contracting' country's sovereignty.

Article 6, paragraph 4 of the SUA Convention expresses:

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

Article 10, paragraph 1 states:

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

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<sup>113</sup> Singapore and Brunei later ratified the SUA Convention 1988 in 2005.

Therefore Article 6 has given a clear obligation to the State party either to “extradite or prosecute”, a concept not normally accepted because extradition of a State’s own nationals to prosecution in another State is normally not accepted, neither it is normal to extradite an alien to prosecution somewhere else if it is suspected that he will not get a fair trial or if the sentence is likely to be death sentence and the State where the alleged offender is found is not in favour of this.<sup>114</sup>

Despite the efforts of the international community spearheaded by the IMO and the United States, maritime terrorism continues to occur killing innocent victims. In the year 2000 the bombs exploded on board the ro-ro ferry *Our Lady of Mediatrix* in Panguil Bay, Philippines killing 40 people and injuring 50 others. The bombing of the *USS Cole* in the same year left 19 people killed and 37 injured and in October 2002 despite the intense security measures after the September 11 incident terrorists attacked *the Limburg* an oil tanker in the Gulf of Aden killing one crewmember and spillage of 90,000 barrels of oil.

For countries in Southeast Asia, the problem does not lie solely on lack of diplomatic instruments, but also on the ability to patrol the sea. Apart from Singapore and Malaysia, other States are lagging behind in military and logistical equipment to deal with piracy and possible terrorist acts. Indonesia, which by far is the largest State and controls a vast sea area, is clearly unable to control piratical activities as evident in IMB’s 2002 report.<sup>115</sup> Much of the State’s security resources are now spent to curb terrorism activities on land

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<sup>114</sup> J. Liljedahl, “Transnational and International Crimes”, *Jurisdictional Issues*, 2002, page 126.

<sup>115</sup> For year 2002 Indonesia recorded the highest number of attacks with 103 reported incidents and accounts for more than one quarter of the world’s piratical attacks.

especially after the Bali incident<sup>116</sup> and the JW Marriott Hotel blast in Jakarta on August 5, 2003. The threats of provincial governments such as East Timor<sup>117</sup> and Aceh<sup>118</sup> to break away from the central government after the demise of the Suharto<sup>119</sup> regime in 1998 further complicate the issue.

With Indonesia and Malaysia's name high on United States' list on terrorism, there is a renewed struggle by some States to assert their territorial sovereignty.<sup>120</sup> On December 3, 2002 Mahathir Mohamed, then Malaysian Prime Minister in response to earlier comments by Australian Prime Minister John Howard that pre-emptive action against terrorists or military threats in other countries can be justified warned Australia that any first strike by Australia against terrorists on Malaysian soil would be regarded as an "act of war".<sup>121</sup> Similar sentiments were echoed by other Southeast Asian countries. Indonesia's Foreign Ministry's spokesman said Australia has no right to take military action in other countries, "Fortunately, states cannot willy-nilly flout international law and norms. We have to work

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<sup>116</sup> Terrorists attack, believed to be masterminded by Hambali from Jemaah Islamiyah (JI) group, on nightclubs in the Island of Bali, Indonesia on 12 October 2002 which killed 202 people mostly tourists from Australia.

<sup>117</sup> The island of East Timor is part of the Lesser Sundas group of the Indonesian archipelago, situated some 300 miles to the north of Australia. It was colonised by Portuguese friars in the 16<sup>th</sup> century. It was annexed as the twenty-seventh province of the Republic of Indonesia on 17 July 1976 through a military intervention; see Michael Liefer, *Dictionary of the Modern Southeast Asia*, Routledge, London, 1995, page 254. It was later given independence during the Habibie presidency.

<sup>118</sup> Aceh is the northern-most province of Sumatra and was the last part of the Indonesian archipelago to fall to Dutch rule which was not effectively consolidated until the early twentieth century. After independence in 1949, Aceh became the seat of a Muslim-inspired rebellion known as Darul Islam which challenged the unity of the republic during the next decade. There have been several clashes between the central government in Jakarta and the Aceh insurgents under Aceh Independence Movement (GAM), see Michael. Liefer, *Dictionary of the Modern Southeast Asia*, Routledge, London, 1995, page 45.

<sup>119</sup> Indonesia's second president. Forced to relinquish power by massive students demonstration in 1998 and succeeded by B.J.Habibie.

<sup>120</sup> For further reading on the struggle for sovereignty. See Michael. Liefer, *International Straits of the World: Malacca, Singapore and Indonesia*, Sijthoff & Noordhoff Alphen aan den Rijn, 1978.

<sup>121</sup> See CNN.com/world at <http://www.cnn.com/2002/WORLD/asiapcf/auspac/12/02/australia.terror.us/> retrieved on 20 January 2003.

within the system.”<sup>122</sup> Thailand’s government spokesman said. “Each country has its own sovereignty that must be protected and operations on Thai soil would require highly cautious consideration.”<sup>123</sup> While the Philippines National Security Adviser said governments must work together rather than one country acting unilaterally and” It’s not wise and it doesn’t follow...the doctrine of peacekeeping and sovereignty. Sovereignty is not decided by fight, it’s decided by right.”<sup>124</sup>

When the Southeast Asian Regional Centre for Counter Terrorism (SEARCCT)<sup>125</sup> was declared open in Kuala Lumpur in June 2003, the United States was conspicuously absent although it was thought initially that it will be included as a party.<sup>126</sup> Despite this, there is growing evidence that cooperation between United States and Southeast Asian States to combat terrorism is well in place. On 15 August 2003 a highly wanted terrorist, Hambali<sup>127</sup> who was regarded as the leader behind the Bali bombing was arrested in Thailand and was surrendered to United States authority. The swift action by Thailand to surrender him to United States and subsequent statement by Malaysia’s Police Chief that Malaysia had a hand in his arrest indicated that there was a high level cooperation with the United States to combat terrorism in Southeast Asia. A year before that Colin Powell, the then U.S.’s Secretary of State during his visit to Indonesia announced that the United States and Indonesia are starting to build a more “normal” military-to-military relationship and he said

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<sup>122</sup> See CNN.com/World at <http://asia.cnn.com/2002/WORLD/asiapcf/12/01/australia.terror.un/index.html>, retrieved on 20 January 2003.

<sup>123</sup> CNN.com, note 122 above.

<sup>124</sup> CNN.com, note 122 above.

<sup>125</sup> The Centre is wholly funded and staffed by the Malaysian government. It has been tasked with organizing seminars, conferences and training for regional law enforcement agencies on counter terrorism matters.

<sup>126</sup> The United States had approached Malaysia at the 2002 APEC Summit in Los Cabos, Mexico to establish the centre in partnership with Washington.

<sup>127</sup> His real name is Riduan Issamuddin, born in Cianjur, West Java but living in exile in Malaysia in the 1990s and said to be the only non Arab in Al Qaeda’s military committee and largely blamed for the Bali attacks. See Baradan Kuppusamy, “Hambali: The driven man”, *Malaysiakini* feature, 25 August 2003. <http://www.malaysiakini.com/opinionfeatures/200308250041318.php>, retrieved 25 August 2003.

the United States is “very pleased” with the level of U.S.-Indonesia cooperation on a range of bilateral issues including terrorism.<sup>128</sup>

In this period, India has emerged as a new key naval player in East Asia with the proposed India-United States joint patrolling of the sea lanes along the Straits of Malacca which included, “among other suggestions”, escort operations by ships of the Indian navy for US supply ships every eight to ten days in the Straits.<sup>129</sup> On November 29, 2001 Admiral Dennis C. Blair, the Commander in Chief, United States Pacific Command declared that both countries’ interest “run from ensuring the free and unimpeded flow of oil that comes out of the Persian Gulf all the way across this region, all the way to friends and allies in East Asia and further through places like the Straits of Malacca, where shipping has been subject to attack in the past.”<sup>130</sup> This can be achieved by stepping up United States naval influence on the strategic port of Trincomalee on the eastern part of Sri Lanka.<sup>131</sup>

The United States’ sudden surge in the interest to patrol the Straits could have been the direct result of the attack of terrorists on the USS Cole in the Port of Aden in October 2000. As a result, the United States has stepped its regulatory maritime security regime through the Maritime Transportation Security Act (MTSA) 2002.

Another pertinent issue regarding piracy vis-à-vis terrorism is to what extent piracy can be regarded as terrorism post September 11. As explained earlier in Chapter 1.6 the

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<sup>128</sup> Department of State Transcript; U.S., Indonesia Starting to Normalize Military Ties, 2 August 2002. See <http://usembassy-australia.state.gov/hyper/2002/0802/epf509.htm> retrieved on 20 January 2003.

<sup>129</sup> *Asia Times online*, April 5, 2002. See <http://www.atimes.com/ind-pak/DD05f01.html> retrieved on 30 January 2003.

<sup>130</sup> Transcript, United States Pacific Command, 29 November 2001 at <http://www.pacom.mil/speeches/sst2001/011129> press conference. htm retrieved on 4 February 2003.

<sup>131</sup> *Asia Times online*, 7 January 2003, “US closes in on South Asia’s ‘strategic jewel’”. See [http://www.atimes.com/atimes/South\\_Asia/EA07Df02.html](http://www.atimes.com/atimes/South_Asia/EA07Df02.html) retrieved on 4 February 2003.

fundamental problem again lies with definition as terrorism itself is devoid of a common definition. Schmid, for example, surveyed 100 scholars and concluded “Terrorism is an anxiety-inspiring method of repeated violent action, employed by (semi) clandestine individual, group or state actors...”<sup>132</sup>

Another writer remarks “in other words, just as the Torrey Canyon did not “create” the marine environment, the horrific events of September 11, 2001 by no means invented the issues of “maritime security” or “maritime violence”....what September 11 has done is to intensify focus on this issue and present the IMO with the challenge of deterring perceived threats to maritime security through proactive measures and new instruments.”<sup>133</sup>

As terrorism is not addressed under the definition of piracy under the UN Convention 1982, there are conflicting views as to whether terrorism acts could be assimilated under it because of the lack of private motive. Mejia in his paper puts forward two conflicting arguments by Pugh<sup>134</sup> and Menefee<sup>135</sup>;

Pugh, for instance, argues that “political violence or “terrorism” at sea has been considered as a separate issue (from piracy and armed robbery) in international law.” The private ends requirement is explicit under UNCLOS and is alluded to in the IMO definition of armed robbery. The phrase “private ends” does not appear in the IMO definition but the word “robbery” does, thus implying the private end of the unlawful taking of property by one party from another. In addition, the terrorists were themselves originally passengers on board the vessel they hijacked. Menefee, on the other hand, contends that acts of maritime terrorism such as “the *Achille Lauro* attack might well be deemed piratical.” He disputes the two main objections that disqualify the *Achille Lauro* incident from being classified as piracy, namely

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<sup>132</sup> Schmid, A., *Political Terrorism: A research guide to concepts, theories, data bases and literature*, Amsterdam: Netherland: North-Holland, 1983.

<sup>133</sup> M.Q. Mejia Jr., “Defining Maritime Violence and Maritime Security”, *National Symposium of World Maritime University*, Malmo, Sweden, 2002, page 27.

<sup>134</sup> Michael C Pugh,” Piracy and armed robbery at sea: problems and remedies”, *Low Intensity Conflict & Law Enforcement*, No.1. Vol. 2, Summer 1993, pages 4-5,

<sup>135</sup> Samuel P. Menefee,” The *Achille Lauro* and similar incidents as piracy: two arguments,” in Eric Ellen (Ed.), *Piracy at Sea*, Paris: ICC Publishing SA, 1989, pages 179-180.

the two-ship rule and private motive, by arguing that: (1) the second part of Article 101(a) makes no mention of the two-ship rule and (2) the term “private ends” is ambiguous; perhaps ambiguous enough not to exclude political motives. He also makes the argument that Article 101 is neither exclusive nor comprehensive and that there is a strong case for maritime terrorism being assimilated to the crime of piracy under customary international law.<sup>136</sup>

Clearly at the moment, in the absence of a written definition, terrorism and piracy could only be differentiated by the motives of the perpetrators. It is sensible to say that financial motive will denote piracy while political will indicate terrorism. The definition of terrorism itself was first attempted during a series of conferences which came to be known as the International Conferences for the Unification of Penal law<sup>137</sup> although the United Nations only adopted a resolution to condemn all acts of terrorism as “criminal acts” on 9 December 1985.<sup>138</sup>

In the Pacific Rim the Asia-Pacific Economic Cooperation, APEC, in response to the terrorist attacks of 11 September 2001 issued a Leaders’ Statement on Counter-Terrorism in Shanghai in October 2001 and on the 9<sup>th</sup> APEC Finance Ministers’ Meeting in Los Cabos, Mexico in September 2002 reaffirmed the commitment to disabling the financial networks of terrorist and agreed an action plan to combat the financing of terrorism.<sup>139</sup> Before that, during the 3<sup>rd</sup> APEC Transportation Ministers Meeting in May 2002 in Lima, Peru APEC agreed to “support the actions and initiatives undertaken by IMO in maritime security” which includes “suppression of piracy and armed robbery.” And during the Los Cabos Summit, the leaders issued a joint statement to “promoting ship and port security plans by

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<sup>136</sup> M.Q.Mejia, “Defining Maritime Violence and Maritime Security”, note 133 above, page 34.

<sup>137</sup> Geoffrey Levitt, Is ‘Terrorism’ Worth Defining?, 13 OHIO N.U.L. REV.97,97 (1986) as quoted by Douglas Kash in ‘Abductions of Terrorists in International Airspace And on the High Seas, (1993) *Florida Journal of International Law*, Vol.8, 1993, page 66.

<sup>138</sup> *United Nations Resolution on Terrorism*, G.A. Res. 40/61, U.N. GAOR, 40<sup>th</sup> Session., Supp. No.53, at 301, U.N. Doc. A/40/53, 1985.

<sup>139</sup> *APEC Secretariat Final Report on Implementation of the Leaders’ 2001 Statement on Counter-Terrorism*, page 3.

July 2004 and installation of automatic identification systems on certain ships by December 2004.<sup>140</sup> This appears to correspond with the implementation date for the ISPS Code by IMO.

### **2.13.3. Armed Robbery against Ships**

The exclusive character of the definition of piracy in the UN Convention 1982, as discussed previously, means that the majority of cases which the laymen would consider as piracy will never be tackled due to legal constraints. This will also make it almost impossible for the specialised agency like the IMO to formulate effective legislation for meaningful enforcement. Thus to overcome this shortcoming the IMO recognises the definition of piracy under Article 101 of the UN Convention 1982 but adding the term “armed robbery against ships” to cover piratical acts not covered under the UN Convention.<sup>141</sup>

The term “armed robbery against ships” is defined by IMO as “any unlawful act of violence or detention or any act of depredation, threat thereof, other than an act of “piracy”, directed against a ship or against persons or property on board such ship, within a state’s jurisdiction over such offences”.<sup>142</sup>

As under international law, piracy is only confined to acts committed on the high seas or in the exclusive economic zone, the IMO’s definition which includes “any unlawful act of violence or detention or any act of depredation ... within a state’s jurisdiction over such

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<sup>140</sup> *APEC Leaders Joint Statement on Fighting Terrorism and Promoting Growth*, 26 October 2002.

<sup>141</sup> International Maritime Organization, “Draft Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships”, *IMO Document MSC/Circ.622/Rev.1*, 16 June 1999.

<sup>142</sup> IMO, “Draft code of practice for the investigation of crimes of piracy and armed robbery against ships,” *IMO Document MSC Circ. 984, art.2.2.*

offences” provides a complement to Article 101 of the UN Convention 1982. This definition too, seems to be of a better alternative to IMB’s definition as shown in Chapter 1.5. This creates confusion by including almost any attack on a ship or robbery aboard a ship.

Beckman, however, points out that the IMO’s definition is not without ambiguity arguing that it is called “armed robbery” even though it includes offences committed without weapons. He also criticises the phrase “within a state’s jurisdiction over such offences” as not entirely clear by speculating that it could include attacks on ships in internal waters such as lakes or rivers, as well as attacks on ships on high seas that do not fall within the narrow definition of piracy. Also, it does not appear to include acts of robbery aboard ships that do not include violence or detention.<sup>143</sup> He noted that IMB in its 2001 Report had adopted the definitions of piracy and armed robbery against ships as set out in the IMO Draft Code of Practice.

Beckman offers a solution to this problem of definition by “...to use only the two terms currently used by the IMO.” And “.... the term “piracy” should only be used to describe incidents within Article 101 of the UN Convention that take place in maritime zones outside the territorial sovereignty of the coastal state: on the high seas or in an exclusive economic zones. The term “armed robbery against ships” should be used to describe incidents which take place in the maritime zones within the sovereignty of the coastal state: in internal waters, territorial sea, or archipelagic waters. Most incidents in straits used for

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<sup>143</sup> Beckman, R.C., “Combating Piracy and Armed Robbery against Ships in Southeast Asia: The Way Forward.” *Ocean Development & International Law*, No.33, 2002, page 320.

international navigation would be described as armed robbery against ships because such straits are usually within the territorial sea of a coastal state.”<sup>144</sup>

It should be borne in mind that IMO is a specialized agency of the United Nations and it is expected to follow the 1982 UN Convention definition of piracy. By adding the ‘armed robbery’ definition on top of the already well entrenched international law principle as piracy would only compromise its status and its enforcement on the matter will be subject to close scrutiny unless a compromise is reached by all its participating member countries. The efforts undertaken by the IMO must take place in a manner consistent with the rules of public international law, that is, as set out in the 1982 UN Convention on the Law of the Sea.

To sum up at this stage the ambiguities in these definitions can result in individual states declaring their own interpretations. Singapore for example declared that pirates roaming the waters of Southeast Asia should be regarded as terrorists. Its Home Affairs Minister Wong Kan Seng told AFP in an interview<sup>145</sup> on 22 December 2003 that “there should not be distinction between pirates operating for personal gain and terrorists, with the motive of anonymous attackers impossible to judge until they are caught...so in other words if it’s piracy we treat it just like terrorism because it is difficult to identify the culprits concerned unless you board the ship,” This may be regarded as a far fetched statement and is no doubt made to take advantage of the prevailing security situation after the September 11 incidents. Almost everyone at this time was trying to use the term “terrorism” to indicate

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<sup>144</sup> Beckman, note 143 above, page 320.

<sup>145</sup> See “Pirates should be regarded as terrorists: Kan Seng”, *The Shipping Times*, at <http://business-times.asia1.com.sg/story/0,4567,103261,00.html> retrieved on 3 January 2004.

the seriousness of a matter, and possibly to attract the attention and support of the United States, which in its aftermath declared the “global war on terrorism”.<sup>146</sup>

Mukherjee and Mejia highlighted that in contrast to piracy, there is a wider spectrum of acts that could be classified under armed robbery against ships which include opportunist attacks likened to maritime muggings which targeted cash and valuables and usually last no more than half an hour and on the other hand attacks that are pre-mediated, highly sophisticated and extremely violent organized by crime syndicates targeting the ship and its entire cargo.<sup>147</sup> They also point to another variant of armed robbery that has been on the rise, that is, the hijacking of vessels and kidnapping of crew for ransom. This type of robbery originated from Somali waters but now has spread to Southeast Asian waters, specifically off the waters of Indonesia, Malaysia, and the Philippines.<sup>148</sup>

#### **2.14. Other Measures by Strait States in Navigational Jurisdiction**

One concern referred to earlier is that over environmental precautions. Malaysia has an extensive coastline with mangroves and coral reefs. There are high ecological and economic dependencies on these. The minimum control over vessels under transit passage in particular has meant seeking other avenues for legal protection. These are noted below under environmental jurisdiction. There is also concern for the passage of vessels with large number of people displaced from countries elsewhere in Asia which can cause complex

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<sup>146</sup> This can be seen in the Philippines’ war against the Moro insurgents in Mindanao and Thailand’s efforts to control the volatile Muslim-majority province in Southern Thailand.

<sup>147</sup> P.K.Mukerjee and M.Q.Mejia Jr, *The Legal Framework of Maritime Security in International Law*, 2003, page 3.

<sup>148</sup> Mukherjee and Mejia, note 147 above.

problems and consequently entail actions by the coastal States under local, regional and international law, as appropriate. This is noted under socio-political interventions.

## **2.15. Environmental Jurisdiction**

Pollution of the sea is a main concern and because of the need to take precautionary and definite measures Malaysia ratified the MARPOL Convention on 28 January 1997 with compulsory Annexes I and II, and also adopted optional Annex V, which deals with matters other than the discharge of oil, oily wastes and noxious substances.

Other measures by states are institution and proposals for Marine Protected Areas (MPA), Particularly Sensitive Sea Areas (PSSA) and Areas to be Avoided (ATBA). The International Union for the Conservation of Nature (IUCN) defines a MPA as:

Any area of intertidal or subtidal terrain, together with its overlying water and associated flora, fauna, historical and cultural features, which has been reserved by law or other effective means to protect part or all the enclosed environment.<sup>149</sup>

In the past many regulations were directed at activities such as sea-bed exploitation, land-based pollution and dumping but in recent years it was thought that prohibiting passage of all ships (or certain types of ships) from specific areas can be extremely effective for safeguarding MPAs as it would prevent certain polluting activities closely connected with navigation. These efforts of restriction of passage, however, always run in conflict with the

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<sup>149</sup> Resolution GA 17.38, General Assembly of the IUCN, adopted at San Jose, Costa Rica, February 1988, as quoted in F. Spadi, "Navigation in Marine Protected Areas: National and International Law", in *Ocean Development & International Law*, Vol. 30, 2000, pages 285-302.

principle of freedom of navigation and IMO while realising the importance of the issue of environmental protection could only issue guidelines.<sup>150</sup>

For coastal states, while imposing certain regulations to protect MPAs in the territorial sea do not seem to bring many difficulties due to their absolute power in territorial sovereignty, the same position could not be applied in straits where the principle of transit passage allows greater freedom of navigation. For example, when Italy and France decided to create an International Marine Park in the Strait of Bonifacio they were unable to impose prohibition on foreign ships and could only managed a Resolution of IMO – Res. A.776 (18), 4 November 1993, Navigation in the Strait of Bonifacio – that recommended Governments “to prohibit or at least strongly discourage the transit of the Strait of Bonifacio by laden oil tankers and ships carrying dangerous chemicals or substances in bulk liable to pollute....”<sup>151</sup>. It is clear from Article 41 of the UN Convention 1982 that coastal states can regulate the passage through sea lanes and traffic separation schemes. Therefore, it can be argued that coastal states can restrict navigation in certain parts of an international strait but cannot prohibit it altogether.

In Southeast Asia, the frequent incidents of ships collisions in the 80’s and 90’s which cost the littoral States of the Straits of Malacca millions of dollars to clear the oil spills swept onshore prompted the then Prime Minister Mahathir’s call for the user countries to pay certain sums to compensate the affected States. Many such regulations involving liability and compensation for damage were introduced after the *Torrey Canyon*<sup>152</sup> disaster in 1967.

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<sup>150</sup> Refer to *IMO Resolution A/720(17)*, 6 November 1991.

<sup>151</sup> F. Spadi, note 149 above, page 294.

<sup>152</sup> For explanation on the circumstances of the disaster, see further E.D. Brown, *The Legal Regime of Hydrospace*, Stevens, London, 1971, page 141-142.

In the *Torry Canyon* the main issues were: who is to be held responsible for damage caused by oil pollution, the basis for determining liability and the level of compensation for damage. Although there were already well established procedures for settling claims resulting from a collision between two ships and other admiralty issues they concerned parties involved in the dispute such as the shipmasters and cargo owners and other persons on board who may sustain injuries. However a major pollution emanating from a huge disaster such as *Torry Canyon* involves coastal states.

## **2.16. Socio-Political Interventions**

The Strait States also continue to intervene with vessels suspected of carrying refugees in their area for several reasons. Refugees and asylum seekers are two bands of people who created considerable concerns to safe passage at sea. They are products of failed political systems in which thousands have fled their homes to escape war, political persecutions and economic uncertainties. Apart from the navigational menace they cause by plying the sea with unchartered courses which pose problems to other vessels at night, the real danger faced by these refugees and asylum seekers are to themselves. It is estimated that during 1983 to 1984 period around 60 percent of the boats arriving in Thailand were attacked by pirates.<sup>153</sup> There is also danger of refugees overpowering a merchant vessels' crew and taking over the control.

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<sup>153</sup> B.H. Brittin, "Piracy and Terrorism at Sea: Commonalities and Differences in *Shipping under Fire Conference*, Athens, Greece, January 1987, pages 20-21.

The plight of Vietnamese refugees or “the boat people” escaping their homeland by sea as a result of political persecution is well documented case.<sup>154</sup> Many of them were subjected to inhumane treatment by the boat agents at the beginning of the journey and once on the high seas they were exposed to attacks from pirates resulting in robbery, murder, rape and kidnapping.<sup>155</sup> The refugee problem from Indo- China has been gradually solved by United Nations High Commissioner for Refugees (UNHCR) by “screening” of all Vietnamese arrivals in East Asian regions to determine their refugee status, the resettlement of “genuine” refugees and the repatriation of those deemed to be economic migrants. By mid-1996 more than 88,000 Vietnamese and 22,000 Laotians have returned to their countries of origin when Malaysia and Singapore completed their repatriation process and in early 1998<sup>156</sup> after the coastal States saw several justifications to intervene in these sea areas.

## 2.17. Conclusion

This chapter focuses on the rights of ships in various sea areas and the trends in sea activities which are curtailing and impeding rights of passage. It also shows common, and diverse interests of maritime and coastal states. It also points out that the concept of freedom of navigation was not an alien concept in Southeast Asian seas, as it was already in practice before the coming of the Western powers from the early part of the 16<sup>th</sup> century.

This partly underlies the national stance and pride of these independent states. For almost four centuries passage at sea became dictated by the policies of new Western powers,

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<sup>154</sup> See for e.g. Joachim Henkel, “Refugees on the High Seas: A Dangerous Passage”, in Eric Ellen (Ed.), *Piracy at Sea*, 1989, page 107.

<sup>155</sup> Read the accounts of two Vietnamese girls An and Linh in Pascal Boulanger, “The Gulf of Thailand”, in Eric Ellen (Ed.), *Piracy at Sea*, 1989, pages 83-85.

<sup>156</sup> The Europa World Year Book 2002, Vol. I, on United Nations High Commissioner for Refugees, UNHCR, page 54.

mostly competing with each other in attempts to monopolise the lucrative spice trade in the Malay Archipelago, to the detriment of the local traditional sea merchants and those from the Middle East, India and China, who had previously enjoyed relatively unrestricted passage, while acknowledges certain laws and customs of adjacent states.

The constant struggle for maximum freedom of navigation for maritime states merchant shipping and warships continued before and after the ratifications of the UN Convention 1982. In Southeast Asia, the importance of the Straits of Malacca for such commercial and strategic needs has been recognised for a long time and this importance grew in the decades following the UN Convention 1982. This was clearly because of the need to supply oil from the Middle East to Japan and China and the requirements of the United States to send warships from the Pacific to the Indian Ocean in the later part of the Cold War and during the two Iraq Wars in 1991 and 2003.

Finally, it is concluded that the new forms of piracy and the upsurge of what is termed “terrorisms” and “armed robbery” is a major issue in formulating and implementing legal rules in the zones and in relationships between states.

## **Chapter 3**

### **MALAYSIA AND THE SECURITY OF THE STRAITS OF MALACCA**

#### **3.1. Introduction**

From an economic and strategic perspective the Straits of Malacca is clearly one of the most important shipping lanes in the world, an equivalent of the Suez Canal or the Panama Canal. They form the main ship passageway between the Indian Ocean and the Pacific Ocean, linking three of the world's most populous nations: India, Indonesia and China as well as the economic hub of Japan.

The Straits are used by more than 50,000 vessels per year, carrying between one-fifth and one quarter of the world's sea borne trade. Half of the oil shipments carried by sea go through the Straits, in 2003, an estimated 11 million barrels a day, a trade that is expected to expand as oil consumption rises in China. As the Straits are only one-and-a-half nautical miles wide at the narrowest point, (at Phillips Channel in the Singapore Strait), they form one of the world's significant traffic bottlenecks and checkpoints.

All these factors have caused the area to become a target for piracy and a perceived target for terrorism. In 2003 the piracy cases reported in the straits accounted for around one-third of all piracy in the world for that year. The number of attacks rose again in the first half of

2004 and in response of persisting international criticism the littoral States; Malaysia, Singapore and Indonesian navies stepped up their patrols of the area in July 2004<sup>1</sup>.

Fear of terrorism rests on the possibility that a large ship could be subject to a pirate attack and sunk at a shallow point in the strait (it is just 25 meters deep at one point), effectively blocking the strait. If successfully achieved, the attack would have a devastating effect on world trade. Opinions amongst security specialists differ about the nature, feasibility and likelihood of such attacks.<sup>2</sup> However, there has been general agreement that positive deterrence was needed from the presence of warships in the region.

All straits used for international navigations are governed by the rule of transit passage under the UN Convention 1982. However, each has specific physical and geopolitical characteristics. Several share a feature of choke points in international relations when it comes to strategic conditions. The Strait of Hormuz for example is particularly significant in this respect as there is no alternative sea route to the Gulf oil terminals. The sensitivity of this strait is not so much of pirate activities but due to military and terrorists' interference with the passage of merchant ships that stem from the political circumstances of the Gulf region and the Middle East.

The Strait of Bab el Mandeb is similarly a vital choke point but there is an alternative route via the Cape in the case of closure of the strait. Here there are the likely incursions of pirates emanating from Somalia and Horn of Africa locations during periods of economic and political upheavals. These wider comparisons between straits are considered more fully

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<sup>1</sup> See Chapter 4.2.4.

<sup>2</sup> Based on interviews with experts in Malaysia, Singapore and Indonesia. See, list of interviews under the Bibliography.

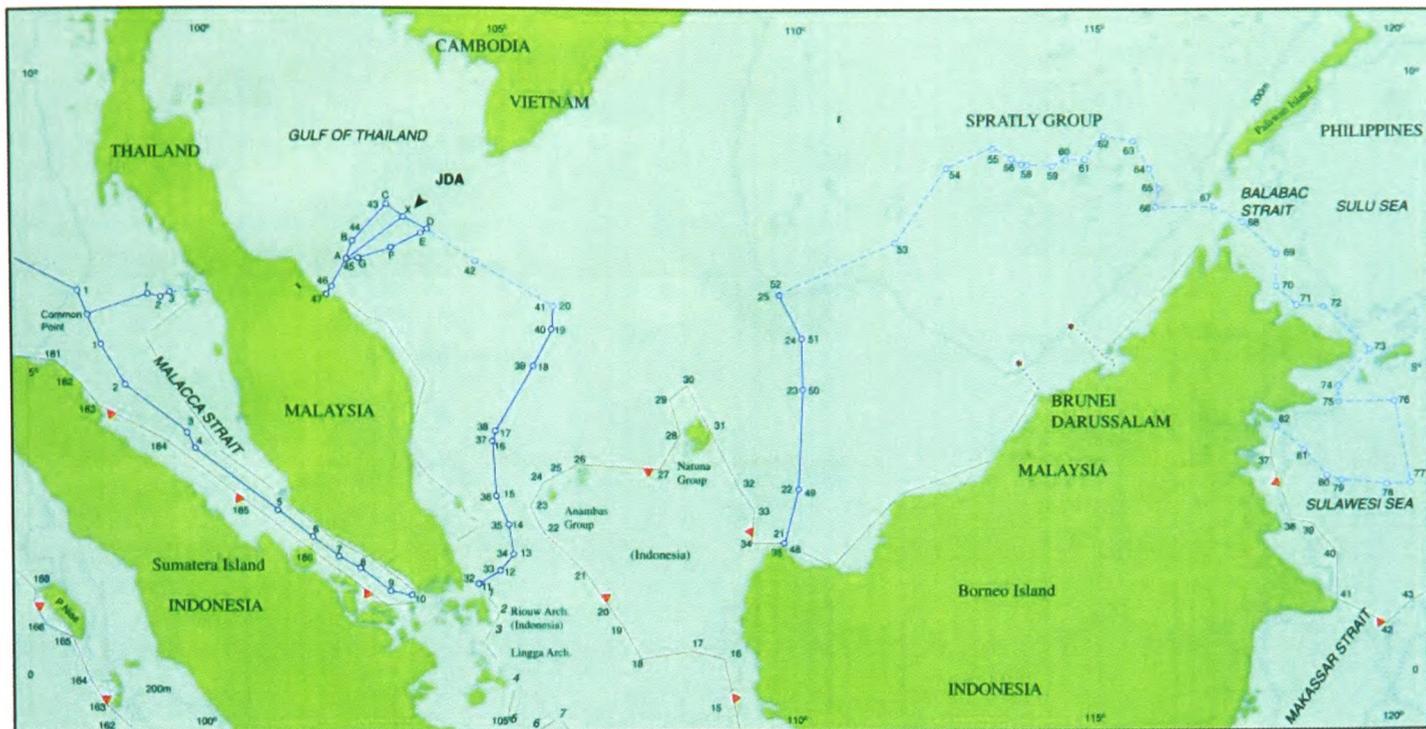
in Chapter 7. An important legal feature of some 116 straits has been their inclusion into territorial waters with the extension of territorial sea from three to twelve nautical miles.

Nevertheless, the issue of piracy is very significant in when it comes to the Straits of Malacca. There is also complex regional legal situations related to the Straits of Malacca, and there are equally complex possible legal solutions. It arises from the interaction of three littoral states and the relationship with user states in international trade. The interactions and complexities in law revolve around acts of pirates, robbers and possibly terrorists, and how these acts and participants are defined, as well as the activities of fishermen in their spatial extent. It involves also diplomatic relationships in reacting to victims of pirates and other illegal activities.

### **3.2. Malaysia and the Straits of Malacca**

To appreciate some of the complexities of jurisdiction in the region it is necessary to revisit the history of the area. Malaysia is a federation of 13 states formed by two land areas; the Malaysian Peninsular (formerly Malaya) and North Borneo states of Sabah and Sarawak. The two geographical regions are divided by the South China Sea. The Malay Peninsular gained independence from the British in 1957 and later amalgamated with Sabah and Sarawak after the two states obtained independence from the British and opted to join the federation together with Singapore in 1963. Singapore left the Federation in 1965 due to serious policy disagreement with the Federal Government in 1965.

## Map 2 Malaysian Maritime Boundary



Source: Vivian L. Forbes and Mohd. Nizam Basiron, *Malaysia's Maritime Space Atlas*, Maritime Institute of Malaysia, Kuala Lumpur, 2002, p. 9

The Peninsular is physically and culturally close to the Indonesian Island of Sumatra. Many local indigenous Malays of the Peninsular originated from nearby Sumatra, speaking the same language and professing Islam as a religion. Long before the 19<sup>th</sup> century the Straits of Malacca was already recognised as an important waterway for trading ships between China in the east and India and Middle East to the West.

### 3.2.1. The Dutch-British Sphere of Influence

After the Portuguese were defeated by the Dutch in the 17<sup>th</sup> century the Dutch and later the British were the dominant powers in the region. During the Napoleonic War in Europe, Malacca was handed over to the British temporarily and remained so after the war with the

signing of the Anglo Dutch Treaty 1824<sup>3</sup>. The two powers then drew a line on the chart dividing the Straits of Malacca between them, with an agreement to pursue and destroy the pirates within their own areas of influence.

### **3.2.2. Post World War II Developments**

After the defeat of Japan in the Second World War the new independent country of Indonesia emerged from former Dutch colonies in Southeast Asia and inherited their spheres of influence. In turn in the north Malaysia inherited the British spheres of influence, including Singapore and the North Borneo States of Sabah and Sarawak.

Malaysian maritime policy on the Straits of Malacca after its independence in 1957 was heavily oriented towards the issue of sovereignty. This emphasis was as a result of Indonesia's rigorous attempts to pursue the concept of the archipelago principle to cement its fragile geographical unity during the negotiations for the Geneva Convention 1958. The threats were further aggravated from Malaysia's point of view after Indonesia launched hostile actions towards Malaysia following the formation of an independent Malaysia in 1963 known as "Konfrontasi", which ended in 1966. Michael Liefer remarks, "Before 1966, tensions across the Straits of Malacca and Singapore were governed, in great part, by an Indonesian perception of external constraints on the exercise of its influence in the

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<sup>3</sup> Also known as the Treaty of London. The treaty was to resolve disputes arising from the execution of the Anglo-Dutch Treaty of 1814. The new treaty defines a British sphere of influence on the Malay Peninsular and a Dutch sphere of influence on Sumatra and other Indonesian islands. Malacca was returned to the British and the Dutch stop objections to British founding of Singapore. Both governments agreed to oppose piracy and not provide hiding places or protection to pirates or allow the sale of pirated goods. It was ratified by Netherlands on June 2, 1824 and by the United Kingdom on April 30, 1824. This treaty was later used to define the boundary of modern Indonesia after World War Two.

region,”<sup>4</sup> Malaysia had taken a cautious approach because Indonesia had a perceived inclination to embrace the Peninsular as part of the Greater Indonesia during its foundation years. Sukarno, the future President, had shown his public support for the ideas propagated by the Indonesian nationalist ideologue Muhammad Yamin:

“Even if we do not take this reason into account I still say, despite the danger of my being accused as an imperialist, that Indonesia will not become strong and secure unless the whole Straits of Malacca is in our hands. If only the west coast of the Straits of Malacca, it will mean a threat to our security”.<sup>5</sup>

Malaysia-Indonesia relationship improved after the fall of Sukarno in 1966 and the formation of the Association of South East Asian Nations (ASEAN) in 1968. The focus of the Malaysian government on the straits was now on the issues of navigational safety and territorial limits. On 2 August 1969, Malaysia extended the limit of its territorial sea from three to twelve nautical miles. This was followed by a treaty delimiting the territorial sea boundary between Malaysia and Indonesia in the Straits of Malacca, South of One Fathom Bank (see Map 3) which came into force on 10 March 1971.

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<sup>4</sup> Michael Liefer, *International Straits of the World: Malacca, Singapore and Indonesia*, Sijthoff & Noordhoff, Alphen aan den Rijn, Netherlands, 1978, page 15.

<sup>5</sup> Muhammad Yamin, *Naskah Persiapan Undang-Undang Dasar 1945*, page 206 as quoted in Liefer, note 4 above, page 12.

**Map 3**  
**Malaysia and Indonesia Maritime Delimitation Boundary Agreements, 1969 and 1971**  
Note



**Note:** This is an official electronic map issued by the Mapping and Survey Department of Malaysia. The sea area in the light blue is the internal waters. The outer blue line is the continental shelf boundary. Malaysia makes no distinction between its EEZ and the Continental Shelf based on the agreements in 1969 and 1971.

### 3.2.3 Malaysia and UNCLOS III

During the UNCLOS years of the preparatory negotiations texts Malaysia was preoccupied with the issue of the straits<sup>6</sup> and archipelagos.<sup>7</sup> Concerned with Indonesia's quest for

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<sup>6</sup> Malaysia is one of the eight coastal states which produced 'the Eight Power Draft' in Subcommittee II of the Sea-Bed Committee to oppose the major maritime powers' demand for a right of transit in the straits. In principle, the Eight Power Draft insists on straits which form part of territorial sea as territorial waters which limit navigation to innocent passage.

<sup>7</sup> Malaysia was concerned that the concept of archipelagic state strongly pursued by Indonesia would result in the sudden severance of the free access and all forms of communication which Malaysia had always

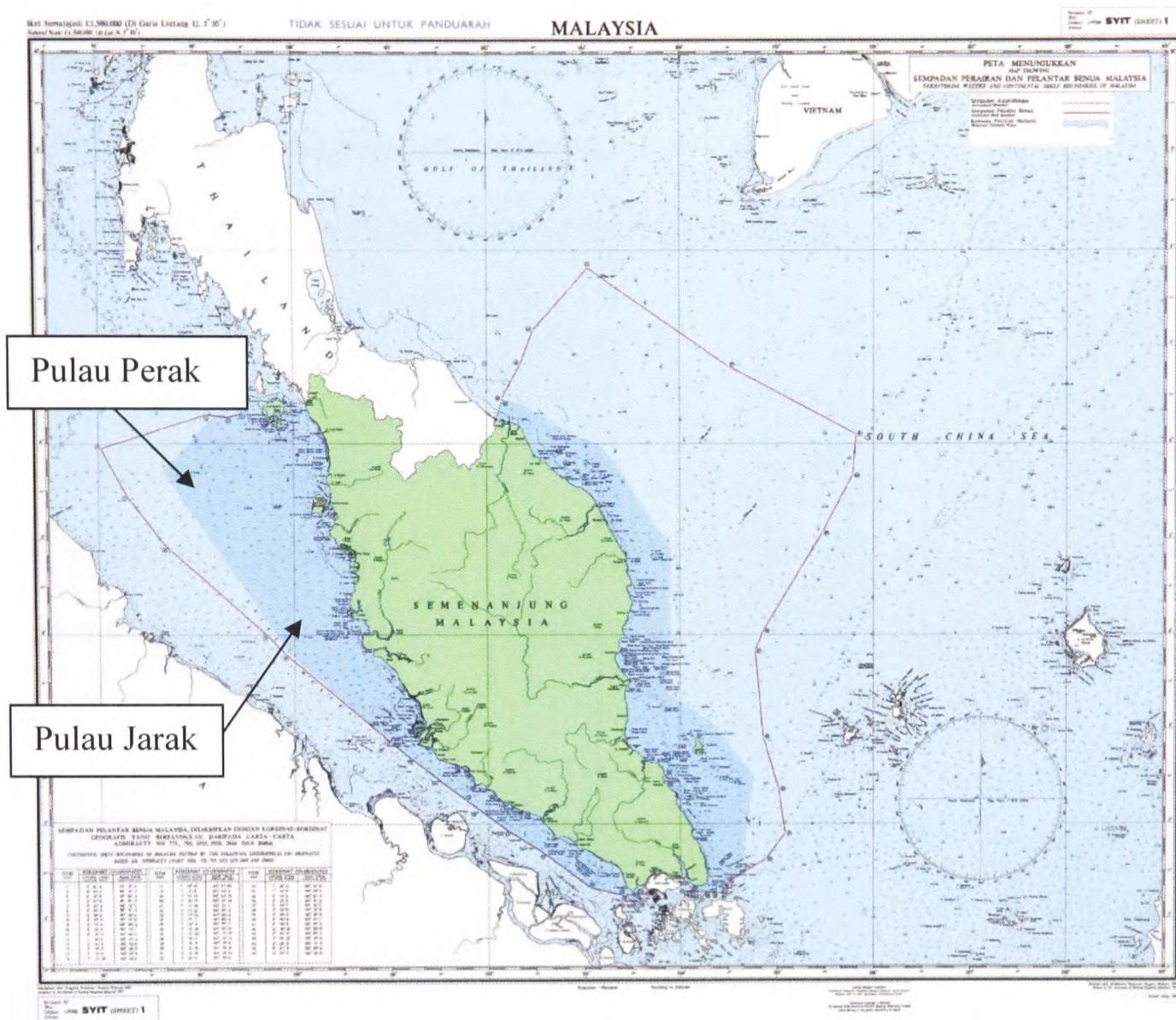
archipelagic state concept, Malaysia extended its maritime boundaries in stages in the 1960's and 1970's before finally publishing its "Peta Baru" (New Map) in 1979. The new map adopted the use of straight baselines which departed from the general run of the coast. In the Strait of Malacca the new map takes in a large area of territorial sea in the northern part of the Peninsula based on Malaysia's Pulau Jarak and the disputed Pulau Perak. Malaysia's use of straight baselines, in fact, was influenced in negotiations with Indonesia and the enactment of its territorial sea limits was carried out only after prior consultation with Jakarta.<sup>8</sup> Before the conclusion of UNCLOS 1982, the Director of National Mapping, Malaysia published the new map indicating the territorial waters and continental shelf boundaries claimed by Malaysia. The "Peta Baru" of the Peninsular Malaysia is shown in Map 4 below.

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enjoyed through the high seas between Peninsular Malaysia and East Malaysia, see speech by Mr. Vohrah, *UNCLOS III Off. Rec., Vol. II*, at page 292.

<sup>8</sup> Michael Liefer, *International Straits of the World: Malacca, Singapore and Indonesia*, Sijthoff and Noodhoff, Alphen aan den Rijn, the Netherlands, 1978, page 30.

## Map 4 Peninsular Malaysia Maritime Zones



Source: New Map of 1979 by the Department of Survey and Mapping, Malaysia

**Note:** In the narrow south eastern part of the Straits a territorial sea boundary had been delimited by agreement. The northern boundary is inferred and still unresolved. Malaysia claims a large area of territorial sea based on the existence of two small islets Pulau Perak and Pulau Jarak off Penang Island which belong to her. The red lines indicate the Malaysian continental shelf and the dark blue shading the territorial waters.

### 3.2.4. The Issues of Piracy and Terrorism

The new divisions of the sea, disputed areas and increased sea transport brought the issues of piracy into focus. The issue of piracy was never really on the Malaysia maritime priority agenda until in the late 80's, then increased concerns caused Malaysia to invite the IMB to

open its regional office, the IMB Piracy Reporting Centre (PRC) in Kuala Lumpur in 1992. This reflects Malaysia's increased concerns due to frequent reports on attempted and real piracy in the straits in the preceding years. Malaysia's interest in having an IMB office in Kuala Lumpur was also driven by its growing economy since early 1990's and to underline its interest in safeguarding related sea transport in the Straits of Malacca.<sup>9</sup> To meet the threat Malaysia had to significantly increase its protective measures.

These developments were fully justified as Malaysia is one of three Coastal States which border the Straits of Malacca and the straits has been singled out as one of the world 'hot spots' of piracy by the IMO and the IMB. The IMB in its Annual Piracy Report 2003 praised the efficiency of the Malaysian authorities in suppressing piratical attacks in the Straits of Malacca, as follows:

“...attacks in Malaysia reduced to 5 in 2003 from 14 in 2002. In the last six months of 2003, no attacks were reported in Malaysian waters. This remarkable progress must be due to vigilant patrols and constant operations by the relevant Malaysian authorities particularly the Royal Malaysian Marine Police.”<sup>10</sup>

In the same report the IMB cautioned that Indonesian waters “continues to record the highest number of attacks with 121 reported incidents in 2003” and it also pointed out

“... Malacca Straits, is one of the busiest shipping lanes, had seen a welcome drop in the number of piracy in 2002 as compared to 2000 but the 2003 figures showed a rise to 28 incidents in the Malacca Straits. We hope that the Indonesian Authorities will increase their efforts, without which the area will always remain high risk.” In page 15 under the heading “Piracy Prone Areas and Warnings” the Indonesian side of the Straits is again blamed and vessels are warned to “avoid anchoring along the Indonesian coast of the Straits unless required for urgent operational reasons. North Sumatra/Aceh coast is particularly risky. Numerous violent attacks had been

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<sup>9</sup> Malaysia is seen as a more appropriate host as compared to Indonesia and Singapore. Indonesia lacks infrastructure and Singapore controls a very limited area at the southern tips of the Straits of Malacca. According to Noel Choong, the Director of the Piracy Reporting Centre (PRC, Kuala Lumpur, Malaysia) was chosen purely because of its strategic location.

<sup>10</sup> *ICC- IMB Annual Report 2003.*

reported this year. Pirates armed with guns, knives, machetes and small arms normally attack and rob vessels that do not maintain any anti-piracy watch”.<sup>11</sup>

The international concern for pirate attacks has been intensified by the concern for political terrorism. Since Sept 11 atrocities the major maritime powers namely the United States and others like Japan and Britain have painted a possible scenario of increased maritime disasters caused by terrorist attacks in the straits as a more urgent agenda than the traditional problem of piracy. The same points were made recently by Singapore including calls for joint operations with the United States to patrol the straits. These proposals were vehemently rejected by the Malaysian and Indonesian Governments citing “interference with the sovereignty of the coastal states”.<sup>12</sup> The situation is volatile and compounded by political and legal issues.

It is important in these respects to note that in addition to the requirements of the UN Convention 1982, there is the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988, and its Protocol of 1988 relating to Fixed Platforms Located on the Continental Shelf (the SUA Convention and Protocol). These are now the main instruments used to suppress piracy and similar unlawful acts at sea. The actual effectiveness of the SUA Convention 1988 and the new SUA Protocol 2005 will be examined in detail in Chapter 8 when alternative solutions are evaluated for the Straits of Malacca complexities.

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<sup>11</sup> *ICC-IMB Report 2003*, page 16.

<sup>12</sup> See for example, media reports, “Indonesia, Malaysia, Singapore agree to joint Malacca Straits patrols”, *AFP*, 29 June 2004; “Najib rules out joint naval patrols with Singapore”, *Malaysiakini*, 27 July 2004. Malaysian Deputy Prime Minister Najib Tun Razak was reported to have ruled out naval patrols with Singapore saying that the territorial integrity of both countries must be respected. As a response to Admiral Thomas Fargo, the Commander of US Forces in the Pacific suggestion that the US Marines and other forces might help patrol the waterway the three littoral states of the Straits of Malacca had earlier agreed to conduct ‘co-ordinated patrols’ as opposed to ‘joint patrols’ in the straits.

### 3.3. The Vulnerability of Vessels and States in the Straits of Malacca

The periodic problems between the littoral states have intensified the vulnerability of the Straits internationally. The Straits of Malacca is a narrow stretch of water with varying width between Peninsular Malaysia and the Indonesian island of Sumatra. At its western entrance, the strait is spacious and the two littoral coasts of Malaysia and Indonesia are separated by approximately 200 miles of water. In the south-easterly direction it begins to narrow and at just below One Fathom Bank the legal limits of territorial waters between Malaysia and Indonesia have begun to overlap evoking problems of equidistant and equability issues. The narrowest breadth between opposite shores of the straits is 8.4 miles at the south-western tip of the Peninsula Malaysia.<sup>13</sup>

Because of its physical geographical characteristics the strait has always posed problems to navigation. This assumes two major forms i.e. the danger of collision of vessels arising from an increase in their number, size, and consequent congestion of the narrows as well as from the handling characteristics of large tankers; and the problem of grounding. This arises from the size, draft, and handling characteristics of vessels whose displacement of water (which increases with speed) is such that the precise measure of under-keel clearance is critical. Not only are there areas of relatively shallow seas and shoal waters, but the depth of the waters is also reduced by the regime of tides.<sup>14</sup> Michael Liefer in his book which now is considered as the authority on the Straits of Malacca has described the physical characteristics of the Straits in detail, (as reproduced in Appendix 2). It is clear that the constraints of navigation give advantages for both pirates and terrorists by limiting the sea

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<sup>13</sup> See, Michael Liefer, *International Strait of the World: Malacca, Singapore and Indonesia*, note 8 above, pages 52-53.

<sup>14</sup> Michael Liefer, note 8 above, pages 53 -55.

room of large vessels. It also adds to the problem of coastal states from possible pollution if a vessel lacks adequate controls.

More recently the emphasis has shifted from improving navigational freedom to many political developments which are taking place in relation to positive actions in the Straits of Malacca. The issues of navigational responsibilities between Malaysia, Singapore and Indonesia is now giving way to the politics of nation state sovereignty with regards to the issue of maintaining maritime security of the straits. Singapore with its ever-growing dependence on shipping for its economy has expressed a greater need for this because of the fears of terror attacks involving hijacked ships in the strait.<sup>15</sup> As will be appreciated from Map 7 there have been numerous attacks widely spread in the Straits of Malacca in 2003, but also high concentrations in the southeast sector in proximity to Singapore.

