

*A LEGAL ANALYSIS OF PIRACY AND ARMED ROBBERY AT SEA IN
THE STRAITS OF MALACCA: THE MALAYSIAN PERSPECTIVE*

by

HENDUN ABD RAHMAN SHAH

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ABSTRACT

The motivation for undertaking research on the topic of piracy began when the Straits of Malacca was declared a war-risk zone in 2005 due to escalating numbers of piracy incidents being reported, particularly by the International Maritime Bureau. As the Straits is one of the busiest straits in the world and of great significance for global seaborne trade, piracy and armed robbery in the Straits have a devastating impact on the world economy. While customary international law, the 1982 United Nations Convention on the Law of the Sea (1982 Convention) and other international and regional instruments have established principles and guidelines governing piracy, they are argued to be inadequate and insufficient to deal with contemporary piracy. Since the legal status of the Straits, determined in the early chapter, is that of 'straits used for international navigation', which comes under part III of the 1982 Convention, it is the primary responsibility of Malaysia, Indonesia and Singapore (the littoral States) to ensure the continuous safety and security of ships transiting the Straits. In view of the fact that the issue of piracy in the Straits gained global attention, the efforts to suppress piracy are discussed at each level, namely international, regional and national levels. Before embarking on the issue of piracy in the Straits, a general discussion on the historical development of the International Law of the Sea and the definitional and jurisdictional issues of piracy is undertaken. Then, the thesis examines regional responses to the problem of piracy. Since an individual state is an important nucleus in international law, the Malaysian policy and legal framework are highlighted at the end of the thesis to determine the extent of the efforts undertaken by Malaysia especially the MMEA, and to examine whether the existing Malaysian law is adequate to suppress and prosecute piracy and armed robbery against ships. The thesis ends with a conclusion and recommendations for overcoming the problems. Due to the scarcity of local commentaries on this topic, it is believed that a study of this kind could provide an interesting contribution to the existing literature and may contribute to the current debate, especially on the issue of the Somali pirates who were detained on the high seas and are currently standing trial in the Malaysian High Court.

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(*The MT Bunga Laurel Incident*)

LIST OF ABBREVIATIONS

ARF	ASEAN Regional Forum
AALR.	Anglo-American Law Review
AJIL.	American Journal of International Law
Am. Pol. Sci. Rev	American Political Science Review
Am.Ec.Rev	American Economic Review
Am.J.Leg.Hist.	American Journal of Legal History
Ann. Surv. Int'l & Comp.L	Annual Survey of International and Comparative Law
ALJ	Australian Law Journal
Alb.L.Rev	Albany Government Law Review
ASEAN	Association of Southeast Asian Nations
BBC	British Broadcasting Corporation
BYB IL.	British Year Book of International Law
CA	Court of Appeal
Cal.W.Int'l L.J.	California Western International Law Journal
Cal. L.R.	California Law Review
Chi. J. Int'l L	Chinese Journal of International Law
CSIS	Centre for Strategic and International Studies
CDIS	Centre for Defense Information Studies
CIEL	Centre for International Environmental Law
CLJ.	Cambridge Law Journal
Camb.Rev.Int.Aff.	Cambridge Review of International Affairs
CLP.	Current Legal Problems
CMC	Center for Marine Conservation
Int'l Trade L.J	Current International Trade Law Journal
Colum.L.Rev.	Columbia Law Review
Duke L. J.	Duke Law Journal
DePaul L. Rev.	DePaul Law Review
EC	European Community

ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECOSOC	United Nation Economic and Social Council
EEZ	Exclusive Economic Zone
EJIL.	European Journal of International Law
ELJ.	European Law Journal
Env. L.R.	Environmental Law Reports
EU	European Union
FMSLR	Federated Malay States Law Reports
HILJ	Harvard International Law Journal
HLR.	Harvard Law Review
HRLJ.	Human Rights Law Journal
ICJ	The International Court of Justice
ICLQ	International and Comparative Law Quarterly
Int'l J. Marine & Coastal L	International Journal of Marine and Coastal Law
ICLYB.	International Law Commission Year Book
IJIS	International Journal of Information and Security
IDSS	Institute of Defence and Strategic Studies (Nanyang Technological University Singapore)
ISEAS	Institute of Southeast Asian Studies
IISS	International Institute for Strategic Studies
IJECL	International Journal of Estuarine and Coastal Law
Int'l Rev of the Red Cross	International Review of the Red Cross
ILA	International Law Association
ILM.	International Legal Materials
ICC	International Chamber of Commerce
IMB	International Maritime Bureau
IMO	International Maritime Organisation
ISPS code	International Ship and Port Facility Security Code
ISC	Information Sharing Centre
ITO	International Trade Organisation
J. Conflict Resol.	Journal of Conflict Resolution

J.Env.L.	Journal of Environmental Law
J.F.C	Journal of Financial Crime
JSEAS	Journal of Southeast Asian Studies
J.L.&Relig.	Journal of Law and Religion
J.Soc.Comp.Legis.	Journal of Society of Comparative Legislation
JIA	The Japan Institute for International Affairs
J.Int'l Aff.	Journal of International Affairs
Korean J.Int'l L.	Korean Journal of International Law
Law & Pol'y Int'l Bus.	Law and Policy International Business
Loy.L.A. Int'l & Comp. L. Rev	Loyola of Los Angeles International and Comparative Law Review
LQR.	Law Quarterly Review
L. & Contemp. Prob	Law and Contemporary Problems
Colum.L.Rev.	Columbia Law Review
Duke L. J.	Duke Law Journal
DePaul L. Rev.	DePaul Law Review
EC	European Community
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECOSOC	United Nation Economic and Social Council
EEZ	Exclusive Economic Zone
EJIL.	European Journal of International Law
ELJ.	European Law Journal
Env. L.R.	Environmental Law Reports
EU	European Union
FMSLR	Federated Malay States Law Reports
HILJ	Harvard International Law Journal
HLR.	Harvard Law Review
HRLJ.	Human Rights Law Journal
ICJ	The International Court of Justice
ICLQ	International and Comparative Law Quarterly
Int'l J.Marine & Coastal L	International Journal of Marine and Coastal Law

ICLYB.	International Law Commission Year Book
IJIS	International Journal of Information and Security
IDSS	Institute of Defence and Strategic Studies (Nanyang Technological University Singapore)
ISEAS	Institute of Southeast Asian Studies
IISS	International Institute for Strategic Studies
IJECL	International Journal of Estuarine and Coastal Law
Int'l Rev of the Red Cross	International Review of the Red Cross
ILA	International Law Association
ILM.	International Legal Materials
ICC	International Chamber of Commerce
IMB	International Maritime Bureau
IMO	International Maritime Organisation
ISPS code	International Ship and Port Facility Security Code
ISC	Information Sharing Centre
ITO	International Trade Organisation
J. Conflict Resol.	Journal of Conflict Resolution
J.Env.L.	Journal of Environmental Law
J.F.C	Journal of Financial Crime
JSEAS	Journal of Southeast Asian Studies
J.L.&Relig.	Journal of Law and Religion
J.Soc.Comp.Legis.	Journal of Society of Comparative Legislation
JIA	The Japan Institute for International Affairs
J.Int'l Aff.	Journal of International Affairs
Korean J.Int'l L.	Korean Journal of International Law
Law & Pol'y Int'l Bus.	Law and Policy International Business
Loy.L.A. Int'l & Comp. L. Rev	Loyola of Los Angeles International and Comparative Law Review
LQR.	Law Quarterly Review
L. & Contemp. Prob	Law and Contemporary Problems
Mar.Pol'y	Marine Policy
MASDEC	Malacca Straits Research and Development Centre