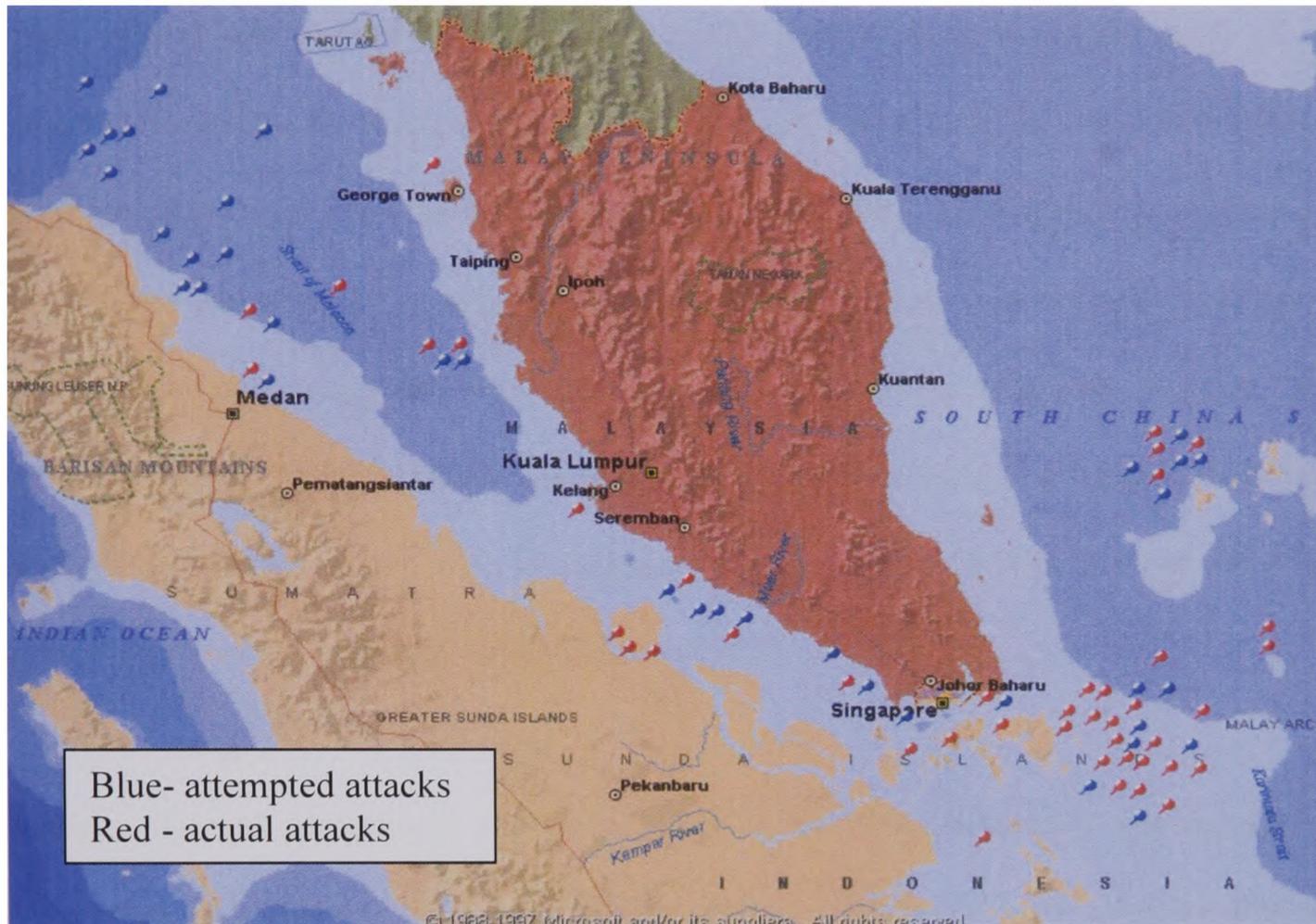
#### **3.4. The Politics of Maritime Security in the Straits**

Due to international pressure especially from the United States and Australia the littoral states finally launched coordinated patrols over the Straits in June 2004. This is mistakenly taken as “joint-patrol” by the international media. The coordinated patrol means the three littoral States will patrol their respective territories at the same time and there will be intelligence gathering and sharing among them. This is seen by many as merely a “gimmick” to satisfy persistent enquiries from the international community on the ability of coastal States particularly Indonesia to safeguard the Straits from pirates and other unlawful acts.

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<sup>15</sup> See, “Najib rules out joint naval patrols with Singapore” *AFP Report*. 27 July 2004.

## Map 5 “Piracy” Incidents in the Straits of Malacca 2003



Source: Locations based on the IMB Annual Report 2003

Map: Courtesy of Iskandar Sazlan Mohd Salleh (August 2004)

Note: As indicated most attacks occurred outside Malaysian territorial sea.

The annual reports and other data from the IMB continue to show the upwards trends of piratical activities. Apart from Singapore, the other two coastal States have indicated their displeasure to the IMB stating that the statistics are inflated, and in July 2004 the Chief of the Indonesian Navy accused the IMB of being the tool of foreign countries.<sup>16</sup>

Many military experts question the effectiveness of the existing patrols in combating piracy, by arguing that for the coordinated patrols are strategically weak. The littoral states in turn view anything beyond coordination as challenges to their sovereignty. The coordinated patrols only allow the navy of a State to patrol its own sea area. This exercise is

<sup>16</sup> See statement of Admiral Bernard Kant Sondakh, *AFP Report*, 20 July 2004.

considered by external interests as unacceptable and overrides military logic. The current exercise by coastal states is directed towards deterrence of 'piracy' and not 'terrorism' which would allow more foreign action at sea. Under piracy it means political barriers continue to apply, as foreign naval vessels cannot enter into the territorial waters of a neighbouring country to take action against piracy as they could against a perceived wider scale act of terrorism. It is argued by some external powers that normal precautions and measures against piracy are inadequate and inappropriate to deal with maritime terrorist threats, particularly suicide terrorists when the ship may be used as a weapon. Indonesia for instance, has no agreement with its neighbours on the issue of hot pursuit, an effective tool even to eradicate pirate boats which roam the strait.

Matters of legal perceptions clearly continue to bedevil discussions and solutions. The Malaysian authorities in their political appraisals go further and are adamant that strictly speaking there is no "piracy" in the Straits of Malacca, but have recognised the fact that there are crimes they agree to call "sea robbery".<sup>17</sup> This is due to the fact that 'piracy' as defined in the United Nations Convention on the Law of the Sea (UN Convention) is not applicable to the straits due to its geographical area which does not include the high seas, a paramount ingredient to satisfy Article 100 of the UN Convention relating to piracy. This is more than semantics since such definitions underpin the concepts of sovereign jurisdiction.

In contrast to the Malaysian position, Admiral T. Fargo, Chief of the United States Pacific Command heightened the debate on the issue of maritime security in the straits and actions against pirates and terrorists. During his testimony to the US Congress in March 2004,

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<sup>17</sup> This is based on private communications with a number of senior officers of the Malaysian Government during field study July – August 2004.

Admiral Fargo indicated that the US will send navy ships to patrol the straits to protect vessels from attacks by pirates and potential terrorists. He said in relation to this threat:

“... I think we’re also going to have to take a look at how we transform our capability to deal with it. You know, we are looking at things like high-speed vessels so that we can use boats that might be incorporated with these vessels to conduct effective interdiction in, once again, these sea lines of communications where terrorists are known to move about and transmit throughout the region.”<sup>18</sup>

Admiral Fargo, in the subsequent interviews, denied making the statement linking pirates and terrorists, saying that the press misquoted him. During his visit to Malaysia in June 2004 he told the media that “there was no evidence that heavily armed pirates attacking fishing vessels and other traffic in the vital sea lane had ties with groups such as Jemaah Islamiah” [a terrorist group].<sup>19</sup>

The issue of security in the straits has split the policy making the region over whether there is a parallel between piracy and acts of terrorism. While Malaysia and Indonesia avoid mentioning terrorism, Singapore on the other hand welcomes the United States offer to police the strait. Singapore Deputy Prime Minister Tony Tan hinted at connections between pirates and groups such as the Jemaah Islamiah, which was blamed for the Bali bombings in 2002 and is widely believed to have links with Osama bin Laden’s Al Qaeda network. In June 2004 Tony Tan called for tighter security and US help in policing the sea-lane citing a recent pirate attack on a container ship in the straits which included military-style tactics employed by terror groups.<sup>20</sup> This controversy over the issue of inviting or conceding to the US Navy to patrol the straits has raised questions of its legitimacy, and the limits of national control.

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<sup>18</sup> US Pacific Command Speeches and Transcripts at <http://www.pacom.mil/speeches/sst2004/040331hasc-qas.html> downloaded 23 June 2004.

<sup>19</sup> See the *Straits Times Online*, 24 June 2004.

<sup>20</sup> See the *Strait Times Online*, note 17, above.

### **3.5. Legitimacy**

Before the extension of the territorial sea to twelve nautical miles the strait states had jurisdiction over the three nautical miles territorial sea, and in straits more than six nautical miles there was a high seas corridor. The compensation for the loss of the corridor was achieved for foreign vessels having the right of transit passage. Transit passage gives more rights to vessels than innocent passage but less than high seas rights. It was a compromise. Under transit passage all ships and aircraft can exercise the right of freedom of navigation and over flight solely for the purpose of “continuous and expeditious transit”. The Strait of Malacca and the Strait of Singapore are categorised under straits used for international navigation.

When exercising the right of transit passage it is the duty of foreign ships and aircraft to proceed without delay through or over the straits. The ships also must refrain from making any threat or use of force against the sovereignty, territorial integrity and political independence of the bordering states. Foreign ships and aircraft are prohibited from taking any military or non-military postures that can be construed by the coastal states as undermining their security. Such posture include naval patrols as well as training flights by foreign forces which are considered inconsistent with transit passage rights in the straits used for international navigation.

It is a well-established right that foreign ships and aircraft can proceed through and overfly the straits in a normal mode.<sup>21</sup> This has been interpreted also as the right of submarines proceeding submerged, not allowed under innocent passage. But the situation is complex. Clearly there is no legal basis under international law for a third party to conduct enforcement action in strategic sea lanes when part of the passage falls into what is the territorial sea of a sovereign nation in every respect other than transit passage. The situation would change however if the littoral states requested foreign military help to patrol their own sector of the straits. Foreign vessels flying their state flags may in turn claim the right to defend their own ships (as floating part of their territory) by their own warships, but this could still be regarded as usurpation of coastal state rights in straits, and a possible threat.

### **3.6. Limits of National Control**

The frictions between strait States and foreign shipping relate to the interpretation of sovereign rights in the Straits. Malaysia and Indonesia are the only two states bordering the Straits of Malacca while Singapore, whose shorter strait links up the Strait of Malacca on its western side, is not. Singapore clearly has the right to invite a third party to patrol its own side of the much shorter Strait of Singapore, but there is no legal basis under the UN Convention 1982 or international law for her to extend the invitation to patrol the Strait of Malacca to which she is not a littoral state. While admittedly, Singapore's economic dependency on the Strait of Malacca is greater than that of Malaysia and Indonesia, the island's open invitation made to the United States (when) to patrol the longer strait has raised serious concerns in Malaysia and Indonesia.

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<sup>21</sup> *UN Convention 1982 Article 39(1)(b).*

UN Convention 1982 provides for the sovereignty of a coastal state to include internal waters and ports, territorial sea twelve nautical miles from coast, archipelagic waters within the baselines and parts of straits used for international navigation that are within territorial sea. Under the UN Convention 1982, littoral states to the straits can therefore deny passage that is not innocent in their twelve miles territorial waters, and they can suspend passages, at least for a short time. On the other hand, in straits used for international navigation, the neighbouring coastal states cannot hamper transit passage (Article 44).

Furthermore, the littoral states are required to follow the International Maritime Organization regulations to ensure navigational safety. During the UNCLOS negotiations Malaysia and Indonesia fought hard to limit the passage of deep draught vessels and the Very Large Crude Carriers (VLCCs) through the strait to avoid possible collisions, groundings, and oil spills.<sup>22</sup> This was a futile attempt, as under the transit passage rules the littoral states have no control over the transit passage other than in agreement with IMO on traffic separation schemes.<sup>23</sup>

It was perceived by the littoral states during negotiations that they had to concede on navigational rights. What the littoral states continued to argue was their right alone to provide for security, and have rejected attempts by a third country to patrol the straits. It is argued by the strait states that this goes against the meaning of transit passage which limits the passage for the “sole purpose of continuous and expeditious transit of the strait between one part of the high seas or an EEZ and another part of the high seas and EEZ”. Furthermore, in areas of where national sovereignty applies it is doubtful under the current

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<sup>22</sup> For further reading read, for example M. Liefer, above, page 53-76. See also, J.N.Mak, “Unilateralism and Regionalism: Working Together and Alone in the Malacca Straits” paper presented in *Workshop on Maritime Security, Maritime Terrorism and Piracy in Asia*, 23-24 September 2004, Singapore, pages 11-17.

<sup>23</sup> J.N.Mak, note 22 above, pages 10-12.

legal regimes if acts of sending warships and armed speedboats from elsewhere can be considered innocent.

Taking these various legal points together, Indonesia and Malaysia have perceived the United States intention to patrol the Straits by linking piracy and terrorism together as another attempt to weaken their control over the Straits and of doubtful legality. It is argued that involvement of a third party in this way will introduce a new security dimension in the enforcement regime of the strait and creates a precedence that will further erode control by the littoral states. Much of the debate on these rights and obligations rests on the distinction between piracy, sea robbery and terrorism. Establishing this requires examination of the precise actions and objectives of illegal groups operating in the region.

### **3.7. The Activities of “Pirates”, Sea Robbers and Terrorists**

In the past a pirate is one who robs or plunders at sea without a commission from a recognised sovereign government. The pirates usually target other ships but have also attacked targets on shore. As discussed earlier in Chapter 1 there is no legal definition of pirates in international law, only the definition of the act of piracy as enshrined in Article 101 of the UN Convention 1982. While most states have the offence of robbery in their penal law the offence of “piracy” is not always available. Most modern legislations would consider petty theft at sea or act of robbery on board of ships or attacks on ships for monetary gains while in territorial sea as “robbery” and the offender “sea robbers”.

Unlike pirates or sea robbers who employ unlawful acts for the simple aim of monetary gains, defining or making distinction between insurgent and terrorist groups is not always

easy as there is a tendency to lump together a group of people ready to die to realise their political or religious tendency with separatist group organized to respond to long-standing political or economics alienation from those in power. In the region, there have existed groups fighting for separation from the central government since the countries gained independence. They are to be found in the Aceh province of Indonesia, Mindanao in the Philippines and in Thailand, and the heavily populated Muslim regions bordering Malaysia in its southern region. In general, piracy is committed for financial gain while terrorism (maritime or otherwise) is perpetrated for political objectives.

There are, according to the Malaysian authorities' knowledge and investigations, various illegal groups operating in the straits. These are:

- (i) The Gerakan Aceh Merdeka (GAM) or the Free Aceh Movement – operating mainly in the northern region.
- (ii) Various separately organised 'thugs' operating in the Southern region in the waters of Johore and the Singapore Straits. These comprise two major groups from (a) Palembang, Batam and Karimun Islands and (b) from Bengkalis.
- (iii) Elements suspected by Malaysia to originate from within the Indonesian maritime enforcement agencies, including the TNI-AL (the Navy), the POLAIR (marine police) and others. Their area of operation appears to be in the central region near the disputed international border between Malaysia and Indonesia.<sup>24</sup>

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<sup>24</sup> This is a conclusion by the researcher after extensive interviews and personal communication with Malaysian fishermen, enforcement agencies' personnel and other sources.

Officially, until the completion of the field study in August 2004 there were no arrests of ‘pirates’ in the Straits of Malacca. Based on police intelligence sources in 2002 a group of Indonesian were caught off Johore coast while smuggling goods into Malaysia. Although they were caught in a boat that fit piracy activities they were treated as common criminals because of the lack of evidence of piracy as defined in the conventions. They were released after it was revealed that they were Indonesian Navy personnel.<sup>25</sup>

The modus operandi of these various groups will now be examined in detail to help determine their status under current law. These are complex issues and need close examination through case studies. Always there is the problem that “one man’s terrorist is another man’s freedom fighter”. This should, however, be less ambiguity when it comes to robbery, or attacks on innocent civilians.

### **3.7.1. The Free Aceh Movement or *Gerakan Aceh Merdeka* (GAM)**

The Free Aceh Movement (*Gerakan Aceh Merdeka* (GAM)), also known as the Aceh Sumatra National Liberation Front (ASNLF), is an armed Islamic group seeking independence for Aceh on Sumatra from the rest of Indonesia.

Since 1959 Aceh had been granted special status by the Indonesian central government which allow Islamic laws and traditions greater prominence. However this changed under the Suharto regime in the 1970s which preferred centralization partly due to Aceh’s rich resources. GAM responded with a declaration of independence and self-determination in

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<sup>25</sup> These facts were revealed during the researcher’s investigation with a number of Malaysian enforcement officers in July 2004.

1976. The causes of complaint by the GAM were primarily on the perceived threats to Acehese culture and Islamic religion from the central government which they proclaimed as 'neo-colonial' and encouraging mass migration from Java. Another issue is the uneven distribution of income from Aceh substantial natural resources of minerals, petroleum and timber.

Despite alleged aid from Iran and Libya in the 1980s the guerrilla war waged against the central government was unsuccessful and it failed to get the support of the people as a whole. The central government continued with repressive measures on the Aceh population to alienate them from aiding GAM. From 1991 to 1995 the area was given the designation 'Operation Military' and in 1996 the Indonesian government announced the end of GAM. The Indonesian National Army (TNI) presence in the region was not subsequently greatly reduced and reports of arrests, torture, and extra-judicial killings continued and both the military and GAM were often accused of human rights abuses.

There was a brief ceasefire after the toppling of Suharto in 1998. Presidents B.J. Habibie and Abdul Rahman Wahid both favoured direct negotiations with the rebels and in 1999 a troop withdrawal was announced but the military presence remains high. Hostilities continued after further negotiations failed during the Megawati Presidency and the troop numbers are believed to have risen to around 35,000 by mid 2002. Security 'crackdowns' in 2001 and 2002 are reported to have resulted in several thousand civilian deaths.<sup>26</sup>

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<sup>26</sup> Refer *Asian Pacific Security Outlook 2004*, Japan Center for International Exchange, 2004, Tokyo, page 102.

Following a breakdown of talks with the Indonesian Government held in Tokyo on May 17-18, 2003, the Indonesian Government imposed martial law in Aceh province and launched a massive military operation against the rebels. Despite repeated claims of success by the military, however, the war in Aceh continued. By the end of the first six months of an 'Operasi Terpadu' (Integrated Operation) the military claimed to have killed 1,106 rebels, arrested 1,544, forced 504 to surrender, and seized 488 weapons (approximately 30 percent of the estimated GAM weaponry). With these results, the military believed that it had reduced GAM's strength by 55 percent.<sup>27</sup>

This GAM conflict, over the period expanded to the sea and has affected the security of the Straits of Malacca, in particular the northern waters. During the corresponding time many fishermen from Malaysia reported harassments by gunmen who claimed to represent the GAM, and they collected dues for the Nanggroe Aceh Darussalam.<sup>28</sup> Many boats operating in the waters of Pulau Perak and Langkawi have lodged complaints that they have had to pay RM 400 a month for each boat as a levy to GAM, or risked action from them. As a consideration of cooperation and payments, the GAM issues a permit 'legalizing' fishing in these waters. (See Document I). There have been reported cases of Thai fishermen being kidnapped and taken to the GAM army base in northern Sumatra. Some aspects of these collected reports are given below. They are important in showing the characteristics of this common category of assault at sea and the hidden elements which affect both diplomatic and legal solutions. They are the evidence from which the actions of pirates or terrorists can be cited in courts.

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<sup>27</sup> See *Asia Pacific Security Outlook 2004*, note 26 above.

<sup>28</sup> Aceh's official name which means 'State of Aceh, the Peaceful Kingdom.'

## Document 1:

### Fishing Permit Issued by the Gerakan Aceh Merdeka (GAM)

**Surat Izin Operasional**

Kami Tujukan kepada : No. Seri : 83  
Nama Perusahaan : KHF  
Alamat Perusahaan :  
Kode / No. : 1321

Surat ini sebagai tanda lunas iniad/pajak untuk negara Aceh Sumatra.  
Panglima Wilayah Langkat

Mengetahui :

1. Tgk. Muzakir Manaf  
(Panglima Komando Pusat Di Tiro)
2. Tgk. Kamaruddin Abubakar  
(Komandan Operasi Pusat Di Tiro)

Tgk. Ibrahim

Acheh Sumatra National Liberation Front

Source: Obtained From a Malaysian Fisherman.

*Translation: "Operational Permit", serial no: 83; Industry: KHF (Malaysian Fishing Boat); Code No. 1321. Issued under the orders of Tgk Ibrahim, Head of Langkat Territory, Aceh and with the knowledge of (1)Tgk Muzakir Manaf (Head, Central Commando, Tiro) and (2) Tgk Kamaruddin AbuBakar (Commandant, Central Operation, Tiro).*

#### 3.7.1.1. Case Study I

This is a record of fisherman Y who was attacked and shot by several Indonesian men believed to be from GAM in 2003.<sup>29</sup>

On 28 May 2003 about 1530 Hrs Mr Y and four other fishermen were fishing in Malaysian waters 12 nautical miles from Pulau Sembilan, Pangkor, Perak. Suddenly a Thai boat without registration number turned up with 10 men believed to be Indonesians armed with automatic weapons. The pirates then fired approximately 30 shots to the fishing boat causing injury to Mr Y on the right thigh. The pirates' boat later approached the fishing boat and ordered Mr Y and his crew to board their boat and the pirates took over Mr Y's boat together with Mr Y's brother in law and one of his workers. The pirates left the scene with the abducted fishermen in the fishing boat towards Indonesian waters.

<sup>29</sup> This is based from researcher's interview with Mr Y in July 2004.

Mr Y and his crew were left behind in the pirates' boat where they later were rescued by another passing boat. Mr Y was taken home and hospitalised for the injuries sustained in the incident.

Two months after the incident on 31 July 2003 Mr Y received a call through his mobile phone from an Indonesian man claiming to be from the GAM informing that his brother in law and another fisherman were detained in Aceh and asked for RM500,000 ransom money for their release. After negotiation the man agreed to reduce the sum to RM50, 000. Mr Y was allowed to speak to his brother in law to ascertain his safety.

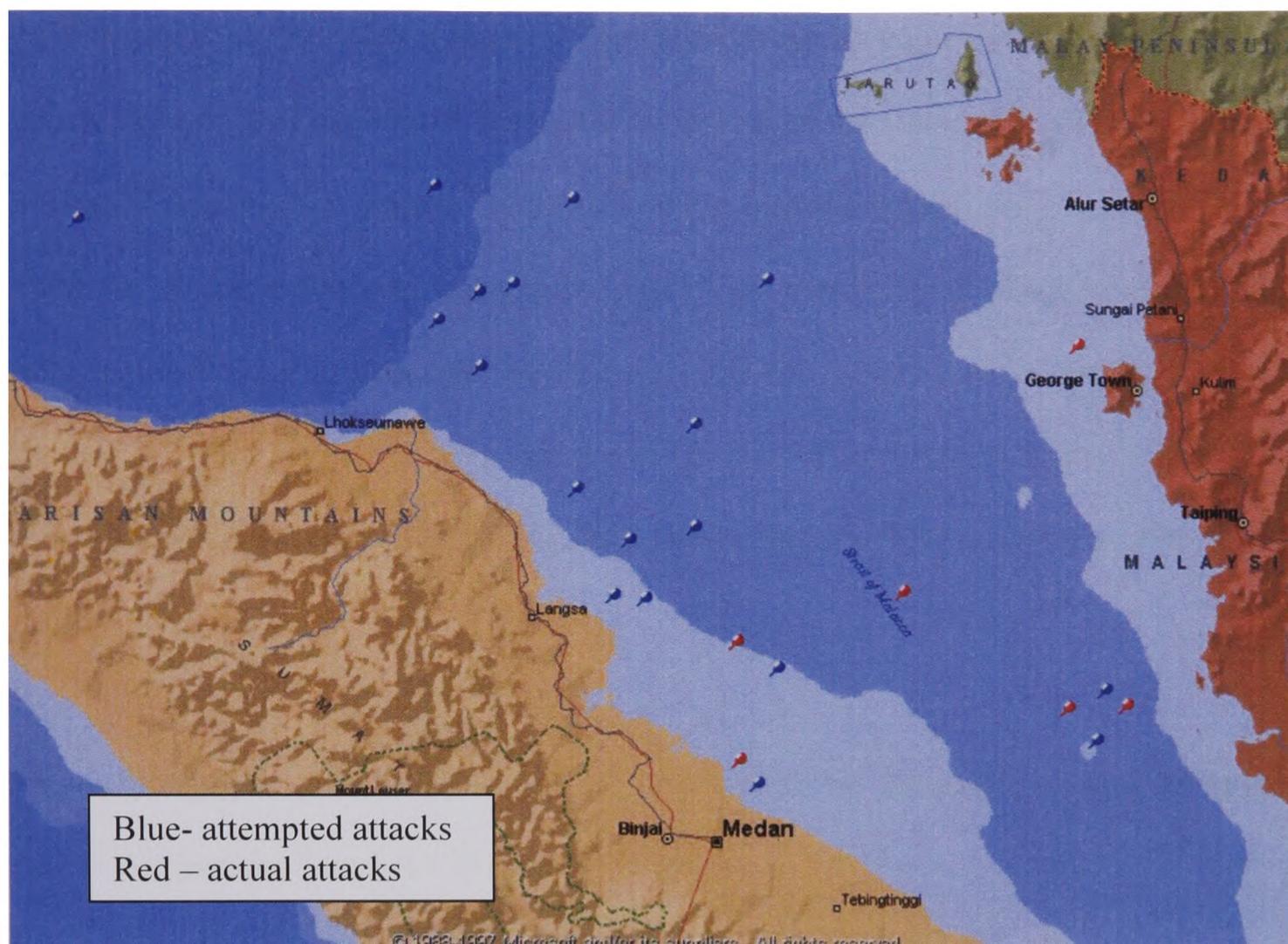
The man ordered Mr Y that the ransom money is handed over to Mr Y's long standing friend named Ah Lee (not a true name) who lived in Medan, Indonesia. The money was supposed to be handed to the GAM at an undisclosed location in Sumatra. After the ransom money was handed over to Ah Lee Mr Y came to know that his brother in law and his friend had escaped from the GAM hideout during skirmishes between the GAM and the Indonesian Army and they were under safe custody of the Indonesian police. This incident happened some time in August 2003. Through the help of the Malaysian Consulate in Medan Mr Y brother in law and his worker arrived safely home in September 2003.

According to Mr Y's brother in law, after he was abducted with his Thai worker, they were taken to a place called Langsa in Aceh where they were kept in a hut guarded by two armed guards around the clock and given two meals each day. During the time there Mr Y's brother in law, his worker and other detainees were always moved from one place to another to avoid the Indonesian Army. The guards claimed that they belonged to the GAM and wore military attire with red beret with a tiger symbol. During one of the battles between the GAM and the Indonesian Army Mr Y's brother in law and his worker managed to escape after their hut was left unguarded. The Indonesian Police later rescued them.<sup>30</sup>

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<sup>30</sup> It was later revealed that the boat carrying the ransom money was scuttled after being shot at. Mr Y claimed that he sustained the loss of the boat worth RM500,000 and the RM50,000 ransom money that went down together with the boat.

## Map 6 “Piracy” Incidents in the Northern Region of the Straits of Malacca 2003



Source: Locations based on the *IMB's Annual Report 2003*  
Map: Courtesy of Iskandar Sazlan Mohd Salleh (August 2004)

### 3.7.1.2. Case Study II

This is a record derived from fisherman Mr X who was kidnapped together with four other fishermen in a northern part of the Straits of Malacca in early 2004.<sup>31</sup> In the interest of brevity, although without minimising the importance of such a record, the case has been entered in Appendix 13.

<sup>31</sup> This was based in verbatim from a report lodged to the Royal Malaysian Police made available to the researcher. According to the police investigation officer, it was a normal practice for Malaysian fishing boat owners to employ Thais as workers to reduce the operating costs.

The cases above demonstrated the severity of what can be construed “piracy” attacks aimed at the most vulnerable victims, the fisherman. The ability of the GAM to extort money from the fishermen has become a cause of great concerns in Indonesia because intelligence reports showed that the GAM was able to arm itself by using the extortion money to purchase weapons in southern Thailand.<sup>32</sup> Many security experts were puzzled as to the inabilities of the Indonesian security forces to curb the incidents given the facts that the Aceh region had been surrounded by the Indonesian armed forces in the last few years. This has led to the suspicion of connivance by the authorities at some levels. These complications which extend across the littoral states have political implications for relations within the region.

### **3.8. “Piratical Attacks” Said to be committed by Elements within Indonesian Authorities<sup>33</sup> and the Malaysian Dilemmas.**

There is a firm belief among Malaysian fishermen and maritime enforcement departments that Indonesian officials are involved in attacks at sea. There was no suggestion or certainty that the atrocities directed primarily towards Malaysian fisherman are organized officially, but the lackadaisical attitude of Indonesian authorities only strengthen the belief held by their Malaysian counterparts that these activities are within the knowledge and ultimate control of officialdom.<sup>34</sup> The attacks were reported in the Malaysian media, but the issue

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<sup>32</sup> This information was based from the researcher’s private communications with several Malaysian security personnel, July-August 2005.

<sup>33</sup> For better understanding on the issue see for example, Damien Kingbury, et al., “East Timor border security” in Damien Kingsbury (Ed.), *Violence in Between Conflict and Security in Archipelagic Southeast Asia*, ISEAS, Singapore, 2005, pages 280-292 which detailed the Indonesian Armed Forces (TNI) involvement in business and some other illegal activities such as smuggling a mean to support the grossly inadequate pay of the lower ranked members of the forces in East Timor.

<sup>34</sup> A conclusion the researcher made after extensive interviews with various Malaysian maritime enforcement officers. One in particular admitted that he has brought this to the attention of a senior

died down after a senior official put the blame squarely on Malaysian fishermen who “are believed to have encroached the Indonesian waters and tried to run away”.<sup>35</sup> This incident is not isolated because before that there have been similar incidents, although no deaths were involved.

The lukewarm responses of the Malaysian authorities to the fisherman’s plight indicated the dilemma for them when dealing with this very sensitive issue due to the improving relationship in other respects between Malaysia and Indonesia in recent years.<sup>36</sup> The Malaysian authorities find it expedient to ignore this problem in order to safeguard “the greater national importance”.

Malaysia depended heavily on Indonesian migrants to work in domestic, agricultural and construction sectors. Since 1980’s, millions of Indonesian workers entered Malaysia without proper documents. These illegal immigrants had helped Malaysia to become ASEAN’s most successful economy after Singapore. But they were also blamed for the rising crime.

There have been numbers of police reports lodged to the Malaysian authorities regarding this matter but so far none has been investigated to the final stage due to non-cooperation

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Indonesian officer during the annual border meeting between the two countries. The name of one officer alleged to be involved in these attacks was made known and he was found out later transferred to other assignments.

<sup>35</sup> In this incident on 25 June 2001 one fisherman was shot dead in Malaysian waters. It was widely reported by newspapers and it was also reported that more than 1000 fishermen refused to go fishing after Malaysian authorities did not take appropriate actions after complaints were lodged.

<sup>36</sup> Malaysia under Prime Minister Mahathir Mohamed had a long and close relationship with President Suharto. After the ‘reformasi’ demonstrations in 1998 President B.J.Habibie replaced Suharto and after a free election Abdul Rahman Wahid was elected president. At the same period, Mahathir was facing discontents due to the dismissal and subsequent imprisonment of his deputy Mr. Anwar Ibrahim who were perceived to have close personal relationships with Indonesian post-Suharto leaders such as President Habibie, President Abdul Rahman Wahid and Amien Rais, the Speaker of the Upper House of Parliament who frequently made remarks against Malaysia over Anwar Ibrahim’s issue.

by the Indonesian authorities. The question of Indonesian enforcement officers' involvement in piratical attacks, ransom taking and border encroachments<sup>37</sup> has always been carefully avoided during annual border meetings to protect the so-called 'kita satu rumpun' (we are from one single race stock) and 'semangat kejiranan' (neighbourhood spirit').

What is seen here is the 'give and take' of politics which sometimes overrides legal aspects – and possibly rightly so, but it does add to the complexities of control of unlawful acts at sea. A similar complexity arises out of tacit informal agreements between some fishermen and various authorities. This again may be best appreciated from a unique case study which follows the details of a process.

### **3.8.1. Case Study III**

Mr Lim Ah Ba (not a real name) is a fisherman who owns a deep sea fishing fleet in a fishing village Tualang Tiga (not a real name) along the coast of Straits of Malacca. He always made a good catch in the Malaysian waters near the international border with Indonesia. This is his account.<sup>38</sup>

“On 14 December 2003 at 8.30 am I received a call from one boat belonging to my brother that his boat and two other boats have been detained by Marine Police Indonesia and towed to Pulau Belawan near Medan, Indonesia. He said he needs to pay 250 million Rupiahs to secure the release of the boats and 14 crews. On 15 December 2003 I received a phone call from one of the captors and we negotiated about the sum. I agreed to pay RM 100,000 first at sea. I went there at midnight

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<sup>37</sup> See for example, *Feasibility Study Report to Establish the Coastguard*, Prime Minister's Department, Kuala Lumpur, 2002, page 26.

<sup>38</sup> Based on the researcher's private communications with the fisherman involved in this incident in July 2004.

with an assistant and upon reaching the agreed location at the international water a grey-coloured fibre boat bearing no. 401 with 7 people in it approached my boat and the money changed hands. After that in the morning my brother and others were released. They were given a map and bearing to head home from Pulau Belawan. A few days later I received a phone call from one Bambang (not real name) threatening to kill me or my crew because I did not pay the remaining RM 150,000 as agreed. I felt threatened and I decided to make a police report.”

The Royal Malaysian Police investigated the matter and found that on 12 December 2003 the fishing boats left Tualang Tiga at 1.30 am and upon reaching 30 nautical miles from Sekinchan started to fish. They fished there for two days uninterrupted until 14 December at 8.30 when a grey boat bearing words “Polisi” came and some men in uniform boarded the fishing boat no PKFA 7888 after firing warning shots toward that boat. One of the men asked the fisherman to call his “towkay” (boss) and asked for RM100,000 to be paid from them.

The fact that the alleged incident happened at the middle of the sea made it difficult for the Malaysia Police to determine the exact location. The matter was then referred to the International Police (INTERPOL) but to date there is still no progress because there is no reply from the Indonesian side.

The above incident is not isolated. For the past few years there have been similar complaints by fishermen to the Malaysian authorities. Due to lack of response from the authorities, the fisherman resorted to “secret negotiations” with the Indonesian perpetrators.

The Fisheries Department of Malaysia played down the issue partly because most of the fishermen involved are from ethnic Chinese background and they are known “to be opportunistic” by fishing into the Indonesian side of the Straits. A recent operation by the Malaysian maritime enforcement authorities discovered the sightings of Malaysian boats fishing inside the Indonesia maritime territory.<sup>39</sup> This is denied by the fishermen who

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<sup>39</sup> Interviews with Fisheries Department officers and the Malaysian Marine Police.

adamantly said that they are fishing within the permitted zone and all the boats are guided by Global Positioning System (GPS).<sup>40</sup>

The reality is that Malaysian waters fish stocks are dwindling and the fishermen know this. It is a fact that no Malaysian authorities would admit. The high demands on sea resources due to Malaysian increased domestic income coupled with the specific dwindling stocks of fish in the Malaysian side of the straits has made some of the deep-sea fishing fleets encroach on the Indonesian EEZ, but after paying agreed substantial sums to the Indonesian maritime enforcement personnel. This has been tacitly encouraged by the Malaysian authorities, while at the same time seeking judicial and physical measures to curtail it. It is further compounded by, in places, the extent of jurisdiction at sea with overlapping claims.

### **3.9. Overlapping Claims at the North End of the Straits**

Malaysia and Indonesia both claim twelve nautical miles of territorial sea but the issue of using offshore islands for base lines results in very wide territorial zones (Map 7). On 7 November 1969 the two countries entered into an agreement to delimit continental shelf boundaries between them (Text of Agreement is at Annex 1) by drawing the base lines giving effect to the offshore islands. According to Forbes:

The geographical coordinates of six terminal points and 19 turning points define the continental shelf boundary between the two states in the Malacca Straits and in the South China Sea. The delineated boundary represents an attempt at dividing the shelf equally between the territorial sea baselines of the two states. Although Indonesia had declared its baseline system, that of Malaysia's was inferred. The negotiated boundary comprises three separate segments. The overall length of the boundary is 978 nm; the average length of each geodesic being 44.45nm. All three segments of Indonesia/Malaysia continental shelf boundary were drawn on the

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<sup>40</sup> Mr Y in interview, see footnote 26 above.

principle of equidistance. Distance offshore islands in the Malacca Straits and off the east coast of the Malay Peninsula were given full effect with respect to the first two segments. However, the Indonesian islands located northwest of Tanjung Datu were not given full effect due to concessions offered to Malaysia by Indonesia in order to gain its support for Indonesia's archipelagic claim. Malaysia entered this continental shelf agreement prior to signing a territorial sea boundary agreement between the two states. It can be argued that political, strategic, environmental and economic considerations were factors that affected not only the actual location of the boundary but also the timing of the delimitation.<sup>41</sup>

As will be appreciated also from Map 7 and 8 without precise GPS it is difficult for fishing boats and other less-equipped vessels to establish their exact locations in relation to these lines. This results in confusions among Malaysian, Thais and Indonesian fishermen who fish regularly in this fertile fishing ground. This also brings about the question of effective enforcements in the area.

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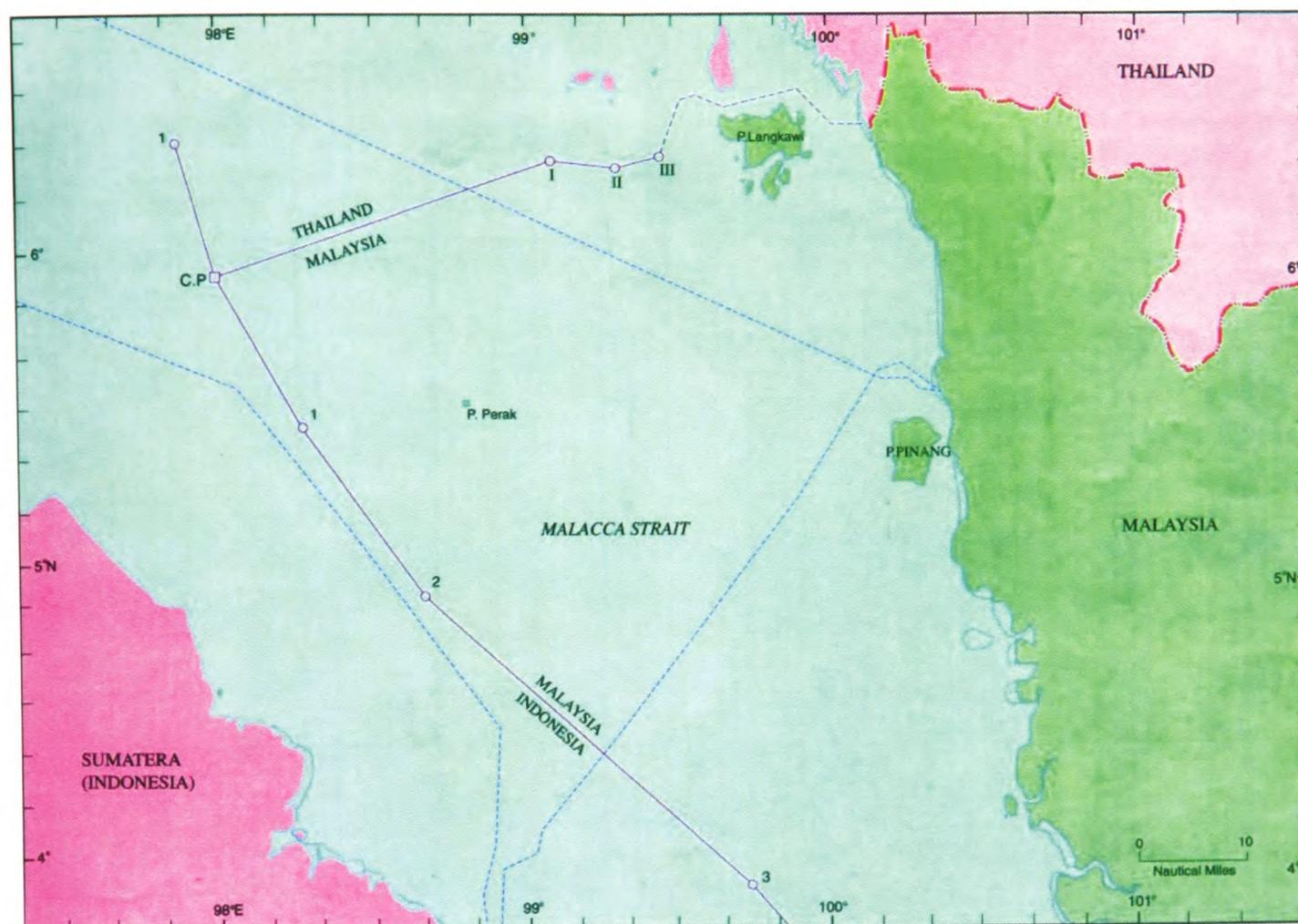
<sup>41</sup> Vivian L Forbes, *Indonesian Maritime Boundaries*, Maritime Institute of Malaysia, Kuala Lumpur, 1995, page 22.

**Map 7**  
Malaysia- Indonesia Continental Shelf Delimitation in the Straits of Malacca



Source: Vivian Louis Forbes and Mohd Nizam Basiron, *Malaysia's Maritime Space Atlas*, Maritime Institute of Malaysia, Kuala Lumpur, 2002.

**Map 8**  
**Tri-junction Point (C.P) between Malaysia, Indonesia and Thailand**  
**on Northern Part of the Straits of Malacca**



Source: Vivian Louis Forbes and Mohd Nizam Basiron, *Malaysia's Maritime Space Atlas*, Maritime Institute of Malaysia, Kuala Lumpur, 2002

### 3.10. Piratical Attacks by Groups of 'Thugs' in Southern Region of the Straits

In the southern region of the Straits of Malacca between Batu Pahat waters in the Malaysian State of Johore to the Riau islands in Indonesia, the pirates are not organized as a whole.<sup>42</sup> They belong to groups of *samseng* (thugs) also known as *preman* in the Indonesian language. They come from the cluster of Riau Islands including Pulau Karimun, Tanjung Balai, Palembang, Batam, Bintan, Tanjung Pinang and Bengkalis. Tanjung Pinang is the old capital of the Province of Riau before Pekan Baru (Map 9).

<sup>42</sup> This is based on private communication with ACP Aziz Yusof, Commander, Southern Region, Marine Police of Malaysia on 20 August 2004.

## Map 9 “Piracy” Incidents in Southern Part of the Straits of Malacca, 2003



Source: Locations based on *IMB Annual Report 2003*

Map: Courtesy of Iskandar Sazlan Mohd Salleh (August 2004)

The modus operandi of this group is simple – the leader will take his group to sea for fishing and while at sea he will instruct his men to rob merchant ships underway or fishing boats. Sometimes these different groups will informally combine forces at sea, speedboats are used and the crew are armed with pistol, machetes and *parang*. These pirates will “link-up” their boats at the back of the ships underway and will board the victim ship without the ship crew realising it until too late. This modus is effective because the southern part of the Strait of Malacca is geographically quite narrow especially the area stretching from

Tanjung Tohor to Parit Jawa and it is vulnerable to ships because the shipping passage is inside the Indonesian area which is less guarded compared to Malaysian waters.

Their method of attack is confirmed in the 2003 ICC-IMB Annual Report,

“...also the increase in co-ordinated attacks by several boats at once to approach a target ship from different directions and spray the superstructure with gunfire in an attempt to get her to stop. Most frequent in the Malacca Strait and around Bintan Island, this type of action led to the death of several crewmembers even when the attack ultimately failed to get the pirates onboard.”<sup>43</sup>

One of the traits of the pirates operating in this area is that they are well-versed with the ships and some of them can use boarding tackle very efficiently as if they have previous “military training”. The Malaysian Marine Police recently arrested two groups of such pirates in port at Batu Pahat, Johor. However, as they were not caught at sea, they were classified as “common criminals” involved in many other illegal activities such as smuggling goods, cigarettes, theft, theft of *sampan* among others. Due to lack of operational evidence the charges were not brought against them in court of law. Figure VIII shows where this type of operation regularly takes place.

An example on how pirates operate in this area is shown in the IMB report for 2003:<sup>44</sup>

On 10 August 2003, A Malaysian tanker *MT Penrider* was attacked and hijacked by armed pirates in position 02 47.5N – 101 05.3E at approximately 1330 Hrs LT. The *MT Penrider* was en route from Singapore to Penang, Malaysia when she was hijacked by armed pirates while navigating inside the North bound Traffic Separation Scheme in the Malacca Straits.

About eight pirates in a fishing boat armed with automatic machine guns chased and opened fire at the tanker. They managed to board the tanker and took all 10 crew members including the Master hostage. They ordered the Master to divert the ship crossing the traffic separation scheme and into the vicinity of Pulau Jemur, Indonesia. At 2010 Hrs LT, the pirates left the tanker on a fishing boat, kidnapping the Master, Chief Engineer and the Greaser for ransom. They also stole crew

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<sup>43</sup> ICC-IMB Annual Report 2003, page 16.

<sup>44</sup> ICC-IMB Annual Report 2003, page 20.

personal belongings, cash, ship's documents and certificates. At 2015 Hrs LT, the Chief Officer took command and sailed the tanker to Penang, Malaysia. The tanker arrived Penang Inner anchorage on 11 August 2003.

The pirates later demanded USD 100,000 for the release of the three hostages. After protracted ransom negotiations, the hostages were returned unharmed.

During Megawati's tenure as president, the number of reported piracy cases in the Straits of Malacca and all other Indonesian waters spiralled out of control. This could be attributed to the instability in Indonesian politics and the less prominent role played by the army. This trend alarmed neighbouring countries especially Singapore which economic survival depends very much to the safekeeping of its port and the sea lanes. After one incident of piracy where an oil tanker was left pilotless in the busy Strait of Singapore, Singapore sent its Deputy Prime Minister to meet Megawati in Indonesia. There was a marked improvement of the situation after that and this led to the belief that Indonesia has the ability to put the piracy under control and "it seems that Indonesia works better under pressure"<sup>45</sup>.

The perception that Indonesia has the means to suppress piracy is highlighted by Muhammad Muda:<sup>46</sup>

"To my mind, it is easy to identify the pirates because they used boats.... speed boats, which must be docked somewhere. As in the Peninsular, all coastal villages Indonesia have police stations. I am sure that, given their weak economic background, not many of them could afford speedboats. Furthermore, speed boats must be registered. If a proper investigation is made, I am pretty sure that the perpetrators could be arrested and charged. They would know the syndicates which supplied the boats to the pirates, even"<sup>47</sup>.

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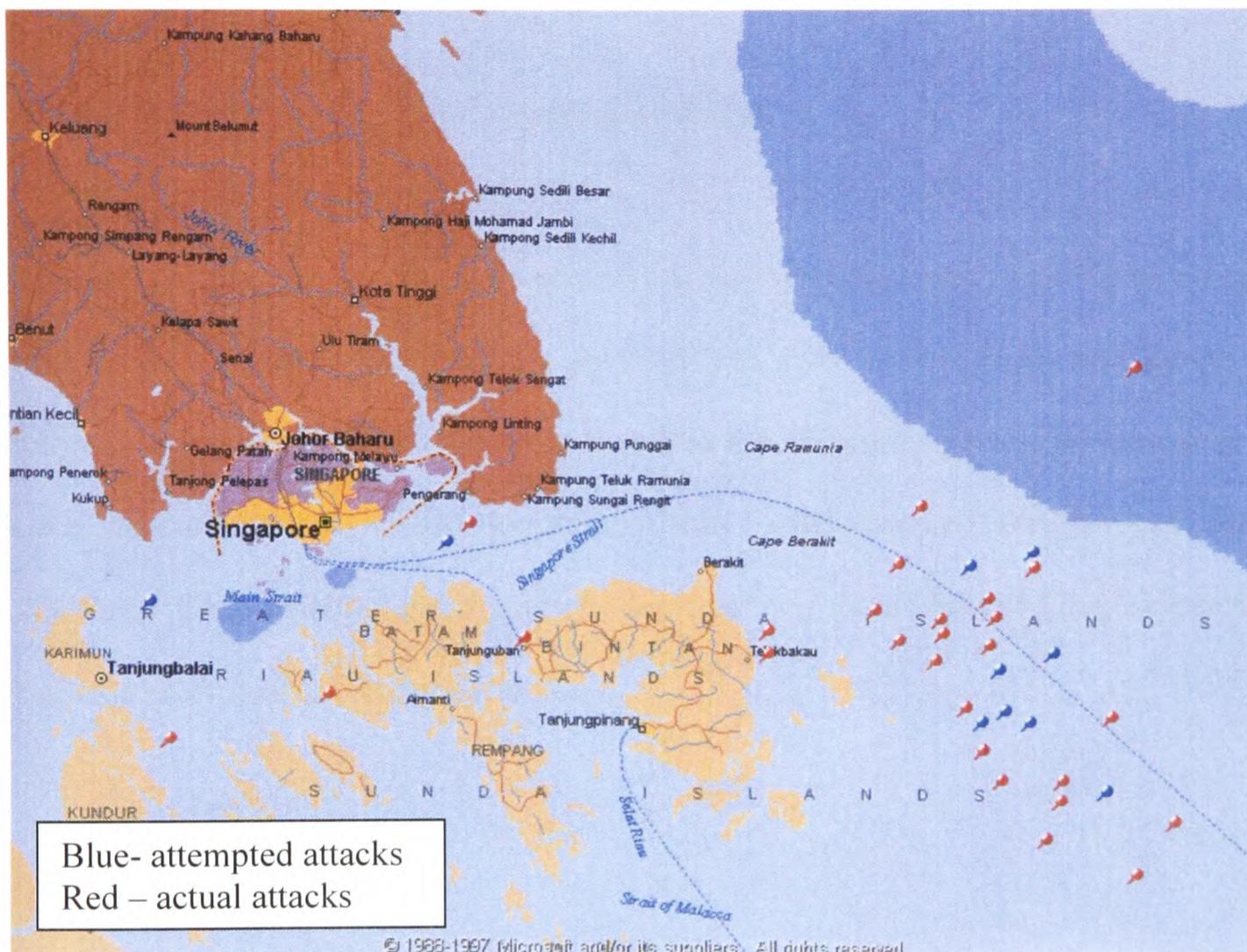
<sup>45</sup> Interview with Noel Choong, Director, Piracy Reporting Centre, Kuala Lumpur, July 2004.

<sup>46</sup> Head, Malaysian Marine Police 1998-2003.

<sup>47</sup> Interview with Muhammad Muda, conducted in Putrajaya, August 2004.

The view that Indonesia has not done enough is not new. In early 1990's there were signs that Indonesian had stepped-up actions to contain the problems and there were reports that the naval personnel had successfully arrested 30 pirates in the Straits of Malacca,<sup>48</sup> however the outcome of these arrests was not made known to the outside world.

**Map 10**  
**“Piracy” Incidents in Southern Part of the Strait of Malacca and Singapore and Around Riau Archipelago (Indonesia), 2003**



Source: Locations Based on *IMB Annual Report 2003*  
 Map: Courtesy of Iskandar Sazlan Mohd Salleh (August 2004)

It is clear from Map 10 that numerous piracy attacks occurred within or near Indonesian waters off Bintan Islands and near the Riau Archipelago. The IMB noted that piracy here

<sup>48</sup> Robert C. Beckman, “Acts of Piracy in the Malacca and Singapore Straits”, *Maritime Briefing*, IBRU, University of Durham, 1994, page 16.

were conducted through co-ordinated attacks by several boats at once to approach a target ship from different directions and spray the superstructure with gunfire in an attempt to get her to stop. This has resulted in a number of deaths even in abortive attacks.<sup>49</sup> The Map 12 confirms the distributional bias towards Indonesia which makes control by other littoral states difficult and legally sensitive as the issue of hot pursuit into territorial waters of another state will certainly spark off tensions between neighbouring countries whose territorial sea boundaries are still unresolved.<sup>50</sup>

### **3.11. Decided Cases on Piracy-Related Offences**

Malaysia follows the English common law system with extensive modifications after its independence in 1957. All laws are codified into Acts of Parliament and judges' main function is to apply and interpret laws based on established English legal principles. Until now, Malaysia has no exclusive legislation dealing with piracy or other maritime offences. The Penal Code which stipulates its criminal law was based from the Indian Penal Code contains no provisions on crimes at sea.

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<sup>49</sup> *ICC-IMB Annual Report 2003*, page 16.

<sup>50</sup> In Map 7 there are two areas where the territorial sea boundaries between Indonesia, Malaysia and Singapore are still unresolved; the first one is the southern end of the Strait of Malacca, that is, where it merges with the western end of the Strait of Singapore and secondly at the eastern end of the Strait of Singapore in the direction of the South China Sea. See Mark J. Valencia, *Malaysia and the Law of the Sea: Foreign Policy Issues and Options and their Implications*, ISIS, Kuala Lumpur, 1991, page 31. The dispute between Malaysia and Singapore over the ownership of Horsburgh Lighthouse on Pedra Blanca (Batu Puteh Island) is currently awaiting determination in the International Court of Justice (ICJ).

Extensive research in the law journals<sup>51</sup> in Malaysia had resulted in a few cases relating to piracy in international law and only one case on a municipal law. They are examined below:

In Regina v. Tunkoo Mahomed Saad & Others<sup>52</sup> the first accused was a member of royalty of the Rajah of “Quedah<sup>53</sup> and the leader of a rebellion against the Siamese who were then occupying the state. The first accused was charged together with a number of his followers under the admiralty court with piracy. The piratical acts charged being the forcible capture on the high seas of a ship and then the custody of the crew who were out in bodily fear of their lives. It was argued on behalf of the accused that the acts did not amount to the crime of piracy because it was committed by the accused and his followers, subjects to the King of Quedah, an independent sovereign state, in just and lawful warfare against the Siamese and the English, their allies; and the acts were done by way of retaliation, and with the sole object of regaining the Kingdom of Quedah from the Siamese, from which their King had been unlawfully expelled, and who was then unlawfully detained a prisoner by the English. The issue before the court was whether the act of the accused and his followers was an act of piracy, or a justifiable act of national reprisal upon a national enemy. In the course of its judgment, the court referred to “Hume’s Commentaries of the Criminal Law of Scotland” which said:

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<sup>51</sup> Malaysia has several law journals which report selected cases decided mainly by the High Court, the Court of Appeal and the Federal Court. The Malayan Law Journal (MLJ) has been in monthly publication since 1932 except in the interim war years 1941-1944. Its predecessor, the Kyshe Report covered major cases in the Straits Settlements and the Federated Malay States Report (FMSLR) provided earlier reports of significant decisions. Within the last ten years a number of new publications have emerged which include the Malaysian Current Law Journal (MCLJ), the All Malaysian Reports (AMR). The Supreme Court Reports (SCR) reports major decisions of the Supreme Court of Malaysia (the forerunner of the present Federal Court), Singapore, Brunei and those of Privy Council (on appeals emanated from Singapore and Brunei as Malaysia had severed its ties with the Privy Council in 1985).

<sup>52</sup> [1840]2 Ky., Cr., page 18.

<sup>53</sup> It is now spelt as ‘Kedah’, a northern territory of the Peninsular which became part of the Federation of Malaysia after the Independence from the British in 1957.

The characteristic of a pirate, and that wherein he differs from a regular enemy, is that he has no license or commission of hostility from any acknowledged state or government; but acts predoniously and carries on a private and indiscriminate war, purely on his own authority, and on no piratical but his pleasure.

It was the opinion of the court that the accused and his followers did not require a license or commission from any higher authority than the accused himself. The accused in conjunction with the son of the former Rajah wielded for many months the entire powers of government in Quedah, and having therefore, a perfect right to direct, much more personally to commit reprisals by sea or land, upon those who had driven him from his country; nor could a capture of enemies' property at sea be called piratical. The court held that the actions of the accused in making reprisals was justified and was acquitted of the charge of piracy.

Regina v. Nya Abu & Others [1886]<sup>54</sup> was an appeal from the accused who were convicted by a jury which also found that the offence was committed at a place more than 3 miles from the nearest beach. The facts revealed that the accused were natives of Rigas in Acheen (Aceh) and charged in Penang of piratically and feloniously making an assault on the high seas and within the jurisdiction of the admiralty, and causing bodily fear and danger of lives to the passengers of a Dutch flagged vessel, robbing goods, merchandise and money on board the vessel. The accused argued that since the vessel were not British subjects nor the vessel attacked, the court had no jurisdiction unless the offence amounted to *piracy jure gentium* and that the accused should not have been tried by a common jury but by a special jury. The court held that the offence amounted to *piracy jure gentium*, and that according to

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<sup>54</sup> [1808-1890] 4 Ky, 1885-1890, page 169.

the British piracy laws<sup>55</sup>, such an offence is punishable with death. It was further held that an accused charged with that crime must therefore be tried before a special jury. Since the accused had been tried for *piracy jure gentium* and convicted by a common jury, the court treated the proceedings and verdict as a nullity and discharged the accused.

In The King v. Chia Kuek Chin & Others<sup>56</sup> the accused were charged with piratically and feloniously assaulting and putting in fear of the lives certain Chinese sailors on board the “*Pong Teng Li*” on the high seas at a point distant one mile from the Johore coast and about twenty miles from the Singapore coast. At the original trial before a high court the special jury found the three accused guilty and sentenced to death. On appeal, the Court of Appeal had to consider whether the court dictum in Regina v. Nya Abu & Others that “*piracy jure gentium* is still punishable by death in this colony” was to be followed. The court referred to successive British Piracy Acts and pointed out that the Piracy Act 1837 revised the penalties provided for in the earlier Acts to the effect that whoever was convicted with piracy and punishable with death was liable for a substitution to imprisonment of natural life or for a term not less than 15 years. The Court of Appeal held that as an appellate court it was not bound by Regina v. Nya Abu & Others and accordingly altered the sentence to one of penal servitude for life.

While all cases cited above originated from the Peninsula Malaysia, one case was discovered to have originated from the Sulu waters immediately after northern Borneo State joined the Malaysian Federation. In Muka bin Musa v. Public Prosecutor<sup>57</sup> the facts of the

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<sup>55</sup> the court referred to the definition of piracy in Digest of the Criminal Law, page 64 and to two other similar cases, i.e., *Rex v. Dawson* 13 St Tr. 454 and *Attorney General of Hong Kong v. Kwok A Sing*, 5 L.R.P.C., page 177.

<sup>56</sup> [1915]13 S.S.L.R.,page 1.

<sup>57</sup> 1964] 30 MLJ, page 275.

case are that on 9<sup>th</sup> April 1962, five persons who can be described as pirates came by boat to a small village on Pulau (island) Omdal off the Sabah coast. They were all armed. One of the pirates remained in the boat while the others went to the village and shot a Chinese shopkeeper and an ethnic Bajau man who worked in the shop, removed some goods and left them in the boat. Almost a year later on the night of 11<sup>th</sup> February 1963 a British warship came upon a boat on the high seas. One of the persons in the boat was Muka bin Musa (the appellant) who was taken into custody. Subsequently, he made a statement before a magistrate, the admissibility of which was not contested at the trial. The confession was the only evidence which connected the appellant with the charge. The appellant was convicted in the high court for the offence of “gang robbery with murder” under section 396 of the Penal Code which is punishable with the death penalty. The appellant appealed to the Federal Court which in turn affirmed the conviction and sentence of death penalty.

It appears that after Muka bin Musa's case above, there was no piracy cases filed in the Malaysian court after 1964. The obvious reason is that there were no arrests made against the pirates to warrant prosecution in a court of law. Due to the absence of arrests and prosecution the legal position of piracy in Malaysian municipal law cannot be determined. It would be interesting to note the court's view on this issue after Malaysia became a signatory to UN Convention 1982 as the applicable rule of international law was different since the limit of national jurisdiction was extended beyond 3 miles from the sea baselines. Since the Straits of Malacca is primarily enclosed within national jurisdictions of Malaysia and Indonesia, it makes it more difficult for the littoral states to arrest pirates because of the definition of piracy under UNCLOS requires it to happen beyond the national boundary.

### **3.12. Conclusion**

The issue of security in the Straits of Malacca which has, in reality, split the region politically is over whether there is a nexus between piracy and acts of terrorism. The basic problem lies in the definitions of piracy and terrorism and when exactly the two overlap.

The thrust of the proposed new international legislations such as the 2005 SUA Protocol and the ISPS Code is towards the rights of states to combat terrorism in any sea area as well as in ports and not the exclusion of places under state jurisdiction as stipulated under Article 105 of the UN Convention 1982. The definition of piracy in the UN Convention 1982 is clearly violence on the high seas beyond the twelve nautical miles territorial sea.

This is problematic in application in the Straits of Malacca where most robberies occur within the territorial sea of littoral states which leaves only a very small sea area to be designated as “high seas” in the northern region of the straits as in Map 5. Furthermore, Malaysia and Indonesia have repeatedly declined any pressures or offers from third parties to help patrol the straits. These two littoral states, in particular, have resisted the use of the word ‘terrorism’ for fear of perceived international interference in their national sovereignty. During their much publicised coordinated patrol in July 2004 the two governments clearly avoided using terrorism as a reason for the exercise. This is not proving acceptable to many users of the Straits.

Maritime terrorism it is recalled can be defined as illegal acts directed against ships, their passengers, cargo or crew, or against port facilities with the political intent of influencing a policy of a government. Many argue that while there may be a difference in the definitions

between piracy and terrorism, the result and effect of the two acts is the same. The coordinated patrol is acceptable as a combined show of maritime forces to deter potential perpetrators but its long-term effect cannot be determined as Indonesia has vast areas of sea to cover with a very limited naval capability. Singapore and Malaysia which have better equipped naval forces cannot stray into Indonesia's territory for want of hot pursuit agreement between them. It is argued by other parties that the two littoral states fear of perceived international challenges to national sovereignty has been allowed to override military logic necessary to defeat both pirates and terrorists.

In order to understand further the attitude of the littoral states in this, it should further be recalled that the regime of "innocent passage" would normally apply in the territorial sea. However, the regime of transit passage applies in these straits used for international navigation. Since in navigation the transit passage regime takes precedence over the regime of innocent passage, Malaysia and Indonesia are left with the view that their territorial sovereignty is not complete, thus, the waterway must at least be jealously guarded by both states from possible further outside interference in the form of creeping jurisdiction.

Further problems are the processes hidden from international discussions, namely, the informal agreements between the states. These are revealed by the case studies within which governments are prepared to sweep the issues of violation and possibly corruption "under the carpet" so as not to impede more significant issues requiring cooperation such as the ASEAN unity, the presence of illegal Indonesian migrant workers in Malaysia and the rising threats of religious extremism.

When all the facts of incidents are also considered they have placed the Straits of Malacca on the international community's most "piracy hot spot" for quite a number of years. The crimes have continued unabated in the views of users due to inadequate jurisdiction. Recent trends indicated that the number of attempted and actual attacks may be falling although hijackings of tugs and barges and kidnapping crews from these boats continue to increase especially in Indonesian waters.

The pressure has increased for the coastal states to take more positive actions as the world community moves ahead to assess their security measures to combat terrorism, The IMO during its 84<sup>th</sup> Legal Committee meeting decided to review the SUA Convention and its Protocol. After a significant amount of discussion through five Legal Committee meetings, the 89<sup>th</sup> Meeting agreed that the IMO will convene a diplomatic conference to adopt the amendments in October 2005. The proposed amendments to the treaties in the revised draft protocols include a substantial broadening of the range of offences included in Art 3 of the SUA Convention and the introduction of provision for boarding vessels suspected of being involved in terrorist activities in Art 8. It must be concluded from this Chapter that the diplomatic negotiations in the Straits of Malacca are compounded by complex legal and political issues, and by the related organizational structures at national, regional and international levels.

## Chapter 4

### STRAIT STATES AND THE RECORDED ATTACKS ON MERCHANT SHIPS IN SOUTHEAST ASIA 2002-2005

#### 4.1. Introduction

In the previous chapters, extensive discussions on the origin of the present-day definition of piracy were put forward. As will be observed in this chapter, this leads to many areas in the Southeast Asia region to be declared as "piracy-prone" by the IMB. In particular, special attention was given to the Straits of Malacca and Indonesian waters that have recorded high numbers of attacks compared to other parts of the world. The situation has been described as being so bad that Indonesia was depicted as a haven for pirates and even dubbed "pirate republic".<sup>1</sup> Based on regular reports issued by several agencies such as the IMB and the IMO, this threat continues to the present time. This chapter aims to examine the situation based on the statistics mainly from the IMB.

The chapter puts into perspective the attacks on merchant ships that have taken place in the Southeast Asian region during a four-year period from 2002 to 2005. The four year period will be divided into two phases; Phase 1 for 2002 to 2003 periods and Phase 2 for 2004 to 2005 periods. This is done to determine if there are changes or improvements of the situation after the littoral states embarked into several maritime enforcement measures during 2004 to 2005 period. The statistics used will be those issued by the ICC-

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<sup>1</sup> Bertil Lintner, *Blood Brothers: Crime, Business and Politics in Asia*, Allen & Unwin, Crows Nest, 2002, page 291.

International Maritime Bureau (IMB). The reason why the IMB statistics are used for this study is because for over a decade its statistics have been taken by the world community especially the shipping sector as the authoritative figures on 'piracy and armed robbery against ships' incidents world wide. However, it should be emphasised from the outset that the IMB unlike the IMO is not a creation of a treaty but in fact part of the International Chamber of Commerce (ICC)<sup>2</sup> which makes its position under international law somewhat uncertain. It should be noted that the IMB Reports tend to use the term "pirate" and "piracy" unsparingly without giving due consideration that the terms might cause considerable difficulties given the complexities that exist in the littoral states.

#### **4.2. The History of Piracy Reporting**

On 1<sup>st</sup> October 1992 the IMB opened a centre in Kuala Lumpur styled as "IMB Piracy Reporting Centre (PRC)" with the support of the IMO and International Mobile Satellite Organization (INMARSAT)<sup>3</sup> whose primary duty is among others, "to collate and analyse information received and issue consolidated reports to relevant bodies, including the International Maritime Organization".<sup>4</sup> The centre is financed by voluntary contributions<sup>5</sup> from shipping and insurance companies although the contributions have not always been consistent.<sup>6</sup> It provides services that are free of charge to all vessels irrespective of ownership or flag. The PRC receives reports from shipowners, managers, masters, law

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<sup>2</sup> The ICC was founded in 1919 and its Commercial Crime Services (CCS) is a non-profit organization that deals with various crimes that affect business on international level. The CCS comprises of the IMB, Counterfeiting Intelligence Bureau, Commercial Crime Bureau and Cyber crime Unit., See Mark Bruyneel, can be accessed at <http://home.Wanadoo.nl/m.bruyneel/archive/modern/index.htm>

<sup>3</sup> INMARSAT was established in 1979 to serve the maritime industry by developing satellite communications for ship management and distress and safety applications. See M.Bruyneel, above.

<sup>4</sup> *ICC-IMB Annual Report 2003*, page 2.

<sup>5</sup> *ICC-IMB Annual Report 2005* listed twenty two entities which include among others, Government of Cyprus, the Union of Greek Shipping, and Japan P&I Club.

<sup>6</sup> For example, there was a marked drop of contributors during the Asian financial crisis in the late 1990s.

enforcement agencies or other sources on suspicious or unexplained craft movements and compiled “Reports of Piracy and Armed Robbery against Vessels” which is broadcasted daily around the world through the Pacific Ocean region satellite from Singapore Land Earth station.<sup>7</sup>

Prior to the establishment of the PRC, the IMB issued some information on maritime incidents since 1983. The first three series were issued on the request of the IMO in 1983, 1984, and in October 1985. This was followed by a chronology of “Gulf War and Terrorist” attacks in “Violence at Sea”, first published in 1986 and reissued with updated information in May 1987. This was followed by Piracy at Sea, providing chronology of piratical attacks from 1981-87 and a third listing of possible yacht piracies.<sup>8</sup>

Globally, beside the IMB, the only other reliable statistics are those issued by the International Maritime Organization (IMO). In Malaysia, statistics are issued by government agencies such as the Polis DiRaja Malaysia (Royal Malaysian Police) and the Maritime Enforcement Coordination Centre (MECC) but they are not as comprehensive as those issued by the IMB. The IMO figures seem to have been taken mainly from the IMB statistics.<sup>9</sup> The reason is obvious, while the IMB’s sole object is reporting the piracy cases world wide, the IMO and the Polis DiRaja Malaysia roles are wider.<sup>10</sup> In any case, there

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<sup>7</sup> www.icc-ccs.org.

<sup>8</sup> See Samuel P. Menefee, “Under-reporting of the problems of maritime piracy and terrorism: Are we viewing the tip of the iceberg?”, et. al., in Maximo Q Mejia (Ed.) *Contemporary Issues in Maritime Security*, WMU Publications, Malmo, 2005 at page 248 which quoted information from Brian A. H. Parrit, *Violence at Sea: A Review of Terrorism, Acts of War and Piracy, and Countermeasures to Prevent Terrorism*, 1986, and Eric Allen, Ed., *Violence at Sea*.

<sup>9</sup> Samuel P. Menefee, above at page 248.

<sup>10</sup> The IMO is a specialized agency of the United Nations which is responsible for measures to improve the safety and security of the international shipping and to prevent marine pollution from ships. For a background reading on the role of the IMO, go to the website, <http://www.imo.org/home.asp>. Statistics of piracy in Malaysian waters is regularly (but only for internal use) issued by the Marine Police, a unit under the Royal Malaysian Police but the fate of this unit is not certain due to the Government’s move to

are questions by some authorities on the purpose and validity of all such statistics in the region.

#### 4.2.1. Statement of Statistical Problems and Definitions

IMB statistics have come under heavy criticisms for quite some time particularly on their definitions. In 1998, a representative from the Hong Kong Shipowners' Association observed:

“...the statistics being published do not suggest solutions but sensationalism.”<sup>11</sup>

The Maritime Institute of Malaysia (MIMA) heavily criticised the IMB reports by publishing a paper entitled “An Analysis of Statistic On Piracy In the Straits of Malacca And Malaysian Waters”<sup>12</sup> in which the purpose is explained, “to provide an analysis of so called ‘piracy incidents’ in the Straits of Malacca and Malaysian waters in order to give a more balanced, and less lop-sided view of the situation than that provided by the International Maritime Bureau”.<sup>13</sup> The main complaint was that the definition adopted by the IMB appears to be too wide so much so it embraces every criminal act including the minor ones, which critics say should not be included.

The IMB<sup>14</sup> defines piracy as:

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set up the Agensi Penguatkuasaan Maritim Malaysia ( Malaysian Maritime Enforcement Agency) in 2005.

<sup>11</sup> Philip Bowring, “The Views of the Shipping Industry on Piratical Attacks, Including the seizure of Vessels for Ransom”, *ICC-IMB Third International Meeting on Piracy and Phantom Ships*, Kuala Lumpur, June 1998.

<sup>12</sup> Issued under direction from its Board of Directors to analyse the statistics whilst “relooking” the definition of piracy in the Malaysian context, 26 June 2001.

<sup>13</sup> Note 12, above.

<sup>14</sup> See the ICC homepage at [www.icc-ccs.org](http://www.icc-ccs.org).

An act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in the furtherance of that act.<sup>15</sup>

For statistical purposes, this definition “covers actual or attempted attacks whether the ship is berthed, at anchor or at sea (and) petty thefts are excluded unless the thieves are armed”.<sup>16</sup> The IMB however, explains, “the definition has been adopted as the majority of attacks take place within the jurisdiction of States and piracy as defined under United Nations Convention on Law of the Sea 1982 does not address this aspect.”<sup>17</sup> The definition is not recognised in international law because the IMB is not a treaty-based organization and it contradicts the universally-accepted definition under Article 101 of the UN Convention 1982 which remain as the only recognised definition to date. Although the IMB realises that its definition is highly controversial it continues to use this.<sup>18</sup>

The IMB Annual Reports separated the attacks into actual and attempted attacks and these are further divided into “boarded”, “hijacked”, “fired upon” and “attempted boarding” respectively. The report goes on to give detailed accounts such as the port and anchorages where the attacks have been reported, types of ships attacked, nationalities of the ships, types of arms used by geographical locations and types of violence inflicted upon the victims.<sup>19</sup> One of the finer points of the report and probably controversial too is the section that identifies “piracy prone areas and warnings” where mariners are warned to be extra cautious and to take necessary precautionary measures when transiting the areas.<sup>20</sup> The annual changes of the attacks are tracked under heading “trends” where the upward or

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<sup>15</sup> *ICC-IMB Annual Report 2003*, page 3.

<sup>16</sup> *ICC-IMB Annual Report 2003*, above.

<sup>17</sup> *ICC-IMB Annual Report 2003*, above.

<sup>18</sup> See *ICC-IMB Annual Report 2005* at page three where the same definition is repeated.

<sup>19</sup> As an example, for *ICC-IMB Annual Report 2005*, see pages 5-13.

<sup>20</sup> *ICC-IMB Annual Report 2005*, at page 15.

downward movements of <sup>21</sup> certain countries in the numbers of attacks registered are examined, and under the heading “observations” narrations of the attacks on each year are given with the more serious incidents are described in chronological sequence.

For the purposes of this chapter, the researcher combined all incidents of “actual attacks”, and “attempted attacks” because it is felt that attempted attack is still an attack although it is unsuccessful. The IMB’s statistics, however, are taken with care because it aggregates every single criminal attack at sea to fall under its definition as piracy or armed robbery. A closer look will see that the number of merchant ships involved in the attacks is not as great as it was projected to be. This does not negate the fact that many of the attacks are pre-meditated and employed sophisticated methods and have become more deadly in recent years. Describing the IMB’s method as “unfortunate” and “very broad” Stefan Eklof says:

This definition is unfortunate – even if only for statistical purposes – because it blurs any attempt to gain a more comprehensive understanding of the problem of “piracy” in Southeast Asia as well as in other parts of the world. Many of the so-called armed robberies in port areas are in fact more readily describable as “theft in port”, typically involving some three or five perpetrators boarding a ship in order to steal supplies, such as engine spare parts, some cans and ropes. These so-called “pirates in port” are not likely to be more identical with the more audacious – and often violent – pirates who board steaming vessels at sea, with both their methods and objectives differing. From the point of view of protection and law enforcement, moreover, it does not seem very helpful to conflate the two types of incidents as they require very different counter-measures. Combating the first type of incidents mainly involves improving security onboard ships when in port and in port areas, whereas combating the second type of incidents requires international coordination and intelligence sharing between the authorities of several nations, the shipping industry and international organizations”<sup>22</sup>

On the other hand, Samuel P. Menefee, a frequent writer on piracy issues suggests that there is a strong case on under-reporting by the IMB as well as the IMO. Relying on a case

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<sup>21</sup> For example *ICC-IMB Annual Report 2005*, see pages 17-25.

<sup>22</sup> Stefan Eklof, “Piracy in Southeast Asia: Real Menace or Red Herring?”, *Japan Focus*, August 2, 2005.

study concerning the under-reporting of acts of piracy and maritime violence in Bangladesh

he commented:

“Previously, the IMB has been criticized for separately reporting multiple attacks on a single vessel. While it seems clear that each container jimmied during a raid on one vessel should not count as a discrete incident, the Bureau has not done this, and most would accept that separate attacks on different days should be counted separately. What was surprising to find was quite the opposite – attacks by a group on multiple targets have been grouped together as a single occurrence. If one reads the Bureau’s annual piracy report, raid on twenty or thirty fishing vessels are counted as a single incident. This is a far greater problem, and suggests that the statistics offered up may need upward revision.”<sup>23</sup>

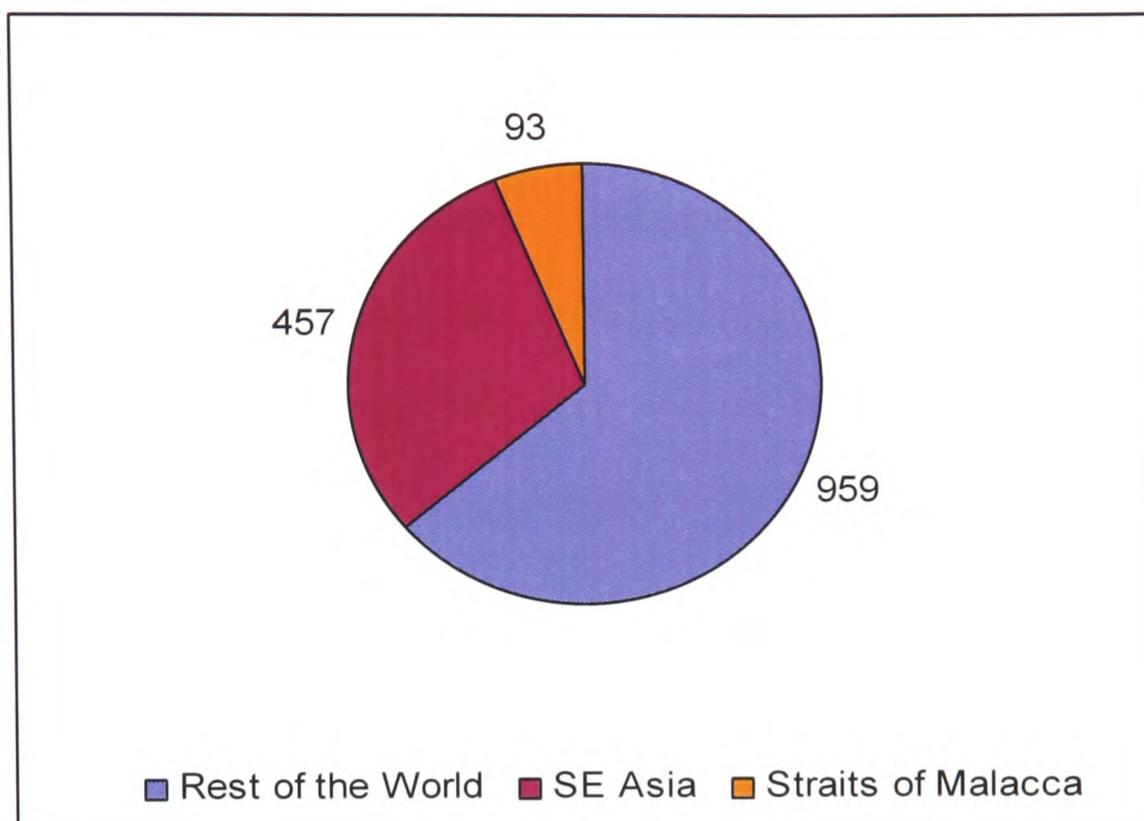
But, away from these contradictory observations from the two writers one cannot deny the role played by the IMB in providing so far, the single most precise, scientific figures and in highlighting the issue of piracy and armed robbery in the world. This is strengthened by the fact that it appears almost all discussions on the issue of piracy in the region as well as in other parts of the world are based on the IMB reports and statistics. Consequently, apart from case incidents identified by the researcher, IMB figures are adopted as the main sources.

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<sup>23</sup> Samuel P. Menefee, et al. “Under-reporting of the Problems of Maritime Piracy and Terrorism: Are We Viewing the Tip of the Iceberg?” in *Contemporary Issues in Maritime Security*, WMU 2005.

#### 4.2.2. The Statistics 2002-2003

**Diagram 1:**  
World Wide Distribution of Piratical Attacks 2002-2005



Source: Figures taken from the *ICC-IMB Annual Reports 2002-2005*

During the first two-year period of 2002 and 2003, there were 302<sup>24</sup> attacks (141 in 2002 and 161 in 2003) on merchant ships reported in Southeast Asia with Indonesian Waters and the Straits of Malacca singled out as the most dangerous areas for ships. As in 2002, the IMB continued to warn ships to avoid anchoring along the Indonesian coast of the Straits of Malacca unless required for urgent operational reasons, with North Sumatra and Aceh coasts as particularly risky. While thanking Malaysia for its efforts to combat piracy through its “vigilant patrols and constant operations by the marine police” Indonesia’s efforts were lacklustre as the IMB puts it, “...we hope that Indonesia Authorities will increase their efforts, without which the area will always remain high risk”. In Indonesia,

<sup>24</sup> *ICC-IMB Annual Reports 2002 and 2003*. This figures exclude attacks on non-merchant ships such as fishing trawlers and petrol boats.

Anambas Island, Balikpapan, Bintan, Dumai, Gaspar Straits, Pulau Laut, Samarinda and Tanjung Priuk were considered piracy prone areas in year 2003.<sup>25</sup>

In 2002 Indonesia recorded the highest number of attacks with 103 reported incidents and accounts for more than one quarter of the world's piratical attacks. For the same period Malacca Straits and Malaysia recorded 16 attacks and 14 attacks respectively. The figures did not change much for in year 2003 when Indonesia continues to record the highest number of attacks with 121 reported incidents. Malacca Straits, which had seen a drop in the number of piracy attacks in 2002, had come back with a rise to 28 incidents.

What were obvious in the statistics are the methods used by the "attackers" when attacking ships. They have become more sophisticated with the help of communication gadgets, speedboats<sup>26</sup> and automatic weapons. This has raised the questions as to their capability and trainings as to who trained and supplied them with the sophisticated weapons. This has been examined with case studies in Chapter 3 and Chapter 5.

#### **4.2.3. Examples of Attacks during 2002-2003 Period**

Three cases below are selected from the ICC-IMB Annual Report 2002 and 2003 to indicate the types of attacks prevailing during this phase in Indonesia and the Straits of Malacca. The original term, "pirates", is substituted with the more appropriate term "attackers" as the term "piracy" was controversially used by the IMB and the media.

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<sup>25</sup> *ICC-IMB Annual Report 2003*, page 15.

<sup>26</sup> See for example, attack on *Dewi Madrim*, a chemical tanker on 26 March 2003 in Malacca Straits where 10 pirates armed with automatic weapons had their own portable VHF for communication.

#### **4.2.3.1. Attack on *MT Nautica Kluang***

On 27 September 2002 this Malaysian tanker departed Sungai Udang Port in Malacca bound for Labuan. The tanker was loaded with 2,891 metric tons of diesel oil. The next day, armed attackers on a speedboat attacked and hijacked the tanker at approximately 3 am near Pulau Iyu Kecil, south of the Malacca Straits. The attackers were estimated to be 10 to 15 persons and armed with guns and knives. The attackers tied up all 12 crewmembers and locked them in the cabin. The attackers destroyed the ship's communication equipments and changed the ship's name from *Nautica Kluang* to "*Caklu*" to avoid detection. They then transferred the cargo of diesel oil into another ship, which arrived later. The attackers left after stealing the cargo. All crew members were left unharmed.<sup>27</sup>

#### **4.2.3.2. Attack on the Tug Boat *Usda Jaya***

On 14 September 2002, Indonesian tug boat *Usda Jaya* and barge *Bes 04* departed Rengat bound for Dumai, Indonesia with cargo of 1,500 metric tons of palm oil. Then on 17 September 2002, at 2 am, approximately 15 attackers armed with guns and knives in speed boats attacked and hijacked the tug and barge between the waters of Pulau Busang and Pulau Cawan. The attackers tied all 17 crewmembers and left those at Pulau Busung where they were rescued by local fisherman.<sup>28</sup>

#### **4.2.3.3. Attack on the *Suhaila***

On 25 February 2003 while underway near Kuala Langsa (East Aceh) four boats with eight pirates in each boat armed with AK47 rifles and rockets chased "*Suhaila*" a chemical tanker registered in Malaysia and fired at the ship. Bullets hit starboard side of accommodation plating and destroyed bridge windows along with VHF radio on the bridge. The Chief Engineer sustained gunshot wounds in the head and his condition was serious and had to be evacuated by a navy boat for treatment.

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<sup>27</sup> ICC-IMB Annual Report 2002, page 20.

<sup>28</sup> ICC-IMB Annual Report 2002, page 20.

**Map 11**  
Location of Attacks on the *Usda Jaya and Bes 04*, *MT Nautica Kluang*,  
and the *Suhaila*



The attacks above represent the trends of attacks on merchant ships in the Straits of Malacca and Indonesia. The pirates appear to be well prepared, equipped with automatic guns and the use of speedboat. They number more than five with the prime objective of plundering cash or similar valuables.

#### 4.2.4. Concern of Strait States over Sovereignty

During this period (2004-2005), the security of the Straits of Malacca was constantly under the scrutiny of the international shipping community. Under intense international pressure<sup>29</sup>

<sup>29</sup> See, for example, “Osama bin Laden meets Jolly Roger” in *Fairplay*, 20 November 2003, page 13,” In the past nine months, Southeast Asia’s shipping lanes have suffered more attacks than any year on record. With maritime security deteriorating fast, fears are rising that the pirates’ success could encourage terrorist”.

the littoral states of the Straits of Malacca embarked upon some maritime exercises after a very bad year in 2003. The efforts were driven by the possibility that “the Western powers” would interfere to secure the straits after the attacks were linked to possible terrorism activities.<sup>30</sup> During this period, Maritime media such as *Lloyd’s List* and *Fairplay* continued giving prominence to the issue of piracy in the region. These relentless pressures from foreign governments<sup>31</sup>, user states, shipping companies and media forced Indonesia and Malaysia to react to the situation. Indonesia Navy Chief, Admiral Bernard Sondakh for example, issued the Navy “shoot on sight” order<sup>32</sup> and all three littoral states started the “joint patrols”<sup>33</sup> in July 2004. Despite this “media exercise”,<sup>34</sup> Malaysia and Indonesia continued to issue statements regarding the littoral states’ sovereignty over the straits.

The IMB reports were, for the first time, openly rejected by Indonesia and Admiral Bernard Sondakh who accused the IMB of “conspiring” with the West to intervene in the straits.<sup>35</sup> This was refuted by Noel Choong of the PRC citing the possibility that a recent visit by a United States admiral to the Piracy Reporting Centre in Kuala Lumpur as a possible cause for the misunderstanding,<sup>36</sup> and that the centre reported tangible cases based from facts. Following Indonesia’s move, Malaysia too issued a statement rejecting the

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<sup>30</sup> See for example, “US warned: Don’t try to police Malacca Strait” *Fairplay*, 15 April 2004. See also, “Asian call for IMO role in Malacca Straits talks”, “Asian shipowners have called for a solution to the Malacca Strait security problem through the IMO, but the United Nations body is still studying whether it should be involved. Security of the Malacca Strait has been in spotlight in recent months over the potential for a terror attacks in the busy shipping lane, especially if terrorists should link up with or copy pirates already operating there”, *Lloyd’s List*, 26 May 2004.

<sup>31</sup> This term should include Singapore, one of the littoral states that encouraged outside help to secure the straits. See for example, statement by Singapore Minister of Defence Rear Admiral Teo Chee Hean, “Littoral states cannot protect Malacca Strait” *Lloyd’s List*, 27 April 2004, at page 3.

<sup>32</sup> See for example, “shoot pirates on sight, says Indonesian Navy Chief”, *Lloyd’s List*, 21 June 2004, page 1.

<sup>33</sup> The exact term used was “coordinated patrols”. See for examples, “Malacca’s joint patrols to be limited”, *Fairplay*, 8 July 2004 and “Malacca Strait anti-piracy patrols start next week”, *Lloyd’s List*, 15 July 2004.

<sup>34</sup> Refer to the researcher’s finding in Chapter 7.

<sup>35</sup> See, for example, “ Indonesian Admiral sees conspiracy by West in piracy data”, *Fairplay*, 29 July 2004.

<sup>36</sup> Interview, 20 July 2004. Mr Noel Choong informed that Admiral Thomas Fargo paid the Centre a call in conjunction with the latter’s meetings with the littoral states defence minister.

suggestion by Singapore that “policing the Straits of Malacca is an obligation for all user-nations, and not just the littoral states”.<sup>37</sup> The two littoral states’ stance on the issue of sovereignty drew criticisms from some quarters. The General Secretary of Numast wrote a letter to the Lloyd’s List:

Sir, it was with great disappointment that I read your reports of how Indonesia and Malaysia have poured cold water on the US proposals to deploy marines and Special Forces troops in the Malacca Strait. The idea of deploying US forces in the busy shipping lanes echoes Numast’s repeated calls for some sort of tangible protection to be given to merchant shipping in areas, where there is a known high risk of attack.<sup>38</sup>

Conversely, Malaysia acknowledged the concerns when the Chief of the Royal Malaysian Navy spoke at the end of 2004 about the issue of terrorism at sea:

[T]his can be attributed to the perception that terrorists might use the dense shipping areas to launch their operations, which may have serious implications to the economy of many countries especially the coastal states. Though armed robbery at sea does not pose a significant threat to the state system, there are views that piratical activities might become instruments of terrorist. Malaysia and the other coastal states acknowledge their concerns.<sup>39</sup>

He reiterated that the littoral states would not abandon their duties:

We therefore also hope that the international community acknowledges and will understand that the real threats that we currently faced needs to be dealt with immediately and those coastal states will do it utmost best to take necessary measures to mitigate potential threats from terrorism.<sup>40</sup>

Indonesia, however, elected to be more combative in the same issue:

That there has been a perception that terrorists can work together with robbers in Malacca Straits and attack or destroy one of the biggest trade lanes in the world. Any analysis in this globalised era is legal, but the important thing is the readiness and alertness to overcome all possibilities that may happen to Indonesia, which is already a terrorist victim. Up to now, terrorist attacks, directed specifically to the

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<sup>37</sup> See, for example, *Lloyd’s List*, 29 April 2004, page 5.

<sup>38</sup> *Lloyd’s List*, 21 April 2004, page 5.

<sup>39</sup> Admiral Dato’ Sri Mohd Anwar bin Hj Mohd Nor, “Managing Security of the Security of the Straits of Malacca”, Paper presented for the *Conference on the Straits of Malacca, Building Comprehensive Security Environment*, Kuala Lumpur, 11-13 October 2004, page 3.

<sup>40</sup> Admiral Dato’ Sri Anwar, above, page 3.

target at sea are still rare. If we observe carefully, however, we will find out that terrorism at sea is still rare and their effects are not as frightening as the terrorism on land. The main target of terrorism is to give serious fear effect to the people. One thing that we know is that there is no maritime terrorism in Indonesia especially in Malacca Straits.<sup>41</sup>

In what was a rather perplexing move, Japan was allowed to join the anti-piracy efforts of the Strait States by flying aircraft patrols<sup>42</sup> over the straits, giving rise to the thought that the issue of threats to sovereignty was used selectively, in which a “friendly” nation that has no military influence in the region would be welcome.

There may have been successes in the period 2004-2005 but the statistics are dubious. In 2004,<sup>43</sup> there were a total of 93 and 37 attacks registered in Indonesia and the Straits of Malacca respectively. This was followed by a remarkable decrease in 2005 where 79 cases were registered in Indonesia and 12 in the Straits of Malacca. The IMB attributed this to “increased awareness and anti-piracy watches by masters in risk prone areas, increase in law enforcement patrols and international pressure on some governments to act”.<sup>44</sup> However, under close scrutiny there appears to be an anomaly in the IMB Report in 2005. The Report apparently removed Belawan from the statistics of the Straits of Malacca, which is an anomaly because not only is Belawan geographically located in the Straits it also appeared prominently as a prone area in the preceding years.

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<sup>41</sup> Admiral Bernard Kent Sondakh, “National Sovereignty and Security in the Straits of Malacca,” Paper presented for the *Conference on the Straits of Malacca; Building a Comprehensive Security Environment*, Kuala Lumpur, 11-13 October 2004, page 7.

<sup>42</sup> See, *Tradewinds*, 30 July 2004.

<sup>43</sup> ICC-IMB Annual Report 2004, pages 29-68.

<sup>44</sup> *ICC-IMB Annual Report 2005*, page 16.

#### 4.2.5. Example of Attacks during 2004-2005 Period

##### 4.2.5.1. Attack on the *Idaten*

**Picture 1:**  
The Photo of the *Idaten* During the Attack



*Source: Royal Malaysian Marine Police*

*Note : this photo was taken by a crew member of Kuroshio I barge and was handed over to the Royal Malaysian Marine Police. A number of the attackers were seen here in black fatigues on the Idaten tug boat.*

On 14 March 2005 Japanese tug *Idaten* towing a Panamanian barge *Kuroshio I* was attacked by heavily armed attackers at position 04:25.6 North and Longitude 099:40.7 East at approximately 1735 hrs Indonesian time. Several attackers heavily armed with guns and rocket propelled grenades in three fishing boats fired and later boarded the tug. They later took the Master, Chief Engineer and Third Engineer and escaped. The attackers also tried to board the barge but were unsuccessful. Crew from the barge reported to the IMB Piracy Reporting Centre who then alerted the Royal Malaysian Marine Police. Two patrol boats were dispatched immediately to the location of the incident and later escorted the tug and

barge to Penang, Malaysia. Later, all three crew were released unharmed but it was not known if a ransom was paid for their release.<sup>45</sup>

#### **4.2.5.2. Attack on the *MT Steadfast***

On 18 December 2005, a Dominica chemical tanker *MT Steadfast* was hijacked by attackers after the cargo was loaded and the voyage commenced. The ship was loaded with a cargo of 16,585 metric tons of vegetable oil at Palembang, Indonesia bound for China with bunkering stopover at Singapore. The last message received by the owners from the vessel was on 19 December 2005. The IMB Piracy Reporting Centre immediately sent out alerts to all ships and authorities in the region. The PRC later provided the authorities in Vietnam, Cambodia, Indonesia and Singapore with information to seize the vessel if it entered their territorial waters. The attackers eventually turned the vessel back towards Indonesian waters and left the vessel on 24 December 2005. The Master brought the vessel and its 25 crew safely back to Singapore on the same day with the ship and cargo reportedly intact. The Singapore authorities are still investigating the matter.<sup>46</sup>

### **4.3. Most Prone Areas in Southeast Asia**

Within Southeast Asian region, the IMB Annual Reports 2002 to 2005 listed Indonesia and the Straits of Malacca as “prone areas” in every single year. For Indonesia, in 2002 prone areas are Belawan, Balikpapan, Bontang, Panjang, Samarinda, Santan Tarahan and Jakarta. For 2003 different areas are cited i.e. Anambas Island, Balikpapan, Bintan Island, Dumai, Gaspar Straits, Pulau Laut, Samarinda and Jakarta. For 2004, roughly the same areas were cited with Belawan which was not listed in 2004 reappeared. In 2005, the same areas were cited and Adang Bay was included for the first time. In the Straits of Malacca, for 2002, 2003 and 2004, Indonesian coast was cited with waters near Aceh considered particularly

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<sup>45</sup> ICC- IMB Annual report 2005, at page 21.

<sup>46</sup> ICC-IMB Annual report 2005, at page 28.

risky. This trends was somewhat slowed after the tsunami but two months after the tragedy, the attacks reappeared closer to Malaysia waters.<sup>47</sup>

Other countries were relatively calm. The Philippines was listed in 2002 in Batangas area, 2003 in Manila area but escaped the listing for 2004 and 2005. Thailand appeared once in 2002 with Koh Si Chang area cited as risky but since then, the state was no longer appeared as prone area for piracy. The reverse trends appeared for the Singapore Strait when it was listed for 2004 and 2005 after a long spell of relative calm. For Malaysia, Sandakan was considered risky for 2002 and 2004.

**Table 1**  
Attacks in Southeast Asian Region

Area	Year			
	2002	2003	2004	2005
Southeast Asia	153	169	156	102
Indonesia	103	121	93	79
Straits of Malacca	16	28	37	12

*Source: ICC-IMB Annual Reports 2002-2005*

#### 4.4. User States Reactions

As has been discussed earlier in Chapter 2, piracy and maritime terrorism are two prime threats to safe passage at sea. But as alluded to above, there is no piracy within the meaning of international law in the Straits of Malacca. But it is conceded that there were “attacks” in the area which can be used for statistical purposes, and also to satisfy the media’s preference. The term “piracy” is used in a loose non-legally binding situation. However, the

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<sup>47</sup> *ICC-IMB Annual Reports 2002-2005.*

real question is: how serious are the threats? Lloyd’s insurers definitely consider it very seriously with the listing of the waterway under its war risk area on 20 June 2005. This has shocked and infuriated<sup>48</sup> the littoral states, but the underwriter’s warning has “spurred Indonesia, Malaysia and Singapore to agree to complement their co-ordinated sea patrols with anti-piracy air monitoring”.<sup>49</sup> In September 2005, Malaysia’s armed forces Chief Admiral Mohd Anwar Mohammad Noor<sup>50</sup> announced that “the nearest vessels of enforcement agencies from the littoral states will be cleared to conduct hot pursuit up to five miles into neighbouring territorial waters”.<sup>51</sup> This is in fact, an astonishing shift in the littoral states stance on this sensitive issue because they always treated it as encroachment into territorial sovereignty. This was later immediately followed on 13 September 2005 by daily coordinated air security surveillance over the straits which were introduced to the world as “Eyes in the Sky” plan in which each of the three traditional littoral states, Indonesia, Malaysia, Singapore together with Thailand contributed two aircraft for the program.<sup>52</sup>

**Table 2**  
Percentage of Attacks in the Straits of Malacca

Year	No. of Vessels	No. of Attacks	Percentage
2002	62,393	16	0.025%
2003	62,334	28	0.045%
2004	63,636	37	0.058%
2005	62,616	12	0.019%

Source: Marine Department Malaysia and IMB Annual Reports 2003 - 2005

<sup>48</sup> See, *Fairplay Daily News*, 3 August 2005.

<sup>49</sup> See, *Fairplay*, 21 July 2006.

<sup>50</sup> Admiral Mohd Anwar Mohammad Noor was promoted to become the Armed Forces Chief of Malaysia. His appointment followed that of Admiral Widodo in Indonesia. The appointments of the heads of Naval forces reflect the growing importance of maritime issues in both countries. Traditionally the head of the armed forces is chosen from the army.

<sup>51</sup> See, *Fairplay*, 11 August 2005.

<sup>52</sup> See, *Fairplay*, 15 September 2005.

The Lloyd's JWC decision can be called to question on two accounts: First, by comparing the number of piracy occurrences in the area and the number of vessels plying the straits on the corresponding years so as to get an objective answer whether the straits are so dangerous as to trigger the war clause. Table 2 indicates the number of attacks and the percentages when compared to the total number of vessels using the straits, for the period of 2002-2005.

It is submitted that the number of attacks in the Straits of Malacca never exceeded 0.06 percent of the total number of vessels plying the passage. This can be taken as too small to trigger the war risks. Secondly, the Lloyd's JWC declaration on the area at risk excludes the Strait of Singapore. The area of concerns was first published on 20<sup>th</sup> June 2005:

#### Malacca Strait

From Laem Phra Chao (7°45'·5N, 98°18'·5E) south-eastwards along the western coast of the Malay Peninsula to Tanjung Piai (1°15'·9N, 103°31'·0E); thence south-westwards to Pulau Iyu Kecil (1°11'·4N, 103°21'·2E); thence south-eastwards to the northern extremity of Pulau Karimun Kecil (1°09'·9N, 103°23'·4E); thence westwards to Tanjung Kedabu (1°05'·7N, 102°59'·0E) in Sumatera; thence north-westwards along the coast of Sumatera to Ujing Baka (5°39'·5N, 95°26'·0E); thence north-eastwards to Laem Phra Chao.<sup>53</sup>

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<sup>53</sup> *Lloyd's Joint War Committee Hull War, Strikes, Terrorism and Related Perils Listed Areas*, 20<sup>th</sup> June 2005.

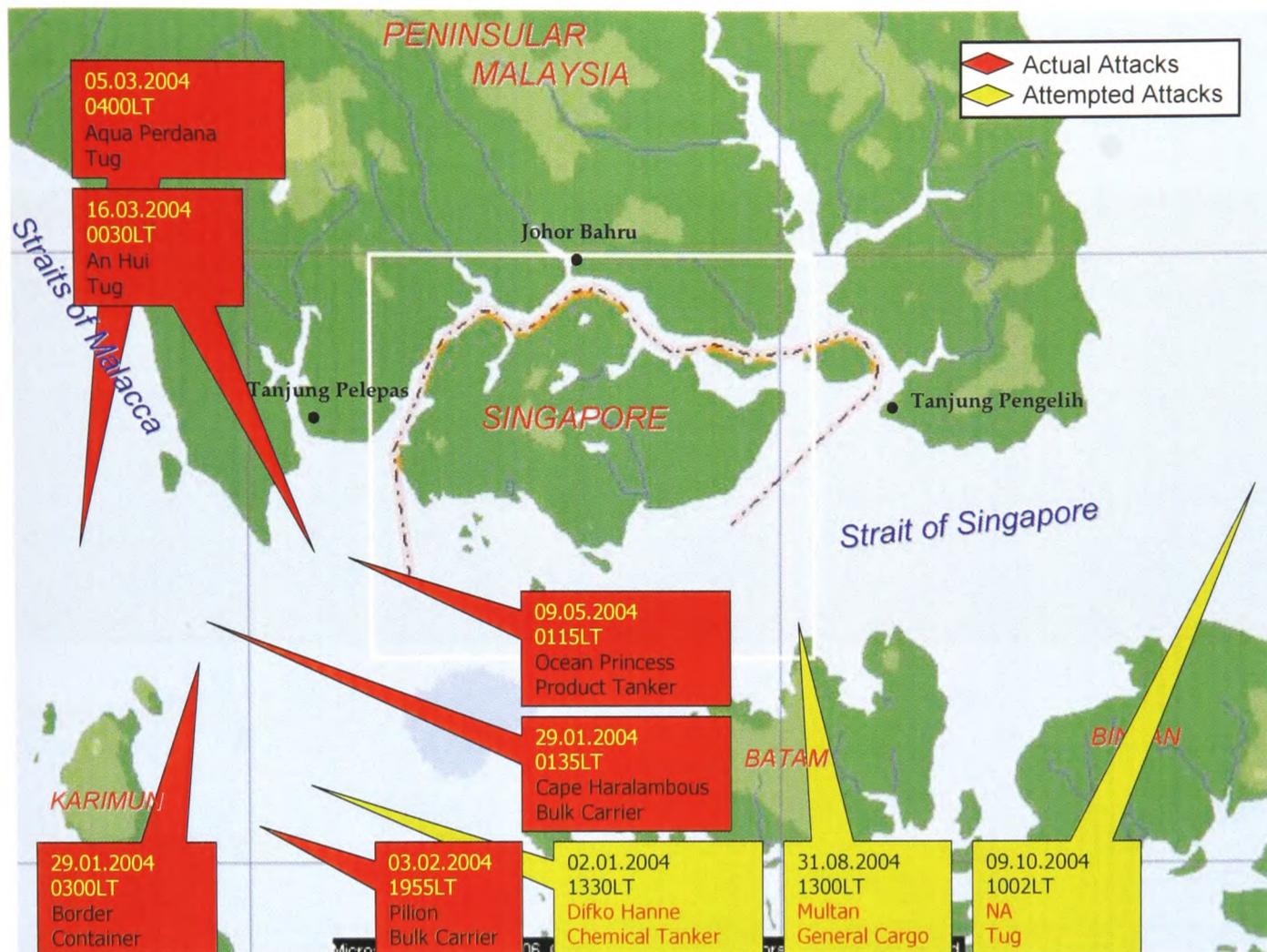
**Map 12**  
**Llyod's Joint War Committee Declaration Area on the Strait of Malacca**



Source: Iskandar Sazlan Mohd Salleh (2005)

It was perplexing for other littoral States to see that the Singapore Strait was not included as a war risk area while there have been some actual attacks in the Strait as reported by the ICC-IMB in the corresponding period as shown in Map 13.

**Map 13**  
Piracy Incidents in the Strait of Singapore, 2004



Source: ICC-IMB Annual Report 2004

#### 4.5. Comparative Statistics Issued by the MECC

It may be useful to see the corresponding figures in the Straits of Malacca waters as compiled by the MECC, a specialist agency on maritime enforcement in Malaysia.<sup>54</sup> The statistics below indicate that more attacks took place in the Malaysian side of the straits. This is attributed to the warnings given by the IMB to ships to avoid transiting and anchoring along Indonesian waters thus “creating a vacuum” on the areas of Pulau Jarak

<sup>54</sup> The nature and roles of the MECC are deliberated in Chapter 7.

and Pulau Perak, the outermost islands in the northern side of the straits of Malacca and attracting the attackers to move into Malaysian waters.

**Table 3**  
Attacks in Straits of Malacca 2002-2005

Years	Malaysian Waters	Indonesian Waters	Total
2002	13	3	16
2003	13	15	28
2004	32	16	48
July 2005	16	2	18
<b>Total</b>	<b>146</b>	<b>56</b>	<b>202</b>

Source: *MECC (2005)*

#### 4.6. Conclusion

As has been observed, despite criticism from certain quarters, the statistics issued by the IMB so far has been the most complete and authoritative. IMB's press releases often caught the attention of the world media that have always been hungry for dramatic news on attacks at sea. It was under this situation that the influence of the IMB grew. Under close observation, one could see that the IMB sometimes issued comments that are considered by the Strait States as detrimental to the image of a sovereign country such as Indonesia, while at the same time commend others. Without going too deeply into the question of the appropriateness and "rights" of a commercial entity such as the IMB to commend or condemn a sovereign nation, one cannot escape the question whether IMB under its present role, as far as the issue of piracy is concerned, has managed to "sneak in" as "a competent body" within the meaning of Article 223 of the UN Convention 1982, the role widely

accepted by the world community as only accorded to the IMO. The reason for this is that the world has acknowledged the role played by the IMB in the area of piracy although of course one could still argue that its role is only limited to reporting as opposed to a deeper role played by the IMO such as holding talks with coastal states.

As alluded to in chapter 2, the rights under international law in the straits used for international navigation are shared by three parties namely the littoral states, the user states and the internationally “competent bodies”. While the question of the sovereignty of the coastal rights in waters which fall under their territorial sea is never in question, the rights of the other two are not as clear. In a hypothetical question, one may ask, who are the users? The answer would be the ships. Who then owns the ships? The answer would be private companies. Who in turn owns the flags the ships hoist? The answer is certainly sovereign states. So are the ships sovereign? Under this situation, it is untenable for the littoral states to dismiss an international body such as the IMB because it is brought into being by the need of the shipping community to the basic need of security passage. Some user states such as Japan take an attack against their ships seriously.

Apart from the IMB, there are other potential players emerging in the straits such as the Lloyds and Private Security Companies (PSC). These new players are most probably come to the fore based on “profit-oriented” services that the littoral states are incapable of providing.

For all that, as has been seen, maritime attacks continue unabated in the Southeast Asian region. Although there are signs, at least statistically, the Straits of Malacca and Indonesia waters that the attacks have been reduced in 2005. There are question marks as to whether

this will be a permanent feature or just a temporary lull of the piratical activities. The challenge of the coastal states is to maintain a long and sustainable cooperation among them.

One of the solutions would be for the littoral states of the Straits of Malacca to “desecuritize” the straits since the concept of maritime security is too wide. This issue will be dealt with in the final chapter. It can also be concluded at this stage that due to unnecessary confusion in the media, the IMB should consider ceasing from using the term “pirates” and “piracy” unless the attacks are compatible with the requirements under Article 101 of the UN Convention 2005. It is important in these respects that the work of the “competent” international authority as formally recognised in law is assessed.

Chapter 5 will proceed to examine in detail the actual typical forms of serious attacks on vessels in the region by two case studies of hijackings in the Straits of Malacca along with their judicial processes.