MALSINDO	Codenamed for Malaysia, Singapore and Indonesia Tripartite Security Arrangements in the Straits of Malacca
MSP	Malacca Straits Patrol
MBRAS	Malaysian Branch of the Royal Asiatic Society
Mod. L. Rev	The Modern Law Review
MLR	Malaya Law Review
MLJ	Malayan Law Journal
MJIL	Michigan Journal of International Law
MLJA	Malayan Law Journal Article
MIMA	Maritime Institute of Malaysia
MMEA Act	Malaysian Maritime Enforcement Agency 2004
MMEA	Malaysian Maritime Enforcement Agency
MMZ	Malaysian Maritime Zone
MECC	Maritime Enforcement and Coordination Centre
MoU	Memorandum of Understanding
Notre Dame L.Rev	Notre Dame Law Review
NAFTA	North American Free Trade Area
NGO	Non Governmental Organisation
OUP	Oxford University Press
OPRF	Ocean Policy research Foundation
PCIJ	Permanent Court of International Justice
PRC	Piracy Reporting Centre
ReCAAP	Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia
RSIS	Rajaratnam, S School of International Studies
SAIS Review	SAIS, The Review of International Affairs
Santa Clara J. Int'l L	Santa Clara Journal of International Law
SLOC	Sea Lanes of Communication
SOAS	School of Oriental and African Studies
SOLAS	Safety of Life at Sea Convention 1974
Stan.J. Int'l L.	Stanford Journal of International Relations
STRAITREP	Mandatory Ship Reporting System in the Straits of

	Malacca
SUA 1988	Suppression of Unlawful Acts against the Safety of Maritime Navigation
Suffolk Transnat'l L.Rev	Suffolk Transnational Law Review
SSLR	Straits Settlements Law Report
Pac.Rim L.& Pol'y	Pacific Rim Law & Policy Journal
Tul.J.Int'l & Comp.L	Tulane Journal of International and Comparative Law
Tex.L.Rev	Texas Law Review
TTEG	Tripartite Technical Experts Group
UN	United Nations
UNCHR	United Nations Commission on Human Rights
UNCITRAL	United Nations Commission on International Trade Law
UNDP	United Nations Development Program
UNCTAD	United Nations Conference on Trade and Development
San Diego Int'l L	San Diego International Law Journal
U. Pa. J. Int'l Econ. L.	University of Pennsylvania Journal of International Economic Law
U.Pa.L.Rev.	University of Pennsylvania Law Review
US/USA	United States of America
Vand.J.Transnat'l L.	Vanderbilt Journal of Transnational Law
U.Miami Int'l &Comp.L.Rev	University of Miami International and Comparative Law Review
VCLT	Vienna Convention on the Law of Treaties 1969
Va J. Int Law	Virginia Journal of International Law
Yale LJ	Yale Law Journal
Yale J. World Pub.Ord	Yale Journal of World Public Order
Yale J. Int'l L.	Yale Journal of International Law
Y.B. Int'l L. Comm'n	Year Book of the International Law Commission

PART I

INTRODUCTION

AND

HISTORIC DEVELOPMENT OF THE INTERNATIONAL LAW OF THE SEA:
SPECIAL REFERENCE TO THE TERRITORIAL SEA BREADTH, REGIME OF
STRAIT AND PIRACY AND ARMED ROBBERY AGAINST SHIPS

CHAPTER ONE

INTRODUCTION

1.1 RESEARCH BACKGROUND

Advances in shipping technology, international sea-borne trade and the economic growth of developing countries in Asia have boosted the significance of the Straits of Malacca¹ as an international waterway. In view of this, it is perhaps not surprising that the safety of navigation and the security of the Straits has become an important agenda item for watchdogs beyond the littoral states of Malaysia, Indonesia and Singapore.² As straits used for international navigation, the strategic and economic importance of the Straits for the stakeholders³ particularly coastal⁴ and flag states⁵ are crucial.

The question of navigational rights through and over international straits and the extension of the limits of the territorial sea had previously been contentious issues. A

¹ It should be noted that in this thesis the phrases 'the Straits' and 'Straits of Malacca' refer to both the Malacca Strait and the Singapore Strait unless otherwise stated. Malaysia is at the northern entrance to the straits and Singapore is at the southern entrance, which is the narrowest part of the Straits; thus both form the Straits: AG Hamid, 'Maritime Terrorism, The Straits of Malacca and the Issue of State Responsibility' (2006) 15 Tul.J.Int'l & Comp.L 155-179, 155.

² In the context of the Straits of Malacca the term 'littoral states' refers to the states bordering the Straits, namely Malaysia, Indonesia and Singapore.

³ Stakeholders in the context of safety and security of the Straits of Malacca are referred to the coastal or littoral states, flag or user states including the shipping and insurance companies as well as maritime trade related industries.

⁴ The term 'coastal state' refers to a state whose sovereignty 'extends beyond its land territory and internal waters and, in the case of an archipelagic state, in its waters, to an adjacent belt of sea described as the territorial sea. Such sovereignty extends to the column of air space over the territorial sea and to its seabed and subsoil': Art 2 of the 1982 Convention. When the issue of strait is discussed it may also refer to as 'strait state.' A 'strait state' refers to a state bordering a strait used for international navigation as defined under Art 37 of the 1982 Convention: See M George, *Legal Regime of the Straits of Malacca and Singapore* (LexisNexis, Petaling Jaya 2008) 3.

⁵ A 'flag state' is a state which has granted to a ship the right to sail under its flag. This rule is derived from Art 6 of the 1958 Convention and Art 92 of 1982 Convention. It also refers to a state that, within the terms of Art 94 of the 1982 Convention, effectively exercises its jurisdiction and control in administrative, technical and social matters over ships flying its flag: See George (2008) 3. It may also be referred to as a 'user state.'

joint statement by Malaysia and Indonesia in 1971 against the internalization of the Straits was seen as a deprivation of freedom of navigation to the maritime states.⁶ Thus, the regime of transit passage in the 1982 Convention which guarantees ‘the freedom of navigation and over-flight solely for the purpose of continuous and expeditious transit’⁷ for foreign vessels and aircraft provided they respect the ‘sovereignty, territorial integrity or political independence of States bordering the straits’⁸ was introduced to compromise the competing interests of both the littoral states and other users of the Straits. It is apparent that the 1982 Convention has successfully concluded a compromise regime of transit passage in the strait that used for international navigation. However, the advantage of strategic location of the Straits of Malacca, coupled with high density of traffic in this narrow and shallow waterway has caused serious problems for the littoral states in that they have become a piracy hot spot.

Piracy is not a new phenomenon. Pirates have been treated as outlaws and ‘the enemy of all mankind’ or ‘*hostis humani generis*.’⁹ The customary international law recognised the right of all states to capture and punish the perpetrator under the ambit of universal jurisdiction. Nevertheless, the lack of international enforcement mechanisms to exercise such a right has made the international law of piracy, to some extent, unenforceable. Obviously, this is not an issue for international law of the sea alone. It has its roots in the basic discussion on international law itself. Azubuike, for example, has questioned whether the international law is really a law as it is difficult

⁶ M Leifer, *Malacca, Singapore and Indonesia* (vol.2, Sijthoff & Noordhoff, The Netherlands 1978) 93.

⁷ Art 38 (2) of the 1982 Convention.

⁸ Art 39 (1) (b) of the 1982 Convention.

⁹ *The Case of the S.S Lotus (France v Turkey)* (1927) PCIJ, (Ser. A) No.9, 70 (*The Lotus Case*).

to implement.¹⁰ Goldsmith and Posner also share this view when they claim that international law is merely a set of guidelines and does not create legal obligations.¹¹ Meanwhile, O’Connell argues otherwise. She relies on Grotius’ theory that regards international law as ‘law superior to other domestic law which may be enforced through the sanctions.’¹² It is noteworthy that Grotius theory on the freedom of the sea has become the basis of the 1982 United Nations Convention on the Law of the Sea (1982 Convention).¹³