## Chapter 5

### CASE STUDIES

#### MODI OPERANDI OF PIRATICAL ATTACKS: THE HIJACKINGS OF THE *MV ALONDRA RAINBOW* AND THE *MT NEPLINE DELIMA*

##### 5.1. Introduction

This chapter comprises two case studies. The reasons for this are primarily the need to consider tangible court prosecution procedures and outcomes, and to penetrate the actual processes and mechanisms of a hijack and the arrests before a trial of the perpetrators. The first case study on the hijacking of the *MV Alondra Rainbow* is based mainly on interviews with Dr P. Paleri, Deputy Director General of the Indian Coast Guard,<sup>1</sup> Mr Noel Choong of the Piracy Reporting Centre (PRC), Kuala Lumpur,<sup>2</sup> Mr Jayant Abhyankar<sup>3</sup> of the International Maritime Bureau (IMB), London, the 145-page judgement of the case by the Greater Mumbai Sessions Court,<sup>4</sup> Reports from the ICC-IMB Annual Report and where applicable, newspaper cuttings and books written about the incidents. In the hijacking of the *MV Alondra Rainbow*, the account revealed several problems regarding the rights to intervene and the roles of the defence and prosecution in the court actions. The procedures are followed through critically by examining the legal issues brought out by both parties

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<sup>1</sup> The interview took place at the IMO, London on 17 March 2004.

<sup>2</sup> The interview took place at the Piracy Reporting Centre, Kuala Lumpur on 20 July 2004.

<sup>3</sup> The interview took place at the IMB, Barking, London on 14 April 2004.

<sup>4</sup> The certified copy of the Judgment was supplied by the Indian Coast Guard.

and subjecting these to analysis in international law. There are few such opportunities for this.

The second case study on the hijacking of the *MT Nepline Delima* is a result of a field study conducted in Malaysia in July and August 2005. This is the first time that pirates “caught in action” have been arrested and brought to court for trial. There was in fact an earlier arrest in connection with the boarding of the *MT Kyosei Maru* in Singapore Strait within the Malaysian waters, which resulted in arrest, prosecution and conviction in Kota Tinggi Magistrate Court, Johor<sup>5</sup>.

**Picture 2**  
*MT Kyosei Maru* Captured Perpetrators



Source: *Royal Malaysian Marine Police*

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<sup>5</sup> For details see *Tanjung Kupang Police Report 169/2005*.

This case has a serious shortcoming in the sense that the police arrested the perpetrators two weeks after the boarding of the *MV Kyosei Maru*, possibly based on intelligence. During the above-mentioned court hearing, all accused pleaded guilty to the charges before the case went to trial, thus depriving the public of the actual accounts of how the boarding took place. The second case study focuses on various aspects of the hijacking of the *MT Nepline Delima*.

It shows the origins of a conspiracy to hijack a ship. It demonstrates the sequence of events, the multinational groups involved, the hidden manipulations, the finance involved and the recruitment of seafarers. It is no doubt typical of these processes and is unique inasmuch as there is considerable detail uncovered, which is not readily available.

The final part of the chapter considers the legal implications of these cases taken together. It reveals issues of national jurisdiction, enforcement problems between states, intelligence sharing, intervention of political expediency, and the lessons that can be derived from the issues.

As piracy is an international crime<sup>6</sup>, it is the right of the warships of any nation to take action against pirates at sea. However, once the hijacked ship is outside the national jurisdiction of coastal states, the perpetrators are relatively safe unless the enforcement measures provided for under the UN Convention 1982 are undertaken by maritime powers with high seas capability. However, because territorial sovereignty is guarded with extreme jealousy, cooperation between enforcement agencies of different coastal states where the

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<sup>6</sup> Article 100 of the UN Convention 1982 states that piracy is *inter alia* “any illegal acts of violence or detention etc directed on the high seas against another ship...in a place outside the jurisdiction of any state.” For detail arguments on this issue, see chapter 3.

waterway is shared is often seriously lacking. It is also the case that although military or police intelligence is the best source to prevent a pirate attack, lack of state coordination, political expediency and/or legal defects have often been stumbling blocks to effective actions.

The case studies given here provide examples of cases where acts of piracy were physically stopped with the determination of coastal states, but the arrest of perpetrators was not met with similar efficiency by the coastal states' legal instruments; i.e., there was a lack of provision on piracy laws. It was left for the prosecution to take place under ordinary robbery, theft or even immigration regulations. As will also be seen, when an arrest is made by an enforcement body not familiar with the law, there will be further confusion as to the manner of how to bring the perpetrators to justice. In a civilised legal system, the Judiciary will administer justice based on the legal provisions promulgated by the executive branch of the government through parliament. It is often the case that because of its rarity in occurrence, piracy is not considered important enough to be made into a distinct law. As a result, when arrests are made, charges are framed not under piracy law *per se* but under normal penal laws, thus making it indistinguishable from the thousands of robbery or theft cases registered in court every day. Also, as will be seen in the *MV Alondra Rainbow* case, in the event of lack of coordination between enforcement agencies due to the absence of applicable laws, it is the political will that prevails.

It is in fact politics that influence the approach to such events. For example, in the Straits of Malacca, where the two hijackings occurred, accusations had been made in the past by

other states about the involvement of the Indonesians in piracy activities.<sup>7</sup> There is evidence of this, but a tangible case has also proven the converse. In the hijacking of the *MT Nepline Delima*, the heavy involvement of Malaysians in planning the hijacking of a ship for monetary gains is revealed for the first time, when it might have been politically opportune to pass the blame, and thereby confuse the pursuit of legal action.

## 5.2. Research Methods and Sources

For the hijacking of the *MT Nepline Delima*, detailed accounts were obtained from the researcher's interviews with the prosecutor and a police officer, who gave extensive explanations of the backgrounds of the perpetrators based on the police investigation into the hijacking. As the case is still awaiting trial, a cautious approach was employed so as not to reveal any evidence that the prosecution seeks to use should the trial proceed (at the time of the study, the defence team had written to ask the Deputy Public Prosecutor to allow the accused to plead guilty on lesser charges). Attempts were made to gain access to the perpetrators in custody, but this was not possible due to the fact that they were still in remand pending trial. Other information was obtained through newspaper reports in the early days following the arrest and was later verified with the police and a researcher at the Maritime Institute of Malaysia (MIMA).

There are three major sources of information in the study of the *MV Alondra Rainbow*. Firstly, interviews were conducted with persons involved directly with the incidents, namely Dr P. Paleri, Deputy Director General of the Indian Coast Guard, Mr Jayant

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<sup>7</sup> Langewiesche, W., *The Outlaw Sea*, Granta Books, London, 2005, page 46.

Abhyankar, Deputy Director of the International Maritime Bureau, who was also a witness in the trial, and Mr Noel Choong of the Piracy Reporting Centre (PRC), Kuala Lumpur. Secondly, the court's judgment is the most important and authoritative source of information for this study. In total, twenty-four prosecution witnesses gave testimony during the trial which were critically examined by the presiding judge in the judgement. There was a setback because all fifteen<sup>8</sup> accused elected to remain silent during the trial and therefore their version of events was not explained. However, some of their actions and denial of involvement could be found indirectly from their mitigation for leniency to the court and some through the testimonies of the prosecution witnesses. Thirdly, newspaper reports, books and Internet articles and news are employed as secondary sources and used only to fill in the gaps in the study. In the events of conflicting points, the original sources, i.e. the interviews and the court's judgment, prevail.

The researcher uses the data in these two politically sensitive cases to examine key questions, i.e. were systematic criminal methods employed by the so-called syndicate to hire land-based 'thugs' to hijack ships? Do these two cases fulfil the requirements of piracy under international law? To what extent did international bodies and Coastal States cooperated objectively to combat piracy, and did the arrests and the subsequent trial satisfy the standards required under international legal norms?

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<sup>8</sup> Altogether, there were initially 15 accused, but Accused No .4, Frances Junus Umboh, died in remand custody while awaiting trial. Nonetheless, his name was not expunged and he remained as one of the accused throughout the trial.

### 5.3. The Hijacking of the MV Alondra Rainbow<sup>9</sup>

**Picture 3**  
*The MV Alondra Rainbow Being Pursued by the Indian Coast Guard*



Source: *The Indian Coast Guard*

The case of the *MV Alondra Rainbow* has become well-known as a result of the success of the Indian Coast Guard in intercepting and later arresting the hijacked ship after a long hot pursuit. There have been a considerable number of articles and books written about the arrest and the subsequent trial of the 15 crew of the hijacked vessel, some of which are based on facts supplied by the media or piracy agencies such as the International Maritime Bureau. This research will consider the facts surrounding the hijacking from trial court documents, i.e. the judgment of the Greater Mumbai Sessions Court. The prosecution of the

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<sup>9</sup> The version of events is taken from the Mumbai Session Court judgment and by William Langewiesche, *The Outlaw Sea*, Granta Books, London, 2005. The author stated in the book that he had met and spoken with Captain Ikeno, two accused at Mumbai Prison, the Defence Counsel, the prosecutor and several other witnesses of the case.

crew of the hijacked vessel (always addressed as pirates by the media even before the trial commenced) was the first of its kind where the provision of the international law of the sea on piracy was invoked in a court.

The *MV Alondra Rainbow* was owned by the “I Mura Kisen Company Limited” and was registered in May 1998 in the name and style of “Alandro Maritime S.A. Panama”. She was an ordinary cargo ship with two holds and twin decks, two hatches with the G.R.T of 7,783 and D.W.T of 8,912 tonnes, and the port of registry was Panama. The original colour of the hull was dark blue, the bottom was red, the superstructure was white, the cranes and derrick was beige and the funnel was in red, white and blue stripes.<sup>10</sup>

At about 8 pm on 22 October 1999, the *Alondra Rainbow* left Port Kuala Tanjung Port on the Island of Sumatra with a cargo of 7,000 tonnes of aluminium ingots, heading for Miike, Japan. The vessel had Master Captain Ko Ikeno and Chief Engineer Kenzo Ogawa, of Japanese nationality, and 15 Filipino crew members. The ship’s route was through the Strait of Malacca southward into the Strait of Singapore, then northward across the South China Sea, past the Philippines and Taiwan before again crossing the East China Sea and arriving at a port situated at the southern Island of Kyushu.

Captain Ikeno’s narration of events after the *MV Alondra Rainbow* left the port of Kuala Tanjung was stated as evidence in the Mumbai Sessions Court as follows:

“On 22 October 1999 when they sailed out of Port Kuala Tanjung at about 2200 hours he went down to his cabin to take a bath. He was sitting at the table and writing a telex to the charterers and owners. After 30 minutes he heard abnormal

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<sup>10</sup> See the judgment, page 74 taken from the testimony given by Captain Ikeno.

sounds over the public address system. When he heard the sound he rushed to the bridge and when he tried to open the door towards the bridge somebody was pushing the door from the other side. Therefore he pushed the door from his side and from the little gap he noticed a pistol and a knife, so he gave up pushing the door. Thereafter two strangers tied his hands behind his back and pushed him towards the bridge. Approximately 10 strangers were on the bridge. The Third Officer and the able seaman's hands were also tied. The said persons stole his master key and watch. Further PW2<sup>11</sup> (Captain Ikeno) did not say anything to the strangers because they were the type who could attack them. All the 10 strangers were masked and they were barefoot. PW2 has further stated that one of the accused was armed with a pistol and the other was armed with a knife and they forced the crew to go out of the cabin. The crew came out of the cabin with their hands tied behind their backs and they were blindfolded. They were taken to the mess room and asked to sit down. PW2 was made to go to the engineer's room. The Third Engineer was operating the machine and at that time they were running at full speed. Hence the person was asked to slow down the speed. Then both of them were taken to the mess room. Then they came to the cabin of PW2. In the cabin of PW2 the pirates opened the safety box with the keys, which they had taken from him earlier, and stole the cash from the safety room. PW2 has further stated that the money stolen from the ship was 2,500 American Dollars and 380,000 Japanese Yen. His personal money was 800,000 Yen. The pirates took him to the mess room and blindfolded him. They told him to stay there like his crew. In his cabin, apart from his safe box, there were his different clothes, a spare wristwatch, the crew's passports and some ship documents. The pirates went to other cabins and stole the crewmembers' private money. He did not know what had happened to those articles that were found apart from his safe box in his cabin. He did not take anything with him. Pirates took away his passport.

...Two hours later they heard the sound of a pump and different engine sounds. Thereafter after about half an hour the pirates took him and the crew one after another to the poop deck. The pirates removed his blindfold. When he opened his blindfold he found one dirty cargo ship on the starboard side. The said vessel was poorly maintained. The pirates then ordered them to transfer to that ship. All of them one by one were transferred to that ship. The pirates again blindfolded them one by one and they separated them into two groups. One group was kept in the central room and the other was kept in a room at the port side. The pirates even changed the shackles of their hands from the rear to the front. PW2 was kept in the port side room. The pirates ordered them to lie down on the floor where there were dirty mattresses. They were ordered not to speak to each other and not to stand up and also not to look outside. Sometimes the accused told them not to make trouble and that they would kill the crew if they made trouble. They were in the dirty ship for six days. After six days at about midnight the vessel stopped and the pirates took the crew one by one to the main deck. PW2's blindfold was removed and he saw a life raft on the starboard side of the ship. The crew were ordered to board the raft. The pirates then cut the rope of the raft and they were separated from each other i.e. the pirates sailed away and the raft drifted. When he got into the life raft he checked the same and found that it belonged to the *Alondra Rainbow*.

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<sup>11</sup> Court's abbreviation for "Prosecution Witness No.2"

...they drifted for about ten and a half days. They were hungry as they was very little food to eat and very little water to drink...on 8<sup>th</sup> of November in the afternoon he saw a small fishing boat ahead of them and heading towards them slowly...the fishing boat was flying a Thai flag...The skipper of the fishing boat allowed all of them on board the fishing boat, then proceeded to the port of Phuket, Thailand. They reached Phuket the next morning and the Thai marine police came there. All of them were taken to the police station and (the police) made enquiries (about the hijacking). Two days they were there in Phuket. Thereafter they were taken to Bangkok and thereafter repatriated to their homes.<sup>12</sup>

In Kuala Lumpur the owners had already notified the Piracy Reporting Centre, seven days after the hijacking, and the shipping industry was alerted, with a USD200,000 reward offered by the insurance company.

The hijacked *MV Alondra Rainbow* sailed through the Singapore Strait and across the South China Sea to the port of Miri in Malaysia's State of Sarawak. During this voyage, the perpetrators painted the hull sides black and renamed the ship Global Venture. While in waters near Miri, almost half of the aluminium cargo was transferred to a freighter, the *Bansan II*, which later arrived in the Subic Bay, the Philippines, under another name, *Victoria*, where the cargo was quickly sold.<sup>13</sup> The hijacked *MV Alondra Rainbow* was again renamed as the *Mega Rama* and by this time it flew the flag of Belize.

The hijacked *MV Alondra Rainbow* now moved in a westerly direction and it was not known whether she passed through the Straits of Malacca or used the longer route in Indonesian waters at the south. But when she was in the Indian Ocean near India, she was

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<sup>12</sup> See the Judgment, pages 79-81.

<sup>13</sup> See Langewiesche, page 60. The Philippines local police mounted a criminal investigation of the *Victoria*, which went nowhere; there has been no prosecution of any kind. One of the reasons cited is that the syndicate received protection from the authorities, and the then President of the Republic of Philippines, Mr Estrada, was said to have been involved. This information is based on an interview between the researcher and Mr Noel Choong of the PRC at Kuala Lumpur on 20<sup>th</sup> July 2004.

spotted. Soibam Mahendra Singh, the Deputy Commandant attached to the Coast Guard ship *Tarabai*, who was a witness in the trial, explained how she was arrested. The court summarises his testimony as follows:

“ ...PW1 (Soibam Mahendra Singh) has further stated that he received another fax message (from the Piracy Reporting Centre) that the vessel was proceeding towards one of the Indian ports to discharge cargo and the 17 crew members had (already) been rescued by the Thai authority. Thereafter the coastguard initiated rescue operations for the missing vessel. (PW1) further stated that on 13 November 1999 one merchant ship *Al Shuhadaa* reported a sighting of the missing vessel at about 50 nautical miles west of Kerala coast doing a course of 330 degrees and a speed of 8 knots.....at about 1400 hrs on 14 November 1999 the coastguard ship *Tarabai* sailed to intercept the hijacked vessel the *Alondra Rainbow*. On the same day at about 2000hrs the ship *Tarabai* intercepted the vessel at 40 nautical miles west of Cochin. PW1 has further stated that their ship asked for identification of the vessel *MV Alondra Rainbow* on VHF Channel 16; however, this was not acknowledged. They fired to draw the attention of the vessel. When PW1 called (again) on the said channel, the accused increased the speed of the ship and altered course to 130 degrees. The said incident happened approximately 40 miles from the Indian coast.

...PW1 has further stated that thereafter, for the entire night, they maintained channel 16 and also maintained a safe distance from the *Alondra Rainbow*. In the early morning of 15 December 1999 the vessel was visually sighted and a Dornier aircraft was dispatched from Daman for the positive identification of the vessel. The vessel had come upon Channel 16 and identified (herself) as MV Mega Rama, whose last port of call was in Manila and next port of call was Fujiala (Fujairah). They ordered the accused to stop the ship for investigation. However, the accused refused, saying that the ship was in international waters and had to reach Fujiala, where the coastguard could do whatever they wanted to do, but the accused did not stop. Thereafter they used moderate force to stop the ship. Prior thereto the accused on board the ship had fired towards the coastguard ship. To save their men and the ship the coastguard had also fired. PW1 has further stated that in the morning of 16 December 1999 the persons on board the ship (surrendered?) (Illegible) to embark the ship and 15 persons were (?) (Illegible); when the coastguard personnel went inside the ship they found that the ship was burning and they recovered documents pertaining to *Alondra Rainbow*. Later, it was handed over to the police under panchanama. PW1 has further stated that he came to know before they boarded the ship that there were coastguard ships *Veera* and *Annie Besant*. From the Navy, *I.N.S Prahar* also came. When they went inside the engine room they found that it was flooded and the Chief Engineer of the vessel had scuttled the ship. On the evening of the 17<sup>th</sup> the Coastguard ship *Veera* towed *MV Alondra Rainbow* to Mumbai and arrived on 29 November 1999 in the evening. PW1 further stated...when he boarded the vessel he found the pirates, 15 in number, and when PW1 talked to the accused it was revealed that the accused had entered the vessel forcibly and taken charge of it and had disposed of part of the cargo. He had spoken with Christianus, accused No.1 and one Chief Engineer amongst them. Two of the persons to whom

he talked could speak broken English...according to Accused 1 and 7, with whom he spoke, the name of the ship was Mega Rama. PW1, at page 5 para 8 (of the notes of proceeding), has further stated that on boarding the ship there were fires on the bridge of the ship and the main engine room. When he went inside the bridge, the documents were on fire. When he went inside the Captain's cabin he found documents pertaining to *MV Alondra Rainbow*. From the ship's office he found books and documents from the *Alondra Rainbow*. PW1 has further stated that there was no fire but thick fumes of smoke in the common passage. Thereafter he went to the engine room and he found that the documents were burning. PW1 collected the same and gave them to his boarding team for safe custody. Later on PW1 handed the documents to the Police on 26 November 1999. Coast guards carried out the preliminary investigation and the accused were asked their names, nationality and where the accused were from and how much they knew about the vessel *Alondra Rainbow*. Apart from the same PW1 recovered the personal belongings and kept the same in safe custody; they were handed to the police at Yellow Gate Police Station on 26 November 1999. PW1 has further stated that he found the engine room flooded and asked the Chief Engineer, i.e. Accused No.7, how the water came to be there and it was revealed from Accused (illegible) that the Accused had opened the underwater walls in order to sink the ship.. Thereafter they looked for the ship's diagram and the diagram they found was of *Alondra Rainbow*. Thereafter damage control operation was undertaken to control the flood. The flood was brought under control and de-flooding was carried out. The walls were plugged from outside by the divers. The divers were part of a naval diving group from *I.N.S. Gomati*. The de-flooding arrangement was carried out, then towing arrangements were made. *I.N.S Gomati* was present at position and came on the afternoon of the 16<sup>th</sup>. The coast guard ship *Veera* towed the vessel to Mumbai.... towing started on 17 November 1999 in the evening and the vessel arrived in Mumbai on 20 November in the evening.”<sup>14</sup>

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<sup>14</sup> The Judgment, pages 99-103.

**Map 14**  
Possible Movements of the *MV Alondra Rainbow*  
from Port Kuala Tanjung – Miri - Cochin



Source: ICC-IMB

The fifteen captured pirates were arrested and produced before the Greater Mumbai Sessions Court, where they were remanded pending trial. They were charged with eleven counts of offences and were committed together with twenty-six others still at large.<sup>15</sup> On 25 February 2003, they were convicted on nine offences and sentenced to seven years' imprisonment on the lead charges and other varying sentences as regards other charges.

<sup>15</sup> Those mentioned in the charges were: (1) Yan @ Yance Makatengkeng, (2) Rager, (3) Narnes Zachawarus, (4) Boss (name not known), (5) Ating @ Ting, (6) The Captain of MV Bansoon II and 20 others (names not known). See judgment of Judge Shri R.R.Vachha in *The State Vs Christianus Aeros Mintodo & 14 ors*, Criminal case No. Session Court of Greater Mumbai No.197 of 2000 (unpublished) page 2. It is said that the plan to hijack the vessel was hatched in a coffee shop in Batam where one an @ Yance Makatengkeng, acting as a manning agent for another man known only as "Boss", came scouting for seafarers and met Christianus Mintodo, the first accused. As there was no defence case, this cannot be verified, but a reference could be attributed to Langewische's, *The Outlaw Sea*, page 82.

The detail of the charges and sentences is presented in the Appendix 8.

The Session Court ordered that all the nine sentences were to run concurrently and all accused were entitled to offset the prison sentences with the period they had already served while on remand custody. The court also acquitted all accused of the charges in regard of “entering India without valid documents”, an offence under section 3(3) of the Passport Entry into India Act, 1920 and under section 13(i) read with section 14 of the Foreigner’s Act 1946 and under section 120B (1) of the Indian Arms Act read with section 34 of the Indian Penal Code.

#### **5.4. The Trial: Analysis of Procedures and Ruling of the Court<sup>16</sup>**

It was quite clear that there was a confusion regarding procedures after the surrender of the hijackers to the Indian coastguard. While the researcher is disadvantaged by failure to obtain the precise notes of proceedings from the Greater Mumbai Sessions Court,<sup>17</sup> this was overcome by the availability of the judgment written by Sessions Judge Shri R.R.Vachha, which was extraordinarily long and detailed.<sup>18</sup> In this lengthy judgment the judge often, in

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<sup>16</sup> Some of the analyses are based from a paper, “Legal Commentary on the *Alondra Rainbow Case*” by Professor P.K.Mukherjee in *Coastal Zone Piracy Symposium* held in the World Maritime University, Malmo, Sweden, 13-15 November 2006. The Researcher elects to dispute some of the analyses put forward by the learned Professor based on his own experience as a Deputy Public Prosecutor and Sessions Court Judge in Malaysia. The Penal Code, the Evidence Act and the Criminal Procedure Code of Malaysia are in *pari materia* with the Indian corresponding Acts.

<sup>17</sup> Efforts were made to get the notes through the Indian Coast Guard but the researcher was informed that the notes were not available because the court building was undergoing renovation. It is presumed that since the case did not go on appeal, there was no need for the trial judge to prepare the notes that would normally be included in the appeal record. With the absence of the notes, the researcher does not have the absolute advantage of examining the submissions of both prosecution and defence, on which every trial judge relies so heavily before arriving at a decision.

<sup>18</sup> The researcher was supplied with a 246-page judgement which discussed in detail the facts surrounding the hijacking. The *ratio decidendi* (the “reasons”) itself was quite short and did not address the basic issue of jurisdiction. This could be due to the fact that the accused chose to remain silent without providing any evidence, thus leaving the judge to rely entirely on the facts adduced during the prosecution stage.

places, repeated *in verbatim* the evidence adduced by important witnesses such as the victim, i.e. Captain Ikeno, the original master of the *MV Alondra Rainbow* and members of the arresting party. Reading the judgment in detail reveals many discrepancies, some of them major, which could render the conviction unsafe.

The main criticism of the judgment is that there is virtually no discussion on piracy either under the UN Convention 1982, or under common law, as well as hijacking and terrorism, even though the words "...the offences are related to international terrorism contrary to international law of the sea piracy and contrary to UNCLOS as also international terrorism" are incorporated in almost every single charge. (See further argument below). It would also appear that the court has used the term "high seas" indiscriminately without attempting to explain how an offence in the high seas can come under the jurisdiction of a coastal State.

There is doubt as to the validity of the Sessions Court's application of the UN Convention 1982. As opposed to the monoist system, India as in most common law countries follows the dualistic principle in contending that international and domestic law are distinct systems of law, and that international law only applies to that extent that it does not conflict with domestic law. Even if one were to argue that the UN Convention 1982 has now evolved as customary international law, it is submitted that for purposes of domestic enforcement and prosecution it still has to be put in effect in the municipal law.

Although understandably the crew were tried under Indian Penal Code, there were several charges where the offences were said to be connected to "international terrorism and

international law on sea piracy and contrary to the UN Convention 1982.”<sup>19</sup> The court did not make it clear in the judgment on how India had adopted the piracy provision of the UN Convention 1982. It is a well-entrenched principle that “the rules of international law are binding as such only on States or other international persons. To become binding upon citizens or companies, they must be incorporated in municipal or national law in accordance with the constitutional process of the State concerned”.<sup>20</sup> There was no evidence adduced by the prosecution that India had adopted the piracy provision of the UN Convention 1982 into its national law because if the country had done so, surely the perpetrators of the *MV Alondra Rainbow* would have been charged under the new laws without difficulty. It is submitted that merely saying that India is a member of the UN Convention 1982 is not, by itself, sufficient to frame a criminal charge of this nature. However, if the geographical jurisdiction could ascertain that the offence took place in India’s territorial sea, India’s authorities would have every right to prosecute the perpetrators under its municipal laws.

In the present case, the court did not decide whether the definition of piracy in the old Indian Admiralty Offences (Colonial) Act 1849 was compatible with the provisions in Article 101 of the UN Convention 1982 to allow for direct application of the Convention. The principle of common law piracy was taken from the 1696 case of Regina v. Dawson where it was decided that piracy was the jurisdiction of the admiralty. It should, however, be recalled here that the definition of piracy under the UN Convention 1982 was based on the Harvard Draft 1932 and certainly it was not piracy as understood in the traditional

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<sup>19</sup> Out of the total of eleven charges brought against the accused, nine were framed as “contrary to international law on sea piracy and contrary to the International Law of the Sea and also international terrorism”. See the Judgment pages 2 to 11.

<sup>20</sup> E.D. Brown, page 2.

English law of piracy in the 17<sup>th</sup> century. Brown highlights the need to examine the term piracy as follows:

“Another reason for careful examination of the concept of piracy as defined in these conventions (the Geneva Convention and the UN Convention 1982) is that the term piracy is also used, but with different meanings, in municipal law and marine insurance. It is necessary, therefore, to distinguish piracy *jure gentium* from what is sometimes called “piracy by analogy”, that is, piracy under the various systems of municipal law, as well as from piracy as defined for purposes of interpreting policies of marine insurance”.<sup>21</sup>

Brown goes on to explain that under English criminal law, certain acts which do not constitute piracy *jure gentium* do constitute “statutory piracy” under the Piracy Acts of 1698 and 1721 and gives the example of a successful prosecution of piracy under English law in the Court of Appeal decision in R. v. Boniface<sup>22</sup>, where three deckhands of the Grimsby Trawler *Loveden* received prison sentences after being found guilty of conspiracy to commit acts of piracy. The three men had taken possession of the *Loveden*, confined the master, mate and cook, terrorised the engineer, assaulted the master and made off with the ship’s lifeboat and various stores.<sup>23</sup>

It is also unclear whether the definition of piracy under the old (Indian) Admiralty Offences Act 1849 follows that of the (English) Piracy Acts of 1698 and 1721. By virtue of India being an English colony during that period, one should expect that she followed the English common law, which includes the said Acts. But if the meaning assigned to the Admiralty Offences Act 1849 is indeed the same meaning in those two English statutes, it is certainly not the same as piracy contemplated in the UN Convention 1982, as argued above.

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<sup>21</sup> E.D. Brown, *International Law of the Sea Vol. I*, Dartmouth Publishing, Aldershot, 1994, page 300.

<sup>22</sup> [1967] Crim. L.R. page 186

<sup>23</sup> E. D. Brown, note 21 above.

There was also no discussion of the exact location of the arrest apart from the evidence of PW1 Soibam Mahendra Singh, who testified that the hijacked vessel was first intercepted 40 nautical miles west of Cochin.<sup>24</sup> There was no evidence adduced to show that the point of interception was inside Indian territorial sea, where a competent Indian criminal court derives its jurisdiction. While admittedly an able maritime power such as India could pursue and arrest a pirate ship in the high seas,<sup>25</sup> there is a possible loophole in law when the perpetrators are arrested and charged in a competent court because the question of geographical jurisdiction will arise as to whether the “hijacked or stolen” ship is the same as the pirate ship under international law. Article 103 defines a pirate ship as one that, “is intended by the persons in dominant control to be used for the purpose of committing one of acts referred to in article 101”.<sup>26</sup> What would be the position if some of the perpetrators or crew of the stolen ship were to deny being party to the hijacking and were indeed *bona fide* seafarers taken on board at some point in the voyage? And further, how is the court going to determine who, among the crew, is in dominant control of the ship? These are the loopholes and possible complexities that need to be addressed by the court. An opportunity was lost when the judge in the *MV Alondra Rainbow* case did not address the definition of piracy in international law although the convention was cited in the charge. It appears that throughout the judgment, the learned judge keeps on mentioning the UN Convention 1982 but does not attempt to use it.

On evidentiary analysis of the case, another obvious discrepancy is that there was no confirmation that the arrested crew of the hijacked vessel were in fact the perpetrators of the hijacking in the Strait of Malacca. At no point in his testimony, that Captain Ikeno,

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<sup>24</sup> The Judgment, page 99.

<sup>25</sup> Article 100, *UN Convention 1982*.

<sup>26</sup> Refer to the conclusion below.

being the only witness to the hijacking, had positively identified any of the accused as the perpetrators. This issue is only mentioned once:

“PW2 (Captain Ikeno) has further stated that he read in the newspaper and saw on television that the Alondra Rainbow had been rescued by the Indian Coast Guard. He was asked by his company to go to Mumbai for inspection and therefore he had come to Mumbai and identified the Alondra Rainbow because he had lived on the said ship for 10 months...Police recorded (his) statement and showed him some documents which he identified as documents of the Alondra Rainbow. Thereafter he was taken to jail for identification of the accused. He was shown 25 persons in jail....”<sup>27</sup>

The learned trial judge did not state that PW1 had positively identified any of the accused; nor did he clarify the procedure undertaken to identify the perpetrators. Under the criminal system of Common Law countries such as India, this discrepancy is considered fatal. It should be remembered at this point that during the early stage of the hijacking, before he was blindfolded, Captain Ikeno could see that there were ten strangers on the bridge. It was also not made clear in the judgment whether the twenty-five persons shown to PW1 at the jail were participants in an identity parade, because if they were, this is another contradiction of the system, as these parades are normally conducted in the police station. Although all accused were positively identified by other witnesses as having been on board the *MV Alondra Rainbow* during the arrest,<sup>28</sup> this does not negate the duty of the prosecution to prove that they were the original perpetrators, by way of positive identification by a witness, because this could attract a strong presumption that some, if not all, of the accused were innocent seamen caught in the situation, as there was no evidence adduced by the prosecution as to the movements of the *MV Alondra Rainbow* between the hijacking and the arrest. It is submitted further that it is not sufficient for the prosecution to

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<sup>27</sup> The Judgment, page 82.

<sup>28</sup> The Judgment, page 116.

merely prove continuation of an offence between the time of hijacking and the apprehension of the ship by the Indian Coast Guard. It is paramount for the prosecution to prove at least some of the apprehended *Alondra Rainbow* crew in the Arabian Sea were the same persons identified by PW2 before he was blindfolded in the Straits of Malacca waters.

It was evident from the judgment that the judge had made a strong presumption against innocence.<sup>29</sup> This includes the admissibility of extra-judicial confessions of the accused to PW9 Surendra Singh Dosla, the Deputy Commander of the Indian Coast Guard, immediately after arrest.<sup>30</sup> The Court admitted the confessions despite the fact that they were obtained after interrogations and the accused were not conversant in English and question had to be interpreted into the Indonesian language by one Christianus Mintado, who was later made Accused No.1.

Two of the basic questions on the law of the sea that were not discussed by the court are the right of boarding by the coast guard on the high seas and whether the act of a crew to ignore and decline a request to board is lawful and reasonable. The court took the evasive action of the crew as a non-innocent action, a concept unknown on the high seas. The court says:

“Had the accused really been innocent persons it would have been proper on their part to stop when the call was given by the Indian Coast Guard ship when they were signalled to stop. Had it been so, definitely it would have reflected their honesty. On the contrary, the reply given by the accused persons, which stands unchallenged through the evidence, that they were in international waters and the Indian Coast Guard could do nothing to them and the further fact that chase was required to be given and the services of three coast guard ships, navy ships and one Dornier

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<sup>29</sup> The Judgment, page 136.

<sup>30</sup> The Judgment, pages 133 – 135.

aircraft were required to be called to control them and to seize the ship goes against the innocence of the accused persons as suggested by the defence”.<sup>31</sup>

From the judgment, it was also evident that the accused did not have the advantage of a competent counsel, particularly in shipping matters. Clearly, the counsel who was assigned by the State lacked proficiency in shipping practice, and he failed to lay down sufficient defence during the cross-examination.<sup>32</sup> One of the major errors committed by the defence was not to present the accused as witnesses under oath. Without sworn testimonies of all the accused, the judge was left with only the evidence put forward by the prosecution. In this situation, under the common law criminal procedure adopted by most common law countries, including India, the judge has to re-evaluate the prosecution evidence in totality and decide by the prosecution case alone whether the charges have been proven beyond reasonable doubt. This cost the defence the opportunity to explain how all the accused came into possession of the *MV Alondra Rainbow*, resulting in the conviction. The second mistake was not to file an appeal against the conviction and sentence to the higher court. It is believed that, with the discrepancies, there was a possibility that the conviction would not have stood on any appeal if such were made by the defence.

With the world’s attention on the case, the State has shown elements of over-zealousness in the prosecution of the perpetrators under the third charge of entering India without valid documents. This could be considered a *mala fide* act by the State, since the accused never intended to enter India in the first place. They were arrested in international waters and

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<sup>31</sup> The Judgment, page 137.

<sup>32</sup> As highlighted by Langwiesche, during cross-examination of Mr Jayant Abyankar, a shipping expert from the IMB, London, the defence counsel failed to ask essential questions on manning practice etc: see pages 79 - 80.

brought inside Indian Territory by the Coastguard. As expected, the accused were acquitted under this charge.

Since the judgment was not appealed against, the case has lost its significance to other commonwealth countries, primarily because a judgment of a lower court is not normally reported in the law journals thus depriving other courts from referring to the case.

### **5.5. The Hijacking of the *MT Nepline Delima***

This account differs in its objectives from the *MV Alondra Rainbow*. The intention is to penetrate the underlying informal and formal arrangements in the conspiracy to attack and steal a ship. This is a hidden world, but essential to comprehend as far as possible, for these reasons it is recorded in detail.

As stated earlier, there has been no formal arrest of pirates in the Straits of Malacca by the littoral states under laws of piracy in the past. However, in a way, the arrest of the *MV Alondra Rainbow* was achieved through the information supplied by the coastal states, although it was conducted off Indian waters. This was to change for the first time on 14 June 2005 when the Malaysian Marine Police actually arrested ten pirates in a botched hijacking of the oil tanker *MT Nepline Delima* in the north part of the Straits of Malacca near Langkawi Island. The investigation into this hijacking produced, also for the first time, the exact methods used by a syndicate to perpetrate this crime. As the trial of those accused

has yet to commence in Malaysia, their names are changed for legal reasons.<sup>33</sup> The importance of this account lies in a detailed follow-through of the way in which the hijack was conceived and carried out. It is probably more typical in its simplicity than the models of sophisticated processes frequently assumed and politically attributed to nationalities.

*MT Nepline Delima* is described as a RM 40 million, 6,902 dwt Product Carrier built in 1995. The oil tanker was laden with 6,300 tonnes of diesel worth RM 12 million and was on its way from Singapore to its destination in Yangon, Myanmar. It was owned by the Nepline Berhad, a company listed on the Second Board of the Malaysia Bourse providing water transportation services. For the voyage, the *MT Nepline Delima* had a crew of seventeen: six Indonesians, three Burmese and eight Malaysians. To appreciate the process and the prime characters involved, their roles in the hijacking of the *MT Nepline Delima* are given in Appendix 9 in the detail required for a case in a court of law.

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<sup>33</sup> The trial has been postponed because the accused lawyers were writing to the Deputy Public Prosecutor stating that all accused would like to plead guilty on lesser charges. At the time of writing of this chapter, there has been no further development on the status of this case.

**Picture 4**  
The Arrest of the *MT Nepline Delima* Attackers



Source: *Royal Malaysian Police Marine*

**Map 15**  
The Movements of *MT Nepline Delima* Perpetrators



The above figure illustrates the movements of the players in the hijacking. The red arrow represents the original movement of the syndicate from Jakarta. The green arrow represents the movements of some of the perpetrators who hailed from Aceh Province and the dotted purple arrow represents the combined movement of all Indonesian players from Batam to Penang, where they laid an ambush for the vessel, which route is represented by the yellow arrow.

As shown in Appendix 9, the perpetrators were arrested by the Royal Malaysian Marine Police with the help of a crew of the *MT Nepline Delima* who escaped the ordeal. After 14 days in remand<sup>34</sup>, the perpetrators were taken to Langkawi Magistrate's Court and charged with armed robbery under section 395 of the Penal Code. The tanker was arrested while still in Malaysian territorial waters twenty-three nautical miles from Rebak Besar Island near Langkawi. This it was not the first time that it had been attacked.<sup>35</sup>

<sup>34</sup> Under the Criminal Procedure Code, the Malaysian Police have power to remand suspects for a maximum of 14 days, after which the suspects must be produced before a Magistrate or released with or without bail.

<sup>35</sup> See *IMO Circular MSC/Circ 991*, dated 31 March 2001, page 6. The ICC-IMB Annual Report 2000 stated "On 9 May 2000 a 4,600 dwt Malaysian registered tanker ("*Nepline Delima*"), underway at

Further investigation revealed that five of the gang had no international passports and had entered Malaysia illegally. They were believed to be from the Indonesian Province of Aceh.<sup>36</sup> Three of the conspirators namely Tay Joe, OT and Chua, who were the “financiers” of the hijacking, were never caught. It is believed that they belonged to an international syndicate.<sup>37</sup> Trading ship’s fuel illegally with or without the knowledge of the company is a common practice in the shipping industry in this part of the world. As exemplified in this case study, a syndicate with knowledge and insider information from corrupt and dishonest crew members would find it easy to attack vulnerable ships at sea. More than anything else, greed for fast money is the main motivating factor for the crew. Starting to feel the enjoyment from “*duit kencing*” roughly translated as ‘urine money’, or in the local shipping lingo, “illegal proceeds from ships’ diesel fuel”, the plan to hijack the whole crude oil cargo was hatched with the help of outsiders, in this case, Kasim, who had experience in the industry. Through his connection to the industry via the crew agency, Kasim was able to connect the financiers and the unemployed ‘sea thugs’, who themselves were former sailors.

## 5.6. Conclusion

The two cases highlight the *modus operandi* of two forms of international crime syndicates in hijacking ships with valuable cargo. Although there is a five-year gap between the two hijackings, the *modus operandi* used in the two cases is similar. Both originate from the area of Batam and although the compositions of the criminals vary, the hijackings took

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02.05N: 109.13E reported being boarded by four persons armed with long knives. The third officer was taken hostage and crew valuables and cash stolen before the boarders left the vessel.

<sup>36</sup> See press statement of the Chief Police Officer of the State of Kedah Datuk, Mohamed Supian Amat, in *the Star Online*, June 16 2005.

<sup>37</sup> The Deputy Inspector General Datuk Seri Musa Hassan, made this presumption because, “the pirates had to sell their ill-gotten gains to others” See *the New Straits Times*, July 16 2005.

place in the Straits of Malacca. A lack of the intelligence vitally needed to stop the hijacking in its tracks is shown here, although Batam is the base for the Indonesian Western Front Navy (GUSKAMLABAR).

As in the *MV Alondra Rainbow*'s hijacking, the real promoters of the crime are not known, and when the arrests were made, the financiers could not be traced. Unemployed seamen with some local experience were always the first targets of this syndicate. As in the case of the *MT Nepline Delima*, there was an extensive buffer network between the perpetrators and the original financiers in Jakarta until the hijacked vessels supposedly reached its destination in Myanmar.

These two case studies demonstrate the existence of a highly complicated web of conspiracy by international syndicates to hijack cargo ships in the Straits of Malacca for monetary gains. They have also proved the role of land-based individuals who are willing to participate in the crime for money. The hijacking of the *MT Nepline Delima* in particular demonstrates the role of several corrupt and dishonest company staff who were willing to "tip off" the syndicate with the company's information. The involvement of so many people over a span of several months in the conspiracy to hijack the tanker could only demonstrate the fact that the shipping company did not have sufficient data on the background information of its own staff.<sup>38</sup>

The role of the littoral states' enforcement in the Straits of Malacca is minimal in the two cases. In the *MV Alondra Rainbow*, questions have to be asked about the role of the Malaysian port of Miri because the cargo was unloaded there for several days without

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<sup>38</sup> As explained elsewhere in this chapter, this is not the first time that the ship has been boarded by robbers.

rousing any suspicion on the part of the port authorities. The fact that the ship was able to roam freely in the Southeast Asia seas, changing her appearance and identity several times without being traced by the authorities, remains a mystery and strengthens the belief that inside information and bribery of officials were involved. On the other hand, international bodies such as the IMB did a distinguished job in feeding information on the disappearance on the *MV Alondra Rainbow* to the shipping community as well as the coastal states. One of the main reasons for the success of the IMB is that it is not bogged down by diplomatic bureaucracy between sovereign states: In a way, its role is fast becoming that of an international police force for the shipping industry and its reports of piratical incidents are taken as authoritative by coastal states authorities.

In the *MT Nepline Delima*, the Malaysian Marine Police acted fast and decisively, but it is believed that this was due to the incident occurring in its territorial sea. The prosecution of the hijackers in this instance is not as complicated as in the *MV Alondra Rainbow case*, as there was no hot pursuit involved and throughout its journey, the vessel has been in Malaysian territorial waters<sup>39</sup> and was flying the Malaysian flag. Even with this relative ease of capture, the prosecution admitted that there was no specific legal provision for piracy in the Malaysian Penal Code and the charge of armed robbery was preferred instead.<sup>40</sup>

It is important to acknowledge that the coastal states of the Straits of Malacca need to improve their intelligence gathering to prevent this organized crime from continuing

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<sup>39</sup> See the map for the movement of the *MT Nepline Delima*. It is believed that a hot pursuit traversing the Indonesian territorial sea was not a possibility in any circumstances in 2005 due to a strained diplomatic relationship between Malaysia and Indonesia on the Ambalat issue.

<sup>40</sup> Interview with a Deputy Public Prosecutor, State of Kedah on 4 August 2005.

unabated in the future. There is a strong possibility that the identity of the syndicate could be uncovered by following the trail of the cargoes hijacked. Oil has always been the favourite cargo to steal because it can easily be sold to the black market. The potential that this type of oil cargo hijacking will recur in the near future is great, due mainly to the soaring global oil prices. With careful investigation and good cross-boundary intelligence, this type of crime can be thwarted because the syndicate needs to dock at a “safe” port and unload the cargo, secure a dock or transfer the cargo to another vessel. Ultimately, the ill-gotten money needs to be banked. This type of operation is complex and it is thought that with the recent emphasis on money siphoned off for terrorism, banking procedures have been tightened, making it difficult for the syndicate to move money without being traced by the authorities.

One of the most important measures that could signal coastal states’ commitment to combat this type of menace would be the introduction of the piracy provision of the UN Convention 1982 and the SUA Convention 1988 together with the 2005 Protocol into their domestic laws. As has been seen in the trial of the *MV Alondra Rainbow*, the Indian authorities have admitted the difficulty in pressing charges against the crew of the hijacked vessel. Admittedly, this would not be easy to implement because sometimes introducing international conventions into municipal laws involves major modifications to the existing national laws and in some cases requires constitutional approval. The political scenario often takes over. But, as is evident in the prosecution of the *MV Alondra Rainbow* and the *MT Nepline Delima*, there are serious loopholes in the legal provisions as regards piracy in many coastal states. This needs to be addressed quickly because the act of piracy *Jure Gentium* under international customary law is a very serious offence and it cannot be

equated with the ordinary penal provisions in the Penal Codes of the two states.<sup>41</sup> Dr. Paleri admitted that the prosecution had difficulty in framing charges because of the absence of the piracy offence in the present Indian penal laws. It was only after careful study that the prosecution decided to “test” the effectiveness of the archaic Admiralty (Colonial) Act 1849, which had not been in practice for a long time. He explained further that it was “lucky” and “a surprise” for them that the Act has not been repealed so long after Indian independence.<sup>42</sup> The researcher, however, found it quite unusual for the charges to add wordings such as “...which are offences related to international terrorism contrary to the international law on sea piracy and contrary to the UN Convention on the Law of the Sea as also international terrorism” immediately after the Penal Code provision in the charge. It is paramount that in criminal cases that the offences and the penal provision used in the charge should be clear, precise and unambiguous. The researcher feels that the addition is superfluous and that its absence may not make the charges defective. However the inclusion of the words would impose extra burdens to prove the ingredients of the charge. There was certainly no need to include the words “UN Convention” and “international terrorism” unless the prosecution intended to attract the attention of the international community, given the fact that the trial was conducted in the midst of the 11 September controversies.

The littoral states that are signatories of the UN Convention 1982 should realise that, as far as piracy is concerned, more must be done after acceding to the Convention. Articles 14-22 of the Geneva Convention on the High Seas and, in very similar terms, Articles 100-107 of the UN Convention 1982 provide that they may exercise extraordinary jurisdiction over

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<sup>41</sup> The Indian Penal Code and the Penal Code of Malaysia are *in pari materia*. The Malaysian Penal Code was in fact taken from the Indian version and introduced by the British in Malaysia before independence.

<sup>42</sup> Interview, London, 17 March 2004.

pirate vessels, irrespective of their flag or want of it, and that they may arrest pirate vessels on the high seas and deal with the pirates in their own legal systems. While arresting a hijacked ship, as in the case of the *MV Alondra Rainbow*, may prove undemanding to an able maritime power, the real test is on how to successfully prosecute the perpetrators once they are brought ashore.

The final point is the need to re-examine these two hijackings in the light of the international law of piracy. As explained in Chapter 3, the international law of piracy contains three vital ingredients: (i) The need to have piratical “acts”, i.e. illegal acts of violence, or illegal acts of detention, or any act of “depredation”, a term which covers plundering and pillaging.<sup>43</sup> In this respect, to constitute piracy under international law, these acts must be committed for private ends.<sup>44</sup> (ii) The incident has to occur on the high seas, and (iii) The two-vessel requirement: the attack needs to be launched from another ship. Obviously, the attacks on both the *MV Alondra Rainbow* and the *MT Nepline Delima* occurred in the territorial seas of Indonesia and Malaysia respectively. Brown, however, argues that the requirement for the act to occur in the high seas alone is debatable and after a lengthy discussion on this issue<sup>45</sup> concluded that:

“There is no such incompatibility so far as the piracy provisions are concerned and it would seem to follow that, although this is hardly a model of unambiguous drafting, the intention is that an act of piracy *jure gentium* may still take place within the EEZ. Any other conclusion would of course be highly undesirable since it would mean that only the government ships of the coastal state would be able to arrest “pirates” in their exclusive economic zone”.<sup>46</sup>

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<sup>43</sup> E.D. Brown, *The International Law of the Sea*, Vol. 1, Dartmouth, Aldershot, 1994, page 310.

<sup>44</sup> *UN Convention 1982*, Article 101(a).

<sup>45</sup> E.D. Brown, pages 302-303.

<sup>46</sup> E.D. Brown, at page 303.

Based from the definition of piracy enshrined in Articles 100 – 107 the UN Convention 1982, the two case studies above clearly fall short of the requirements under international law to be safely considered as “pirate ships”. The implication is equally clear that in such a case - i.e. when the ship is not considered a pirate ship - only the flag state has the power to arrest and seize the ship. Other states may have jurisdiction to arrest and extradite or try alleged offenders when they are found in their territories or on board vessels having their nationality.<sup>47</sup> In the *MT Nepline Delima*, the arrest and prosecution is considered valid on two counts: the arrest occurred in Malaysian territorial waters and the ship was flying the Malaysian flag. The perpetrators were later prosecuted under the ordinary armed robbery provisions of the Malaysian Penal Code. On the other hand, it is felt that the arrest, seizure and prosecution of the hijackers of the *MV Alondra Rainbow* raise many jurisdictional and legal issues, which were left unanswered in the judgment of the court. It would have been safer if the Indian authorities had attempted to solve this matter by using international diplomacy and deported the so-called perpetrators to their country of origin.

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<sup>47</sup> E.D.Brown, page 304.

## Chapter 6

### WORK OF COMPETENT INTERNATIONAL ORGANIZATIONS IN MARITIME SECURITY

#### 6.1. Introduction

Agreement among the international community is clearly a prerequisite to safe and secure sea. The main agency dealing with most aspects of safety is the International Maritime Organization (IMO). This chapter examines the work of the IMO as an official body to suppress piracy and maritime terrorism. In this respect emphasis is given to the objectives and the formulation of two IMO international instruments i.e. the Convention of Unlawful Acts Against the Safety of Maritime Navigation, 1988 (SUA Convention 1988) and its review and the practical maritime security measures adopted in the SOLAS Chapter XI-2 on Special measures to enhance maritime security and the International Ship and Port Facility Security (ISPS Code).

Paramount consideration is given to understanding the objectives of these international conventions and how the international community has cooperated and otherwise worked to deal with serious issues effecting maritime security. This is very important because the legislations only came into being after the occurrence of major security disasters, namely the *Achille Lauro* incident in 1985 and the 11<sup>th</sup> September atrocities in New York and Washington D.C. in 2001. This Chapter seeks to comprehend the background of the negotiations of two vital international conventions that have been taking place among

Member States of the IMO and other international shipping organizations in dealing with the two incidents, which brought about increased and different responses in term of urgency - the SUA Convention took seven years to be implemented while the ISPS Code took slightly more than a year. There is also closer examination of the dominant role of the United States delegation and the pattern of debates. It is also necessary to review the SUA Convention and its protocol and why it was more protracted in formulation than that of the ISPS Code.

## **6.2. The International Maritime Organization (IMO)**

The Convention establishing the International Maritime Organization was adopted on 6 March 1948 by the United Nations Maritime Conference, which was convened in Geneva on 19 February 1948. This Convention on the Inter-Governmental Maritime Consultative Organization (IMCO), entered into force on 17 March 1958. The new organization was inaugurated on 6 January 1959. The name of the organization was subsequently changed to the International Maritime Organization (IMO) in accordance with an amendment to the Convention, which entered into force on 22 May 1982.

The purposes of the Organization, as summarised by Article 1(a) of the Convention, are “to provide machinery for cooperation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage and facilitate the general adoption of the highest practicable standards in matters concerning maritime safety, efficiency of navigation and prevention and control of marine pollution from ships”. The Organization is also

empowered to deal with administrative and legal matters related to these purposes. As at 31 December 1999 the Organization has 158 Member States and two Associate Members.

The IMO's structure<sup>1</sup> consists of an Assembly, a Council and four main Committees: the Maritime Safety Committee (MSC); the Marine Environment Protection Committee (MEPC); the Legal Committee; and the Technical Co-operation Committee. There is also a Facilitation Committee and a number of Sub-Committees of the main technical committees. The Assembly is the highest Governing Body of the Organization. It consists of all Member States and it meets once every two years in regular sessions, but it may also meet for extraordinary session if necessary. The Assembly also elects the Council, which is composed of 40 Member States elected by the Assembly for two-year terms beginning after each regular session of the Assembly.

The Maritime Safety Committee (MSC) is the highest technical body of the Organization. It consists of all Member States. The functions of the MSC are to “consider any matter within the scope of the Organization concerned with aids to navigation, construction and equipment of vessels, manning from a safety standpoint, rules for the prevention of collisions, handling of dangerous cargoes, maritime safety procedures and requirement, hydrographic information, log-books and navigational records, marine casualty investigations, salvage and rescue and any other matters directly affecting maritime safety”. The Committee is also required to provide machinery for performing any duties assigned to it by the IMO Convention or any duty within its scope of work, which may be assigned to it by or under any international instrument and accepted by the Organization.

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<sup>1</sup> *The Europa Directory of International Organizations 2001 3<sup>rd</sup> Edition*, Europa Publications, London, 2001, page 156.

Among major conventions adopted by the IMO are international Convention for the Safety of Life at Sea 1974 (SOLAS), the International Convention on Standard of Training, Certification and Watchkeeping for Seafarers 1978 (STCW) and the International Safety Management Code for the Safe Operation of Ships and for Pollution Prevention 1993 (ISM Code). Two most important work by IMO for security at sea are the Suppression of Unlawful Act at Sea 1988 (SUA) Convention and chapter XI-2 (Special measures to enhance maritime security) of the SOLAS Convention and the related International Ship and Port Facility Security (ISPS) Code.

The IMO's interest in security matters was not evident until the hijacking of the *Achille Lauro* in 1985. This is understandable because the main purpose of the IMO is to regulate international shipping which mainly deals with the issue of safety and well-being of seafarers and the shipping business itself. As has been explained in the earlier Chapter 3, doubts have been cast as to whether this incident is piracy *per se* and in one sense, the lukewarm response to the SUA Convention is a result of this. With the re-emergence of piratical attacks especially in Southeast Asia in early 1990s, IMO had to give more emphasis on the issue of security as it has become a real problem to the flow of shipping and constant reminder of the world shipping communities urging the IMO to take lead role to tackle the menace.

### **6.3. IMO's Work 1: the ISPS Code**

The International Ship and Port Facility Security Code (ISPS Code) came to birth after a speedy process taking over just a year's intense work by IMO's Maritime Safety

Committee and its Maritime Security Working Group. The ISPS Code was adopted by one of the resolutions that were adopted on 12 December 2002 by the Conference of Contracting Governments to the International Convention for the Safety of Life at Sea, 1974 held in London from 9 to 13 December 2002. The Code became mandatory on July 1, 2004.

Following the attacks on New York and Washington D.C. on 11 September 2001, the Secretary General of the IMO in response to resolution 1373 adopted by the United Nations General Assembly in October 2001 communicated with IMO's General Assembly Meeting in London in November 2001 which was the body addressing measures to prevent acts of terrorism that threatened the security of ships and port facilities.

As a result of these atrocities, in December 2002, the IMO convened a diplomatic conference of the 1974 Safety of Life at Sea (SOLAS) Contracting Parties. The Conference adopted a number of amendments to SOLAS, the most far reaching being the new International Ship and Port Facility Security Code (ISPS Code). The Code is divided into two parts. Part A contains mandatory detailed security-related requirements for Governments, port authorities and shipping companies. Under Part B, which is non-mandatory, there are guidelines on how to meet the requirements in Part A.

It is clear that risk management is the philosophy behind the Code. In order to determine the appropriate security measures to be taken, the risks must be assessed in each particular situation with the Code to provide a standardized, consistent framework for evaluating risk, enabling governments to offset changes in threat with changes in vulnerability for ships and port facilities.

Under the Code, each Contracting Governments will conduct port facility security assessments. Security assessment will have three essential components. First, they must identify and evaluate important assets and infrastructures that are critical to port facility as well as those areas or structures that, if damaged, could cause significant loss of life or damage to the port facility's economy or environment. Then, the assessment must identify the actual threats to those critical assets and infrastructure in order to prioritise security measures. Finally, the assessment must address vulnerability of the port facility by identifying its weaknesses in physical security, structural integrity, protection systems, procedural policies, communication systems, transportation infrastructure, utilities, and other areas within a port facility that may be a likely target. Once this assessment has been completed, Contracting Government can accurately evaluate risk.

The risk management concept is embodied in the Code through a number of minimum functional security requirements for ships and port facilities. For ships, these requirements will include ship security plans, ship security officers, company security officers and certain onboard equipment. For port facilities, the requirements will include port facility security plans, port facility security officers and certain security equipment.

The requirements for ships and for port facilities include: monitoring and controlling access, monitoring the activities of people and cargo, and ensuring security communications are readily available. Because each ship (or class of ship) and each port facility present different risks, the method in which they will meet the specific requirements of the Code will be determined and eventually be approved by the Administration or Contracting Government, as the case may be. In order to communicate the threat at port facility or for a ship, the Contracting Government will set the appropriate security level.

Security levels 1, 2, and 3 correspond to normal, medium, and high threat situations, respectively. The security level creates a link between the ship and the port facility, since it triggers the implementation of appropriate security measures for the ship and for the port facility. Although the response of the IMO to the 11<sup>th</sup> September atrocities was expected, the speed in which the amendments of SOLAS took place and later adopted by the IMO surprised many.

#### **6.4. How the ISPS Code was Formulated**

There was no doubt in the minds of the drafters that a new way must be found to introduce the safety measures quickly bearing in mind that the previous instruments – the SUA Convention and its Protocol took 7 years to be implemented and not long before that the UN Convention 1982 took 14 years of extensive negotiations before it was opened for signature in Montego Bay, Jamaica on 10 December 1982 and another 12 years for the coming into force in 1994. To formulate another international convention involving more than 100 countries with different legal, political and socio-economic backgrounds will no doubt take a similar time frame. For this, an amendment with insertion to the present convention was deemed necessary to reduce the time. Among IMO conventions, there was none on security except the SUA Convention – and it received lukewarm response from Member States which is reflected by only 58 ratifications up to the year 2001.

#### **6.5. The Intersessional Working Group (ISWG) Meeting 11-15 February 2002**

In February 2001, the first IWSG met and discussed various proposed amendments to SOLAS Chapter V Regulation 19 and XI Regulations 3 and 5 to provide for the installation

of automatic Identification System (AIS), ship alert systems, the ship identification numbers and the issuance of Continuous Synopsis Record (CSR) respectively. The working group also recommended the development of the International Ship and Port Security Code (ISPS) Code. The amendments to SOLAS and the development of the ISPS code are built upon the MSC circulars 443 of 1986 and the subsequent circular 754 of 1996, which set out measures to prevent unlawful acts against passengers and crews on board passenger ships on international voyages of more than 24 hours while the latter catered for passenger ferries on international voyages. Both were a reaction to the *Achille Lauro* and the *City of Poros* incidents, which involved passenger ships in 1985 and 1988 respectively.

These circulars resulted from the provisions of the IMO Assembly resolution A 584(14) that directed the MSC and the other committees “as required, to develop on a priority basis, detailed and practical technical measures including both ashore and shipboard measures which may be employed by Governments, port authorities and administrators, ship-owners, ship operators, ship masters and the crews to ensure the security of the passengers and crews on board ships.”<sup>2</sup>

MSC circular 443 provided for the preparation and development of the ships and port security plans and risk assessment of the port facilities and urged the Governments, port authorities, administrators, ship owners, ship operators, ship masters and crews, to take “appropriate measures against unlawful acts threatening passengers and crews on board ships”.<sup>3</sup> The circular urged the governments to put in place appropriate legislation, which among others could provide penalties for those persons gaining or attempting to gain access

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<sup>2</sup> *IMO Document MSC circ. 754* Para 2 p. 6 on passenger ferry security.

<sup>3</sup> *IMO Document MSC circ. 443* Para 4.1 p.3 on measures to prevent unlawful acts against passengers and crews on board ships (1986).

to port facilities and persons committing crimes on board ships. The circular further elaborated the provisions of the port and ship security plans and proposed the designation of the port facility and ship security officers to develop and implement the security plan while the government were urged to designate an authority to approve and verify these plans. It also required the Contracting Governments to report incident of maritime security to the Secretary General of the OMO. The implementation of these measures should not interfere with the seamless movement of passenger services and should put into consideration of the provisions of the international law.

The MSC circular 754 was the outcome of an IMO seminar on ferry security after the *Herald of Free Enterprise* incident in 1987 and *Scandinavian Star* in 1990. During the seminar that was held in November 1993 the Member States urged IMO to consider recommending development of measures similar to those in circular 44 for passenger ferries operating on international routes and on ports of call. Circular 754 adopted all the measures proposed under circular 443 but introduced the element of the setting up of security levels “as part of bilateral agreements member Governments may wish to agree on a system of threat level notification covering background, moderate and high levels of threat and the security measures each considers appropriate for these levels”.<sup>4</sup>

These two MSC circulars equipped the drafters of the ISPS Code with the basic concepts on the roles to be played by the government, the designated authorities, the administration, the companies and the ship masters and the obligation of each stakeholder in the prevention of the commission of unlawful acts against the shipping industry and the port sector.

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<sup>4</sup> *IMO Document MSC circ. 754 above.*

The ISWG however encountered several contentious issues. They were; identification and background information on seafarers; sharing of information between ships the port state control authorities; ownership and control of ships; and categorization of the ports and the ships. Each issue is examined below.

## **6.6. Identification of Seafarers**

The United States delegation proposed that a new regulation to be added to Chapter XI of SOLAS 1974 entitled “Seafarers Identification and Background Check” which would require the “Administration to verify whether each member of the ships crew or other persons employed or engaged in any capacity on board a ship on the business of that ship has been convicted of any serious criminal offence under the laws of the Administration.”<sup>5</sup>

The issue of identification document for the seafarers received almost unanimous agreement by the delegations as this has been an important agenda of the International Labour Organization (ILO) which was proposing a review of the seafarer’s identity convention 108 of 1958. The ISWG proposed that the IMO should approach the ILO with a view to establish a joint IMO/ILO working group to deliberate on the issue and accelerate the revision of the convention 108 to facilitate the implementation of the proposal alongside other measures to be developed to prevent acts of terrorism against ships and port facilities.

At the plenary, there was a long discussion on the proposal to the requirement of background check to the seafarers. Although there was a general awareness among delegation on the structure and modus operandi of contemporary international terrorists,

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<sup>5</sup> *IMO Document MSC 75/ISWG/5/7 “Prevention and Suppression of acts of terrorism against shipping” submitted by the United States.*

some delegates felt that this would infringe the seafarers' human rights. Further to that, it could also infringe the privacy of information to both seafarers and the official company. The organizations representing seafarers felt that the information to be contained in the identity documents should be disclosed to the concerned employee.

#### **6.7. Ownership and Control of Ships**

In shipping business, it is difficult to ascertain the real owner or owners of the ship. This raises the vital question as to who actually controls the operation of the ship including the employment of the personnel on board ship. The ISWG holds the view that the identification was essential to establish the person or persons who would be held responsible for the implementation of the measures being developed for securing the maritime industry from acts of terrorism. However, this cannot be done easily as most ships are registered under intricate corporate arrangements that involve several layers of registration with the beneficial holder hidden behind corporate veils.

As a compromise, the ISWG settled for the recommendation for an additional Regulation 5 to the SOLAS 74 Chapter XI which require ships to have continuous Synopsis Records on board giving the history of the ship that would include the registered owner or owners of the ship, who appoints the crews and control the operations of the ship, and who signs the charter contracts on behalf the owner.

## **6.8. Sharing of Intelligence Information on Terrorism**

There was a lengthy discussion on this issue of sharing of intelligence information on terrorism between the administration and port state authorities, between flag States and the company and between the port States and the ships. As information on terrorist activities is highly classified document, it is felt that Governments will be reluctant to disclose it to persons not authorised to handle such sensitive government secrets.

Some delegates proposed to resolve this issue by introducing a two-way track inspection where the authorised port state control officers would undertake the statutory classical inspection while the security inspection should be entrusted to other officers from the police forces. There would also be a problem as to who should be designated as the security officers of the company or the port authority. Along with this, comes an issue of expertise qualifications of the persons designated as security officers in view of the sensitivity of information they were expected to handle.

There was also concern expressed by the shipping industry and the ports on the flow of information on which the declaration of security by the Contracting Governments that would facilitate the movement from a particular security level to another. The information is expected to be credible and should be corroborated, as movement from one security level to another would involve additional costs in the form of introduction of extra measures. It is foreseen that the information that can be gathered by intelligence on terrorist organization and their operation is usually fragmented, ambiguous and often of doubtful credibility unless the terrorist organization has been penetrated.

There was also the question of the ports that would be subject to the provisions of the proposed ISPS Code. The adoption of the definition of the port facilities provided for ships serving international voyages bringing a large number of ports and terminals within the scope of application of the Code. This would overburden the port and terminal operators and the administration with the wide range of measures to be implemented and some member states proposed that the categorization be based on the outcome of the port and terminals assessment report that would determine the extent of the threat of the risks each port or terminal faces.

ISWG was aware that some ports might not have particular risks and may not be potential targets of terrorist attacks, however, this notion was treated with caution for while the terrorist may not target particular ports for direct attack, they may still use such ports for infiltration either of weapons or terrorists themselves. This can be illustrated by the attempted smuggling of a terrorist from a port in the Mediterranean coast in October 2001. It was therefore proposed that the Contracting Governments, after the vulnerability assessment should consider the extent of application of the new regulations to those port facilities which although they have been designed or are intended primarily to serve ships not engaged on international voyages but occasionally to receive ships arriving or departing on international voyages unless the assessment indicate none or negligible risk in these facilities.

The International Association of Ports and Harbours (IAPH), the International Chamber of Shipping (ICS) and the Association of European Port and Harbours voiced their deep concerns on the proposal to examine containers at port of loading. They felt that the proposed inspection would give advantage to those ports and affect the flow of container

traffic in the other ports. It could also lead to congestion in ports and affect the turn round of vessels and increase the costs both to shippers and the ship operators. On the other hand, the US delegation in pressing for this examination of containers said, “the potential for use of these containers by terrorists for atrocious acts is very real. Containers can be used for the transport of weapons of mass destruction or as recently experienced in a European port, for the transport of potential terrorists”.<sup>6</sup>

It was further proposed that a container once packed and inspected can be electronically sealed and this may provide it with a chain of custody as it moves through the global transportation system.

It should be noted however, that the United States did not wait for the outcome of this IMO efforts for while the ISWG was still discussing this proposals, the United States customs department had negotiated with various port administration on the same issue. This unilateral move known later as the “container security initiative” received a good response. By August 2002, twenty major ports signed the agreement on container examination. The ISWG only held its meeting a month later and the effect of the United States earlier move was evident when this issue was recommended for cooperation with the World Customs Union with the IMO signing a memorandum of understanding with the organization.

The ISWG met again in February 2002 and made several important recommendations to the MSC 75. The recommendations were, the acceleration of the implementation timetable for the installation of the automatic identification system on existing ships, the amendment

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<sup>6</sup> *IMO Document MSC 75/ISWG/5/7* “Prevention and Suppression of acts of terrorism against shipping” submitted by the United States, page 6, Para 19.

to SOLAS Chapter IX and the proposed international ships and ports security (ISPS) Code, the requirement of the ships security plan, the ships security officers as well as the company security officers. Other recommendations included the new requirements for the port security plan, ship security officers, and the port risk vulnerability assessment. The ISWG also recommended the urgent review of the seafarers' identification documents by the ILO and the installation of ships alert systems to provide the seafarers with the capability to activate alarm in case of terrorist hijacking.

The MSC held its 75<sup>th</sup> Session Meeting in May 2002 and except on some minor alterations on the wordings of the text, adopted all recommendations and draft ISPS Code. An ad hoc working group that met during the MSC 75<sup>th</sup> session came up with the development of the recommendatory part B of the ISPS Code and other special measures to be undertaken in order to implement the amendments.

#### **6.9. The Implementation of the ISPS Code in Malaysia**

As a party to the Safety of Life at Sea Convention (SOLAS) 1974, Malaysia needs to take appropriate actions to comply with and implement the security measures as required under the SOLAS amendments and the ISPS Code. Non-compliance with the requirements of the ISPS Code will have a profound effect to the local shipping and ports industry. When the ISPS Code was introduced, Malaysia was the world's 22<sup>nd</sup> largest ship-owning nation and owns 6.84 million DWT or 0.6 percent of the world shipping tonnage. It was predicted at the time that if Malaysia failed to take appropriate measures to comply with the ISPS Code

by 1<sup>st</sup> July 2004, some 470 vessels, which were trading internationally, would be affected.<sup>7</sup> There were three ports in Malaysia which lies in the coast of the Straits of Malacca, which handled some 220 million tonnes of cargo with forty percent of them, was containerised cargo.<sup>8</sup> In Malaysia, the Jabatan Laut (the Marine Department) is the sole agency in charge of the implementation of the SOLAS provisions in Malaysian jurisdiction.

**Table 4**  
Costs Distribution of SOLAS/ISPS on Ship Operators

	Initial Expenditure USD 1,279 million	Annual Expenditure USD 730 million
Ship Security Alert System	7%	1%
Ship Identification Number	2%	
Company Security Officer and Training (Large Company)	40%	70%
Company Security Officer and Training (Small Company)	12%	21%
Ship Security Assessment	8%	
Ship security Plan	4%	
Ship Security Officer	2%	4%
Ship Security Drills	1%	2%
Security Equipments	24%	2%

Source: OECD, Directorate for Science, Technology and Industry, *Security in Maritime Transport: Risk Factors and Economic Impact*, July 2003, page 38.

Before the implementation of the ISPS Code, there was a question as to whether the Marine Department as a non-security related agency was capable of taking the responsibility of Designated Authority as envisaged by the Code. There were concerns that the Agency would usurp the powers of the more traditional uniformed security-related agencies such as

<sup>7</sup> Figures indicated here were taken during interview with Capt Jailani Jalal of the Malaysian Marine Department, 11 August 2005.

<sup>8</sup> Interview with Capt Jailani, above.

the Royal Malaysian Police Force (PDRM) or the Royal Malaysian Armed Forces (ATM). It was later decided that the Marine Department was the best agency to deal with the new challenges but the decision was achieved not without strong objection from another central agency.<sup>9</sup> Another major problem for the implementation of the ISPS Code was financing the security equipments that must be in place before 1<sup>st</sup> July 2004. The problem was acute, as for example; at that time none of the Malaysian ports was equipped with sensors or infrared cameras to detect intruders. The OECD study estimated that the burden of initial ISPS Code compliance would be at least USD 1,279 million and a further USD 730 million as annual expenditure.

Based from the OECD projections above, the Marine Department made a rough estimates that a major port in Malaysia such as Port Klang would have to spend in the region of RM16 million for the ISPS Code compliance.<sup>10</sup> It was also projected that before the deadline there were about 280 ships that require approval for International Ship Security Plan (ISSP) and at least 20 ports would eventually required approval from the Designated Authority.<sup>11</sup> To mitigate the projected problems the Marine Department proposed that the duty to audit ships security plans to reputable Classification Societies<sup>12</sup> while “to keep in touch” with the industry it was proposed that the Marine Department got involved in at

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<sup>9</sup> The Royal Malaysian Police was said to have objected strongly to the new role assigned to the Marine Department. The principle objection was thought to be on who should be the Designated Authority to relay of classified security intelligence information to fulfil the requirement of the ISPS Code in which it is the duty of the Contracting Governments to set the security level at any particular time from Security Level 1 (normal) to Security Level 2 (lasting for a period of time when there is a heightened risk of a security incident) and finally to Security Level 3 (lasting for the period of time when there is the probable or imminent risk of a security incident). Traditionally in Malaysia, the security intelligence was handled exclusively by the Special Branch Department under the Royal Malaysian Police. The matter was said to be resolved when the National Security Division of the Prime Minister’s Department agreed to take the role to chair the ISPS Security Committee in which the Marine Department is a member to assume the role in place of the Royal Malaysian Police: Interview with Haji Jamil Murshid of the Marine Department, 3 August 2004.

<sup>10</sup> Interview: Capt Jailani, above.

<sup>11</sup> Interview; Capt Jailani, above.

<sup>12</sup> Interview: Capt Jailani, above.

least, the port facility security. Realising the mammoth task Marine Department created a task force, which agreed that the Agency should embrace the new challenges because the ISPS Code was an extension of its current duties on SOLAS and with its vast experience in shipping regulation in Malaysia, it feels that it has the best resources to deal with the challenge of implementing the ISPS Code. Despite the confidence, the agency put a caveat to the planning in view of the establishment of the Agensi Penguatkuasaan Maritim Malaysia (Malaysian Maritime Enforcement Agency).<sup>13</sup>

#### **6.10. IMO's Work 2: The Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA<sup>14</sup>) Convention 1988 and Its Protocol**

By its resolution 40/61 of 9 December 1985 on “measures to prevent international terrorism and the study of the underlying causes of terrorism”, the United Nations, *inter alia*, requested the IMO “to study the problem of terrorism aboard or against ships with a view to making recommendation on appropriate measures”.<sup>15</sup>

By resolution A.584 (14) of 20 November 1985 on “Measures to prevent unlawful acts which threaten the safety of ships and the security of their passengers and crews”, the Assembly of IMO recognized the need of IMO “to assist in the formulation of internationally agreed technical measures to improve security and reduce the risk to the lives of passengers and crews on board ships”. The Assembly directed the Maritime Safety Committee, “in co-operation with other Committees, as required, to develop, on a priority

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<sup>13</sup> See Chapter 7.

<sup>14</sup> “SUA” is the terminology used by the Legal Committee of the IMO to describe the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988. Some other writers have used another terminology “the Rome Convention” as it was concluded in Rome on 10 March 1988.

<sup>15</sup> Foreword to *International Conference on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, IMO London, 1988 at page iii.

basis, detailed and practical technical measures, including both shore side and shipboard measures, which may be employed by Governments, port authorities and administrations, shipowners, ship operators, shipmasters and crews to ensure the security of passengers and crews on board ships”.<sup>16</sup>

Following this direction, the MSC prepared and adopted “Measures to Prevent Unlawful Acts against Passengers and Crews on Board Ships” which were later circulated to Governments and interested bodies and organs.

At its 57<sup>th</sup> session in November 1986, the Council of IMO considered a proposal, jointly submitted by the Governments of Austria, Egypt and Italy, for the preparation, under the auspices of IMO, of a convention on the suppression of unlawful acts against the safety of maritime navigation. The proposal was accompanied by a draft Convention and an Explanatory Note. The Council unanimously agreed that the matter was appropriate for consideration by IMO and deserved urgent action; and it accordingly appointed an Ad Hoc Preparatory Committee with the mandate to prepare, on a priority basis, a draft convention for the suppression of unlawful acts against the safety of navigation, using as the basis of its work the draft convention submitted by the three sponsoring Governments. The Council also decided that the drafts convention prepared by the Ad Hoc Preparatory Committee would be submitted to the Legal Committee of the Organization for its comments, if any, prior to a diplomatic conference which might be convened for the adoption of the convention.<sup>17</sup> The SUA Convention was signed in Rome on 10 March 1988.<sup>18</sup> Both the

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<sup>16</sup> See note 15 above, page iii.

<sup>17</sup> See note 15 above.

<sup>18</sup> See, Vol. II, Doc. 9.9; 27 *ILM* (1988), pp 668-90. See also D. Freestone, “The 1988 International Convention for the Suppression of Acts against the Safety of Maritime Navigation”, 3 *IJECL*, 1988, pages. 305-27.

Convention and the Protocol entered into force on 1 March 1992.<sup>19</sup> It was modelled on the three conventions dealing with unlawful acts against aircraft and the safety of civil aviation: The Tokyo Convention on Offences and Certain Other Acts Committed on Board of Aircraft, 1963, the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1970 and the Montreal Convention for the Suppression of Unlawful Acts o against the Safety of Civil Aviation, 1971.<sup>20</sup>

The IMO website summary notes that the 1988 SUA Convention aimed:

“to ensure that appropriate action is taken against persons committing unlawful acts against ships. These include the seizure of ships by force; acts of violence against persons on board ships; and the placing of devices on board a ship which are likely to destroy or damage it.

The convention obliges Contracting Governments either to extradite or prosecute alleged offenders.”

The SUA Convention deals with offences committed against the safety of ships and persons on board and the Protocol extends the regime of the Convention to offences against fixed platforms located on the continental shelf.

By far Article 3 of the SUA Convention is the most important for it lists the offences covered by the Convention. The offences are:

1. Any person commits an offence if that person unlawfully and intentionally:
  - (a) Seizes or exercises control over a ship by force or threat thereof or any other form or intimidation; or
  - (b) Performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or

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<sup>19</sup> *IMO News*, No.1 of 1993 pages 2 and 16.

<sup>20</sup> For a short discussion on these conventions see E.D., Brown, *The International Law of the Sea, Vol. II: Documents, Cases and Tables*, Dartmouth, Aldershot, 1994, pages 306-307.

- (c) Destroys a ship or causes damage to a ship or its cargo which is likely to endanger the safe navigation of that ship; or
- (d) Places or causes to be placed on a ship by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endanger or is likely to endanger the safe navigation of that ship; or
- (e) Destroys or seriously damages maritime navigational facilities or interferes with the operation, if any such act is likely to endanger seriously the safe navigation of a ship; or
- (f) Communicates information which he knows to be false, thereby endangering the safe navigation of a ship: or
- (g) Injures or kills any persons, in connection with the commission and the attempted commission of any of the offences set forth in subparagraph (a) to (f)<sup>21</sup>

States which ratify the SUA Convention are obliged to make the offences set forth in Article 3 punishable by appropriate penalties which take into account the grave nature of those offences.<sup>22</sup> It is necessary for them to establish their jurisdiction over the said offences when the offence is committed against or on board a ship flying their flag in their territorial waters or by one of their nationals.<sup>23</sup> A state may also take action if the crime is committed by a stateless person who normally lives in its territory; a national of the state is a victim of the offence or where the offence is committed in an attempt to force that state to do or to abstain from doing any act.<sup>24</sup>

The SUA Convention requires state parties either to extradite the offender or to submit the case to their own authorities for prosecution. States may consider the offences covered by the Convention as extraditable, even where no extradition treaty exists between the states in

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<sup>21</sup> Article 3(1), *The SUA Convention 1988*.

<sup>22</sup> Article 5.

<sup>23</sup> Article 6(1).

<sup>24</sup> Article 6(2).

whose jurisdiction the offender is found and the state requesting jurisdiction.<sup>25</sup> It also provides for measures designed to encourage co-operation between states<sup>26</sup> and requires those taking action under it to provide relevant information to the Secretary-General of the IMO.<sup>27</sup>

The SUA Protocol<sup>28</sup> is designed to extend the principles of the SUA Convention to offences occurring on fixed platforms located on the continental shelf. Article 2 of the Protocol defines the offences identical to those in Article 3 of the Convention and Article 1(1) of the Protocol provides that the provisions of Articles 5, 7,10,11,12,13,14,15 and 16 of the Convention shall apply *mutatis mutandis* to the offences set forth in Article 2 of the Protocol.<sup>29</sup>

#### **6.11. The Review of the SUA Convention and Its Protocol**

Following the 11<sup>th</sup> September 2001 atrocities in New York and Washington D.C., the IMO convened for the first time Emergency Meeting in November the same year. During the General Assembly, IMO Member States adopted Assembly Resolution A.924 (22) on the need to review measures and procedures to prevent acts of terrorism which threaten the security of passengers and crews and safety of ships, and highlighted once more the pressing need for the Organization to adopt measures to ensure that the shipping industry does not become a soft target for terrorist activities. Among measures covered by resolution

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<sup>25</sup> Article 10 and 11(1) to (3).

<sup>26</sup> Article 13.

<sup>27</sup> Article 15.

<sup>28</sup> Protocol for the *Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, 1988.

<sup>29</sup> See Article 1(1) SUA Protocol.

A.924 (22) was the IMO's Legal Committee's review of the SUA treaties, namely, the SUA Convention and its Protocol of 1988.

At the eighty-fourth session, the Legal Committee began its consideration of possible amendments to the Convention and its protocol where the Committee agreed that a formal Correspondence Group under the leadership of the United States should be tasked with reviewing the SUA Convention and the SUA Protocol by proposing necessary amendments to the two instruments and reporting to the Legal Committee at its eighty-fifth session.<sup>30</sup>

The proposed draft amendments were circulated by the United States to 65 Members and Associated Members and seven organizations in July 2002. Under the draft amendments the United States introduced even new offences under the existing article 3. They are to ensure that it sufficiently covers a wide range of terrorist acts. They are:<sup>31</sup>

1. with intent to cause death or serious bodily injury to a person on board a ship, possessing or using explosive, biological, chemical, or radiological materials that have the capacity to cause death or serious bodily injury to any person;
2. discharging or causing to be discharged from a ship any substance in a quality and concentration that carries a significant risk of death to humans when the act is carried out for terrorist purpose;
3. carrying or transporting on a ship explosive, biological, chemical, or radiological materials knowing they are intended to be used to commit an offence set forth in one of eight listed United Nations conventions and protocols relating to terrorism;
4. carrying or transporting, or causing to be carried or transported on a ship, certain items covered by the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 1993; the Treaty on Non-proliferation of Nuclear Weapons, 1968; or the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and their Destruction, 1972, in specific circumstances;
5. transporting on ship a person whom the offender knows is travelling to commit, departing from having committed, or avoiding apprehension after having committed an offence set forth in one of nine listed United Nations conventions and protocols relating to terrorism;

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<sup>30</sup> *IMO Document LEG/85/4.*

<sup>31</sup> *IMO Document LEG/85/4*, page 3.

6. using a ship to harm a person or destroy property for a terrorist purpose; and
7. injuring or killing a person in connection with the commission or attempted commission of the foregoing offences, or performing an act of violence dangerous to human life against a person on a ship, for a terrorist purpose.

These proposals were in line with the calls made by the Director, Maritime Safety Division in the outset of the meeting which called the Committee's attention to resolution A.924 (22) on review of measures and procedures to prevent acts of terrorism which threaten the security of passengers and crews and the safety of ships.<sup>32</sup>

The delegation of Japan said the proposals by the United States would substantially exceed the scope of the current SUA Convention and Protocol, and would introduce offences which had already been criminalized by other conventions and felt that there was a need to avoid overlap and duplication with relevant provisions of the other existing conventions on anti-terrorism. The Japan delegation also highlighted the need to make clear why only acts at sea, or on vessels needed to be criminalized but at the same time they are not criminalized on land.<sup>33</sup>

During the 85<sup>th</sup> Meeting concern was expressed that, while the original focus of the SUA Convention had been on safety of navigation, the draft protocol changed that focus by including the use of ship for criminal purposes.<sup>34</sup> But on the question of overlapping, the observer delegation of Comité Maritime International (CMI) said that its study group on piracy had found that criminals take advantage of gaps to avoid or escape jurisdiction, and CMI preferred to have overlaps rather than to leave gaps.<sup>35</sup>

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<sup>32</sup> *IMO Document LEG 85/11.*

<sup>33</sup> *IMO Document LEG 85/4/1.*

<sup>34</sup> *IMO Document LEG 85/4/1, page 13.*

<sup>35</sup> Note 34 above, page 13.

The delegations of the 85<sup>th</sup> Meeting were divided as regards the issue of overlap and duplication with other international instruments on terrorism. The view was expressed that some overlap might be unavoidable in order to close the gaps that would arise if some States did not become party to other conventions on terrorism and if some States did not become party to the new protocol. In this regard it was noted that, while the definition of an offence might overlap with other instruments, in some cases those instruments did not apply to ships and it was necessary to widen the scope of the SUA Convention to cover such ships.<sup>36</sup>

During the intersessional period after the 85<sup>th</sup> Session, 13 Member States – Australia, Canada, Denmark, Finland, France, Germany, Japan, Norway, Poland, Sweden, Turkey, the United Kingdom, Vanuatu, and one observer - the International Transport Workers' Federation (ITF) provided comments on the draft texts set forth in the annexes to document LEG 85/4 for consideration by the SUA Correspondence Group. United States as the chair of the Correspondence Group circulated the preliminary comments to 53 Member States and eight organizations.

The participants to the Correspondence Group focused their critiques and comments primarily on draft Article 2 *bis*, the additional offences proposed to be added to Article 3, Article 8 *bis* and Article 11 *bis*.

### **6.12. Amendments to Article 3**

During the subsequent 86<sup>th</sup> Meeting from 28 April to 2<sup>nd</sup> May 2003 the delegation of the United States, as lead country of the intersessional Correspondence Group, introduced

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<sup>36</sup> Note 34 above, page 13.

documents LEG 86/5 and LEG 86/5/Corr 1. The delegation made reference to several changes in the draft treaties which took into account the most important concerns of the Group's participants, which involved either changing the texts, or inserting square bracket. In this regard, mention was made of a number of matters, notably, the scope of the new offences provisions, including accomplice liability, threat, listing of anti-terrorist conventions mentioned by reference; shipboarding provisions; armed forces exceptions; political offence exception; and mechanisms for the transfer of witnesses to assist investigations and prosecutions.<sup>37</sup>

It was widely agreed by the Legal Committee that the new SUA instruments needed to be developed on account of the dramatic change of circumstances since the adoption of the original treaties in 1988. There were, however, new developments raised by the delegation and observers. The representative of the International Confederation of Free Trade Unions (ICFTU) for example, requested the Committee to ensure that the prospective amendments satisfactorily safeguarded the human rights of seafarers. He expressed the concern that the draft amendments extended the scope of offences in such a way that protocol may criminalize the seafaring profession and seafarers could be prosecuted by States other than the flag State on the mere suspicion of a crime, following boarding of vessel in international waters. This was supported by the Representative of the United Nations which referred to the UN General Assembly resolution 57/219 on "Protecting human rights and fundamental freedoms while countering terrorism", in which the General Assembly had affirmed that States must ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular international human rights, refugee

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<sup>37</sup> *IMO Document LEG 86/16* page 11.

and humanitarian law.<sup>38</sup> In response to this, the Committee agreed to insert a reference to the protection of rights and freedoms of seafarers in the preambles to the prospective SUA protocols.

During the intersessional period after the 86<sup>th</sup> session of the Legal Committee, the United States delegation circulated a new draft Article 3*bis*, which an informal working group convened at the 86<sup>th</sup> session had prepared. The United States delegation received substantive comments from the ICFTU and the Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs of the United Nations.

The Legal Committee held its eighty-seventh session from 13 to 17 October 2003 under the chairmanship of Mr A.H.E. Popp, QC of Canada. During this meeting there was a general agreement among delegations to place the new offences under a separate new article of Article 3*bis* and the Committee generally supported the chapeau in article 3 *bis* (i)(a) containing “*terrorist motive*”. It was suggested by some delegations that the language might need adjustment in the light of other international instruments, and, in particular, the term ‘*seriously*’ should be included before “*intimidate*” and “*unduly*” before “*compel*” to bring this proposed text inline with the EU Council Framework Decision of 13 June 2002 on combating terrorism.<sup>39</sup>

One of the most contentious points in the amendment of SUA Convention during the 87<sup>th</sup> Meeting was article 8 *bis* on boarding. Although there seemed to be general acceptance in the Committee on the need to include provisions concerning boarding in the draft protocol

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<sup>38</sup> Note 37 above, page 11.

<sup>39</sup> IMO Document LEG 87/17 page 15.

there was significant objections to the manner how this could be implemented and the principle of flag State jurisdiction must be respected to the utmost extent and that a boarding by another State on the high seas could only take place in exceptional circumstances. Some delegations even went on to insist that boarding should take place only with the consent of the flag State.<sup>40</sup>

Similarly there were some reservations to the phrase “...*a ship claiming its nationality*” and phrase “*a ship flying its flag*” should be used instead because this phrase is consistent with the terminology used in Article 94 of UN Convention 1982.

One of the most active delegations during this meeting was ICFTU which submitted a counter proposal to the drafts of the US Delegation. Central to the ICFTU concern was the absence of express provisions to protect rights and fundamental freedoms of seafarers. This is in contrast to the new International Ship and Port Facility Security (ISPS) Code which had incorporated express provisions on the human rights and protection of seafarers. ICFTU was of the view that offences in draft Article 3 were drafted very widely with the view to including everyone from the shipowner to all crew members. Given the lack of transparency in the ownership and control of vessels, there is a likelihood that it would be the Master and the crew who would be subjected to proceeding while the shipowners remain anonymous. ICFTU also raised the problem created by Article 3*bis* (1)(c) which includes three offences that introduce imputed knowledge – “or having reason to know”. ICFTU suggested that this text should be deleted because of the fear that on board of ships

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<sup>40</sup> Note 39 above, page 19.

with multinational crews, commercial pressure will constraint ability of the Master and the crew, thus it would be inappropriate to impute such knowledge to them.<sup>41</sup>

As regards to draft Article 8bis , paragraph 7 which provides that the boarding and search “shall be conducted in accordance with the obligation assumed by the requesting Party under international law” the ICFTU considers that it is too narrow as the flag State may be bound by human rights instruments which the requesting Party has not ratified and as the SUA Convention is a multilateral instrument it should not permit a situation where the provisions of international law can be avoided and ICFTU proposed that if the provisions are retained it should be read as “shall be conducted in accordance with all applicable provisions provided for in international law”.<sup>42</sup> Similarly the ICFTU was concerned with paragraph 7(a) on the use of force by the boarding State when boarding a ship using its national law and policies and lack of provision to address the treatment of seafarers on board.<sup>43</sup>

The ICFTU’s concerns for human rights was further evident in its suggestion to replace Article 10(2) with the language used in Article 14 of the International Convention for the Suppression of terrorist Bombings:<sup>44</sup>

“Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international law of human rights.”

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<sup>41</sup> IMO Document LEG 87/5/2, page 3.

<sup>42</sup> Note 41 above, pages 3 and 4.

<sup>43</sup> Note 41 above, page 4.

<sup>44</sup> Note 41 above, page 5.

Several delegations commented on this proposal. In general, there was support for adding a reference to human rights. However, further consideration was required. In particular, it was noted that the proposal required application of human rights law only under the law of the State in the territory of which the person in custody is present, though in the draft protocol the issues might also arise in situations when a ship is boarded on high seas. In this connection, it was suggested that the term “jurisdiction” was more appropriate than that of “territory”.<sup>45</sup>

During the meeting, one delegation commented on Article 8*bis* by asking what action the master, crew and shipowner should take to avoid prosecution if weapons of mass destruction were discovered on ship while at sea. To this, the ICFTU delegation expressed their view that Article 8*bis* should provide for prior notification to the crew before a boarding took place in order to allow the crew to distinguish between a legitimate and an illegitimate boarding saying further that such notification was essential to ensure that crews were not vulnerable to criminals seeking to board the ship and that crews did not inadvertently take evasive action against legitimate boarding parties which they perceived to be a threat. On the other hand, the delegation from the International Chamber of Shipping (ICS) expressed the view that the Article raised many practical questions including (a) the shiphandling skills of those involved in manoeuvring to accommodate a boarding on the high seas; (b) the process by which the ship owner and master are informed that a request has been made to the flag State and are advised of what reply the flag State has given; (c) the responsibility for costs resulting from delay of the ship during its voyage and from inspecting cargo on board, which might require gaining access to containers; (d)

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<sup>45</sup> *IMO Document LEG 87/17* paragraph 137 and 138.

determining who would be entitled to bring a claim when a safeguard was not respected, and in what jurisdiction such a claim could be brought; and (e) who was responsible for damage to cargo or injury to persons on board when the grounds for the boarding are well founded.<sup>46</sup>

After the conclusion of the 87<sup>th</sup> session, the United States delegation circulated a new draft of Article 3*bis*, which an informal Working Group, convened at the 87<sup>th</sup> session had prepared. Based on comments received at the 87<sup>th</sup> session, the United States also prepared a new draft of Article 8*bis* and circulated them to the Correspondence Group at the end of December 2003. Substantive comments on these drafts were received from Brazil, Canada, Finland, France, Germany, Norway, Sweden and the United Kingdom.<sup>47</sup>

### **6.13. Adoption of the 2005 SUA Protocol**

The Diplomatic Conference on the Revision of the SUA Treaties met in at the IMO's London Headquarters from 10 to 14 October 2005 and adopted the amendments in the form of Protocols to the SUA treaties known as the 2005 Protocols. It was attended by representatives of 74 States Parties to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 70 State Parties to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, one Associate Member of the IMO; and observers from four intergovernmental organizations and nine non-governmental international organizations.

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<sup>46</sup> *IMO Document LEG 87/17* page 19.

<sup>47</sup> *IMO Document LEG 88/3* paragraph 3.

The 2005 Protocols broaden the list of offences made unlawful under the treaties, such as to include the offence of using a ship itself in a manner that causes death or serious injury or damage and the transport of weapons or equipment that could be used for weapons of mass destruction. The 2005 Protocol introduces provisions for the boarding of ships where there are reasonable grounds to suspect that the ship or a person on board the ship is, has been, or is about to be involved in, the commission of an offence under the Convention. The adoption of these Protocols marks the completion of the tasks set by the IMO Assembly in resolution A.924(22), aimed at ensuring that the international maritime community is properly equipped to counteract the threat of terrorism at sea.

The SUA treaties complement the practical maritime security measures adopted by the IMO before such as the ISPS Code which came into force in July 2004 in order to regulate the legal situation in a possible terrorist attack at sea. The 2005 Protocols will enter into force ninety days after the date on which twelve States have either signed it without reservation as to ratification, acceptance or approval, or have deposited an instrument of ratification, acceptance, approval or accession with the Secretary General of the IMO. The amended Protocol requires ratification from three States which are also party to the SUA Convention but it cannot come into force unless the 2005 SUA Convention is already in force.

One of the complexities of the 2005 Protocol is the specific reference to the Nuclear Non-Proliferation Treaty. This gave rise to a problem for the original Member States of the SUA Convention who are not signatories of the Non-Proliferation Treaty. As a direct consequence of this some member States feel that the Protocol should not cover the carriage of nuclear materials, while some other States thought that the coverage was

essential. On another complex issue on the boarding provision, the 2005 Protocol appears to have established the legal right to board ships. This right, however, is established together with a set of procedures to ensure that the flag state of the ship has been fully consulted and had consented to the boarding in line with the principles of international law.

Due to reservations made by many States and organisations, the new boarding provisions now contain a comprehensive set of safeguards such as, the use of force must be avoided except in extreme cases to ensure the safety of persons on board, the dangers and difficulties in boarding a ship must be taken into account, reasonable steps must be taken to avoid a ship being detained or delayed, the boarding State must take due account of the need not to prejudice the commercial and legal interests of the Flag State, and finally, the Boarding State shall be liable for damage, harm or loss attributable to it if the grounds for boarding are unfounded. Therefore, it can be argued that due to the comprehensiveness of these safeguards it is not likely that the boarding provision will be abused by the major maritime powers.

Apart from the initiatives undertaken by the IMO above, Singapore as one of the littoral States of the Straits of Malacca had also undertaken a major step in introducing the SUA Convention 1988 into her national law as can be seen in Para 6.14 below.

#### 6.14. Singapore's Maritime Offences Act, 2003

The Singapore's Parliament passed the Maritime Offences Act 2003<sup>48</sup> (The Act) on 10<sup>th</sup> November 2003. It is an Act to give effect to the provisions of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988 (SUA Convention), making her the first littoral State of the Straits of Malacca to have done so. The Act also makes consequential amendments to the hijacking of Aircraft and Protection of Aircraft and International Airports Act (Chapter 124 of the 1997 Revised Edition) and the Supreme Court of judicature Act (Chapter 322 of the 1999 revised Edition).<sup>49</sup>

The Act describes hijacking of ships,<sup>50</sup> unlawfully destroying or damaging ships,<sup>51</sup> other acts endangering or likely to endanger safe navigation<sup>52</sup> and threats to compel any other person to do or abstain from doing certain acts described in Section 4 which would result endangering the safe navigation of the ship<sup>53</sup> as "relevant maritime offence" punishable under the Act with imprisonment for life.<sup>54</sup> These offences are deemed to be included in the list of extradition crimes described in the First scheduled to the Extradition Act (Cap. 103).<sup>55</sup> In the case where no extradition treaty is in force between Singapore and a Convention country, a notification in the Gazette may be made as if there were an extradition treaty between Singapore and that country.<sup>56</sup> In the case where any "act of

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<sup>48</sup> Act 26 of 2003. It was assented to by the President on 28<sup>th</sup> November 2003 and had come into operation on 3<sup>rd</sup> May 2004.

<sup>49</sup> *Maritime Offences Act*, p.3.

<sup>50</sup> *Maritime Offences Act*, Section 3.

<sup>51</sup> *Maritime Offences Act*, Section 4.

<sup>52</sup> *Maritime Offences Act*, Section 5.

<sup>53</sup> *Maritime Offences Act*, Section 6.

<sup>54</sup> *Maritime Offences Act*, Section 9(1).

<sup>55</sup> *Maritime Offences Act*, Section 11(1).

<sup>56</sup> *Maritime Offences Act*, Section 11(2).

violence”<sup>57</sup> was committed by any person in connection with an offence under Section 3, 4 and 5 as stated above shall be deemed to have been committed in Singapore and shall constitute an offence punishable under the law in force in Singapore applicable to it, wherever the act of violence was committed, whatever the state in which the ship concerned is registered, and whatever the nationality or citizenship of the person committing or attempting to commit the act.<sup>58</sup>

### **6.15. Future Developments**

The IMO plans to update the security programmes that are already in place. One of the most important is the early implementation of long-range identification and tracking of ships. The Organization also seeks to consider the need to develop further guidance to ensure the global, uniform and consistent implementation of the provisions of Chapter XI-2 or part A of the ISPS Code.<sup>59</sup>

### **6.16. Conclusion**

The IMO, as the United Nations’ regulatory body responsible for the safety of life at sea and environment protection appeared to have diverted from its original responsibility by devoting a great deal of time persuading member States to adopt the two security-related international conventions for a more secure shipping in the world. There is no doubt that

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<sup>57</sup> Under Section 2, “act of violence” means any act done in Singapore which constitutes the offence of murder, attempted murder, culpable homicide not amounting to murder, voluntary causing grievous hurt, voluntarily causing hurt by dangerous weapons or means, or which constitutes an offence under section 4 of the *Arms Offences*, section 3 or 4 of the *Corrosive and Explosive Substances and Offensive Weapons Act*, Section 3 or 4 of the *Explosive Substances Act*, or section 3 of the *Kidnapping Act*.

<sup>58</sup> *Maritime Offences Act*, Section 7(1).

<sup>59</sup> Chris Trelawny, “Maritime Security: Implementation of the ISPS Code”, paper presented at the 3<sup>rd</sup> *Intermodal Africa 2005*, Tanzania Exhibition and Conference, Dar es Salaam, 3-4 February 2005, page 10.

the role of the IMO as a “competent” international organization within the meaning of Article 223 of the UN Convention 1982 has been stretched to cover security matters as opposed to a more traditional “safety” matters as envisaged before. The effect 11 September 2001 atrocities appeared to have encouraged the international maritime community to turn to the IMO to pursue the security agenda.<sup>60</sup>

As has been seen on the discussions of the two works of the IMO after the 11 September tragedy, the member States and international maritime community have grown weary of the issue. This could be witnessed as the difficulty of reaching a consensus on some provisions of the SUA Protocols 2005. The 2005 Protocol, although still to some extent successful in eliminating doubts on the ability of the former SUA Convention 1988 to counter terrorism, still met stronger opposition as compared to the acceptance of the ISPS Code earlier. The reasons could be divided into (1) after the adoption there was the experience of the difficulty in the implementation of the highly bureaucratic, expensive and cumbersome ISPS Code requirements, and (2) the 2005 SUA Protocols, despite their noble objectives, had attempted to reducing the right of free passage on the high seas which was universally accepted in international customary law and in the UN Convention 1982.

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<sup>60</sup> The reason is quite obvious because over the years the IMO has been able to muster supports for its program due to the absence of other “competing organizations” in maritime matters and the international community has grown accustomed to the fact that the IMO is “the” competent organization as far as maritime matters are concerned be it safety or security.

## Chapter 7

### THE SPATIAL AND ORGANISATIONAL DIMENSIONS OF REGIONAL AND NATIONAL ORGANIZATIONS IN SECURITY

#### 7.1. Introduction

Emphasis has frequently been placed on regional cooperation as the answer to curtailing all the acts of violence already referred to. Maritime regionalism has developed steadily since the end of the Second World War. With the break-up of colonial empires around the world, new independent states, with strong anti-colonial feelings and an urgent need to develop the mostly poor nations, discovered that they need to form groupings amongst themselves to balance the might of bigger players on the global stage. In Southeast Asia, the Republic of Indonesia was a major player after the War and was active in championing the issue of coastal state rights.<sup>1</sup> Indonesia has always demonstrated its discomfort with the involvement of powers outside the region, meddling in its affairs primarily to protect its own fragility.<sup>2</sup> As the most extensive archipelago in the world, it needs to consolidate power among thousands of islands separated physically by vast waters. This perception of fragility coloured Indonesia's struggle towards global recognition of the archipelagic state principle during the UNCLOS negotiations and later during the struggle to secure maximum control over the Straits of Malacca.

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<sup>1</sup> For background information on this issue, see, for example, Michael Liefer, *International Straits of the World: Malacca, Singapore, Indonesia*, Sijthoof & Noordhoff, Alphen aan der Rijn, 1978. For contemporary Indonesian politics, see, for example, W. Case, *Politics in Southeast Asia*, Routledge Curzon, London 2002, pages. 29-80. For Indonesia's position in the ASEAN, see J. Henderson, *Reassessing ASEAN*, Adelphi Paper 328, Oxford University Press, New York, 1999, pages 44 - 47.

<sup>2</sup> The fragility of Indonesia could also affect its neighbours: as Henderson puts it, "ASEAN will be shaken no matter which way Indonesia goes" J. Henderson, *Reassessing ASEAN*, Adelphi Paper 328, Oxford University Press, New York, 1999, page 78.

In international politics, Indonesia and Malaysia are members of the United Nations (UN), the Non Aligned Movement (NAM) and the Organization of Islamic Conferences (OIC). Singapore is a member of the UN and the NAM, but unlike the other two coastal states, is not a member of the OIC due to her small population of Muslims. As former colonies of the British Empire, Malaysia and Singapore are both members of the Commonwealth. It is important to note Indonesia's role in NAM because its status as one of its founding nations demonstrates Indonesia's attitude towards Western powers as well as strengthening its priority towards national unity and territorial sovereignty.<sup>3</sup> The NAM movement adheres to five basic principles: (i) Mutual respect for each other's territorial integrity and sovereignty; (ii) Mutual non-aggression; (iii) Mutual non-interference in domestic affairs; (iv) Equality and mutual benefit; (v) peaceful co-existence. The movement asserted its influence on the world stage during the 1960s and early 1970s, but struggled to find relevance after the break-up of the Soviet Union and the fast expanding concept of globalisation. The three littoral states to the Straits of Malacca are members of the regional grouping of the Association of Southeast Asian Nation (ASEAN).

The tension between the neighbouring countries has primarily emanated from history. For instance, Singapore was a rich port-state under direct British rule before it was offered independence through the Federation of Malaysia in 1963. Due to racial tension and political differences with the central Government in Kuala Lumpur, Singapore was asked to leave the Federation in 1965. This separation brought about the continuing unresolved

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<sup>3</sup> The idea of NAM was formulated during the first gathering of world leaders not aligned to the two opposing world powers, the Soviet Union and the United States, after World War II in Bandung, Indonesia in 1955. During the conference, the leaders declared their desire not to become involved in the East-West ideological confrontation of the Cold War. The conference was called by President Sukarno of Indonesia and attracted the majority of African and Asian countries, but it was not until 1961 that the NAM was formally established as a political movement when President Josip Tito of Yugoslavia initiated the first NAM summit in Belgrade. Since then, NAM summits have rotated among its member countries and take place every three years.

problems mentioned in detail below. However, there remains a high degree of economic and social inter-dependence between the two countries, but bilateral relations are complex and during the last 40 years, there have been many incidents that have threatened these relations.<sup>4</sup>

## **7.2. Legal Issues That Might Be Addressed Through Regional Action**

Some of the more pressing issues that should be tackled through regional efforts are: legal enforcement, piracy and maritime terrorism, shipping, maritime education and training. These issues have direct consequences for all ASEAN member states, which are all littoral states with the exception of Laos, which is land-locked. The other relevant parties are the non-ASEAN countries that have particular interests in the Southeast Asian waters, such as Japan, the United States, China, and Australia. The third group is the international agencies, especially those within the United Nations system, which have various economic, environmental, scientific, peacekeeping and other interests in the region. Outside the UN system are such agencies as the IMB, CMI etc. The other group is private companies, such as shipping firms, oil companies and financial institutions.