Despite the existence of an established rule of customary international law on piracy, the 1982 Convention had included several provisions on piracy. Yet, nearly 30 years after the adoption of the 1982 Convention issues of maritime safety and security, particularly the risk of piracy and armed robbery at sea and its nexus with maritime terrorism, remain unsolved. The definition of piracy in the 1982 Convention which limits the application of the term ‘piracy’ merely to unlawful or violent acts that occur on the high seas with the motive of private gain become a matter of concern among scholars.¹⁴ This definition excludes similar acts of violence that occur in the territorial seas from the ambit of international law of piracy. Likewise the definition given by the International Maritime Organisation (IMO) that considers ‘piracy’ as an activity that occurs on the high seas. If the incident occurs in the territorial seas of a state, it is merely known as ‘armed robbery against ships’ as stated in the IMO’s Code of

¹⁰ L. Azubuike, ‘International Law Regime Against Piracy’ (2009) 15 *Ann. Surv. Int’l & Comp.L* 43, 43; JL Goldsmith and EA Posner, *The Limits of International Law* (OUP, Oxford 2005) 193-195; ME O’Connell, *The Power & Purpose of International Law: Insights from the Theory and Practice of Enforcement* (OUP, Oxford 2008) 2.

¹¹ Goldsmith and Posner (2005) 2.

¹² ME O’Connell (2008) 6.

¹³ Cross refer to Chapter 2 (para 2.1.1) on the Controversy over Mare Liberum and Mare Clausum.

¹⁴ Cross refer to Chapter 3 (para 3.2.2.2) on Piracy under the Regime of United Nations for discussion on Art 101 of the 1982 Convention.

Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships.¹⁵ Meanwhile, the International Maritime Bureau (IMB)'s definition on piracy has not made any distinction on the location of the attacks.¹⁶ Nonetheless, the broad meaning of piracy by the IMB, has invited uneasiness among the littoral states. Since this narrow Straits mostly encompasses their territorial seas, such acts, if occurring in the Straits are clearly not acts of 'piracy' as defined under international law. Moreover, the term 'piracy' in international law has a legal implication which confers universal jurisdiction to any state to pursue the perpetrators as they are considered as an enemy against mankind.

This situation has, more or less, portrayed the inefficiency and inadequacy of present international law of the sea especially in dealing with the modern threat of piracy which, according to some commentators, needs to be replaced or amended.¹⁷ In fact, the 1988 Suppression of Unlawful Act (SUA Convention)¹⁸ and the Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (SUA Protocol) have been created with

¹⁵ Armed Robbery is defined as:

- (i) any illegal act of violence or detention, or any act of depredation, committed for private ends and directed against a ship, or against persons or property on board such ship, in a place within a Contracting Party's jurisdiction over such offences;
- (ii) any act of voluntary participation in the operation of a ship with knowledge of facts making it a ship for armed robbery against ships;
- (iii) any act of inciting or of intentionally facilitating an act described in subparagraphs (1) or (2).

¹⁶ '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.' 2010 IMB-PRC Annual Report.

¹⁷ RC Beckman 'The Piracy Regime under UNCLOS: Problems and Prospects for Cooperation' in RC Beckman, JA Roach (eds.) *Piracy and International Maritime Crimes in ASEAN: Prospects for Cooperation* (Edward Elgar Publishing, Cheltenham 2012) 18; Keyuan Zou, 'Seeking Effectiveness for the Crackdown of Piracy at sea' [2005] 59 J.Int'l Aff. 117,131; Some of them have questioned whether this international law of the sea is really a law: see L Azubuike, 'International Law Regime Against Piracy'(2009) 15 Ann. Surv. Int'l & Comp.L 43, 43.