Lewis M. Alexander predicted in 1982:

The littoral countries of the Southeast Asian Seas area have few marine-related interests in common, although they face many common marine-related problems. Overfishing of both coastal and highly migratory stocks, weather prediction, and

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<sup>4</sup> Some of the contentious bilateral issues were: The visit of Israeli President Herzog in 1986, suspicion over military capability where Malaysia always claimed that Singapore's Forward Defence Strategy was always aimed at her, the Malaysia-Indonesia joint military exercise in Johor in 1991, which was held without consultation with Singapore, Premier Lee Kuan Yew's negative description of Johor in his affidavit filed in connection with Singapore's opposition politician, the withdrawal of Malaysia in an FPDA exercise in 1998 and Singapore's military aircraft's intrusion into Malaysian air space. See Andrew T.H. Tan, *Security Perspectives of the Malay Archipelago*, Edward Elgar, Cheltenham, 2004, pages 23-25.

navigational safety – these and other issues logically should bring the countries together. But I postulate that within the foreseeable future the only marine-related issues handled meaningfully on a regional cooperative basis will be dealt with at the (i) bilateral level; (ii) the subregional level if the issues are not politicised; (iii) at the subregional level if the issues are perceived as highly important (e.g. Oil spills in the Malacca and Singapore straits); (iv) at the subregional level if organizations such as ASEAN become sufficiently strong; or (v) at the subregional level if leadership and funding become available through a UN agency.<sup>5</sup>

Valencia followed up Alexander's work and noted in 2000<sup>6</sup>:

There is a web of ASEAN efforts regarding marine matters. Permanent ASEAN committees of marine importance include Fisheries (as a part of food production and supply), Meteorology (as part of air traffic service), Science and Technology, and Shipping. The Federation of ASEAN Shippers' Council sponsored the formation of a Federation of ASEAN Shipowners Association, presumably to present a united bargaining position vis-à-vis the European-dominated Far Eastern Freight Conference, which controls trade and sets rates for transport of goods between Europe and Asia".<sup>7</sup>

On military cooperation, Valencia mentioned:

Finally, there is growing military cooperation among ASEAN members, although mostly on a bilateral basis at present. Indonesia has conducted joint air, naval, and army manoeuvres in Malaysia, and the two countries have cooperated in patrolling their common South China Sea border areas. Indonesia has conducted joint naval surveillance in the Celebes Sea with the Philippines. Moreover, Thailand and Malaysia have a bilateral defence pact and in addition to the 1954 Manila pact, Thailand and the Philippines have agreed to cooperate on security matters.<sup>8</sup>

It would seem that more than two decades later, while Alexander was correct in most areas, he did not envisage that the issue of maritime security would become a dominant factor in Southeast Asian affairs. Even Valencia, who had written quite extensively on this subject, did not pay much attention to the issue of maritime security before the 11 September

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<sup>5</sup> Lewis M Alexander, *Marine Regionalism in the Southeast Asian Seas*, East-West Center, Hawaii, 1982, page 30.

<sup>6</sup> Although published in 2000, a part of the same article was presented earlier to the *Council for Security Cooperation in Asia-Pacific (CSCAP) Maritime Co-operation Working Group Meeting*, 17-18 November 1998 at the Maritime Institute of Malaysia, Kuala Lumpur.

<sup>7</sup> Mark .J. Valencia, "Regional Maritime Regime Building: Prospects in Northeast and Southeast Asia", *Ocean Development & International Law*, 31:223-247, 2000, page 238.

<sup>8</sup> Valencia, above, page 238.

atrocities. Piracy was mentioned in passing but the issue of maritime terrorists was never brought up. At present, piracy and terrorism have become the two most contentious issues among the littoral states of the Straits of Malacca. Outside the straits, piratical incidents have also occurred in other parts of the region, in Indonesia and the Philippines.

Various forms of regional arrangements to address the violence continue to be regarded as the best solution, since most other efforts are often seen as impingements on littoral states' sovereignty. The term "regional arrangements" in these respects refers to multinational treaties, conventions, agreements, cooperative investigations and so on, together with the mechanisms associated with these phenomena.<sup>9</sup> It will be appreciated, however, that several forms of regional cooperation are still subject to national sovereignty issues, some of which have strong link to the past.

### **7.3. Existing Regional Maritime Cooperation**

At present, the following institutions represent the regional security cooperation in Southeast Asia:

#### **7.3.1. Five Power Defence Arrangement (FPDA)**

The Five Power Defence Arrangement (FPDA) is a defence relationship established by an agreement between the United Kingdom, Australia, New Zealand, Malaysia and Singapore, signed in 1971, whereby the five nations will consult each other in the event of external aggression or threat of attack against Malaysia or Singapore. The FPDA was set up

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<sup>9</sup> See, Lewis M Alexander, above.

following the termination of Britain's defence guarantees of Malaysia and Singapore as a result of Britain's decision in 1967 to withdraw its forces east of Suez. The FPDA provides for defence co-operation and for an Integrated Air Defence System (IADS) for Malaysia and Singapore based in RMAF Butterworth, Penang under the command of an Australian Air Vice Marshal. Until 1988, RMAF Butterworth was under the control of the Royal Australian Air Force. It is at present owned by the Royal Malaysian Air Force, but hosts rotating detachments of aircraft and personnel from all five countries. In 1981, the five powers organised the first annual land and naval exercises. Since 1997, the naval and air exercises have been combined. In 2001, IADS headquarters was re-designated as headquarters for an Integrated "Area" Defence System instead of an Integrated "Air" Defence System, signalling a wider role. It now has personnel from all three branches of the armed services, and co-ordinates the annual five-power naval and air exercises, while moving towards the fuller integration of land elements.

Being a creation to thwart Communist threats during the Vietnam War and a response to the Domino Theory,<sup>10</sup> the usefulness of the FPDA was questioned after the end of the cold war when cooperation within the region was "not yet sufficiently oriented to the region's new non traditional security threats".<sup>11</sup> During this period, the United States had withdrawn its forces from the Subic Bay, Philippines in 1991, thus significantly reducing its presence in Southeast Asia. At about the same time, the US Congress instituted a variety of restrictions on arms sales and military training for Indonesia due to Indonesia's action in the killings of civilians in East Timor in 1993. The restrictions almost reached a total ban

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<sup>10</sup> The theory is believed to have been started by President Eisenhower in 1954 to describe the prospects of communist expansion across Southeast Asia if Indochina were to fall.

<sup>11</sup> John F. Bradford, "The Growing Prospects For Maritime Security Cooperation in Southeast Asia", *Naval War College Review*, Vol.58, No.3, Summer 2005, page 66.

during bigger revolts in the province before Indonesia finally agreed to award East Timor full independence during President Habibie's short-lived administration in 1999.

To fill the vacuum left by the United States in the region, the coastal states adopted a new approach by conducting new "operationalised cooperation endeavours" whereby bilateral naval exercises became common features, such as naval pairings between Indonesia-Malaysia, Malaysia-Cambodia, Brunei-Australia, Singapore-India, and Malaysia-Philippines. Out of these pairings, the Malaysia-Singapore, Malaysia-Indonesia and Singapore-Indonesia were the most active.<sup>12</sup> Bradford, citing his privileged interviews with the "shipboard officers" of the three coastal states from October 1995 to September 2004, commented that these officers "lamented that bilateral coordination of these patrols amounted to little more than exchanges of schedules, to which in many cases partners did not adhere"<sup>13</sup>.

The idea to reactivate the FDPA, which by now had almost ceased to exist, began in Penang in June 2004 when the FDPA defence ministers announced that the organization's activities would, for the first time, be focused towards anti-piracy initiatives, maritime interception and counter terrorism.

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<sup>12</sup> John F. Bradford, above, page 66.

<sup>13</sup> Bradford, page 66.

### 7.3.2. The Association of Southeast Asian Nation (ASEAN)

Although not a defence pact *per se*, this grouping is the most active and is acknowledged as the most effective body of cooperation among the countries in the region. The Association of Southeast Asian Nations (ASEAN)<sup>14</sup> was established on 8 August 1967 in Bangkok. It is a major regional grouping among the countries of Southeast Asia. It started with five founding nations: Malaysia, Indonesia, Thailand, Singapore and the Philippines. In 1999, Cambodia became the tenth country to join the regional organization. ASEAN aims to foster cooperation and mutual assistance among its members. Being a non-military pact, ASEAN has always distanced itself from military actions in the past, but recent statements from the leaders have indicated that this is to change.

At a meeting in Bali in October 2003, the leaders of the member nations signed a declaration known as the Bali Concord II, in which they agreed to pursue closer economic integration by 2020. According to the declaration, “an ASEAN community would be set upon three pillars, namely political and security cooperation.... for the purpose of ensuring durable peace, stability and shared prosperity in the region”.<sup>15</sup> In the same meeting, the leaders also discussed setting up a security community alongside the economic one, though without any formal alliance.

At the 30<sup>th</sup> ASEAN Ministerial Meeting (AMM) in Kuala Lumpur in 1997, the foreign ministers stressed the need for sustained cooperation in addressing transnational concerns,

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<sup>14</sup> For some background reading on this subject, see footnotes in Chapter 1. For more contemporary works on the issues of politics and security, see, for example, Damien Kingsbury (Ed.), *Violence in Between: Conflict and Security in Archipelagic Southeast Asia*, ISEAS Publications, Singapore, 2005; Andrew T.H. Tan, *Security Perspectives of the Malay Archipelago*, Routledge, Cheltenham, 2004.

<sup>15</sup> Asean website at [www.aseansec.org](http://www.aseansec.org).

including the fight against terrorism, trafficking of people, illicit drugs and arms, piracy and communicable diseases. Piracy *per se* was never considered an important agenda in ASEAN. It only gained prominence when it was related to the increasingly urgent issue of terrorism.

The biggest problem faced by the ASEAN countries in relation to combating piracy and terrorism relates to concerns about national sovereignty. With the exception of Thailand and the Philippines, all other states in ASEAN are relatively young, having been founded after the Second World War. Territorial integrity is still a big selling point for nationalist politicians. This is particularly true in the case of Indonesia, Malaysia, Singapore and Thailand. Among these countries, there are still unresolved territorial disputes at sea.

### **7.3.3. Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia (ReCAAP)**

ReCAAP is a key regional agreement specifically intended to combat piracy and armed robbery at sea. It should be noted that the word “terrorism” is not included, due to the fact that it was established long before the 11 September atrocities, at a time when the word “terrorism” was still not universally accredited. The key pillar of ReCAAP is the Information Sharing Centre (ISC) whose role is, among others, “to facilitate communication and information exchanges between member countries and ... serve to improve the quality of statistics and reports on piracy and armed robbery against ships in the region.”<sup>16</sup> As at 6 June 2006 fourteen countries have signed the ReCAAP Agreement:

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<sup>16</sup> Julia Ng, “Singapore, Japan, Laos and Cambodia Sign Pact to Fight Piracy”, *Channel News Asia*, 28 April 2005.

Brunei, Cambodia, India, Japan, Korea, Laos, Myanmar, Philippines, Singapore, Sri Lanka, Thailand, Vietnam, China and Bangladesh. Eleven of these have ratified the Agreement and deposit it with the depository in Singapore. With India having been the tenth Member Country to deposit its instrument of ratification, the ReCAAP Agreement shall enter into force on 4 September 2006.<sup>17</sup>

It would appear that Indonesia was still not entirely sure as to the mechanism of ReCAAP when President Susilo Bambang Yudhoyono met Prime Minister Junichiro Koizumi in Tokyo on 2 June 2005. Following the meeting, the two leaders issued the Japan-Indonesia Joint Announcement on Maritime Affairs (see Appendix 5) in which, as regards ReCAAP, “the Government of the Republic of Indonesia, in accordance with its domestic procedures, would seriously consider concluding a ‘Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia’”. On the issue of the Straits of Malacca, the two leaders expressed their desire to strengthen cooperation in a comprehensive approach encompassing safety of navigation, the marine environment and maritime security. Such an approach to maritime security would cover, among others, security against piracy, armed robbery against ships and smuggling (arms goods, persons, drugs etc.).<sup>18</sup> Indonesia’s well known stance on sovereignty was again highlighted when “Prime Minister Koizumi recognized that the Government of Japan fully respects the sovereignty and sovereign rights of the republic of Indonesia over its territorial sea and exclusive economic zone (EEZ) within the Straits of Malacca, which is a strait used for international navigation.”<sup>19</sup> The closely worded statement also indicated that Indonesia will subject the

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<sup>17</sup> See, [www.recaap.org](http://www.recaap.org).

<sup>18</sup> *Japan – Indonesia Joint Announcement on Maritime Affairs*, 2 June 2005, Tokyo.

<sup>19</sup> *Japan-Indonesia Joint Announcement*, above.

cooperation to a situation that it “should be carried out in accordance with the United Nations Convention on the Law of the Sea of 1982”.<sup>20</sup>

The effectiveness of ReCAAP to combat piracy in the Straits of Malacca is put to test because of Malaysia and Indonesia’s stance not to sign it. Reports indicate that both countries refused to sign it as they believed it is still not in line with the sovereignty of three neighbouring countries securing the Straits.<sup>21</sup>

#### **7.3.4. ASEAN Regional Forum (ARF)**

Inaugurated in Bangkok on 25 July 1994, the ARF was established a year before, during the 26<sup>th</sup> ASEAN Ministerial Conference in Singapore on 23 – 25 July 1993. The ARF is an informal multilateral dialogue of 25 members that seeks to address security issues and in the Asia Pacific region. The current participants in the ARF are: ASEAN, Australia, Canada, China, EU, India, Japan, North Korea, South Korea, Mongolia, New Zealand, Pakistan, Papua New Guinea, Russia, East Timor and the United States.

The 27<sup>th</sup> ASEAN Ministerial Meeting in 1994 pronounced that, “the ARF could become an effective consultative Asia-Pacific forum for promoting open dialogue on political and security cooperation in the region. In this context, ASEAN should work with its ARF partners to bring about a more predictable and constructive pattern of relations in the Asia Pacific”.<sup>22</sup>

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<sup>20</sup> *Japan-Indonesia Joint Announcement*, above.

<sup>21</sup> See statement by Major General Dadi Susanti, in “Indonesia Yet to Agree on ReCAAP”, *Antara News*, 2 September, 2006.

<sup>22</sup> See ARF website at [www.aseanregionalforum.org](http://www.aseanregionalforum.org).

The objectives of the ARF are:

- (1) To foster constructive dialogue and consultation on political and security issues of common interest and concerns; and
- (2) To make significant contributions to efforts towards confidence-building and preventive diplomacy in the Asia Pacific region.

During the ASEAN Ministerial Meeting on Transnational Crime in January 2004, clear statements were issued that was indicative of the intention to improve cooperation between member states of the ARF. It was equally clear at that time that a series of events in Southeast Asian waters from the beginning of the new millennium until 2003 had attracted concerns among the maritime states, in which the sea makes up eighty percent of the region's area. Amongst the frequently quoted incidents that drew concerns were the bombing of the ferry *Our Lady Mediatrix* in the Philippines waters, in which forty people were killed and fifty others wounded on February 2000. A month later, in March, an insurgent group in Southern Philippines, the Abu Sayyaf Group, was blamed for kidnapping Western tourists from the Island resort of Sipadan, in Borneo, Malaysia, and the same group was again blamed for similar attacks in Palawan, Philippines in May 2001. These amphibious terrorist attacks were then new phenomena in the region and were thought to be isolated cases. But subsequent events outside the region such as the well-publicised bombings of the *USS Cole* in Yemen and the global effects of the 11 September 2001 atrocities in New York and Washington changed this outlook. This new view that maritime terrorism is present everywhere was further fortified by the attack on the *Limburg* in the Arabian Sea.

The notion that all these attacks were perpetrated by Islamic terrorist groups seeking global attention awakened the region from its slumber after the end of the cold war. This is due to the existence of Islamic insurgent groups such as the "traditional" anti central government

insurgent groups seeking independence, such as Gerakan Aceh Merdeka (GAM) or the Free Aceh Movement, the Pattani United Liberation Front (PULO) and the Southern Philippines' Moro Islamic Liberation Front, as well as newly discovered militants<sup>23</sup> such as the Abu Sayyaf Group, Jemaah Islamiyah, Laskar Jihad, Kumpulan Militan Malaysia and Al Qaeda splinter groups – each with more radical splinter groups already operating in the regions. These groups' strong presumed links with Middle Eastern allies<sup>24</sup> encouraged a shift in the region's strategic thinking that the groups and other potential perpetrators might follow the tactics of global *jihadi* groups<sup>25</sup> to achieve their political ends. In Southeast Asia, as in any other parts of the world, the maritime sector was viewed as the weakest area, ready to be exploited by these groups, but it could be strengthened by regional cooperation.

#### 7.4. Problems of Regionalism

The most potent danger that could undo all efforts towards effective regional maritime cooperation is the issue of sovereignty of coastal states in territorial disputes. Other threats

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<sup>23</sup> In Southeast Asia there are three organizations that have been proscribed by the UN as terrorist groups. They are: Al-Qaeda, Abu Sayyaf Group and Jemaah Islamiya. See, for example, Carlyle A. Thayer, et al. "Al-Qaeda and Political Terrorism in Southeast Asia" in Paul J. Smith (Ed.), *Terrorism and Violence in Southeast Asia: Transnational Challenges to States and Regional Stability*, M.E. Sharpe, New York, 2005, pages 84-92.

<sup>24</sup> See, for example, Rohan Gunaratna et al, "Understanding Al-Qaeda and its network in Southeast Asia" in Paul J. Smith (Ed.), *Terrorism and Violence in Southeast Asia: Transnational Challenges to States and Regional Stability*, above, pages 62-75. The spread of radical Islam to this region was said to be the result of Al-Qaeda decentralization, which had an impact on, among others, the Southeast Asia Network. Among the parties and groups it has established, infiltrated and influenced are Jemaah Salafiyah in Southern Thailand, Kumpulan Mujahideen Malaysia in Malaysia, Lashkar Jundullah in Indonesia and the Moro Islamic Liberation Front in Southern Philippines; see page 70.

<sup>25</sup> These tactics include establishing an organizational structure such as the one employed by the Jemaah Islamiyah, with *Amirs* (leaders), Chairman of a *shura*. Beneath the *Shura* were the secretaries and different committees, including Missionary Works, Military Committee, Security Committee, Financial Committee, and the heads of the four regional commands called *mantiqi*s. *Mantiqi* 1 covered the Peninsula Malaysia, Singapore, and Southern Thailand, *Mantiqi* 2 covered Java and Sumatra, *Mantiqi* 3 covered the Philippines, Brunei, Eastern Malaysia, Kalimantan and Sulawesi, and, *Mantiqi* 4 was being developed to establish cells in Australia and Papua (formerly Irian Jaya). See Zachary Abuza, et al., "Al-Qaeda Comes to Southeast Asia", in Paul J. Smith (Ed.), *Terrorism and Violence in Southeast Asia*, above, pages 44-45.

include strained bilateral relationship due to historical factors and socio-politico-economic problems between neighbours. As a result, problems such as piracy and terrorism, the environment and transnational maritime crime, are considered unlikely to be solved in the face of possible territorial disputes which linger on in the region.

#### **7.4.1. Malaysia – Singapore Disputes**

Malaysia has several long-standing disputes with Singapore over a number of issues, namely the delivery of fresh water to Singapore<sup>26</sup>, maritime boundary disputes over a Singapore-occupied islet known as Pedra Branca in Singapore and as Pulau Batu Puteh in Malaysia, located 20 nautical miles off the east coast of Singapore, the relocation of the Singapore station of Malaysia's Railway (KTM) from Tanjong Pagar to Kranji and the withdrawal of the Central Provident Fund by West Malaysians.

Some of the disputes will be explained in detail below:

The issue of fresh water supply from Malaysia to Singapore has been a long-standing dispute between the two countries. Singapore depends on Malaysia for forty percent of its water supply. The problem started soon after the separation in 1965 and since then, every time bilateral relations become strained, the issue will again be highlighted to demonstrate Singapore's vulnerability. Long summarised the situation as follows:

“The penchant for Malaysian leaders to periodically exploit the asymmetrically dependent relationship by threatening to terminate the water supply, to express unhappiness over policies pursued by Singapore, to influence governmental decisions in the City-state or for domestic political purposes has generated concerns

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<sup>26</sup> For details and chronology of the Malaysian-Singapore water disputes, see Lee Poh Onn, “The Water Issue between Singapore and Malaysia: No Solution in Sight?” *ISEAS Working Papers*, January 2003.

that Singapore-Malaysia relations may quickly deteriorate, with potentially violent outcomes”.<sup>27</sup>

What annoyed Singapore was, in her perception at least, Malaysia’s attempt to tie the water negotiations with other issues such as the use of Malaysian airspace by the Singapore air force, the withdrawal of Central Provident Funds (CPF) by West Malaysians, the location of Malaysia’s customs, immigration and quarantine facilities, the development of the Malaysian Railway land in Singapore and the construction of a bridge to replace the present causeway.<sup>28</sup> Malaysia sees the water supply issue differently, accusing Singapore of manipulating the facts and arguing that Malaysia’s interest is nothing more than having a fair price”.<sup>29</sup> Despite this tension, Malaysia assures that it has no intention to terminate the water supply prior to the expiry of the water agreement in 2061:

“The people of Singapore can count on Malaysia’s continued supply of raw water to Singapore, at least until 2061, when we would prefer to supply treated water instead”.<sup>30</sup>

The first water agreement signed in 1961 will expire in 2011, and there is a suggestion that Singapore will not renew this because of a drop in Singapore’s population and the availability of a new technology that allows used water to be recycled for drinking, known as NEWater, which has been developed successfully by the republic. Apart from this, there is also another suggestion that Singapore can source water domestically as well as obtaining a huge raw water supply from the Indonesian province of Batam and Riau.<sup>31</sup>

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<sup>27</sup> Long, as quoted in Lee Poh Onn, “The water Issue between Singapore and Malaysia: No Solution in sight?” *ISEAS Working Papers*, January 2003, page 2.

<sup>28</sup> See Lee Poh Onn, page 3.

<sup>29</sup> See, “Water: The Singapore – Malaysia Dispute: The Facts - Is a Fair Price for Water Too Much Too Ask?” Foreign Ministry of Malaysia’s website at [www.kln.gov.my/water.htm](http://www.kln.gov.my/water.htm).

<sup>30</sup> See note 29 above.

<sup>31</sup> For further readings refer to Kong, Y.C., “Natural Resource Management and Environmental Security in Southeast Asia: Case Study of Clean Water Supplies in Singapore”, *IDSS Working Paper* No.15, May

The issue of sovereignty over the island of Pulau Batu Puteh, known in Singapore as Pedra Branca, is another rift in bilateral relations between Malaysia and Singapore. The rock island, which is managed by Singapore, is an important aid to navigation that is passed by about fifty thousand ships every year.<sup>32</sup> This dispute has been referred to the ICJ for arbitration.<sup>33</sup>

#### 7.4.2. Malaysia – Indonesia Disputes

Before the emergence of the Republic of Indonesia and the Federation of Malaysia in the aftermath of the Second World War, the whole of present day Indonesia and the Malay Peninsula were loosely called “Nusantara” or the “Malay Archipelagos”. Before the arrival of the Western powers in the 16<sup>th</sup> century, there was already fierce rivalry between the Majapahit Government, centralised in the island of Java, and successive rulers of the Malay Peninsula from the Kingdom of Langkasuka and the Sultanate of Malacca. The rivalry continued after the fall of Majapahit and Malacca in the form of Anglo-Dutch animosity, which was ended through the Anglo-Dutch Treaty 1824, which determined the sphere of influence; however, in reality, the old rivalry continued. As explained earlier, the founding father of the modern Indonesia was a nationalist figure who thrived on a grandiose project of amalgamating thousands of islands in “Nusantara”, which literally means “the lands between the ocean”, including all lands that speak the Malay language, the *lingua franca* of the region. He bitterly opposed the formation of the Malaysian Federation and launched a

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2001 and Long, J., “Desecuritizing the Water Issue in Singapore – Malaysia Relations,” *Contemporary Southeast Asia*, 23, No.3, December 2001, pages 504-532.

<sup>32</sup> The territorial disputes over Pedro Branca reached new levels of emotion from 1989-92. During this period, media from both countries stirred up the issue, which made open conflict a possibility. There was a report that both countries had put their armed forces on alert in September 1991. See Andrew T.H. Tan in *Security Perspective of the Malay Archipelago*, above, page 24.

<sup>33</sup> See ICJ Reports on Case Concerning Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Lodge, (Malaysia/Singapore), September 2003.

limited military offensive against the Peninsula Malaysia in 1964 with his battle cry “*Ganyang Malaysia*” (crush Malaysia).<sup>34</sup> The attempts failed and he soon lost his power in a bloody armed struggle in 1965.<sup>35</sup>

The importance of the historical background above is that it highlights the fact that the rivalry between Malaysia and Indonesia is not a new phenomenon. Although there is a vast difference in terms of economic prosperity in favour of Malaysia, Indonesia always prides itself as a big brother to Malaysia and has less tolerant views on matters involving territorial integrity, which it considers vital for the survival of the republic and has always considered with esteem as a matter of “national pride”.<sup>36</sup>

After the fall of Sukarno, Indonesia and Malaysia had a long spell of relative calm in bilateral ties. This situation encouraged both sides to sign an agreement on matters relating to territorial boundaries. On 17 March 1970, Adam Malik, the Foreign Minister of Indonesia, and Tun Abdul Razak, the Deputy Prime Minister of Malaysia, signed a treaty to determine the boundary lines in the Straits of Malacca between the two countries. The treaty determined the territorial waters between the two countries at the narrow part of the straits as follows:

- a. In the North by the line which connects Tanjung Thu, Latitude 02°51'·1N, Longitude 101°16'·9E to Point 1, Lat. 02°51'·6N, Long. 101°00'·2E to Batu Mandi Isle Lat. 02°52'·2N, long. 100°41'·0E, and

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<sup>34</sup> For a detailed account of the conflict, see J.A.C. Mackie, *Konfrontasi: The Indonesia-Malaysia Dispute 1963-1966*, Oxford University Press, London, 1974.

<sup>35</sup> The attempted *coup d'etat* by Lieutenant-Colonel Untung and his associates was crushed on 1 October 1965. General Suharto assumed power as *de facto* President of Indonesia and the future Foreign Minister Adam Malik made swift moves to end the fruitless conflict with Malaysia. See J.A.C. Mackie, above, page 308.

<sup>36</sup> This is based on the researcher's personal experience and personal communication with Indonesian officials in boundary meetings between Malaysia and Indonesia during 1998-2000.

- b. In the South by the line which connects Tanjung Piai, Lat. 01°16'·2N, Long. 103°30'·5E to Point No.8, Lat. 01°15'·0N, Lat. 103°22'·8E to Iju Ketjil Isle Lat. 01°11'·2N, Long. 103°21'·0E and Tandjung Kedabu, Lat 01°05'·9N, Long. 102°58'·5E.<sup>37</sup>

The Treaty explained that the boundary lines of territorial waters of Indonesia and Malaysia at the Strait of Malacca in areas as stated above shall be in a line at the centre drawn from the baselines of the respective parties in the said areas.<sup>38</sup> The Treaty made a requirement that both parties shall promise assurances that every necessary measure shall be taken in their countries to comply with provisions inserted in the Treaty<sup>39</sup> and any dispute that may arise between the two parties from interpretation or implementation of the treaty shall be settled amicably through consultation or negotiation.<sup>40</sup>

The spirit of amicable solution in settling territorial disputes between Indonesia and Malaysia was followed in the dispute regarding the ownership of Pulau Sipadan and Ligitan, which was referred to the International Court of Justice, which overwhelmingly decided in favour of Malaysia.<sup>41</sup> This ICJ decision was taken in a positive light in Indonesia, more so after losing East Timor.<sup>42</sup>

The last dispute was solved through the International Court of Justice (ICJ) but it did not solve the entire issue of off-shore claims. In early 2005, the two countries became deeply

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<sup>37</sup> *Treaty between the Republic of Indonesia and Malaysia on the Determination of Boundary Lines of Territorial Waters of the Two Nations at the Strait of Malacca, dated 17 March 1970.*

<sup>38</sup> *The Treaty*, above, Article 1.

<sup>39</sup> *The Treaty*, Article II.

<sup>40</sup> *The Treaty*, Article III.

<sup>41</sup> See *ICJ Report on the Case Concerning the Sovereignty Over Pulau Ligitan and Pulau Sipadan (Malaysia/Indonesia)*, 17 December 2002. The Court decided by a vote of 14 to 1 in favour of Malaysia.

<sup>42</sup> *Straits Times*, 18 December 2002, page 3.

involved in a diplomatic row over the Ambalat issue.<sup>43</sup> Despite some apparent signs of cooperation, a number of ongoing bilateral issues between the two countries could still trigger possible conflicts on issues such as timber thefts, cross-border raids, illegal Indonesian immigration, the haze stemming from forest fires in Kalimantan and suspicions that Malaysia was harbouring Acehnese rebels.<sup>44</sup>

Malaysia and Indonesia are among the claimants of the Spratly islands in the South China Sea. The islands are believed to have rich reserves of oil and gas. Although the failure of oil explorations so far on the Vietnam continental shelf has dampened the expectations of finding huge quantities of oil, the area is said to have rich fishing resources.<sup>45</sup>

### 7.4.3 Indonesia – Singapore Disputes

The relationship between Indonesia and Singapore began to deteriorate after Singapore joined the Malaysian Federation in 1963, when Indonesia launched the Konfrontasi.<sup>46</sup> After Singapore was expelled from the Federation,<sup>47</sup> the relationship between the two countries deteriorated further after the Singapore government refused to commute the death sentence on two Indonesian marines, who were executed in 1969.<sup>48</sup> Relations only began to improve

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<sup>43</sup> An area in the Sulawesi Sea, Ambalat is adjacent to Pulau Ligitan and Pulau Sipadan and both Malaysia and Indonesia are claiming sovereign rights over its resources.

<sup>44</sup> Andrew T.H. Tan, page 28.

<sup>45</sup> See Timo Kivimaki (Ed.), *War or Peace in the South China Sea?*, Northern Institute of Asian studies (NIAS) Press, 2002, pages 6-21, and for backgrounds to Malaysia and Indonesia's claims, see pages 28-29.

<sup>46</sup> See 8.4.2 above.

<sup>47</sup> A detailed account of this "separation" was given by Mr Lee Kuan Yew in his biography, *The Singapore Story: Memoirs of Lee Kuan Yew*, Times Editions, Singapore, 1998. In particular, see Chapters 41-43, pp 616-648. Another critical account of the events leading to the split is given by Nancy McHenry Fletcher, *The Separation of Singapore from Malaysia*, Data Paper No.73, Southeast Asia Program, Cornell University, New York, July 1969.

<sup>48</sup> See Lau Teik Soon & Bilveer Singh, *Singapore-Indonesia Relations: Prospects and Problems*, Singapore Institute of International Affairs, Singapore, 1991, page 1.

after 1973 when Prime Minister Lee Kuan Yew paid a visit to Jakarta as Prime Minister of independent Singapore. The relationship blossomed, and due to excellent bilateral personal ties between Suharto and Lee Kuan Yew, Singapore-Indonesia relations have grown in the areas of politics, economics, military and socio-culture.<sup>49</sup> Despite this positive outlook, the relationship between the two countries remains “far from perfect”.<sup>50</sup> In the last few years, there have been other problematic areas, such as the visit of the Israeli President to Singapore and the issue of Malays in Singapore’s Armed Forces (SAF). Although these two issues are basically Singapore’s domestic issues, when they coincide with some bad press in Malaysia or Indonesia, they will affect bilateral relations between Singapore and Indonesia.<sup>51</sup> Another issue that caused considerable damage to the Singapore-Indonesian bilateral relationship was the toxic smog that engulfed Singapore, Malaysia, Brunei and Southern Thailand in September 1997.<sup>52</sup>

#### **7.4.4. Amicable Solution in Solving Disputes and Future Threats**

So far, trends have indicated that despite complexities in the littoral states’ relationships, they are willing to settle disputes amicably. Adjudication in international tribunals has, to date, been the preferred method when diplomacy and regional frameworks have failed to resolve issues. The failure of ASEAN to mediate the territorial disputes is due to its

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<sup>49</sup> See L.T. Soon & B. Singh, above, page 1.

<sup>50</sup> There are perceived “suspicion and questioning of intentions”. One source of contention is Singapore’s refusal to release statistics on her trade to Indonesia. See Kawin Wilairat, *Singapore’s Foreign Policy*, Field Report No.10, ISEAS, June 1975, particularly pages 92-93.

<sup>51</sup> See Ambassador Barry Desker et al, “Developments in Singapore-Indonesia Bilateral Relations” in L.T. Soon and B. Singh, above, pages 101-106.

<sup>52</sup> It was caused by land clearance in Indonesia and climatic conditions caused by the El Nino weather system. At its worst, it reduced visibility to five metres. It paralysed economic activity, affected tourism and created serious health problems. Singapore was estimated to have lost \$74 million as a result of this disaster. See J. Henderson, above, pages 45-46.

purposeful avoidance of entanglement in member countries' internal affairs.<sup>53</sup> The willingness to address the issue reflects the concept of ZOPFAN,<sup>54</sup> which is one of ASEAN's core values. Despite this optimism, the sovereignty disputes among its littoral states are too volatile and sensitive to allow a really peaceful outcome to be predicted. When coupled with other issues such as security, national pride and prejudices, limits and opportunities, these disputes could transform into an open conflict with a possibility of military involvement. The trends of modernising military equipment among the littoral states are indicative of this.<sup>55</sup>

Malaysia as one of littoral States of the Strait of Malacca is modernising its administrative structure to combat the problem of piracy and general enforcement at sea. The traditional methods have been to rely on the existing armed forces and the police but this was found to be inadequate and there was a need to set up a dedicated agency for enforcement at sea.

#### **7.5. MALAYSIA: Establishing Anti "Piracy" Agencies**

For Malaysia, the question becomes one of adapting national solutions that are acceptable to neighbouring states when integrated regional solutions are under negotiation.

Malaysia has no agency with the specific duty to combat piracy or maritime terrorism, although in the past there have been a number of agencies that have shared the duty of law

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<sup>53</sup> J. Henderson, above, page 78.

<sup>54</sup> Zone of Peace, Freedom and Neutrality is a concept that was introduced by Malaysia during the 1970s and has been embraced by ASEAN ever since.

<sup>55</sup> See for example, Craig. Snyder et al., in *Maritime Security in Southeast Asia*, pages 118-123. Among the three littoral states, Singapore is regarded to have the most advanced military capability. Malaysia, too, is in the process of modernizing its capability, especially in the navy. Indonesia, however, has not been able to adequately modernise its fleet following the financial crisis in the late 1990s.

enforcement in its national waters. Before independence from the British in 1957, Malayan (the forerunner of Malaysia) territorial sea was patrolled by the Royal Police. When the Royal Malaysian Navy (RMN) was established, it was not initially empowered to patrol the coastal waters because its prime function is towards defence during war. In the 1970s, when the threat of uncontrolled arrival of Vietnamese refugees became a problem, its role was expanded to protecting the sea from all illegal immigrants, including those from Indonesia, the Philippines and Myanmar, along with the interception of illegal trawlers in the EEZ and anti smuggling operations. The capabilities of agencies operating in Malaysian waters are shown below.

#### **7.5.1. The Royal Malaysian Navy**

In 2004, the Royal Malaysian Navy (RMN) had about 14000 personnel with one naval commando unit equipped with 2 Lekiu frigates (Exocet SSM and Seawolf corvettes (OTO Melara SSM), 8 Spica/Combattante II missile boats (Exocet SSM); 4 Lerici minehunters, and on order, 6 Meko A-100 OPVs, 1 Agosta (training) submarine, 2 Scorpene submarines, 6 Super Lynx and 6 Fennec helicopters.<sup>56</sup> As a branch of the Malaysian Armed Forces, the RMN's enforcement function is limited to giving assistance to other agencies in the EEZ on matters pertaining to the Fisheries Act 1985, the Environment Quality Act 1974 and the Immigration Act 1959/63.

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<sup>56</sup> Sources: *The Military Balance 2003 – 2004*, The International Institute for Strategic Studies, Oxford University Press, London, page 164, *Asia-Pacific Defence Reporter*, June 2003, *Asian Military Review*, February 2001, *Asian Defence Journal* and *Jane's Defence Weekly* (various issues). As quoted in Andrew T.H. Tan, above, page 147.

**Table 5**  
Bilateral/Multilateral Exercises between Malaysia and  
Foreign Maritime Enforcements<sup>57</sup>

Singapore Navy	Ex-Malapura
TNI-AL/POLAIR	PATKOR Optima
TNI-AL	Malindo Jaya
Philippines Navy/Coast Guard	PHIMAL
Thai Navy	Thalay-Laut
Thai Navy/Marine Police	Seaex-Thamal
Brunei Navy	Hornbill
Australian Navy	Mastex
United States Navy	CARAT
FPDA	Starfish
Philippines Navy	Mal-Phil Jaya

The RMN has active bilateral relations with navies of other countries. Bilateral exercises with the navies of Indonesia started in 1972, Thailand in 1980, Singapore in 1984 and Brunei Darussalam in 1985.<sup>58</sup> The acronyms of several RMN bilateral exercises are given above in Table 5.

### 7.5.2. The Marine Police

This is a branch of Malaysian Police, which was established in 1947. Until the year 2000 it had the strength of 2431 personnel equipped with 208 boats, and it derives its power from section 3(3) of the Police Act 1967. Apart from boats, it is also assisted by the regular air wing. Its area of operation is in the rivers, inland waters and territorial waters.

<sup>57</sup> Taken from Iskandar Sazlan & Mat Taib Yassin, note 58.

<sup>58</sup> Iskandar Sazlan & Mat Taib Yassin, "Southeast Asian Maritime Security Cooperation: Malaysian Perspectives and Recent Developments", *Maritime Studies*, July-August 2004, page 29.

### 7.5.3. Maritime Enforcement Coordinating Centre (MECC)

The National Maritime Enforcement Coordinating Centre (MECC) was established at Lumut, Perak in January 1986 to coordinate various maritime enforcement agencies' functions on a daily basis. It is answerable to the National Maritime Council (NMC) and the National Security Council (NSC).<sup>59</sup> It was formed with the objective of coordinating maritime law enforcement and to ensure that the national assets involved in maritime operations are utilised competently, swiftly and efficiently for the security and sovereignty of the national maritime area. There are about twenty national laws to be enforced in the national maritime area under the responsibilities of eight major enforcement agencies. The MECC, having no enforcement assets of its own and having no command or control function, relies on these agencies to carry out this enforcement, which is often slowed down and rendered ineffective by bureaucratic problems. To overcome the shortcomings of various agencies, which result in very few arrests, the MECC conducts bilateral joint operations to deter encroachment in specific areas for a period of about seven days. They are known as PATKOR and PHILMAL<sup>60</sup>. PATKOR is the acronym given to *Patroli Koordinasi* (Coordinated Maritime Patrol Operations) carried out in the Straits of Malacca by Malaysia and Indonesia. Critics have pointed out that these operations lack effectiveness and so far there have been no arrests, although the operations have been going on annually since 1993. PHILMAL, on the other hand, is the acronym for the Philippines-Malaysia Coordinated Border Patrol in the east coast of Sabah bordering the Philippines, an area known for its piratical attacks, sea robbery, illegal fishing and intrusions of illegal

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<sup>59</sup> These two units oversee the maritime affairs and the security of the country and are placed under the Prime Minister's Department, Kuala Lumpur.

<sup>60</sup> This information was taken from a visit to the MECC Headquarters in Lumut, Perak, August 2005.

immigrants. All these bilateral co-operations will eventually be taken over by the Malaysian Maritime Enforcement Agency.<sup>61</sup>

#### **7.5.4. Malaysian Sea Surveillance System<sup>62</sup>**

The concept of a Malaysian sea surveillance system (MSSS) was floated as early as 1977 but it was not until 1989 that the idea was taken up by the government. The initial focus of the project was towards maintaining maritime security, but after a number of incidents<sup>63</sup> in the Straits of Malacca, the government decided to enlarge its scope to include navigational safety. Due to its massive scale, the project was implemented in three stages. The first stage was to cover the Straits of Malacca, due to their importance. The second and third stages cover the East coast of Peninsula Malaysia and the Sabah and Sarawak coasts respectively. The first project was to install three radar sites, two at Port Klang and Tanjung Piai, both in the Straits of Malacca, and another one on the offshore oil platform in the South China Sea. The MSSS was commissioned on 14 March 1998.

The primary objective of the MSSS is to conduct surveillance to enhance the safety and security of maritime activities. To meet the overall objective, the system is further divided into two main aspects with two distinct objectives. The first is the National Security Aspect (SWASLA). SWASLA strives to ensure the security of marine traffic in the Straits of Malacca, Singapore and Johore by monitoring maritime activities in selected areas. It also monitors fishing boats and oil facilities within specified waters. It is an integral element of

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<sup>61</sup> Interview: Mr Abdul Rahim Hussin, National Security Division, Prime Minister's Department, Putrajaya, July 2004. See further discussion in 7.5.5. below.

<sup>62</sup> Based on papers made available to the researcher during visit to the MECC Headquarters in Lumut, above.

<sup>63</sup> The sinking of the *MV Royal Pacific* and the collision between the *Nagasaki Spirit* and the *Ocean Blessing* were cited as the causes of the change of scope of the system.

the MECC, based in Lumut. The second aspect is the Safety of Navigation Aspect (VTS). The Vessel Traffic Services (VTS) protects the safety of shipping in the Straits of Malacca, Singapore and Johore, coordinates maritime search and rescue and provides information for the prevention and control of maritime pollution. It is placed under the command of the Marine Department in Port Klang. Both SWASLA and VTS share the same system and infrastructure but they are used for different purposes.

Under the system, there is a chain of eight radar stations with co-located marine radio stations together with supporting infrastructure at various locations along the Malaysian coast of the Straits of Malacca. These unmanned radar stations are known as Remote Sensor Site (RSS) and are linked to three area control centres (ACC) at Langkawi, Klang and Johore. These ACCs are subsequently linked to the main control centre at Lumut, Perak. The MSSS system consist of a number of equipment components or subsystems of varying levels of technology integrated to form a unique system, which incorporates the highest levels of technology available in the market. The irony of the MECC is that it functions only to disseminate information to various maritime agencies on the ground and has no assets of its own at sea. The command is still at various departments that could choose to ignore the information. This state of affairs is mentioned in the Report of the Study Group as “the culture of protecting own turfs” which led to disorganization and incompetence.<sup>64</sup>

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<sup>64</sup> *Report on Feasibility Study to establish the Coastguard, Prime Minister’s Department, Kuala Lumpur, 2002, above.*

### **7.5.5. Establishment of Malaysian Maritime Enforcement Agency (MMEA)**

With national jurisdiction, just as much as with regional cooperation, there is still a need for integration. The experiences of the bodies referred to in a dynamic security situation off shore led to the concept of an overall enforcement agency. The idea to set up such an agency dedicated solely to the protection of Malaysian waters was mooted in the early 1990s after the coming into force of the UN Convention 1982. As a signatory of the Convention, Malaysia benefited from extended sea borders under the Continental Shelf and the Exclusive Economic Zone (EEZ). After its proclamation of an EEZ of 200 nautical miles in 1980, the Malaysia sea area covers 614,158 sq km,<sup>65</sup> which is double the size of its land area. As many coastal countries started building up their naval forces to protect their new-found wealth, Malaysia too felt the need to set up a Coast Guard to protect its sea boundary.

In April 1999, the Malaysian Government formed a study group to prepare a feasibility study towards the setting up of a coast guard. The study group was comprised of senior officers from the National Security Division, the Prime Minister's Department, the Attorney General's Chambers, the Institute of Strategic and International Studies (ISIS), the Maritime Institute of Malaysia (MIMA) and a former head of the Royal Malaysian Navy. After a lengthy study and visits to various local maritime-related agencies and some foreign coast guards, the study group made recommendations to the government that a new agency with a wider role than a coast guard be formed under the Prime Minister's Department. Under the recommendations, all maritime enforcement units under various agencies such as the Royal Police, the Royal Custom and Excise, the Fisheries Department and the

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<sup>65</sup> New Map of Malaysia 1979: Department of Mapping and Survey, Malaysia.

Immigration Department were to be streamlined and amalgamated under the new agency. This drew heavy criticism from the Royal Malaysian Police, whose Polis Marin (Marine Police) Unit had been operating with almost the same functions since the early days of independence.<sup>66</sup>

The Study Group noted in its findings that there were eleven different agencies having the power of enforcement at sea with the strength of 5,300 personnel and 486 vessels and boats, with a combined annual budget of RM3 billion. The findings also explained that weaknesses in enforcement were due to functional and jurisdictional duplication, duplication in areas of enforcement, lack of professionalism among the agencies' personnel and the absence of a special law to consolidate all aspects of maritime enforcement.<sup>67</sup>

It also raised concerns about the alarming rate of piracy and sea-robbery cases, as reported by the International Maritime Bureau (IMB) and the Royal Malaysian Police statistics. High profile piracy cases in the Straits of Malacca involving the vessels *MV Alondra Rainbow*, *MV Global Mars*, *MV Tenyu* and *MT Selayang* were highlighted, with further reports on the concentration of piracy cases in Malaysian waters off Malacca, Muar, Batu Pahat, Kukup and Tanjung Piai. The report also noted the small number of arrests and court prosecutions. These demonstrated Malaysia's inefficiency in dealing with the issue, which

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<sup>66</sup> These views are taken from various officers whom the researcher met during the field study in July-August 2004. Many suggested that this is an attempt by the Navy to enlarge its operation from blue waters to grey waters. Some others argued that it was a ploy by the National Security Division to spread its influence beyond the Prime Minister's Department. The use of the assignment "Director General" for the Head of the MMEA instead of the universally used "Commandant" was cited as an example. It should be noted, however, that the Indian Coastguard uses similar "titles" as those in the MMEA.

<sup>67</sup> Report on Feasibility Study to set up the Coast Guard, National Security Division, Prime Minister's Department, Malaysia, pages 73-77.

had already tarnished its image abroad.<sup>68</sup> Due to its weaknesses in patrolling the Straits of Malacca, there were frequent encroachments of foreign fishing vessels, and in 1999 alone there were seven cases of encroachment of Indonesian enforcement vessels into Malaysian waters to extort money from local fishermen.<sup>69</sup> Based on the report from the study group, the Malaysian Government agreed to set up a new agency named “Agensi Penguatkuasaan Maritim Malaysia” (APMM)<sup>70</sup> or in English, the Malaysian Maritime Enforcement Agency (MMEA) following the trends of other coastal states’ establishment of coast guards.

During the tabling of the MMEA Bill in the Lower House of Parliament, “the Dewan Rakyat”, debates focused on the issue of security in the Straits of Malacca and the threat of piracy. A leader of the opposition, Sallahudin Ayub of Parti Islam Se Malaysia (PAS), raised the spectre of “piracy” in the Straits and urged that Malaysia increases its ability to match the sophisticated equipment used by the “pirates”<sup>71</sup>. A government backbencher questioned the right of hot pursuit under section 7(e): “Is this right of hot pursuit only applicable within our waters? What if pirates, robbers, or drug traffickers try to abscond by running inside Indonesian, Philippines or Thailand’s sea borders?”<sup>72</sup> Minister Mohamed Nazri Abdul Aziz clarified that the new Agency would use the United States and Japan Coast Guards as benchmarks and the right of hot pursuit would only be applicable within the Malaysian Maritime Zone, as defined in Act 633.<sup>73</sup>

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<sup>68</sup> Report on Feasibility Study to set up the Coast guard, National Security Division, Prime Minister’s Department, Malaysia, page 26.

<sup>69</sup> Report on Feasibility Study, above, page 26.

<sup>70</sup> The original name proposed by the study group was “the Malaysian Coast Guard” to follow the global trends, but the Prime Minister felt that a new name should be adopted to reflect the vast functions taken over from various existing departments and agencies: private communication with Mr Abd Rahim Hussin, secretary of the Study Group, July 2004.

<sup>71</sup> Hansard, Dewan Rakyat, No.17, 2004, page 24.

<sup>72</sup> Wan Junaidi bin Tuanku Jaafar, Hansard, above, page 33.

<sup>73</sup> Hansard, Dewan Rakyat, above, page 66.

The Malaysian Maritime Enforcement Agency Act 2004 (Act 633) was passed by Parliament in early 2004 and was given the Royal assent on 25 June 2004. It came into force on 1<sup>st</sup> July of the same year. This was an Act to establish the rights of the Malaysian Maritime Enforcement Agency to perform enforcement functions for ensuring the safety and security of the Malaysian Maritime Zone with a view to the protection of maritime and other national interests in such zone,<sup>74</sup> which includes the internal waters, territorial sea, continental shelf, exclusive economic zone and the Malaysian fisheries waters and it also includes the airspace over the Zone. In effect, the Agency shall be employed in the Zone for the maintenance of law and order, the preservation of peace, safety and security, the prevention and detection of crime, the apprehension and prosecution of offenders and the collection of security intelligence.<sup>75</sup>

The Agency was given the powers, *inter alia*, to “stop, enter, board, inspect and search any place, structure, vessel or aircraft and to detain any vessel or aircraft”<sup>76</sup>. In the performance of its functions, the Agency has power to exercise the right of hot pursuit.<sup>77</sup> The extent of the Agency’s powers is demonstrated in section 7(3), in which “an officer of the Agency shall have, for the purpose of this Act, all powers which any relevant agency may exercise under any federal law which is applicable in the Malaysian Maritime Zone.

Within the Malaysian Maritime Zone, the functions of the Agency are:

- (a) To enforce law and order under any federal law;
- (b) To perform maritime search and rescue;

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<sup>74</sup> Preamble to Act 633.

<sup>75</sup> Act 633, section 3(1).

<sup>76</sup> Act 633, section 7(b).

<sup>77</sup> Act 633, section 7(e).

- (c) To prevent and suppress the commission of an offence;
- (d) To lend assistance in any criminal matters on a request by a foreign State provided under the Mutual Assistance in Criminal Matters Act 2002;
- (e) To carry out air and coastal surveillance;
- (f) To provide platform and support services to any relevant agency;
- (g) To establish and manage maritime institutions for the training of officers of the Agency; and
- (h) Generally to perform any other duty for ensuring maritime safety and security or do all matters incidental thereto.

However, on the high seas, the Agency is responsible:<sup>78</sup>

- (a) For the performance of maritime search and rescue;
- (b) For controlling and preventing maritime pollution;
- (c) For preventing and suppressing piracy, and
- (d) For preventing and suppressing illicit traffic in narcotic drugs.

A special feature of the Agency is its dual status. During times of peace, it operates as a civilian force, but during times of need it “shall be under the general command and control of the Armed Forces of Malaysia during any period of emergency, special crisis or war”, under a proclamation signed by Yang di-Pertuan Agong (the King).<sup>79</sup>

These are very extensive powers of coordination and of the rights to control all aspects of the maritime zone. There remain the problems of resources and abilities to do so, as well as

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<sup>78</sup> Act 633, section 6(3)(a) to (d).

<sup>79</sup> Act 663, section 17(1) and (2).

the question of rights to stop and board vessels on transit passage. The potential capacity to deter pirates has been increased by the actions of Singapore in relation to private security companies guarding foreign ships on transit.

#### **7.6. The Issue of Private Security Company (PSC) in the Straits of Malacca**

A new regional and extra-regional dimension entered into the legal equation of the rights of coastal states in their jurisdiction over the straits and the rights of users during 2004. Due to the continued problem of “piracy” in the Straits of Malacca and other important waterways in the world, several companies based in Singapore offer armed vessel escort services in Southeast Asia to guard oil and gas floating assets and their convoys. One such company is Background Asia Risk Solutions (BARS).<sup>80</sup> This proposal further stirred up controversies in Malaysia and Indonesia, the two major littoral States of the Straits of Malacca. This proposal was brought up in the Asia Security Conference, “The Shangri-La Dialogue”, in Singapore in June 2005. However, before dealing with this issue, the dynamics of the tsunami disaster needs to be appreciated, since the threat at which the new proposal was aimed receded as a result of this disaster.

After the tsunami disaster on Boxing Day 2004, the IMB reported that in the month following the disaster, not a single piracy incident was reported to the centre. This appeared puzzling, given the fact that only the northern region of the straits was affected by the tsunami and many reported cases took place in the southern region. Was it because the world’s focus on this region acted as a deterrent? Or were the “pirates” and their boats

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<sup>80</sup> Background Asia Risk Solutions (BARS) has a homepage advertising its services and claims to work closely with the coastal states’ governments. It also advertises that its principal strategy is to deter an attack. See the BARS website, [www.piracysuppression.com](http://www.piracysuppression.com).

washed away? Or was it because the Indonesian Navy had sent out warnings against such abuses? If this were the case, it could be argued that “piracy” can be suppressed by Indonesia. Or was it because some elements within the navy and other enforcement agencies were themselves involved in the “piratical activities” and they were turned away to help relief efforts in the Aceh region? These are some of the questions circulating in the region. However, whatever they may be seen this was considered primarily as a temporary halt, which cannot be allowed to divert attention from ongoing possible solutions. A most contentious aspect as a solution was the use of the private security companies.

As Valencia has highlighted,<sup>81</sup> the service of foreign escort ships raises difficult questions of law and accountability. As stated earlier in Chapter 2, Article 37 of the UN Convention 1982 states that transit passage applies only in those straits used for international navigation between one part of the high seas or an Exclusive Economic Zone and another part of the high seas or an Exclusive Economic Zone. It is well accepted that the Straits of Malacca fall into this category and the littoral States, since the coming into force of the Convention, have conducted their affairs in the straits with full acceptance of the international law principle. The important characteristic of straits used for international navigation is that the right of transit passage through them cannot be suspended by the coastal state for any purpose whatsoever.<sup>82</sup> It would seem that under this provision, the private armed escort vessels could operate unimpeded in the Straits so long they do not pose any threat or use of force against the sovereignty, territorial integrity or political independence of States

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<sup>81</sup> See Mark Valencia, *Jakarta Post*, 28 July, 2005.

<sup>82</sup> See Articles 38 and 44 of the UN Convention 1982.

bordering the straits.<sup>83</sup> BARS, in its response to Valencia, states: “we have no offensive capability whatsoever. Our role is purely defensive.”<sup>84</sup>

The problem is a situation may arise where the escort vessel may have to use the weapons to protect the escorted ship against pirates or other intruders in a territorial sea of a coastal state. Under this situation can the passage be considered non-innocent? Similarly, carrying firearms in national territories without a valid licence issued by the Home Ministry in Malaysia is punishable by death. This begs the question of the status of the PSC vessels carrying armed civilian personnel licensed to carry firearms by another state other than the littoral state. Can their acts of carrying firearms which clearly contravene the littoral state’s law, be considered innocent and do not in any way threaten the sovereignty of the littoral State? Another legal issue is whether the PSC is required to ask permission to enter territorial waters as warships. Even if the PSC vessel is considered a warship but with specific rules of engagement to use weapons it would need to get prior permission to enter territorial waters. In other words, agreements have to be concluded between the littoral state and the user state allowing such passage. But can this be considered as feasible when the company itself is not even recognised by the coastal state? Such was, and is, the debates over these types of privately operated patrols.

Malaysia as at April 2007 does not have any clear policy with regard to the PSC vessels operating in the Straits of Malacca. Although there is no action taken against these vessels, it does not give tacit approval either. As stated earlier in Chapter 1.10, in an isolated incident a PSC boat was pursued by a MMEA vessel. This could be due to the fact that the

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<sup>83</sup> Article 39(b) of the UN Convention 1982;

<sup>84</sup> See Alex Duperozel, letter to Editor, *Jakarta Post*, July 29, 2005.

PSC vessels did not seek permission in advance and the authorities did not feel obliged to give a ruling on the matter. However, in August 2005 the three littoral States of the Straits of Malacca issued a joint statement reaffirming their sovereignty and primary responsibility to secure the Straits.<sup>85</sup> This could be interpreted to mean that the littoral States did not recognise the operation of the PSC in the Straits.

A commentator criticizes Malaysia for not taking action against these vessels, “there lies the crux of the problem. Malaysia has been trumpeting the importance of its sovereignty while at the same time allowing private maritime security company (PMSC) to go unchallenged”.<sup>86</sup> Apandi Osnin outlines four options and their implications to Malaysia with regard this issue.<sup>87</sup>

Option One: Malaysia does not take any action against the security companies. They are left to the dictate of market forces. This will imply that Malaysia agrees to the presence of the PSC in the Strait of Malacca. In the long run this will create a historical precedent that private foreign forces can enter and secure the Strait.

Option Two: Malaysia allows and regulates the PSC in the Strait by formally endorse the PSC and the need of their presence in the Strait waters. Malaysia then needs to propose for a proper and legally sound framework to monitor and regulate the PSC activities in which the unlicensed PSC vessels will be subject to enforcement and court action. In the long run

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<sup>85</sup> See, the *Batam Joint Statement of the 4<sup>th</sup> Tripartite Ministerial Meeting of the Littoral States of the Straits of Malacca*, Batam, Indonesia, 1-2 August 2005.

<sup>86</sup> Apandi Osnin, “Private Maritime Security Company (PMSC) in the Strait of Malacca: Options of Malaysia”, *WMU Journal of Maritime Affairs*, 2006, Vol.5, No.2, 195-206.

<sup>87</sup> Apandi Osnin, page 205.

this option will also provide historical precedent but Malaysia will have to bear the high costs of enforcement and legal implementation.

Option Three: Malaysia issues a decree for a total ban of the PSC in its waters. Malaysia then must request Singapore to revoke the PSC licences or at least stipulate that their licences are limited to Singapore territorial waters only. This option will require considerable resources to ensure the PSC do not enter Malaysian waters and this could lead to complaints from the maritime community. In the long run if this ban is to get legitimacy, Malaysia needs to get tacit approval through the IMO and it will take decades or longer before the international community can accept it.

Option Four: Malaysia must eliminate the source of the problem i.e. eradicate pirates, hijackers and kidnappers in the Strait.<sup>88</sup>

It appears that Osnin did not discuss in detail the implication of banning the PSC vessels in respect of the rule of transit passage in the Strait of Malacca. The ban will revive the controversy over the closure of the Lombok Strait by Indonesia not too long ago. Stopping a vessel (the UN Convention 1982 uses the term “all ships”) in transit passage would tantamount to impeding a vessel from its rightful navigation in international law. The Malaysia’s dilemma is understandable because it has acceded to the UN Convention 1982 which spelt out very clearly the right of transit passage in a strait such as the Strait of Malacca. The possibility that such action will trigger an international conflict cannot be undermined because of its strategic use. On one hand, it can be argued that under the present circumstances the best option for Malaysia is in Option One. Option Four is not at

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<sup>88</sup> Apandi Osnin, page 205.

all an option because it is Malaysia's duty in its territorial waters to combat piracy if its claim on sovereignty in these waters is to be respected by international community. But it is easier said than done due to its limited resources. But Malaysia has shown an effort by establishing the MMEA as explained earlier in this Chapter. If Malaysia and Indonesia are able to keep the Straits clear of piratical and terrorist activities the demand for the PSC escort vessels will dwindle because the PSC service is very expensive.

On the other hand, in law, there is an advantage if Malaysia imposes strict control over the PSC vessels in the Strait. As has been seen before, patrolling and protecting the Straits from piratical activities is not an easy task given Indonesia and Malaysia's lack of resources but a clear policy followed by effective enforcement has always been taken by the littoral States to exert their sovereignty in a strait used for international navigation. Since Indonesia's actually took a measure to close the Lombok Strait temporarily for naval exercise in 1980s there has been no other attempt to exert the coastal state rights of sovereignty through a coastal state's action. An action against the PSC in the Straits of Malacca would be able to define the rule of transit passage in this grey area of warship-like operation in a strategic strait.

As explained briefly in Chapter 3, there are other straits in the world which have similar strategic importance with the Straits of Malacca. A short discussion is presented below for a comparison with the Strait of Hormuz, Strait of Bab el Mandeb and the Strait of Gibraltar.

## 7.7. Examples of Other Strategic Straits Used for International Navigation

### 7.7.1 The Strait of Hormuz

The Strait of Hormuz (see map in Appendix 10) links the Persian Gulf with the Gulf of Oman and the Arabian Sea. Its width varies between 29 and 51 nautical miles with length about 96nm. The Strait's narrowest part measures 20.7 nautical miles and is between the Iranian island of Jazireh-ye-Larak and the Oman island of Great Quoin, It takes its name from the island Jazireh-ye-Hormoz on which stands a Portuguese fort dating 1514. This testifies to the Strait's strategic and commercial significance for European powers. Anglo-Persian forces recaptured the island in 1662. The Strait of Hormuz is one of the most vital channels of the trade in crude oil pass through it. It is also very vulnerable to mining and to rocket attacks. The world's largest tankers use the Strait and there is plenty of water for large tankers in the main channels. Traffic separation zones, which have to be used by deep draughted ships, are entirely in Oman territorial waters. The northern peninsula of Oman is separated from the rest of the country by the United Arab Emirates. The peninsula is occupied primarily by fishermen. Oman is greatly concerned with pollution from tankers discharging ballast as it is already having adverse effects to local fish stocks.<sup>89</sup>

There have been and continue to be, significant territorial disputes between the Persian Gulf countries which affect the stability in the region. Before Iran-Iraq war in 1980-1988, there was a dispute between the UAE and Iran over ownership of islands Abu Musa, Greater Tunb and the Lesser Tunb, all are located in the Strait of Hormuz. Iran occupied the islands

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<sup>89</sup> Alastair D. Couper (Ed.), *The Times Atlas and Encyclopedia of the Sea*, Times Books Limited, 1989, at page 154.

in 1992 and in 1995 and declared that they are part of Iran. This was rejected by the Gulf Cooperation Council (GCC) and proposed that the matter be referred to the International Court of Justice. The GCC also backs “all UAE measures to regain sovereignty on its three islands peacefully”.<sup>90</sup>

So far, various conflicts in the Gulf such as the Iran-Iraq War, the Invasion of Kuwait and the Gulf Wars in 1991 and in 2003 did not result in the closure of the Strait but the situation remains tense due to the renewed animosity between Iran and the United States due to the alleged Iran’s intention to develop nuclear weapons. On March 1, 2006 it is reported that Iran’s Revolutionary Guards are making preparations for a massive assault on United States Naval forces and international shipping in the Persian Gulf.<sup>91</sup> The effect of possible Iranian attacks to close the Strait from international shipping is, however played down by Rear Admiral Jeffrey Miller; Deputy Commander of United States naval forces in the Gulf who said that the United States has the capability to keep the Strait open and clean them up if that should be required of them”.<sup>92</sup>

### **7.7.2 The Strait of Bab-el-Mandeb**

*Bab-al-Mandeb*<sup>93</sup> is Arabic for “Gate of Tears”. The Strait’s northern extremity is marked by Ras Bab al Mandeb and, about 14 nautical miles away, by Ras Siyane at its southwestern limit. Perim I Yemen divides it in Large Strait and Small Strait. Large Strait is

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<sup>90</sup> See, “Persian Gulf Oil and Gas Export Fact Sheet”, published online at [www.eia.doe.gov/emeu/cabs/pgulf.html](http://www.eia.doe.gov/emeu/cabs/pgulf.html), accessed on 4 December 2006.

<sup>91</sup> See, “Iran Readies Plan to Close Strait of Hormuz”, Newsmax.Com at [www.newsmax.com/archives/articles/2026/2/28/181730.shtm](http://www.newsmax.com/archives/articles/2026/2/28/181730.shtm).

<sup>92</sup> See Tony Capaccio, “Iran Might Try to disrupt Hormuz Oil Flow if Attacked by US”, Bloomberg.com, December 5, 2005.

<sup>93</sup> See map in Appendix 11.

always used in preference to Small Strait because many casualties have occurred in the later. Large Strait is 9nm wide and is deep at 322m and free from dangers in the fairway. Bab al Mandeb's strategic importance began with the opening of the Suez Canal.<sup>94</sup> Oil heading westwards by tanker from the Persian Gulf towards the Suez Canal must pass through the Strait. Located between Djibouti and Eritrea in Africa, and Yemen on the Arabian Peninsula, the Bab al Mandeb connects the Red Sea with the Gulf of Aden and the Arabian Sea. Any closure of the Strait could keep tankers from reaching the Suez Canal or Sumed pipeline complex in Egypt, diverting them around the southern tip of Africa. The area is politically unstable with consequent risk of interference with shipping. In October 2002 the French-flagged tanker Limburg was attacked by terrorists near Yemen.<sup>95</sup> In December 1995, Yemen fought a brief battle with Eritrea over the ownership over Greater Harnish Island in the Strait.<sup>96</sup> The piracy activities near in Somalia waters not too far from the Strait in recent times have been a great concern for international shipping. On 31 August 2001 a marine scientific research vessel the *RIV Maurice Ewing* was attacked by gunmen on a speed boat near the Strait.<sup>97</sup>

### 7.7.3 The Strait of Gibraltar

The Strait of Gibraltar<sup>98</sup> separates Africa and Europe and lies between the Rock of Gibraltar and Mt Abyla in Morocco which formed the ancient Pillars of Hercules. The width of the Strait at the eastern end is 12 nautical miles; to the westward, the Strait narrows to 8

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<sup>94</sup> Alastair D. Couper (Ed.), *The Times Atlas and Encyclopedia of the Sea*, Times Books Limited, 1989, page 154.

<sup>95</sup> See, [www.eia.doe.gov](http://www.eia.doe.gov), accessed 5 December 2006.

<sup>96</sup> See "Persian Gulf and Gas Exports fact Sheet" published by the Energy Information Administration, USA, September 2004 at [www.eia.doe.gov/emeu/cabs/pgulf.html](http://www.eia.doe.gov/emeu/cabs/pgulf.html), accessed 5 December 2005.

<sup>97</sup> The narration of the incident is given by Amy Bower, the chief scientist can be found at [www.unols.org/meeting/2001/2000111cnc/2000111cncap05pdf](http://www.unols.org/meeting/2001/2000111cnc/2000111cncap05pdf), accessed on 3 December 2005.

<sup>98</sup> See map in Appendix 12.

nautical miles and between Cape Trafalgar and Cape Spartel widens to 27 nautical miles. There is deep water in the main channel of over 360 meters but shoals lie within two to three nautical miles off the coast and need to be given a wide berth. Traffic densities are high of merchant vessels and in addition to that there are ferries and concentration of fishing vessels. Strategically the Strait is important; it is the only natural access by sea from the Atlantic into the Mediterranean. It also provides a corridor for planes who wish to pass through the area without overflying adjacent coastal states.<sup>99</sup>

#### **7.7.4. Comparison with the Straits of Malacca.**

The Strait of Hormuz is particularly vital for shipping as it is the only entrance to the Arabian/Persian Gulf. The Straits of Malacca has alternatives through Lombok and Sunda, but at great costs and with greater impact on Singapore. The stability of passage through the Strait of Hormuz is at least secured by the navigational route with the territorial waters of Oman, a state with economic and military links with the United Kingdom and the United States.

Bab al Mandeb is also a strait which is the only entrance to the Red Sea and onwards to the Suez Canal. There are four riparian states where territorial waters have to be used but which can be reduced to two though the large strait. These are regarded generally as weak states, over which the maritime powers would undoubtedly assert their passage rights even at times of war in the region.

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<sup>99</sup> Alastair D. Couper (Ed.), *The Times Atlas and Encyclopedia of the Sea*, Times Books Limited, 1989, page 154.

Gibraltar has been referred to because it illustrates an important point that is the maintenance by maritime powers of at least one adjacent friendly state which can ensure passage. In the case of Gibraltar, the British possession of the Rock provides this for ships, submarines and aircraft. Good relations with Indonesia, Malaysia and Singapore clearly equally vital for maritime powers and this gives the Straits states negotiating power in asserting their sovereignty over security patrolling of the sea area.

## **7.8. Conclusion**

Looking at the sheer number of regional and national organizations in the Southeast Asia and Malaysia, there should no longer be a problem of security in the Straits of Malacca. The threats of piracy and terrorism can be overcome if they work together in concert and with renewed focus in the face of international pressure. This so far has achieved little success. As has been seen in Malaysia, the diverse enforcement agencies, operating with their own agenda has resulted in a weak overall enforcement in the Straits of Malacca.

The Royal Malaysian Navy (RMN) personnel are trained primarily for the defence role and not very familiar with enforcement work which they perceive as a civilian job. This reduces the RMN role to showing a “presence” in certain sea areas to deter possible intrusion into Malaysian waters. The Marine Police, on the other hand, is equipped with limited resources to patrol the twelve-mile territorial sea. Although conversant in its role, it has a long history of professional rivalry with the RMN. The professional rivalry between the two agencies has made the function of the MECC in coordinating enforcement works difficult and ineffective. To overcome the problem of coordination, the Malaysian Maritime Enforcement Agency (MMEA) was established with a long-term goal of making it the sole

agency entrusted with enforcement in the Malaysian Maritime Zone. However, the future success of the Agency depends very much on the successful integration of its personnel which were appointed from mainly the former RMN and other agencies. From the beginning, there is already a complication on the recruitment exercise as it is widely perceived as “Navy-biased.”<sup>100</sup> Despite this, there is no indication that the MMEA operation has suffered as a result.

The regional establishments too, have limitations. Primary to that is the inability to allow greater role for the groupings to influence the internal affairs of a member state. Sovereignty has always been perceived as a stumbling block to a better coordination at the national level. Coordination at patrolling sea areas is thus limited to naval exercises without tangible results. The clearest example of the failure to have common stand in fighting the piracy is the inability of the ReCAAP to persuade Malaysia and Indonesia to join the regional grouping which was established specifically to combat piracy in Asian waters.

As has been seen in this chapter, there is an urgent need to reconcile national, regional and extra-regional laws and actions. There is no one answer, because it depends on the political

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<sup>100</sup> This is the Researcher’s assessment since joining the MMEA in June 2006 as its first Director of Legal and Investigation Branch. There is ample proof to suggest that the Marine Police personnel had declined the option to join in during the initial recruitment drive. The reasons for the poor response were not entirely clear but it was suggested to the Researcher that the Royal Malaysian Police strongly objected to the establishment of the Agency and later “complained” when a senior Naval officer was appointed the Agency’s first Director General, taken as indication to develop the Agency as the “Second Navy.” It is also widely believed that the RMN had taken opportunity of the first recruitment drive to “get rid of” a number of misfit personnel by persuading them to retire early from the military service, “enjoy retirement benefits” and join the MMEA for another lease of life in a civilian agency. These benefits cannot be extended to civilian maritime departments’ personnel in the Marine Police, the Royal Customs Department, Fisheries Department, the Marine Department etc. due to the Public Service Commission’s ruling that civilian personnel cannot enjoy the same benefits by joining another civilian department, thus making MMEA less attractive for them for career development.

will to embrace pragmatic solutions. What is missing is the confidence of the nation states to embark on or adopt solutions that may compromise national sovereignty. Despite their adherence to the transit passage principle, these littoral States reiterate that they have the ultimate control over all security matters and do not welcome any security arrangement imposed by outside powers. These powers have less leverage on the Strait States in Southeast Asia than in the weaker or more client states as outlined above. The end result of these complications is the seeking once again of companies which can give concerted action against pirates and terrorists without compromising sovereignty. This will be discussed in the next chapter on the effectiveness of the SUA Convention 1988 and the introduction of new elements in the SUA Protocol 2005.

## Chapter 8

### THE POLICY DIMENSION OF FLAG AND COASTAL STATES

#### 8.1. Introduction

International law as discussed in this study is, or should be, the basis of relationships between the Strait States themselves and with the user States. However, law, while absolutely essential, is seldom sufficient as a basis for the policies of either the Strait States or the State of users, expressed as flags or beneficial owners of vessels. There are other dimensions that influence attitudes, behaviours and negotiating positions. These include on the part of Strait States the history of inter-state relations, the internal politics of each of the States, feelings of nationalism, existence of ethnic enclaves, boundary maintenance and economic interests. Some users wish unencumbered mobility for warships in pursuit of foreign policy objectives beyond Straits and protection of their merchant ships against attacks from littoral sources.

There are other aspects of State policies influenced by world events which can impact on relationships in Straits. For example, foreign concerns on pirate attacks in narrow waters. With regard to such attack as has been seen in field studies in the preceding chapters, the majority of the piratical attacks in the straits region occur in either Malaysia or Indonesia's territorial waters. Under the UN Convention 1982, a hot pursuit must be commenced when the foreign ship is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing state, and can only be continued outside the territorial

sea or contiguous zone if the then pursuit has not been interrupted.<sup>1</sup> The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own state or of a third state.<sup>2</sup> Thus, in the southern part of the Straits of Malacca from Port Klang southward to Singapore where there is little or no international waters separating the two littoral states, fleeing ships can avoid capture by escaping into territorial waters of the opposing jurisdiction. This has brought about an attitude to Malaysian policy not to transgress into Indonesian waters due to the latter's attitude of overprotecting its border.<sup>3</sup>

Another limit of the UN Convention 1982 on piracy is the requirement that an attack be motivated by private ends.<sup>4</sup> This provision leaves out attacks with political ends. Along the straits there are two potentially explosive regions which have been fighting for political legitimacy against the central governments; the Gerakan Aceh Merdeka (GAM) in North Sumatra and the Pattani United Liberation Organization (PULO) in South Thailand. Among the two, the GAM has proven to be actively involved in attacks against Malaysian fishermen in the northern region where the water area is considerably wider. Although there have been some quarters<sup>5</sup> which have questioned the group ability to conduct attacks so far from its base, the case study in Chapter 3 has proven otherwise. Since the world community has accepted the fact that the GAM is a regional insurgent group,<sup>6</sup> the maritime crimes

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<sup>1</sup> *UN Convention 1982*, Article 111(1).

<sup>2</sup> *UN Convention 1982*, Article 111(3).

<sup>3</sup> This is evident elsewhere. There were reports of Indonesia deploying its naval forces off Sabah waters even after the ICJ had ruled against her in the case over the sovereignty of Pulau Ligitan and Sipadan on 16 December 2002. Bilateral agreements between Malaysia and Indonesia regarding hot pursuit have not been effective in practice.

<sup>4</sup> *UN Convention 1982*, Article 101(a).

<sup>5</sup> Private communications between the researcher and some enforcement officials in Malaysia. One MIMA researcher doubted one case in particular where the attack occurred near Penang island in 2005 which means if the attacks were really perpetrated by the GAM from its base in Northern Sumatra this could only mean that they had to traverse the straits for more than ten hours and returned after the attack for another ten hours, which is not plausible given the size and fuel capacity of the boat involved.

<sup>6</sup> After the Boxing Day tsunami 2004 the Indonesian Government and the GAM had series of negotiations to end the insurgency in the Aceh province. Towards the end of 2005 both sides have agreed to a

committed by this group which include kidnapping for ransom and hijacking could nevertheless go unpunished as piracy as defined under the UN Convention 1982 unless there are other opportunities to suppress such attacks can be found in law, a point discussed further below.

## **8.2. Policies for Suppressing Piracy in the Regional Territorial Seas**

In earlier chapters, the rights of navigation in the territorial sea, in straits used for international navigation and in archipelagic waters have been explained. For the entire Straits of Malacca, the only rule applicable is the transit passage where all ships enjoy unimpeded freedom of navigation solely for the purpose of continuous and expeditious transit through the straits. As the straits are geographically sandwiched by Peninsular Malaysia and Indonesia's Sumatra Island and to a smaller extent Singapore in the south, the issue of navigation has always been debated through jurisdictional sovereignty of the littoral states. If one were to read the newspaper reports in Malaysia and Indonesia regarding the activities in the straits, it would be easy to form a conclusion that the concept of transit passage has not been properly explained to their commentators and populations. This is because the media of both States keep on reiterating their rights of sovereignty over navigation within and through the straits.<sup>7</sup>

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permanent peace program which included ceasefire, withdrawal of Indonesian forces from Aceh and the surrender of arms by the GAM members. On 11 December 2006 Aceh held its first free elections and a former GAM negotiator Irwandi Yusuf was successfully elected as the Province Governor.

<sup>7</sup> The newspapers of both sides of the straits have made constant claims on their rights to determine the passage, most visibly, during the Iraq war when objections were made against the passage of the United States navy deployed from the Pacific towards the Middle East. Similar objections were made highlighting the danger posed by armed escort ships to the sovereignty of the littoral states.

This is not difficult to understand because each state believes in good faith that the sovereignty of a coastal state extends to the territorial sea which is normally 12 nautical miles seaward measured from the baselines. The difficulty arises because of the confusion that the sovereignty of the sea is the same as sovereignty on land. It needs regular reiteration in the region that the sovereignty of the littoral states in the territorial sea, unlike their absolute sovereignty over land, is subject to international rules as patently proclaimed in the UN Convention 1982 as “the sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law”.<sup>8</sup> But local politics are often overriding in such perceptions.

The ambiguity of the situation is compounded by historical claims over certain islands located far beyond the territorial sea. As has been seen in Chapter 3, the established breadth of territorial sea in the Straits of Malacca is still subject to disputes in the northern region. It has also been stated in the case study that Malaysia’s claim over an area beyond 12 nautical miles engulfing Pulau Perak and Pulau Jarak off the State of Perak waters needs further convincing under the current regimes of international law. However, the activities such as regular visits from the Malaysian enforcement units helps fortify the perceptions among the population, especially among the fishermen, that the water area, column and sea bed between the Peninsular mainland and the islands belongs to Malaysia. This is further supported by complex accommodations between Malaysia and Indonesia in not raising this “sensitive” issue; possibly for fear that it would alter the political equation between the two countries in the straits.

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<sup>8</sup> *UN Convention 1982*, Article 2(3).

A similar situation exists in the southern part of the straits with the existence of many Indonesian islands which, when connected, created the archipelagic baselines, thus, sovereignty of the archipelagic waters. It should also be remembered that sovereignty of the archipelagic state over its archipelagic waters is limited by the UN Convention 1982 which provides “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” and “this sovereignty is exercised subject to this Part”.<sup>9</sup> The word “this Part” refers to Part IV which deals with archipelagic states. The Part qualified the sovereignty of the archipelagic waters with rights of innocent passage and if the archipelagic state designates sea lanes it must be suitable for continuous and expeditious passage of foreign ships,<sup>10</sup> a right of passage akin to but somewhat less than that of transit passage in straits used for international navigation.

### **8.3. The Wider Dimensions to Policy Formulation**

To understand the various dimensions to the navigational impediments, several field studies and detailed interviews were conducted in addition to the normal legal research based on documents and cases. The reasons for this were the need to go beyond legal convention and customary international law in identifying the problems and finding solutions. Law, of course, is uppermost, but there were realities *in situ* in Southeast Asia not always reached by general law formulated on an international basis. These realities include unique geographical conditions, history and regional and national politics. The diplomacy and negotiations necessary to solve problems of various navigational freedoms were in practice

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<sup>9</sup> *UN Convention 1982*, Article 49(1) and (3).

<sup>10</sup> *UN Convention 1982*, Article 53(1).

required to take cognisance of these dimensions in fine terms and interpreting international law within the region.

The general complexities of policy and law may be illustrated if we consider for example that a foreign flag vessel may enter a port generally open to international commerce, but a government may restrict access for national security reasons. In 1980, the *MV Tropwave* owned by a Swiss corporation, chartered to a Canadian corporation and flying the flag of Singapore tried to enter the port of Norfolk in the United States. It was denied access by the Coast Guard on the ground that its multi-national crew included a Polish master and Polish officers.<sup>11</sup> In many way, this was a product of the Cold War. It has now taken on the dimension of the war against terror, whereby certain nationalities of crew may be prevented from shore leave. This could, it may be argued by coastal states, extend to curtailing vessels outside internal waters simply on the grounds of command or crew composition by an interpretation of Article 25(3) UN Convention 1982 which allows a state to “suspend temporarily in specific areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security.” This is an aspect which could affect maritime states which have employed crew discrimination in security legislation.

The concern of strait states in this more complex situation is for a further escalation of “out of area” types of policies of foreign maritime powers by extending their warships to protection of own shipping in straits, thereby undermining coastal state jurisdiction over events which may threaten their security as provided for in Article 25(3). This has increased the perception of adjacent coastal states of more interference in their domestic

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<sup>11</sup> See Louis B. Sohn, “International Navigation: Interests Related to National Security” in J.M. Van Dyke, L.W. Alexander and J. R. Morgan (Eds.), *International navigation: Rocks and Shoals Ahead?* The Law of Sea Institute, University of Hawaii, Honolulu, 1988, page 309.

affairs, threats to local fishing vessels, and possible pollution of the coastal environment from military actions at sea in these narrow waters.

#### **8.4. Economics, Piracy and Navigational Safety**

In many ways, the issue of piracy in the Straits of Malacca is, as has been emphasized, inextricably linked to the security of navigation within and through the area. The issue arises precisely because of the importance of the Straits in global economics, commerce and strategy. Although the world in recent years has been witnessing some deadlier pirate attacks on ships in West Africa, the Bay of Bengal, and the Philippines and especially in parts of the Indonesian archipelago, less international significance is given to these events, as the areas were not vital for Cold War strategy in the earlier period or for commerce in the present. The Straits by contrast have continued to retain vital significance in economic policy in the region as a whole.

The rise of industries in Japan and Korea decades ago, and now the emergence of China as a world economy powerhouse, can only mean that more oil is transported from the Middle East to the Far East through the Straits. Although sea transportation can still be achieved through other straits in Indonesia such as the Lombok, Sunda and Makassar straits, none can match the Straits of Malacca in term of cost-saving and efficiency of the ports along the route, such as Penang Port, Port Klang, Tanjung Pelepas Port in Johor Bahru, and one of the best ports and entreports in the world – Singapore.

As has been stressed in previous chapters, Malaysia has always put a high priority on Straits of Malacca issues. From 1970 to 1980, the emphasis was mainly on the safety of

navigation and protection of environment. This is reflected in the famous Joint Statement in 1971 when Malaysia, Indonesia and Singapore agreed to cooperate on the safety of navigation in the straits. They fully admitted the use of the straits for international navigation but Singapore did not join in this, other than merely “taking note” of the agreement. Nevertheless, in the full statement, the three littoral states agreed to the establishment of a new body for cooperation in endeavours to ensure the safety of navigation in the straits. As a result the Tripartite Technical Expert Group on Navigational Problems (TTEG) and a Council for the Safety of Navigation and the Control of Marine Pollution in the straits were established in 1975. Subsequently, two more Joint Statements were issued by the littoral states on the same year and 1977. The politics of the safety of navigation and coastal state primacy of control continued to dominate the 1980s through 1990s with further TTEG meetings. This included the successful implementation of the system of Traffic Separation Scheme (TSS) and the limitation of the size of supertankers through the concept of under keel clearance, mandatory reporting system under STRAITREP, and the policy on marine environment protection.

It was only in the last decade towards the new millennium that the issue of piracy started to attract increased attention. One of the more obvious features of this was the establishment of the Piracy Reporting Centre (PRC) in Kuala Lumpur in October 1992. This was set up with funds from international shipping companies and underwriters. The centre played a pivotal role in reporting incidents of piracy and maritime violence speedily, often through prompt reports from the victims, something the littoral enforcement agencies, engrossed in procedures and bureaucracy, were lacking.

It is useful in these respects to return again to the original intention of the UN Convention 1982 as regards the issue of passage in the straits used for international navigation. There were from the start concerns about the linking of the notion of innocence with the list of subject matters within the competence of the coastal State. Article 19 Para 2 through Para 2(a), which could lead to “a broadening of the range of effects that can be determined to be innocent.”<sup>12</sup> It was highlighted by Heliliah Yusof that “while the 1958 Convention is silent on the definition of innocent passage, the regulatory competence of coastal States is expected to be clarified” and, “only subsequent State practice will furnish evidence whether the problems of objective or subjective intention will again emerge since one of the objectives of having the new provisions is to attain a more definitive scope to the regime of innocent passage”.<sup>13</sup>

Now almost 20 years later, there have been few changes in state policies and practices in the region. But recent developments have suggested that the attempt to enlarge the concept of innocent passage is real (as the issue of the armed escort ship has shown). Malaysia has always relied on Article 43 of the UN Convention 1982 that “User State and States bordering a strait by agreement co-operate (a) in the establishment and maintenance in a strait of necessary navigational and safety aids or other improvements in aids or other improvements in aid of international navigation; and (b) for the prevention, reduction and control of pollution from ships”.<sup>14</sup> Although this provision is exclusively mentioning international aids to maintain a safe navigation from pollution, it could in spirit, be extended in other sea areas such as security, in line with contemporary needs.

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<sup>12</sup> See J.N.Moore, “The Regime of Straits and the Third United Nations Conference on the Law of the Sea, *AJIL* Vol.74, 1980, page 116 as quoted by H.Yusof “Paper on Malaysia: The United Nations Convention on the Law of the Sea in Southeast Asia” in *The Southeast Asian programme on Ocean Law, Policy and Management SEAPOL Studies*, No.2, 1988, page 32.

<sup>13</sup> H.Yusof, above, page 32.

<sup>14</sup> *UN Convention 1982*, Article 43(a) and (b).

When it comes to the interest of other maritime powers to have a say in maintaining safe free passage in the Straits of Malacca, the inherited opposition this received is illustrated by an incident during the Cold War era:

“In April 1972, Chairman of the Joint Chiefs of Staffs Admiral Thomas H. Moorer stated that the United States must have the freedom to go through, under, and over the Malacca Strait. Shortly thereafter, the Chief of Staff of the Indonesian Navy reportedly warned, “Our armed forces will attack any foreign submarines entering territorial waters without permit, because it means a violation of Indonesia’s sovereignty.”<sup>15</sup>

The security interests of the United States have of course changed since the Cold War, but the determination to keep straits open under user rights as they see them, and not simply on the sufferance of adjacent coastal states, have been reinforced in United States policy under the war against terrorism. By contrast, Japan’s interests as a principal user of the Straits are clearly more economic than that of the United States. A major world economy since 1960s Japan relies heavily on the straits as the most important economic line of trade from the Middle East to Japan. Unlike the United States, Japan’s policy towards securing safety of navigation in the straits is geared towards healthy diplomatic relationships with littoral states. This is reflected in Japan’s active participation in the negotiations between the littoral states over the minimum under-keel clearance for deep draft tankers in passage through the straits in late 1970s.

Using its enormous financial advantage Japan has in fact over a long span of time, been a major contributor towards efforts to maintain safe navigation in the Straits of Malacca.

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<sup>15</sup> Per Captain E. F. Oliver, “Malacca: Dire Straits” *U.S. Naval Institute Proceedings*, June 1973, page 29 as quoted in R.E. Osgood et al., “US Security Interests and the Law of the Sea” in R.C. Amacher and R.J. Sweeney (Eds.), *US Interests and Alternatives*, American Enterprise Institute for Policy Research, Washington, 1976.

Nippon Foundation has been funding the Malacca Straits Council (MSC), which works actively with Malaysian and Indonesian governments in providing aids to enhance maritime safety. For example, in 2003 it handed over a new buoy tender vessel to Indonesia and Malaysia. The Foundation has given nearly 13 billion yen over a period of 35 years on projects such as the installation of lighthouses, beacons and buoys which amount to two-thirds of the major visual aids to navigation in the straits.<sup>16</sup>

The efforts by Japan have also shifted beyond its traditional focus on safety of navigation towards security. It hosted the well-publicized international conference on “Asia Anti-Piracy Challenges 2000” and in April the same year Japan hosted another conference dubbed “the Regional Conference on Combating Piracy and Armed Robbery against Ships” in Tokyo. A year later in 2001 Prime Minister Koizumi launched an initiative for creating a legal framework for cooperation among sixteen Asian states on combating piracy.<sup>17</sup>

Japan in its policy has however adopted an indirect approach towards the issue of piracy in the straits. This appeared to have won over the littoral states when the Japan Coastguard patrol ships and aircrafts made several visits to the straits. The acceptance of littoral states students in the Japan Coastguard Academy has in turn boosted Japan’s standing in the issue of piracy suppression in the region. Japan’s continued assertion on unified maritime security in the region was later solidified when the Japan Coastguard initiated the Asia Maritime Security Initiative (AMARSECRTIVE 2004) that was adopted at the Heads of Asian Coastguard Agencies meeting in Tokyo on 17 and 16 June 2004. This set in motion a list of regional measures to address the issue of maritime security based on diplomacy.

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<sup>16</sup> Speech by Efthimmios Mitropoulos, Secretary General of the IMO at Japan International Transport Institute, Japan, 21 October 2004.

<sup>17</sup> Efthimmios Mitropoulos, above.

What the littoral states failed to appreciate in this new situation was the extent of the US strategic perception and actions after the 11 September 2001 attacks in United States. The lightning responses to the events, and the decisive actions of the Bush administration to attack and occupy Afghanistan and Iraq left the two littoral states vulnerable in their isolation to what appeared as possible future Washington unilateral actions in the straits area. The two countries, though members of the Non-Aligned Movement, were in fact strong supporters of United States presence in the Pacific since the Vietnam War. The ASEAN body which is the most active in regional cooperation in Southeast Asia is a grouping closely associated with the United States. Thus, when the war on terror spread to the region with discoveries of terrorist cells in Indonesia, there were dramatic changes to the political equation in the Straits.

When the realization of a changed situation emerged under this constant international pressure the littoral states saw a need to hold the initiative. All three littoral states responded in middle 2004 with a policy of staged coordinated patrols whereby the three maritime enforcement forces conducted simultaneous operations in each own territory. The result of this operation was not made public but judging from regular press and other reports on continued piratical activities in the straits, it could be said that this effort did not yield the expected results and was viewed as inadequate by user states. The inadequacy of each state taking responsibility for security in its area, while preserving national sovereignty, was in fact self-defeating. The patrols were rendered partly ineffective since it was not possible to engage in hot pursuit into each other's waters. The best that can be said is away from the issue of simply preserving sovereignty; behind the scene the littoral states have had success in combating terrorism through intelligence gathering. On land this cross-border intelligence gathering has succeeded in arresting or killing a number of main

suspects of terrorism. At sea, however, this has yet to be achieved, other than in few cases previously detailed in the study.

In the absence of more resolute cooperation between the littoral states, there remains the possibility of unilateral incursions of international forces in the straits to the alarm of Indonesia and Malaysia, which unlike Singapore have very volatile anti-America sentiments among their majority Muslims populations. This drives the two governments to continue to insist that they have rights to control the affairs of the straits under the right of sovereignty of littoral states. These forms of political statements are intended to pacify the population, especially since there have been a number of visits by the United States' navy to Malaysia and Indonesia without media coverage.

Singapore's policy stance in being prepared to accommodate the United States initiatives to intervene is clearly not intended to hurt its neighbours politically. It is rather to secure long term confidence in its lucrative shipping and port business. Among the littoral states, Singapore is the one least affected by the sovereignty issue due to its history and tiny geographical setting. There is also a feeling of uneasiness in Singapore since without security there are some suggestions of a project to build a canal similar to one in Suez and Panama by cutting across Ithmus Kra in Southern Thailand thus bypassing the straits. This could only mean an unmitigated disaster to the island-state survival as an entreport and related commerce.

Singapore had made known to its neighbours its seriousness in tackling security issues and it does not tolerate threats to its port. Its Director General of the (Singapore) Maritime and Port Authority (SMPA) said:

“As a major shipping hub and centre of global commerce, Singapore can ill-afford to take security matters for granted. Neither can we allow the flow of trade to be unduly affected by excessive regulation. Being a major node in the global supply chain, we continually strive to improve the operational efficiency of our port services. Singapore thus accords very high priority to maritime and port security while observing the principle of proportionality in our security measures.”<sup>18</sup>

The principle of proportionality was explained as the emphasis to give “proportional response to the threat to maritime security” and it was done through risk assessment exercises.<sup>19</sup>

Singapore’s seriousness in combating “piracy” is further shown in their Maritime Offences Act 2003. It is in fact to be the first adoption of the SUA Convention 1988 into a littoral state of the Straits of Malacca. It was legislated in 2003 and came into force not too long after 3<sup>rd</sup> May 2004. This piece of legislation provides a comprehensive set of offences thought to be possibilities in its territorial waters. The offences are spelt out as hijacking of ships, destroying or damaging ships and other similar acts such as serious interference with the operation of the property.<sup>20</sup>

To date, only Singapore has enacted an exclusive legislation on maritime crime. Malaysia plans to insert some provisions on maritime crimes under the Penal Code but this plan is hampered by the bureaucratic civil service and the need to amend other provisions in the Penal Code, and related legislations such as the Criminal Procedure Code and the Evidence Act. Indonesia on the other hand has not demonstrated visible moves towards municipal

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<sup>18</sup> Keynote address by Chan Tze Penn, Director-General of the Maritime and Port Authority of Singapore (MPA) at the *International Maritime and Port Security Conference*, Singapore, 21-23 January 2003.

<sup>19</sup> Speech by Mr Chan Tze Penn, above.

<sup>20</sup> “Property” is defined to include any property used for the provision of maritime navigation facilities, including any land, building or ship and any apparatus or equipment used, whether the property is on board a ship or elsewhere. See, Section 5(2) of the Act.

legislation in this issue. This could be due to the instability of the central government as a result of successive political changes after the end of President Suharto administration in 1998. Relative calm in the present administration of President Susilo Bambang Yudhoyono could bring about some changes to this area, although on the surface, Indonesia, among the three littoral states, is the most vocal in condemning international efforts to supervise the straits.

What is being sought in this situation is clearer guidance in international efforts. Much hope was placed on the SUA amendments of 2005 which would extend the definitions and mutual reach of the states towards crimes at sea.

#### **8.5. The Inadequacy of the SUA Protocol 2005 as a Basis of Policy**

As explained in Chapter 6, the SUA Convention 1988 was adopted by the IMO as a direct result of the *Achille Lauro* incident and it is widely considered as anti-terrorist treaty. Although it does not specifically mention the word “terrorism” the Convention lists “unlawful offences” at sea. These unlawful offences are viewed by Beckman as too restrictive because they are qualified by the phrase, “endanger the safety of maritime navigation”.<sup>21</sup>

The SUA Convention 1988 covers offences committed in the high seas and the EEZ. Its application extends to offences committed in maritime zones under the territorial sovereignty of coastal States. Article 4 of the SUA Convention 1988 states that the

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<sup>21</sup> Robert C. Beckman, “Combating Piracy and Armed Robbery against Ships in Southeast Asia: The Way Forward,” *Ocean Development and International Law*, Vol.33 Nos 3-4, page 322.

Convention is applicable so long as the ship is scheduled to navigate beyond the limits of the territorial sea of a single State. Therefore, if a ship is attacked while transiting in the Straits of Malacca and the attackers seize control of the ship or use violence against a person on board the ship, it would be an offence under the Convention. Similar attacks on ships at anchor would also be an offence under the Convention. To date, Malaysia and Indonesia are not parties to the SUA Convention 1988<sup>22</sup> to take advantage of the Convention over criminal matters at sea. If these littoral States are parties to the Convention, attacks on ships in the Straits of Malacca which involve violence or the hijacking of a ship such as the *MV Alondra Rainbow* could become an offence under the Convention even after the attackers entered the territory of another State Party. If Malaysia, Indonesia and India had been Parties to the SUA Convention 1988 at the time of the incident, the perpetrators could have been charged under one of the offences in the Convention. Similarly, if Indonesia had been a Party to the Convention, it would have been under legal obligation to cooperate with India in connection with the criminal proceedings as shown in detail earlier in Chapter 5.

After the September 11 incident, the Convention is viewed as inadequate to face the new challenges of the war against terror. The proposed amendments were first circulated to IMO member States in July 2002. It was adopted in October 2005. Although the SUA Protocol 2005 broadens the list of offences made unlawful under the treaties, it is still viewed as inadequate to fight terrorism and piracy. Under the SUA Protocol 2005, the expansion of definition on offences include unlawful acts that were motivated by the intent to intimidate a population or compel a government to do, or to abstain from doing any act, involving transportation of a person on board ship that has committed an unlawful act under the

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<sup>22</sup> See the status of IMO Conventions at [www.imo.org](http://www.imo.org).

Protocol. However under Article 2, acts which appear unlawful, if committed by a warship or state-owned vessels would not be unlawful. The unlawfulness of an act under the Protocol is depended on whether the perpetrators are proven to have either exercised control over ships or endangered or compromised its safe navigation. This would result in arrests on less frequent offences such as hijacking and kidnapping. It cannot apply, however, to a number of less serious offences occurring in the territorial sea and port area.

The need to reconcile unlawful acts under the SUA Protocol 2005 and piracy in the UN Convention is left unfulfilled in the new Protocol because as an anti-terrorist treaty, the SUA Protocol 2005 does not address the issue of *animo furandi* (intent to plunder) and *lucris causa* (for monetary gain) which are the basic ingredients of the law of piracy in the UN Convention 1982. It also contrasts the UN Convention 1982 with regard to the discretionary power of a State Party to prosecute the offenders. Piracy under the UN Convention 1982 is regarded as *jus cogens* where a third party can enforce the law beyond the coastal state jurisdiction.

Mukerjee and Mejia propose that the division between anti-terrorism and anti-piracy interests needs to be reconciled if complete eradication of criminal acts in maritime areas are to be achieved. The proposals include maintaining the *status quo* in the law of piracy in the UN Convention 1982 but renaming it as the “UNCLOS Piracy” or “High Seas Piracy” while the unlawful acts under the SUA Protocol 2005 are called by a new phrase “Coastal Zone Piracy”.<sup>23</sup>

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<sup>23</sup> Mejia M.Q. Jr., Mukherjee P.K. (2006) “The SUA Convention, 2005: a Critical Evaluation of its Effectiveness in Suppressing Maritime Criminal Acts, *JIML*, 12:3, 170-191.

It would appear also that efforts by the international community are to try overcoming the inadequacy of the definition of piracy in the UN Convention 1982, by complementing it in another separate international convention as can be seen in the work of the IMO, the IMB and the CMI. However, it should be realized that the UN Convention 1982 does not prevent further actions being taken if Article 101 cannot be invoked to suppress a particular piracy incident even to the extent of developing another convention to deal exclusively with the issue of piracy.<sup>24</sup> The difficulty of overemphasizing the importance of a specific convention outside the UN Convention 1982 such as the SUA Convention is that there is a possibility that a state that has ratified the UN Convention may not do the same for the SUA Convention. Such is the case of Indonesia and Malaysia which do not ratify the SUA Convention 1988 and the SUA Protocol 2006 although both have acceded to the UN Convention 1982.

Another difficulty to convince Malaysia and Indonesia to sign the 2005 SUA Protocol is its relationship to the US-led Proliferation Security Initiative (PSI). The 2005 SUA Protocol specifically provides that State Parties may conclude agreements or arrangements between them to facilitate law enforcement operations carried out under the boarding provisions. It can be argued that PSI is complementary to the 2005 Protocol to provide for such arrangements. Under the present circumstances, it is unlikely that the two littoral States would be Parties to a Convention which is closely related to the PSI initiative due to the sensitivity of the population to US-led initiatives as has been discussed in Chapter 3.

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<sup>24</sup> This is the view of Judge Thomas Mensah during a question and answer session in Coastal Zone Piracy Symposium in the World Maritime University, Malmo, Sweden, 13-15 November 2006.

## **8.6. Conclusion**

There is a need for the littoral States of the Straits of Malacca to formulate a joint policy in order to combat piracy and maritime terrorism effectively. So far the focus has been legalistic i.e. to rely on the international conventions and implement them within their jurisdiction as can be seen in the adoption of the SUA Convention 1988 in Singapore's Maritime Offences Act 2004. The other two littoral States are focusing on patrolling the sea area and by enforcing their existing national penal law provisions (in the case of Malaysia) in the territorial sea.

For Malaysia for example, law compliance is essential but it is not sufficient. There are other forces in international and interstate relations such as politics, pragmatism, ideology, nationalism, economics and external influences that can affect policies. Internally, there are ethnic diversity and political differences arising from that. Externally, there is concern for interference by foreign powers. It is difficult to formulate a maritime policy which is acceptable to the population and the user States alike. It is equally difficult to make a policy agreeable to all three littoral States. There has always been a very delicate equilibrium between the need of user States which would like to have boundaries at sea that are more open with high mobility opportunities. For the littoral States, this is difficult to monitor and a degree of control by the user States and foreign assertion of rights over territorial jurisdiction will always invite conflict with border States.

To overcome the problem of piracy the littoral States need to search for legislative and policy consensus. If accepting international conventions is not possible due to objection by the population, the States individually and collectively would still be able to come up with

their own legislation and policy aimed at suppression piracy and terrorism. This is proven with introduction of MALSINDO Joint Coordinated Patrol and 'Eye in the Sky' initiatives taken by the Malaysia, Indonesia and Singapore.

From the policy point of view, it is difficult for the user States to assert their rights (through the SUA Convention) in Southeast Asia generally and in Malaysia in particular. The delicate balance exists in the country between the need to be seen supporting the war on terror propagated by the ruling party and the demand of an influential Muslims population who would not accept any international instrument imposed upon them to extradite a citizen to a foreign country such as the SUA Convention. Another consideration is the need to maintain the delicate balance between the three littoral States. It is a political and diplomatic need for Malaysia to "appease" Indonesia as the two have to demonstrate a united front to Singapore which is seen as too pro-Western in its diplomatic approach.

These are matters for the future in a dynamic situation involving complexities of security, navigation and sovereignty. The overall problems and prospect of success may be summed up in the final chapter as a conclusion to the thesis.

## Chapter 9

### CONCLUSIONS

This thesis has been addressing the research question as to whether the need by the user States to open the navigation in the Straits of Malacca beyond to what has been agreed in the UNCLOS III negotiations is now justified in law and policy, in order to combat terrorism in the aftermath of the 11 September incident.

From the foregoing discussions in Chapter 2 and Chapter 3, the straits are internationally vital. They are *ex natural*, a geographical entity and a passage for shipping. They are recognised as such but, as shown in these chapters, questions of control have always been paramount.

Chapter 3 discusses the security in the Straits of Malacca which remains a particularly complex sea area as far as the application of the international law of piracy and maritime terrorism is concerned, which has been the main issue of this study. The difficulty of applying international customary law and conventions in this and other respects emanate from local and regional conditions and perceptions. The struggle to secure the control of the Straits has its origins in the distant past and continues with the insistence of the principle of sovereignty of littoral states over their territorial seas and straits. The modern approach goes back to the preference of Malaysia and Indonesia of the innocent passage regime over the transit passage for the Straits of Malacca before and during the UNCLOS III negotiations. The concept of transit passage of foreign vessels was a compromise of UNCLOS III, grudgingly accepted by the two main littoral States. Having ratified the UN Convention 1982 Malaysia and Indonesia, had no choice

but to adhere to the transit passage rule in the Straits as the sole regime applicable as far as navigation was concerned. The user states, expected that the Straits were to be kept open at all times to allow for strategic and economic freedom through and over the waterway.

Amongst several issues discussed in Chapter 3 and Chapter 4, the most sensitive is the question of balancing the respective rights of the three Strait States and international foreign user States. In the 1970s it was clear that the Strait States did not regard these straits as “international” in the sense that there was total freedom of navigation. This was a post colonial world with emerging countries asserting their territorial sovereignty. On the other hand it was a Cold War period with the maritime powers asserting the right of transit of their warships through straits.

UNCLOS III in the 1980s was intended to bridge these and other differences. Amongst the many delicate trade-offs made at this time was the exchange of foreign rights of transit passage for the extensions of coastal state jurisdiction over a 12 nautical miles territorial sea. It also provided for ASLP. The former allowed freedom of passage of passage which was quite close to freedom of high seas, while the latter ASLP was closer to innocent passage. Indonesia when it closed the Lombok Strait for a time in the 1980s certainly evoked aspects of innocent passage rejected by user states. The Strait States continued to be suspicious of the intentions of user States in interpreting transit passage although it was agreed by user states that Strait States could determine (with IMO) rules pertaining to traffic separation and other safety matters, such as under-keel clearance.

The issue of control began to take on an added dimension with the increase in pirate activities as described in Chapter 4. Sensitivities and perceptions were, it has been argued, different – not only in respect of user states but between the Strait States.

The findings reached on these Strait States sovereign rights and user rights over security from pirates and terrorists have been analysed in the study, while recognizing the debates and differing interpretations which still exist. Every ship is of course entitled to defend itself, but the claim that maritime military powers and foreign commercial interests could deploy with legal certainty and logistic practicability, armed escorts in straits has not been judged acceptable.

The status of straits used for international navigation in the UN Convention 1982 is clear. Straits are not high seas, which could endow foreign states with such rights. But neither are they territorial seas, which would allow Strait States necessary controls. They are something in between. In this context, it is shown that warships can make an expeditious passage in their normal mode without prior notice. On the other hand the Strait States would regard some actions related to this as offensive. This includes the deployment of private security escort vessels prepared to engage in violent actions, or ships being attacked by pirates off their shores, or ships that fall under the control of terrorists. These do present threats to the peace, and good order of adjacent states and their environments. Such conditions, it has been argued in Chapter 7 of this study, justify Strait States exercising appropriate action towards them in the territorial sea and straits.

The argument against foreign-sponsored escort vessels is political as well as legal. It has been shown in Chapter 7 that a Strait State which concedes the right of escort ships able

to engage in violent action on behalf of foreign powers and vessels in the Straits may generate civil upheaval on shore. Agreeing for example to the uncontrolled freedom of US vessels could increase rather than decrease terrorist attacks at sea, as well as possibly provoke internal disorder. User States and commercial interests have not however been convinced of the legal rights, intentions or capabilities of the Strait States to provide all the necessary security to combat and arrest pirates and terrorists. There have in fact been relatively few arrests although, as revealed in the case studies, there have been successes when inside information was obtained by the authorities on shore in the Strait States.

It has been shown earlier in Chapter 4 of the study that the littoral States have attempted to allay the fears of increasing pirate attacks in the Straits also by enforcement actions in the forms of coordinated patrols and more sophisticated “Eye in the Sky” surveillance. These actions, however, have not brought the expected result or eradication, because, as described in detail for the first time as the result of research for this thesis in Chapter 5, the pirates are funded by highly-complicated webs of international syndicates who hire former seamen and ex-GAM guerrillas as the crews of the hijacked ships backed by intelligence from the shore. The case studies have revealed the mechanisms involved here. It would take a dedicated effort of inter-states intelligence gatherings to suppress the attacks perpetrated by these sophisticated syndicates. The study in Chapter 7 shows, however, that littoral States have difficulties also in improving and modernising their coastal enforcement agencies. It goes further than this in demonstrating that both Indonesia and Malaysia are perceived as prone to collusion for reasons of political expediency, or corruption by parties involved in the sale of licenses in fisheries. This leads to the view that they are less able or willing to face greater challenges in the era of “the war against terror” to be conducted in the region. It is also argued in this respect

that there is evidence of a reluctance to press protection too far in places because of possible insurgent turmoil internally if foreign influence is suspected. On the other hand, they are under policy pressures from international interests to intervene with their assistance.

The thesis goes on to focus on the alternatives to the eradication of pirates and terrorists, through the exercise of covert actions on a more international basis as a deterrent. The trial of the *MV Alondra Rainbow* in India has provided some lessons in this. Such action is very costly, and a coastal state needs to have legislation in place in its national laws in order to have a successful outcome in a trial of pirates who come from different jurisdictions. The arrest of the *MV Alondra Rainbow* also highlighted the role played by non-governmental agencies such as the IMB in relaying fast information to trace hijacked ships. It proves political will is crucial to find and arrest a hijacked ship from different jurisdictions and the subsequent prosecution of foreign nationalities in a coastal state court. The trial, while successful at convicting some of the perpetrators in the lower court, nevertheless invites a number of questions with regards to application of the rule of law which appears to fall short of the international standard of the common law system. This is due to the legal and procedural shortcomings which have been discussed in the case in some detail.