¹⁸ Adopted on 10 March 1988 (entered into force on 1 March 1992).

the intention to overcome the shortcomings of the 1982 Convention on the rules pertaining to piracy and other maritime crimes such as maritime terrorism. The scope of ‘unlawful acts’ in the SUA Convention is wider than that in the 1982 Convention as it covers any unlawful and intentional act of violence against a person on board a ship, or endangering the ship or damaging maritime navigational facilities regardless of the whereabouts of the offence committed.¹⁹ However, the question remains, whether it has solved the problem of piracy particularly in the Straits of Malacca?²⁰ It is an established rule of international law that a treaty only creates legal obligations on the contracting states.²¹ The SUA Convention concentrates on the enforcement mechanism or appropriate action of the contracting states to deal with these maritime crimes. It has been suggested that, the SUA Convention is not an effective mechanism to contain the problem of piracy and armed robbery in the Straits. This is due to non-ratification by the key littoral states namely Malaysia and Indonesia to that Convention. Certainly, as they remain outside this treaty, the rules on the obligations of the contracting states of SUA Convention to prosecute or to extradite alleged offenders could not be imposed on them.

In most cases international law will rely on municipal law to implement its rules and principles. O’Connell pointed out that ‘the difference between the international and municipal crime of piracy lies in the exercise of jurisdiction.’²² This view is also shared by Beckman when he argues that the law of piracy is determined by

¹⁹ Art 3 of the 1988 SUA Convention provides that ‘Any person commits an offense if that person unlawfully and intentionally seizes or exercises control over a ship by force or threat thereof or any form of intimidation.’

²⁰ Cross refer to Chapter 3 (para 3.3) for further discussion.

²¹ Ian Brownlie *Principles of Public International Law* 6th ed (Oxford, Oxford University Press 2003) 13.

²² DP O’Connell, *The International Law of the Sea* (vol. 1, Clarendon Press Oxford 1982) 966.

international law, nevertheless the mechanism for its punishment is still subject to domestic law.²³ Goldsmith and Posner apparently share this view as they believe that domestic law sanctions are more effective than international law's sanctions.²⁴ Thus to argue that existing international law is inadequate to suppress piracy and armed robbery against ships might depend on a state's capability and willingness to enforce its power and employ its assets towards this end.

In the context of the Straits, the pressure and burden to suppress piracy and armed robbery, although is the roles of every state, have been felt especially by the littoral states. The alarming increase in contemporary piracy attacks in the Straits of Malacca and its designation as a war risk zone by Lloyds List in July 2005²⁵ has prompted all littoral states and international instruments to strengthen the preventive measures to response to this. As one of the important straits in the world, the issue of piracy in the Straits has been sensationalised and thus, has been given attention by the international community.

Sittnick criticised Malaysia and Indonesia for not being able to secure the Straits and thus should be held responsible for the dramatic increase of piracy in the Straits.²⁶

This accusation is unfounded. Although, the littoral states have argued that there are

²³ RC Beckman 'The Piracy Regime under UNCLOS: Problems and Prospects for Cooperation' in RC Beckman, JA Roach (eds.) *Piracy and International Maritime Crimes in ASEAN: Prospects for Cooperation* (Edward Elgar Publishing, Oxon 2012) 18.

²⁴ JL Goldsmith and EA Posner, *The Limits of International Law* (OUP, Oxford 2005) 193-195.

²⁵ Yann-Huei Song 'Regional Maritime Security initiative (RMSI) and Enhancing Security in the Straits of Malacca: Littoral States' and Regional Responses' in Sea' in Wu Shicun and Keyuan Zou (eds), *Maritime Security in the South China Sea, Regional Implications and International Cooperation* (Corbett Centre for Maritime Policy Studies Series, Ashgate, Surrey)109-134, 119.

²⁶ TM Sittnick 'State Responsibility and Maritime Terrorism in the Straits of Malacca: Persuading Indonesia and Malaysia to take additional Steps to Secure the Strait' (2005) 14 *Pacific Rim Law & Policy Journal* 743, 761-767.

no ‘piracy’ incidents in the Straits since most of the Straits encompass their territorial seas and there is no high seas area, they have continuously fostered the surveillance and enforcement capacity to secure the Straits.