To sum up, in a conflict between the user States and the littoral States in addressing the issue of security at sea in the Straits of Malacca, it is concluded through this study that combined external measures of arrest and trial may be a sound deterrent. Also, with some political care, it is possible for the littoral States to take their own legitimate and direct military actions against pirates and terrorists in the Straits. They can do so in spite of user state claims to protect their own ships because the user States are represented by

different flags of ships, the ships have different beneficial owners; crews are mixtures of different nationalities, with cargoes owned by many other nationals. It is not feasible for the various user States with so many conflicting interests to address the issue of ship security in a region that is so far away from their flag States or owner States. The coastal States, Malaysia and Indonesia, however, have in turn many shortcomings in the form of meeting specific national interests, internal bureaucracy, and lack of resources. There is also the different course taken by Singapore, a minor littoral State but one which has significant interest in international shipping using the Straits, and the port and entreport of Singapore, without hindrance. Consequently Singapore generally supports private company armed patrols.

In this complicated situation in Southeast Asia it is concluded in Chapter 8 of the thesis that policy making and diplomacy have as much significance as law. In order to have more effective controls over the Straits of Malacca, the littoral States need to remove frictions and to negotiate better regional agreements to overcome the existing and future conflicts of claims of jurisdiction and boundaries which have created regional impediments to good relations. There are clearly needs to seek consensus, bilateral and tripartite cooperation within the three littoral States with good diplomacy at the forefront. There should also be good relations between user states and littoral States whereby user States need to appreciate the feelings of sovereignty of the littoral States. As a long term action to suppress piracy in the Straits of Malacca it may in fact be possible to create “joint sovereignty” between littoral states of the Straits as a solution to the ineffectiveness of patrolling the sea area by individual States and as a means of overcoming the inhibitions to mutual access in hot pursuit.

The concept of “joint sovereignty” would need detailed correspondence in national laws, but it would be within the framework of UNCLOS, which requires cooperation by States in shared areas of the sea for fisheries, and, with goodwill linked to self interest, could be extended to security matters. At present the most easily accepted policy is through the SUA Convention 1988. It is a useful tool to deter the hijacking of ships by international organised crime groups. It is also useful for combating attacks on ships involving violence against crew or other persons on board the ship. However the SUA Convention would again, it is argued in this thesis, only be effective if all three littoral States become parties to the Convention. For Malaysia, there is growing political will to accept international conventions such as the SUA Convention 1988 and the SUA Protocol 2005 as well as to apply UNCLOS. On the other hand it is shown that the UN Convention 1982 cannot be adequately legally applied as far as the piracy provisions are concerned due to lack of high seas definition of piracy. Malaysia must look therefore for a framework outside the Convention such as enacting its own law of piracy and maritime terrorism as has been demonstrated by Singapore. This could be done either by enacting dedicated legislation or inserting similar provisions in the existing penal laws. This would be allied to upgrading its capability to patrol the Straits by using better high speed craft.

Malaysia could exercise the preventive diplomacy to achieve necessary internal legislation since there at present there are frictions but no open conflicts between the littoral States. In the absence of co-operation, Malaysia could move away from the policy of simply courting Indonesia and have the political courage to decide the best policy for the country, but taking into account the interests of others. This diplomatic thrust in the Straits of Malacca is necessary because of the greater importance of the Straits to Malaysia economically as compared to Indonesia. Joining the regional

initiative such as ReCAAP, for example, would be a commendable related decision for Malaysia to give confidence to Indonesia and foreign users in diplomatic interactions.

These are the various options which represent the responses to the enormous multiple maritime complexities in the Straits of Malacca. Not only has safety of navigation and protection of the marine environment to be ensured and managed, but the overriding dangers of pirates and terrorists to be controlled. In doing this, as this study shows, national sensitivities and politics need close attention and suitable freedoms of navigation for users ensured. These measures go beyond the essential legal regimes into maritime policy and more flexible multilateral agreements in and beyond the region.

## **APPENDICES**

## Appendix 1

# COMITE MARITIME INTERNATIONAL (CMI) MODEL NATIONAL LAW ON ACTS OF PIRACY OR MARITIME VIOLENCE

### Preamble

The following Model National Law on Acts of Piracy and Maritime Violence is the result of deliberation by the Joint International Working Group on Uniformity of Law Concerning Acts of Piracy and Maritime Violence. It attempts to attack the problem of piracy and maritime violence by proposing a more systematic treatment of these serious problems through national law, under whose admiralty / maritime jurisdiction the great majority of relevant incidents fall. The intention of the Working Group is to present a series of ideas designed to achieve greater uniformity in the body of various national legal traditions rather than producing a standardized document. Similarly, penalties are not specified, but must be severe enough in the context of national criminal law to discourage illegal conduct. It is recognized that those governments undertaking a review of piracy and related laws possess particular expertise in their own national problems. By isolating several general trends, however, the Working Group hopes to bring the attention of national legislators to international considerations that have a direct impact on national jurisdiction and prosecution. The format in which these are presented in this model is not intended to shape the form of any national legislation; content rather than form is the Working Group's concern. While the Working Group feels that its suggestions represent a balanced and coherent whole, States are encouraged to consider adapting any of the ideas herein, as even incremental change is likely to benefit effective legal coverage of this important topic.

### Section I: Definitions

1. **Piracy** is committed when any person or persons:
  - a. engages in piracy as the act is defined by Article 15 of the 1958 Convention on the High Seas; or
  - b. engages in piracy as the act is defined by Article 101 of the 1982 Convention on the Law of the Sea.
2. **Piracy** is also committed when any person or persons, for any unlawful purpose, intentionally or recklessly:
  - a) engages in an act constituting piracy under the criminal code of (name of enacting State);or
  - b) engages in an act held to constitute piracy by a decision of the (name of the highest judicial court of the enacting State) currently in force; or

- c) engages in an act deemed piratical under customary international law.
3. The crime of **maritime violence** is committed when, for any unlawful purpose, any person or persons, intentionally or recklessly:
- a) injures or kills any person or persons in connection with the commission or the attempted commission of any of the offences set forth in sub-Sections I (3) (b) – (h); or
  - b) performs an act of violence against a person or persons on board a ship; or
  - c) seizes or exercises control over a ship or any person or persons on board by force or any other form of intimidation; or
  - d) destroys or causes damage to a ship or ship's cargo, an offshore installation, or an aid to navigation; or
  - e) employs any device or substance which is likely to destroy or cause damage to a ship, its equipment or cargo, or to an aid to navigation; or
  - f) destroys or causes damage to maritime navigational facilities, or interferes with their operation, if that act would be likely to endanger the safe navigation of a ship or ships; or
  - g) engages in an act involving interference with navigational, life support, emergency response or other safety equipment, if that act would be likely to endanger the safe operation or navigation of a ship or ships or a person or persons on board a ship; or
  - h) communicates false information, endangering or being likely to endanger the safe operation or navigation of a ship or ships; or
  - i) engages in an act constituting an offence under Article 3 of the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation; or
  - j) engages in an act constituting an offence under Article 2 of the 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf; or
  - k) engages in any of the acts described in sub-Sections II (3) (a) – (i), to the extent applicable, where such acts involve an offshore installation or affect a person or persons on an offshore installation.
4. **Maritime violence** is also committed when any person or persons, for any unlawful purpose, intentionally or recklessly endangers or damages the marine environment, or the coastline, maritime installations or facilities, or related interests.
5. An attempt to commit any of the offences listed in sub-Sections I (1), (2), (3) or (4), or any unlawful effort intended to aid, abet, counsel or procure the commission of any of these offences, or threats to commit any of them, shall constitute maritime violence.
6. Notwithstanding the definitions in sub-Sections I (1), (2), (3), (4), and (5), reasonable acts to rescue a person or to recover stolen property or to regain lawful control of a ship or offshore installation shall not constitute piracy or **maritime violence**.
7. Notwithstanding the definitions in sub-Sections I (1), (2), (3), (4) and (5), reasonable or proportionate acts to protect a person, ship or offshore installation,

or related property, against piracy or maritime violence shall not constitute piracy or maritime violence.

8. a) The term **ship** as used in this law includes any type of vessel or other water craft.
- b) The term **person** as used in this law includes, where applicable, entities having juridical personality as well as individual natural persons.

## **Section II: Jurisdiction**

1. Jurisdiction to prosecute piracy as defined in sub-Sections I (1) (a) and (b) shall lie as set forth in the relevant Convention.
2. The offences defined in sub-Sections I (2), (3), (4) and (5) shall be prosecuted if committed within the territory, internal waters or territorial sea of (name of enacting State), and to the degree that the exercise of national jurisdiction is permitted by the 1958 Geneva Conventions on the High Seas and Contiguous Zone or the 1982 Convention on the Law of the Sea, within the exclusive economic zone, continental shelf, contiguous zone or archipelagic waters of (name of enacting State), and on the high seas or in any place outside the jurisdiction of any State.
3. The offences defined in Section I shall be prosecuted if committed:
  - a) on board or against a ship registered in or entitled to fly the flag of (name of enacting State), wherever located; or
  - b) on or against an offshore installation licensed by or operating within the jurisdiction of (name of enacting State).
4. Jurisdiction to prosecute shall also lie when the person accused of committing an offence defined in Section I is a citizen or national of (name of enacting State), or is a foreign national resident in (name of enacting State), or is a stateless person.
5. Jurisdiction to prosecute shall also lie when an offence defined in Section I is committed against a seafarer, passenger or shipowner who is a citizen or national of, or is a foreign national resident in (name of enacting State), or is a stateless person.
6. Trial of an alleged offender in absentia shall be allowed as permitted under the law of (name of enacting State).

## **Section III: Extradition**

1. Extradition from (name of enacting State) may take place when another State has jurisdiction over the offences defined in sub-Sections I (1), (2), (3), (4) or (5). The possession of jurisdiction by (name of enacting State) shall not preclude the extradition of an alleged offender to another State under appropriate circumstances.

2. If another State claims jurisdiction with regard to an incident of piracy or an act of maritime violence, and the alleged offender is not promptly brought to trial in (name of enacting State), the alleged offender shall, subject to the provisions of (relevant national law(s) of enacting State), be extradited to the requesting State. If multiple States with reasonable jurisdictional claims make requests for extradition in the absence of a trial in (name of enacting State), the alleged offender shall, subject to the provisions of (relevant national law(s) of enacting State), be extradited to one of the requesting States.

#### **Section IV: Prosecution, Punishment, Forfeiture and Restitution**

1. An individual found guilty of the crime of piracy shall be subject to imprisonment for a term of not more than \_\_\_\_ years and/or a fine of not more than \_\_\_\_, in addition to any restitution or forfeiture which may be required, or any other penalties which might be imposed under (relevant national law(s) of enacting State).
2. An individual found guilty of the crime of maritime violence shall be subject to imprisonment for a term of not more than \_\_\_\_ years and/or a fine of not more than \_\_\_\_, in addition to any restitution or forfeiture which may be required, or any other penalties which might be imposed under (relevant national law(s) of enacting State).<sup>6</sup>
3. An entity with juridical personality found guilty of the crime of piracy or the crime of maritime violence shall be subject to a fine of not more than \_\_\_\_, in addition to any restitution or forfeiture which may be required, or any other penalties which might be imposed under (relevant national law(s) of enacting State) .<sup>6</sup>
4. In cases where any person is injured or killed, or property is lost or damaged, in connection with an incident of piracy or maritime violence, the person found guilty of the crime shall also be liable to whatever criminal penalties exist under (relevant national law(s) of enacting State)<sup>6</sup> for the injury, death, loss or damage.
5. In cases where any person is injured or killed, or property is lost or damaged, in connection with an incident of piracy or maritime violence, the person found guilty of the crime shall also be liable to whatever civil remedies are available.
6. Where ships, cargo, goods, or equipment have been employed in or were the subject of acts of piracy or maritime violence, such property shall be liable to forfeiture to the State. However, in the case of stolen or misappropriated property, any person having title to or legal custody of the property may assert a claim under (relevant national law(s) of enacting State) for return of the property. Any mortgagee of the property may likewise assert a claim under (relevant national law(s) of enacting State) for payment of the current mortgage obligation.
7. Where ships, cargo, goods, or equipment employed in or the subject of acts of piracy or maritime violence are liable to forfeiture to the State, such property shall be restored as expeditiously as possible to the person having lawful title to or custody of the property, unless the State proves the willful complicity of such

person in the act of piracy or maritime violence. If such person is denied return of such property, any mortgagee of the property shall be entitled to recover payment of the current mortgage obligation out of the proceeds of sale of the property at a public judicial sale under (relevant national law(s) of enacting State), with the remaining balance being forfeit to the State, unless the State proves the willful complicity of such mortgagee in the act of piracy or maritime violence.

8. Where ships, cargo, goods or equipment wrongfully taken by person(s) convicted of piracy or maritime violence have not been employed in such crime(s):
  - a) Such property if unconverted shall be returned to its owners or custodians upon proof of ownership or lawful custody.
  - b) Converted property shall be sold at public judicial sale and the proceeds distributed to the lawful claimants according to admiralty/maritime law, with any balance remaining being forfeited to the State.
  - c) Items not claimed within the period established by law may be subject to public judicial sale, or transfer to a fund for financing State or regional action to fight piracy or maritime violence.
9. Owners of ships or cargo shall not be charged for port expenses incurred during investigation or prosecution for piracy or acts of maritime violence.
10. Nothing in sub-Sections IV (1) through (9) shall compromise or affect any rights or remedies which a person injured by an act of piracy and/or maritime violence might otherwise assert against any perpetrator of the act or acts.

#### **Section V: Reporting of Incidents**

1. Any incident which may constitute piracy or maritime violence shall be reported by the following, as applicable: (a) the Master, (b) shipowner or manager, (c) the crew representative, (d) cargo representative, (e) the insurers, (f) the investigating authorities, or (g) other persons having knowledge of the incident. Reports shall be made without delay and as soon as possible following receipt of knowledge of the incident. Reports shall be sent to (name of central national authority) and shall be in the form provided for by that authority.

Each person or entity listed above has an obligation to report every known incident. This obligation may be met by filing a joint report, or by forwarding and commenting upon a report on the occurrence made by another listed person or entity.

2. The (name of central national authority) shall be under a continuing duty to make reports without delay and in the required formats to the International Maritime Organization (IMO) and the International Criminal Police Organization (INTERPOL).
3. All incident reports made under (1) shall be open to the public. However, addenda marked "CONFIDENTIAL" and containing sensitive operational information shall not be open to the public.

## Appendix 2

### THE COURSE OF THE STRAITS OF MALACCA

At its western entrance, the Malacca Strait, which extends for 500 miles, begins along a southwesterly line from Chong Pak Phra on the west coast of Thailand to Indonesia islands located off the northern tip of Sumatra. Vessels approach this wide entrance by sailing south of the Nicobar Islands, which are an Indian possession. The extensive width of the strait at this point does not present undue problems of navigation. Considerable variations of depth, however, do occur along the line of the deep draft tanker fairway of between thirty-four meters and eighty-eight meters until Indonesian and Malaysian waters begin to overlap and the first controlling area is reached.

At approximately twenty miles before reaching a point in the strait adjacent to the Malaysian port of Klang at latitude 3 degree north, deep draft vessels proceed through Indonesian territorial waters passing to the east of the Aruah Islands, which pose a navigational hazard since their surrounding waters run to depths of only eighteen to nineteen meters. Just south of the latitude through this point are narrows known as One Fathom Bank where the navigable channel for deep draft vessels is two miles wide. These narrows afford the only deep water entry into the southern stretches of the strait. One Fathom Bank itself is a detached patch situated on the northeastern side of the fairway. Depths in this area are irregular, and at one side of the bank are less than eleven meters. Deep draft vessels are obliged to proceed through waters of approximately twenty-one meters, virtually the minimum for such passage. Vessels approaching One Fathom Bank from the north take a bearing from the light positioned on One Fathom Bank shoal and also that located on the Indonesian island of Jemur, the highest in the Aruah group. The degree of difficulty of navigation at this point is underlined by the recommendation that "It is felt necessary that such vessels are able to establish an accurate fix at least one hour steaming away from One Fathom Bank..." The traffic separation scheme in this sector of the strait recommended by the three coastal states made provision for the equivalent of marine dual carriageways on either side of One Fathom Bank with southeast bound traffic keeping to the Indonesian side. The Inter-Governmental Maritime Consultative Organization (IMCO) raised a major objection to the location of the outlet of the north-west bound carriageway and recommended that both traffic lanes be situated to the west of One Fathom Bank.

From One Fathom Bank, deep draft vessels are obliged to divert from a bearing which would take them down the middle of the strait in order to follow the deep water channel which passes beyond the territorial sea boundary on the Indonesia side. The zig-zag or dog-leg pattern is continued after about five in a diagonal change of course towards the Malaysian coast north of Port Dickson and then immediately back again diagonally to a point close to the large Indonesian islands of Rupert and Medang, which are virtually parallel to the Malaysian port of Malacca. Such manoeuvring is necessary in order to avoid a number of shoals that present major navigational hazards. For example, Pyramid shoal, which lies off Cape Rachado on the Malaysian coast south of Port Dickson, is described as the most dangerous one in the vicinity, with a minimum depth over its hard sand of only 3.7 meters. From the island of Medang off the Indonesian coast, the deep draft route proceeds diagonally again but without deviation to the narrow neck between Kukup Island on the Malaysian side where the land width is 8.4 miles and the navigable waters extend to 7.9 miles. It is virtually at this point that the Malacca

Strait merges with the Singapore Strait. This culminating diagonal route avoids Raleigh shoal, with a depth of only 4.9 meters, located approximately parallel to the Port of Malacca and also Rob Koy Bank which lies on a ridge on the southwest side of the fairway twenty miles to its southwest. Traffic separation under IMCO auspices takes place just south of Fair Channel Bank where the width of navigable water is approximately 2 1/2 miles. The actual junction of the two strait occurs along a line drawn from Little Karimun Island on the Indonesian side to Tanjong Piai Peninsula on the Malaysian side. At the entrance to the Singapore Strait, the navigable channel is 7 1/2 miles wide and runs through deep water. The length of the Singapore length is approximately seventy miles. The narrowest land width is 3.2 miles; the narrowest breadth of navigable waters is 1.8 miles. At its western entrance, the Singapore Strait is joined from the south by the Durian Strait, which is the route of passage to and from the Sunda Strait, located between the islands of Sumatra and Java. Flowing to the northern from the Durian Strait is the Phillip Channel, which joins up the Main (Singapore) Strait south of Raffles Light and then continues on to the South China Sea.

The Singapore Strait is as a whole is bounded to the north by the Malay Peninsula and Singapore Island, and to the south, by the Bulan Archipelago and the two large Indonesian islands of Batam and Bintan. Although the fairways set apart by a traffic separation scheme are relatively deep throughout, heavy rain squalls are frequently experienced, as in the Malacca Strait. They are capable of seriously affecting visibility and, as such, pose a real hazard, given the constricted nature of the channels and the volume of fast moving traffic. Of relevance to navigation is the fact that the two daily low waters in the strait differ appreciably in depth, which is not the case with the two daily high waters. *The Admiralty Pilot* observes that in proceeding eastward through the Singapore Strait from a mid-channel position between Little Karimun Island and Tanjong Piai – where there are depths of approximately 36.5 meters – no directions are necessary beyond keeping in the fairway. However, under the traffic separation scheme instituted in 1977, eastbound deep draft traffic follows a southeasterly direction to make the first half of the letter V, which takes it well within the Indonesian territorial sea boundary south of the Singapore island of Setumu on the western side of the Phillip Channel.

### Appendix 3

#### **JOINT STATEMENT OF THE GOVERNMENTS OF INDONESIA, MALAYSIA AND SINGAPORE, 16 NOVEMBER 1971**

1. The Governments of the Republic of Indonesia, Malaysia and the Republic of Singapore held consultations with a view to adopting a common position on matters relating to the Straits of Malacca and Singapore.
2. Consultations between the Governments of the Republic of Indonesia and the Republic of Singapore were held at the Ministry of Foreign Affairs, Singapore on 8 October 1971 and attended by the Minister of Communications, H.E Frans Seda and the Indonesian Ambassador to Singapore, H.E. Major General Soenarno, representing Indonesia while Singapore was represented by the Minister for Communications, Mr Yong Nyuk Lin, the Minister of defence, Dr. Goh Keng Swee and the Acting Minister for Foreign Affairs, Mr. E.W.Barker.
3. Consultations between the Government of the Republic of Indonesia and the Government of Malaysia were held at the Attorney General's Chambers, Kuala Lumpur on 14 October 1971 and attended by the Minister of Communications, H.E. Frans Seda, The Indonesian Ambassador to Malaysia, H.E. Tan Sri Major General H.A.Thalib, PMN and the Indonesian Ambassador to Singapore, H.E. Major General Soenarno representing Indonesia, while Malaysia was represented by the Attorney General the Honorable Tan Sri Haji Abdul Kadir bin Yusof and the Deputy Secretary General, Ministry of Foreign Affairs, Mr Zainal Abidin Sulong.
4. The results of the above mentioned consultations were as follows:
  - (i) The three governments agreed that the safety of navigation in the Straits of Malacca and Singapore is the responsibility of the coastal states concerned;
  - (ii) The three governments agreed on the need for tripartite cooperation on the safety of navigation in the two straits;
  - (iii) The three governments agreed that a body for cooperation to coordinate efforts for safety of navigation in the Straits of Malacca and Singapore be established as soon as possible and that such body should be composed of only the three coastal states concerned;
  - (iv) The three governments also agreed that the problem of the safety of navigation and the question of internationalisation of the straits are two separate issues;
  - (v) The Governments of the Republic of Indonesia and Malaysia agreed that the Straits of Malacca and Singapore are not international straits while fully recognising their use for international shipping in accordance with principle of innocent passage. The Government of Singapore takes note of the position of the Government of the Republic of Indonesia and of Malaysia on the point;
  - (vi) On the basis of this understanding the three governments approved the continuation of the hydrographic survey.

Announced simultaneously in Djakarta, Kuala Lumpur and Singapore on Tuesday, 16 November 1971 at 12.00 hours Western Indonesian Time and at 12.30 hours Malaysian and Singapore time.

## Appendix 4

### JOINT STATEMENT ON SAFETY OF NAVIGATION IN THE STRAITS OF MALACCA AND SINGAPORE, 24 FEBRUARY 1977

The meeting of the foreign ministers of Indonesia, Malaysia and Singapore was held in Manila on 24 February 1977 to consider measures to enhance safety of navigation and to promote close cooperation and coordination on anti-pollution policy and measures in the Straits of Malacca and Singapore.

H.E. Adam Malik, Foreign Minister of Indonesia, Y.B.M. Tengku Ahmad Rithauddeen, Minister of Foreign Affairs of Malaysia and H.E. S. Rajaratnam, Minister of Foreign Affairs of Singapore, attended the meeting.

The Foreign Ministers considered and reviewed the report of the senior officials meeting held in Jakarta from 20 to 21 December 1976 and signed the agreement on safety of navigation in then Straits of Malacca and Singapore, adopting the following recommendations:

- (i) Vessels maintain a single under keel clearance (UKC) of at least 3.5 metres at all times during the entire passage through the Straits of Malacca and Singapore and that they also take all necessary safety precautions especially when navigating through critical areas.
- (ii) The delineation of the traffic separation scheme (TSS) in three specified critical areas of the Straits of Malacca and Singapore, namely in the One Fathom Bank Area, the Main Strait and Phillip Channel, and off Horsburgh Lighthouse.
- (iii) Deep draught vessels, namely vessels having draughts of 15 metres and above, are required to pass through the designated deep water route (DWR) in the Straits of Singapore up to Buffalo Rock and are recommended to navigate in the specified route from Buffalo Rock up to Batu Berhanti area. Other vessels are recommended not to enter the DWR except in an emergency.
- (iv) Navigational aids and facilities be improved for the effective and efficient implementation of the TSS.
- (v) The existing voluntary reporting procedure and mechanism for large vessels be maintained.
- (vi) The principle of voluntary pilotage through the critical areas in the Strait of Singapore be applied.
- (vii) VLCCs and deep draught vessels are advised to navigate at a speed of not more than 12 knots during their passage through critical areas, and that no overtaking be allowed in the DWR.
- (viii) Charts and current and tidal data be improved.
- (ix) Rule 10 of the International Regulations for Preventing Collisions at Sea, 1972, be applied as far as practicable within the TSS.
- (x) The Implementation of the TSS should not pose a financial on the coastal states and the necessary funds be obtained from the users.
- (xi) A joint policy to deal with marine pollution be formulated.
- (xii) All tankers and large vessels navigating through the Straits of Malacca and Singapore be adequately covered by insurance and compensation schemes.

The Foreign Ministers of Indonesia, Malaysia and Singapore expressed their appreciation to the Government of Philippines for having provided the facilities for their meeting in Manila.

## **Appendix 5**

### **JAPAN-INDONESIA JOINT ANNOUNCEMENT ON MARITIME AFFAIRS**

**2 JUNE 2005 IN TOKYO**

1. On June 2, 2005, H.E. Mr Junichiro Koizumi, Prime Minister of Japan, and H.E. Dr. Susilo Bambang Yudhoyono, President of the Republic of Indonesia, discussed maritime affairs including matters pertaining to the Straits of Malacca. The two leaders were accompanied by some members of their respective Cabinets and other high-ranking officials.

2. Recognizing the importance of the Straits of Malacca as an important sea lane of communications, the two leaders expressed their desire to strengthen cooperation in a comprehensive approach encompassing safety of navigation, marine environment and maritime security. Such approach to maritime security would cover, among others, security against piracy, armed robbery against ships and smuggling (arms, goods, persons, drugs etc.). The two leaders believed that this cooperation could further promote the development of neighbourly and friendly relationship between the two countries and enhancing the capacity of the maritime law enforcement authorities of the littoral states by seriously considering provision of patrol boats and other cooperation. The establishment of an effective information exchange mechanism among relevant authorities would be an important element of this comprehensive approach. As such, Government of the Republic of Indonesia, in accordance with its domestic procedures, would seriously consider to conclude "Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia" (ReCAAP). The two leaders reaffirmed that any cooperation should be carried out in accordance with the United Nations Convention on the Law of the Sea of 1982.

3. The two leaders also recognized that ensuring safety and security of maritime navigation in the Straits is a matter of importance for the two countries. Prime Minister Koizumi recognized that the Government of Japan fully respects the sovereignty and sovereign rights of the Republic of Indonesia over its territorial sea and exclusive economic zone (EEZ) within the Straits of Malacca, which is a strait used for international navigation. Recognizing the responsibility of the Coastal States, Prime Minister Koizumi also welcomed the efforts by the Coastal States of the Straits to reinforce their mutual cooperation in the maritime security in the Straits.

4. The two leaders recognized the long-term cooperation between the Coastal States and Japan, for safety of navigation and marine environment of the Straits of Malacca. The two leaders confirmed that Indonesia and Japan will further strengthen cooperation through the framework of bilateral consultations as well as dialogues between the Coastal States and User States. President Yudhoyono also expressed his appreciation for Japan's cooperation, particularly by the Japan Coast Guard and JICA, for enhancing the capacity of the maritime law enforcement authorities of Indonesia.

5. Both countries undertook to work closely in ASEAN Regional Forum (ARF) on maritime Security. Furthermore, Japan welcomed Indonesia's initiative for the

convening of the IMO-sponsored Meeting on the Straits of Malacca to be held in Jakarta, in autumn 2005 as well as the completion of on-going negotiations on Marine Electronic Highway (MEH) between the Coastal States of the Straits of Malacca and the IMO.

Source: The Ministry of Foreign Affairs of Japan.

## **Appendix 6**

### **APEC SECRETARIAT FINAL REPORT ON IMPLEMENTATION OF THE LEADERS' 2001 STATEMENT ON COUNTER-TERRORISM OCTOBER 2002**

#### **Enhanced Aviation and Maritime Security**

The 3<sup>rd</sup> APEC Transportation Ministers Meeting in May 2002 in Lima Peru agreed to:

- Support the actions and initiatives undertaken by ICAO and IMO in aviation and maritime security;
- Endorse efforts to strengthen and harmonise the aviation security framework and promote international cooperation among appropriate entities for the suppression of piracy and armed-robbery; and
- Cooperate to improve aviation safety and security oversight capabilities in the region by assisting APEC economies to meet international safety standards and ensure that official aviation personnel are properly trained and have the necessary resources to carry out their aviation responsibilities.

Source: Asia-Pacific Economic Cooperation Secretariat

## **Appendix 7**

### **APEC LEADERS' STATEMENT ON FIGHTING TERRORISM AND PROMOTING GROWTH**

**LOS CABOS, MEXICO  
26 OCTOBER 2002**

#### **Enhancing Secure Trade in the APEC Region (STAR)**

APEC represents 60 percent of the world's GDP and half of its trade. Most of the world's top megaports are in APEC economies, as are most of the world's busiest airports. We will work together to secure the flow of goods and people through measures to:

- Protect cargo by implementing expeditiously a container security regime that would assure integrity of containers, identify and examine high-risk containers, and working within international organizations to require the provision of advance electronic information on container content to customs, port and shipping officials as early as possible in the supply chain, while taking into consideration the facilitation of legitimate trade.

Implementing by 2005 wherever possible the common standards for electronic customs reporting developed by the World Customs Organization that provide data to target high-risk shipments and facilitate trade.

Promoting private-sector adoption of high standards of supply chain security, as developed by the private sector and law enforcement officials.

- Protect Ships engaged in international voyages by promoting ship and port security plans by July 2004 and installation of automatic identification systems on certain ships by December 2004.

Enhancing cooperation on fighting piracy in the region between APEC for a and organizations such as the International Maritime Bureau Reporting Center and International Maritime Organization (IMO).

## Appendix 8

### THE CHARGES AND SENTENCES OF THE *ALONDRA RAINBOW* PERPETRATORS

(1) All fifteen accused, with the exception of Accused No.4, who was deceased, were found guilty of the offences<sup>47</sup> in contravention of the provisions of the Admiralty Offences (Colonial) Act, 1849, all of which are offences related to international terrorism contrary to the international law on sea piracy, and contrary to the UN Convention on the Law of the Sea as well as international terrorism under section 120B(1) of Indian Penal Code, and were sentenced to suffer two years of rigorous imprisonment.

(2) All fifteen Accused were found guilty of “an act to wit, abandoned and set adrift 17 crew members of the *MV Alondra Rainbow* in a raft on the high seas with the knowledge that the action could cause murder”, an offence under section 307 read together with section 120B(1) of the Indian Penal Code, and each was sentenced to suffer rigorous imprisonment for a period of seven years and a fine of 3000 Rupees each; in default of payment of this fine, each was to suffer rigorous imprisonment for two months.

(3) All Accused were also held guilty of “disobeying the order of the Coast Guard for them to stop proceeding towards Pakistan and for refusing to surrender”, which is an offence under section 1 of the Admiralty Offences (Colonial) Act 1849, which is punishable under section 188 of the Indian Penal Code, and each was sentenced to suffer rigorous imprisonment for a period of six months and a fine of 500 Rupees each and in default of payment of this fine, each was to suffer rigorous imprisonment for a further period of 15 days.

(4) All Accused were also held guilty “of committing mischief to scuttle the *MV Alondra Rainbow* by opening her sea chest valves”, an offence under section 437 read with section 34 of the Indian Penal Code, and each was sentenced to suffer rigorous imprisonment for a period of seven years and a fine of 5000 Rupees; in default of payment of this fine, each was to suffer rigorous imprisonment for a further period of six months.

(5) All Accused were also held guilty of “attempting to commit mischief by putting the engine room on fire”, an offence under section 438 read with section 34 of the Indian Penal Code, and each was sentenced to suffer rigorous imprisonment for a period of seven years and a fine of 5000 Rupees each; in default of payment of fine, each was to suffer rigorous imprisonment for a further period of six months.

(6) All Accused were also held guilty of “pursuance of the said conspiracy by using deadly weapons to wit, fire arms and lethal weapons to wit, fire arms and lethal weapons”, an offence under section 395 read with section 120B(1) read with section 34 of the Indian Penal Code, and each was sentenced to suffer rigorous imprisonment for a period of seven years and a fine of 5000 Rupees; in default of payment of the fine, each was to suffer rigorous imprisonment for a further period of six months. In this regard, the prosecution case fails under section 397, since there was no specific evidence as to

exactly which of the accused used deadly weapons to fire at the ships conducting the operation.

(7) All Accused were also held guilty of “committing fraud to forge certain documents, namely typed copies of the general list of ship *Global Venture* etc”, an offence under section 465 read with section 120B(1) read with section 34 of the Indian Penal Code, and each was sentenced to suffer rigorous imprisonment for a period of one year and a fine of 500 Rupees each; in default of payment, each was to suffer further rigorous imprisonment for 15 days.

(8) All Accused were also held guilty of “using forged documents in respect of the changing of the name of the MV Alondra Rainbow to MV Mega Rama”, an offence under section 471 read with section 120B(1) read with section 34, and each was sentenced to suffer rigorous imprisonment for a further period of 15 days.

(9) All Accused were also held guilty of “setting on fire certain forged documents”, and offence under section 201 read with section 34 of the Indian Penal Code, and each was sentence to suffer rigorous imprisonment for a period of one year and nine months and a fine of 5000 Rupees; in default of payment of this fine, each was to suffer rigorous imprisonment for a further period of six months.

## Appendix 9

### THE DETAILS OF THE CONSPIRACY TO HIJACK THE *MV NEPLINE DELIMA*

Johnny was a 57-year-old Indonesian Batak from North Sumatra and a professed Christian, as are many other Bataks in Sumatra. He had secondary education before leaving school to work at Northern Sumatra's Belawan Port as a labourer. Three years later, he was accepted as a seaman on a cargo ship, where he remained for another three years. In 1973 he attended a six-month course in a local maritime transport institute and obtained a certificate of "Mualim Pelayaran Terbatas" (MPT) or provisional sea-going captain. For the next 26 years, he worked for local and international merchant ships and oil tankers in various capacities and rose to the rank of Chief Officer and Captain after he finally qualified as a master mariner from another marine institute in Jakarta. He retired in 1999 and resided in Batam. With his vast experience at sea, dealing with people of all nationalities, Johnny could communicate in good English.

On 21<sup>st</sup> May 2005 in a coffee shop in Batam town, he was offered work. He was brought to see a Chinese man known as Chua in a hotel nearby. He was asked the straightforward question as to whether he would be willing to help to hijack an oil tanker in Malaysian waters. When Johnny agreed to this proposal, Chua asked him to find another trusted friend to undertake the same task. On the same day, Johnny persuaded another friend, Anen, to join the scheme and the latter was later introduced to Chua on the hotel. The next plan of action was for the two of them to accompany Chua to Malaysia two days later.

On 23<sup>rd</sup> May, Chua gave Johnny and Anen Rp200,000 each before they together embarked on the journey north. From Batam jetty, they boarded a ferry to Stulang Laut Port in Johor Bahru. Later, at a bus station, Johnny learnt that they were heading 400km north to Alor Setar, the capital town of the state of Kedah. They sat apart and no conversation took place between them during the seven-hour journey.

They arrived in Alor Setar the next morning and a Malay man called Nazar was already there waiting for them. Chua, as the person who giving them the assignment, introduced him. A further individual, Ah Ming, then hired a van to take them across the Malaysian-Thailand border to a coastal town called Kantang. In a hotel there, two men who Johnny already knew, Johan and Lokman, both from Batam, Indonesia, received Johnny and others. All six of them - Johnny, Anen, Chua, Nazar, Johan and Lokman - stayed in the hotel in Kantang, Southern Thailand for a week planning the hijacking of the oil tanker. On 28<sup>th</sup> May, Chua told Johnny and his Batam associates to accompany him to Haatyai, a big town in Southern Thailand, where they stayed for another two nights doing nothing apart from eating and entertainment, all costs being borne by Chua and Nazar.

In the morning of 31<sup>st</sup> May 2005, Johnny received instruction from Chua to return to Batam because the assignment was not ready for them. He was given 3000 Baht and similar amounts were given to Johan and Anen. With the money, the three of them found their way back to Batam, Indonesia the next day. A week later, on 6<sup>th</sup> June 2005, Chua asked them to accompany him again to Malaysia the next day and each of them was given Rp200,000 as pocket money for the travel. After disembarking from Stulang Laut Port in Johor Bahru, Chua told them to go to Penang and wait there for Stulang

Laut Port in Johor Bahru, Chua told them to go to Penang and wait there for the next instructions.

On the morning of 8<sup>th</sup> June 2005, Johnny and his associates arrived in Penang. Lokman turned up a little later, followed by Chua. Chua paid for hotel and food expenses and informed them that a person named Kasim would come to explain the assignment in detail. The five of them stayed in the same room until Kasim turned up on 10<sup>th</sup> June 2005.

Kasim was 40-year-old Muslim Malaysian. Born in Masjid Tanah, Malacca, he had his primary education in a Chinese school, something of a rarity for the Malays, who prefer national schools with the Malay language as the medium of instruction. He was not very successful at school and left for Kuala Lumpur in search of job opportunities, and after three years of odd jobs, he got his first permanent job as a clerk with a shipping company in Port Dickson, earning RM600 a month. After three years, he was employed as a supervisor with an oil tanker company in Kuala Lumpur, earning RM1200 a month. He stayed with the job for five years before moving again, this time to become a crew executive with an off-shore company in Shah Alam, Selangor, where he commanded RM 2,500 a month. In 2002 he left the company, went back to his village in Malacca and after a year without a proper job, he moved to Sungai Buloh, near Kuala Lumpur, to start a hardware company as well as part-time with a crewing agency. During his work in one of the shipping companies, Kasim came to know Nazar. Through Nazar, he knew one Halim. He also met Putra, an Indonesian Sailor, six years earlier when they were working in the same off-shore company. His previous acquaintances with these people proved to be useful in his plan to hijack the *MT Nepline Delima*.

Some time in 2004, an old friend of Kasim, Zulkifli, who worked with Nepline Tankers Shipping Company, came to see him in Kuala Lumpur and persuaded him to find a replacement master for the *MT Nepline Delima*, one of the company's oil tankers. Kasim suggested a Malaysian friend, one Mr Rahudin.

In June 2005, Tejo asked Kasim to obtain a 20-foot speedboat to be used in the operation. Kasim obliged and went up to Penang Island together with Halim and Nazar, where boats could be obtained at a reduced price after the Boxing Day Tsunami disaster in 2004. They found a willing seller at Batu Feringgi Beach in Penang Island and purchased a boat for a mere RM 25, 000. Chua later deposited the money for the purchase of the boat into Kasim's bank account and it was duly paid to the seller in two instalments. A small portion of the money was used to buy diesel and lubricants for the boat's fuel. As a precaution, extra fuel was bought in small barrels and hidden in the boat. When Tejo arrived a little while later, he instructed Kasim to buy paint to give the boat a new look. This was carried out swiftly and the boat's paint was changed from bright yellow to blue. While all this was being done, Kasim and his friend talked and mingled with the local fishermen and asked about their daily affairs and the best time to catch fish in the area, this was done to cover their tracks. It was not difficult to convince the locals because Batu Feringgi was a famous tourist destination in Penang, known for its pristine white beaches and international hotels, where fishing is one of the tourists's favourite pastimes.

Kasim, Chua and Halim then drove 400km south to meet Putra in Port Dickson. During the meeting, Putra informed the others of the tanker's movement chart, which he drew on a map. He was given a satellite telephone to keep Kasim aware of the ship's position. Putra was to text Kasim the exact location of the *MT Nepline Delima* while underway.

Leaving Putra to do his part on board *MT Nepline Delima*, Kasim and the others went back to Penang the same night. On arrival there, Tejo instructed Kasim to send all his men to Teluk Kumbar, a small fishing village northwest of Penang Island, where the boat was now docked and where they were to wait until instruction came to sail towards *MT Nepline Delima*. Teluk Kumbar was an ideal location because it is located at the northern tip of the Island facing the 'mouth' of the Straits of Malacca, and it is possible to see all ships passing through heading north to the Andaman Sea.

The next morning, 13<sup>th</sup> June 2005, Kasim sent the group to Teluk Kumbar. By now, the group had become larger because Lokman had taken with him another six men who came with him from Indonesia.

Lokman was a 34-year-old Indonesian of Achenese origin. Born in Karimum Island, south of Singapore, he had little education. After seven years doing odd jobs in Indonesia, he decided to go to Aceh and joined the insurgent group Gerakan Aceh Merdeka (GAM), which was conducting guerrilla warfare against the central Indonesian government. In 1999 he received guerrilla training and for one year after that he lived and fought with the GAM and was involved in many skirmishes against the Indonesian National Army (TNI). After a year with the GAM, he left Aceh, working various part-time jobs, got married and settled down in Batam. While in Batam, he got to know two Indonesians of Chinese origin, OT and Tay Joe, through his cousin, who was with the Navy. He knew a very little of their background except that they were 'businessmen' from Jakarta.

In May 2005, while in Johor Bahru, Malaysia, OT called Lokman and asked to meet him in the Kuala Lumpur Novo Hotel. At the Novo Hotel, he was received by OT and Tay Joe and later introduced to three other men whom he later knew as Chua, Kasim and Nazar. Nothing much transpired during this meeting, which served as a 'get to know' meeting among them. A few days later, there was a bigger meeting in Batam. This time, Lokman was introduced to new members of the group: Captain Johnny, Irfan, who he had known since his days in Aceh.

Then on 15<sup>th</sup> May 2005 Chua asked Lokman to meet him in Orchard Road, Singapore, where he was given some money and told to be prepared and not to go away for long because the 'job' would commence before too long. Five days after the meeting in Singapore, he again met Chua in a hotel in Stulang Laut Port, near Johor Bahru, and the instructions this time were for him to go and wait for Chua in Southern Thailand. While on the journey, Lokman stopped in Kuala Lumpur where he contacted Kasim and Nazar. From Kasim, he learnt that there was a strong possibility that the target ship would make a call in Thailand. After the meeting, Lokman went to the Malaysia-Thailand border on the eastern side of the state of Kelantan where two Thais were already waiting to help him enter Thailand. He was taken to Kantang, where he met Captain Johnny, Johan, Nazar and Chua. After almost a week waiting in Kantang and Haatyai, Chua told them to return to Batam because there had been a change of plan.

However, two days later, on 5<sup>th</sup> June 2005, Chua asked Lokman to meet him in Stulang Laut Port in Johor Bahru and from there he was asked to go to Penang and wait for him at a hotel in Campbell Road. Two days later, on arrival, he found that Captain Johnny and Anen were already there, waiting for him. In the afternoon, Kasim, Naza and Chua joined them. The next morning, Kasim took all of them to Teluk Kumbar where he showed them a speedboat painted in bright yellow, and on the way back to the hotel, Kasim told them that the boat would be used to hijack a tanker that would pass Penang

waters heading north. A clear instruction was given that they were not to harm the crew because Kasim's friend was among them. He reassured them that there would not be any resistance on board because this friend would take necessary steps to let them in and take over the tanker and their task was only to 'stage' the hijacking and keep all crew in the mess room. Captain Johnny was to steer the tanker away from Malaysian waters and at some point after that another group would emerge and take over the ship from them. They would then return to Penang using the speedboat. Lokman was hesitant and doubted their small number but agreed after Kassim told him to get more people to join the hijacking. Each and every one of them was promised USD 10,000 upon completion of the task.

On 12<sup>th</sup> June 2005, Chua and Tay Joe took Lokman out for lunch at a food stall not far from the hotel and during the conversation he was given clear instructions to follow Kasim's orders, as the success of the attacks depended very much on Kasim's plan and his communication with 'a friend' on board the tanker. Shortly before departing, Chua gave Lokman RM 500 for his personal expenses and those under his command. Arriving back at the hotel, he received a call from Kasim informing him that the tanker would sail past Penang after midnight the next day and asking him to be prepared and assemble at Teluk Kumbar jetty at 12 am. Lokman later called his friend Irfan in Batam and Junaidi in Kuala Lumpur to recruit more people for the hijacking.

When the time of the attack drew closer, Lokman went out to nearby shops to buy two rolls of raffia string, ten mask, ten pairs of gloves, plasters and five parangs (long, widened-bladed knives) to be used in the attacks. That night, Kasim came back to the hotel and urged them to get ready because the attack could get underway at any time. Lokman got in touch with Junaidi and Irfan, urging them in turn to come to Penang with their men. Both of them turned up at Penang Jetty later that night with four men recently recruited by them. Lokman took them for dinner at a nearby restaurant and speaking in a low voice he told them the real nature of their job. One of the new men was uncertain but Lokman reassured them that the attack was a 'staged' one and nothing untoward could happen. When they all agreed to participate in the attack, Lokman assigned their individual roles. Basically, Junaidi and Irfan and their men would detain and tied up all eighteen crew in the mess; they were told not to worry because the crew had already been alerted to the attack and would comply.

By eleven o'clock that night, the party was ready at Teluk Kumbar jetty waiting for Kasim and Captain Johnny. While waiting, they chatted like fishermen so as not to arouse suspicion. Kasim and Captain Johnny turned up an hour later. Kasim gave the final briefing. Pointing at a small rock island of Penang Island, he instructed Lokman to call him on his cell phone when the *MT Nepline Delima* was sighted. Again he reminded the party that they were not to use force on the crew.

At about 1am on 14<sup>th</sup> June 2005, the party boarded the speedboat and set out to sea. They stopped in the middle of the sea and waited there. One hour later, the *MT Nepline Delima* was spotted. Lokman immediately called Kasim for instructions. Kasim told him to follow the tanker and only board when instructed. The speedboat tailed tanker, about 300 metres behind it. Except for Captain Johnny and Johan, all the men were given mask and raffia strings. Five were armed with parangs. At 4am, Kasim called Lokman, telling him that it was time to board because it was his friend's turn for duty and they would be let in through the starboard side of the ship.

The attacking speedboat moved slowly to the right side and Lokman and Anen, aided by the ship fence, easily boarded the ship. Armed with parangs, they went up to the control room on the third floor, threatened the crew, and under threats of death, all the crew complied and were tied with the raffia string and blindfolded. When the captain's cabin was secured, Lokman went down to the deck and shouted at Captain Johnny and Johan, who were still in the speedboat, that they could now come aboard and take over the control of the ship. Ropes were thrown down to the speedboat and Captain Johnny and Johan got the ship first, followed by the rest of the party. Captain Johnny went straight to the control room to steer the ship. Suddenly the ship's alarm was triggered and there was mayhem and screaming from the ship's crew on board with the attacking party running all over the place to overcome the unexpected resistance. After one hour, all crew members were overcome, tied up and bundled into the mess room; one of the crew members had suffered a head injury. Lokman asked the captain about the number of crew on the ship, to which the reply was 'seventeen'. After a head count, Lokman was surprised to find that only sixteen crew were there. A massive search was conducted by the attacking party, and to their shock, their speedboat, which had been tied to the back of the ship, was now missing. Lokman called Kasim using his cell phone to inform him of the latest situation. Kasim, sensing danger, switched off his phone, severing further communication with Lokman on board the *MT Nepline Delima*.

Captain Johnny now commanded the tanker and from the ship's chart in the captain's room, he directed the ship towards Myanmar at a speed of 7.5 knots. While he manned the ship, Lokman took charge of the detained crew. The master, Captain Sasongko Samudy, who had slash wounds to the forehead and cheek, together with the First Officer, was later taken into the captain's room and untied, though still guarded by the perpetrators.

What had happened was quite unbelievable. One of the crew members, 27-year-old Mohamed Hamid, managed to escape from the armed gang. While sixteen of the crew surrendered, he did not turn himself in. Hiding under the bed in his cabin the searching party's torchlight caught his knees and chest but for some reason they did not see him. He slipped over the ship's side, landing next to the gang's speedboat. Never having piloted a speedboat before, he groped around in the dark and managed to find the ignition after ten minutes. Guided only by a rough idea of the Malaysian coast, he speeds ahead through a rainstorm. After five hours, the fuel ran out, but he managed to use the spare tank. Not long after that, he spotted a group of Malaysian fishermen who guided him to police station in Langkawi. He made a police report and swift action was taken by the Malaysian Royal Police. A Marine Police speedboat was immediately deployed to chase the hijacked *MT Nepline Delima*.

At about 10am, six hours after the hijacking of *MT Nepline Delima*, Captain Johnny sighted a Malaysian Marine Police boat approaching and later circling the tanker. Through the VHF system, the police demanded that all perpetrators surrender. By now, the raiding party was panicking. Lokman ran down to the mess room and told Junaidi and Irfan that the police had come. Then he ran back up to the control room; afraid that the police might open fire, he suggested to Captain Johnny that they should blow up and scuttle the ship. The ship master, Captain Sasongko, who was in the room, reassured them that the Malaysian police would not open fire at will. If they cooperated, they would be arrested and possibly tried. Lokman talked to the police through VHF system and enquired whether the police would shoot them. The police's reply was that they wanted to negotiate and would like to know if the pirates wanted to surrender. After being given his assurance, Lokman asked Captain Johnny to stop and through the VHF

system, the police ordered the ship to change course to nearby Langkawi Island. When the ship approached Langkawi, the police boarded and arrested all perpetrators, who had earlier released the crew. Lokman threw his parang overhead and the others followed this. At 4.30 pm, putting their hands behind heads, all of them gave themselves up without resistance. They were taken into custody and remanded at Bukit Malut's Marine Police station. Putra, the First Officer, who had plotted with Kasim, was arrested the next day.

Kasim fled to neighbouring Thailand where he stayed for a few days. He received threatening calls from Tay Joe that his life or those of his family were in danger should their roles in the hijacking be discovered by the authorities. But under extensive police investigation, his text messages to Putra and Lokman were discovered and he soon became a target of investigation. Feeling vulnerable and fearing his own safety, Kasim turned himself in at the police near his home in Kuala Lumpur and was arrested.

## Appendix 10

### THE STRAIT OF HORMUZ



## Appendix 11

### THE STRAIT OF BAB EL MANDEB



## Appendix 12

### THE STRAIT OF GIBRALTAR



## Appendix 13

### CASE STUDY II

This is a record derived from fisherman Mr X who was kidnapped together with four other fishermen in a northern part of the Straits of Malacca in early 2004.<sup>1</sup>

In early 2004, Mr X a fisherman with Siamese nationality went to fish with 30 other crew near Pulau Perak waters. At about 2 am a speedboat bearing a Malaysian registration number suddenly appeared and fired a few shots targeting Mr X's boat. The fishermen were shocked and many jumped overboard. Seven Indonesian men armed with automatic fire arms boarded the fishing boat and instructed that all fishermen who earlier jumped into the sea to be rescued. Altogether there were 30 Indonesian bandits. They took the fishing boat on a two-hour journey and while underway the Indonesian bandits ordered that Mr X and four of his colleagues joined them in their boat while the rest were ordered to return back to the fishing port in Satun, Southern Thailand. Their equipments such as radar, a wireless radio and the GPS were returned back to them. Mr X and four others were taken by the perpetrators to a destination which took 20 hours journey believed to be in Aceh in North Sumatra. When arrived, they were taken by foot for about 30km to their camp. While in the journey Mr X fell sick and was unable to walk and the perpetrators took turn to carry him. After two days travelling by foot they arrived in a jungle camp where a group of 25 men in black attire welcomed them. Later more men joined them and the numbers swelled to about 200. Mr X and the other four captives were treated well and were given food and limited medicines. The camp was under constant attacks from the Indonesian Government forces. During 21 days under captive the camp was attack not less than 10 times resulting in deaths and injuries to both sides. While in detention Mr X witnessed young men in their 20s in black uniforms complete with jungle boots and red turbans undergoing trainings using different automatic weapons and rocket launchers.

After two weeks in detention a GAM man telephoned Mr X's wife in Southern Thailand and asked her to get RM 150,000 from the *towkay* (boss) who was living in the same fishing village. Ten days later the man called again for the ransom money and after some negotiations over the phone he settled for a figure of RM 100,000. The next day, following an instruction, the money was taken in the same boat which was attacked three weeks earlier with two crew and they sailed to a location middle of the sea. At the same time in Aceh Mr X and four other captives were taken back in an 18 hours journey in another boat which was used in the attack three weeks earlier, accompanied by 3 GAM men armed with

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<sup>1</sup> This was based in verbatim report lodged to the Royal Malaysian Police made available to the researcher. According to the police investigation officer, it was a normal practice for Malaysian fishing boat owners to employ the Thais as workers in order to reduce the operating costs.

AK 47. The two boats met and the money changed hands. Mr X and four others were transferred to the fishing boat and all documents such as boat license and sonar tracking were returned back to them. The GAM men later warned them that fishermen will be prevented from fishing in the same area unless they pay RM 3000 deposit and a monthly fee of RM 500. Upon payment they will be given a permit written in Indonesian language as a proof of payment to enable them to fish without harassment from the GAM.

Mr X and his four colleagues returned safely to Southern Thailand the next morning.

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