Malaysia, as one of the littoral states in the Straits, has relentlessly tried to ensure and maintain maritime security and safety in its area either through cooperative mechanisms bilaterally, trilaterally or regionally or by enhancing its internal military and legal capacity. Malaysia has participated in several discussions and seminars organised by IMO, ASEAN, ARF and ministerial meetings that promote cooperative mechanism among stakeholders to enhance safety and security in the Straits. Although until now it is not a party to the SUA Convention due to several national reasons,²⁷ the adherence and efforts of Malaysia in implementing security measures proposed at international and regional level can be seen in the strengthening of its legal framework and enforcement mechanisms. The establishment of the Malaysian Maritime Enforcement Agency by the 2004 Act (MMEA Act) is a prudent action taken by Malaysia to bolster its enforcement capability. The Malaysian Maritime Enforcement Agency (MMEA) in many instances has successfully cooperated with the enforcement bodies of its counterparts; namely Indonesia and Singapore, to suppress piracy or armed robbery in the Straits. The tripartite security arrangement under the codename ‘MALSINDO’ is one of the most successful cooperative actions taken by the three states. The improvement of enforcement action by these states would finally lead to the execution of the pirates in the local court. If the perpetrators are caught in the

²⁷ Interview with Mohd Helmy Ahmad, Principal Assistant Secretary, Maritime Security and Sovereignty Division, Prime Minister’s Department (Putrajaya, 20 February 2009, 11 November 2010, 10 January 2011).

Straits but within the territorial sea of Malaysia, they are normally punished under the Malaysian Penal Code or the 1971 Firearms (Increased Penalty) Act.

In a nutshell, the research background merely provides an overview of piracy and armed robbery against ships. Since, the Straits is an important waterway to global trade, the thesis will study the holistic approach of international law and international instruments, regional bodies and also state, particularly Malaysia, on this issue. It is aimed to determine to what extent international law, the regional cooperative mechanism as well as the Malaysian legal framework has adequately dealt with the issue. It is apparent that all states have to have a robust legal framework and consistent policy which is parallel with the spirit of international law to curb the problem of piracy and armed robbery against ship. This is to ensure that if the pirates or armed robbers are caught, states have sufficient domestic law to punish them.

Kasmin pointed out that the effectiveness of enforcement agencies is evident by a reduction of illegal activities in their area of responsibility.²⁸ In other words, rampant criminal acts in one particular maritime area would mean that there is a lack of enforcement capability in securing that area. Since the effectiveness of law and enforcement capability is usually measured by looking at the fluctuation and trend of a crime, the thesis provides an analysis of the trend of piracy and armed robbery from the year 2001 to 2010 according to the annual report of the Piracy Reporting Centre (PRC) of the International Maritime Bureau (IMB). It is noteworthy that, despite the IMB definition of piracy is controversial as it is not defined in accordance with

²⁸ Sutarji Kasmin, *Efficiency Measurement of Malaysia's Maritime Enforcement Agencies* (UKM, Bangi 2009) 216 and 224.

international law;²⁹ the annual report of piracy produced by the IMB has been relied by most of the media and stakeholders in the world.

Although in the theory of criminology, a statistical data is normally used to design crime prevention programs and to evaluate effectiveness of law,³⁰ the piracy report of the IMB in the thesis is merely employs for the purpose of getting a general sight and as an additional support to the argument on the issue of adequacy of piracy law and cooperative mechanism that have already been implemented.

1.2 RESEARCH QUESTION

It is surprising that there is a relative scarcity of academic literature written from the perspectives of the three littoral states, particularly from Malaysia and Indonesia. Thus the thesis is intended to provide holistic understanding of the issues on piracy and armed robbery against ships from the perspective of Malaysia. Many commentators have criticised the existing law of piracy and put forward a hypothesis that the current international law of the sea is no longer relevant and adequate to deal with the issue of piracy and armed robbery against ships in the more sophisticated and contemporary world.³¹ However, despite the sharp increase in piracy incidents worldwide in recent

29 IMB defined piracy as ‘An act of boarding or attempting to board any ship with the apparent intent to commit theft or other crime and with the apparent intent or capability to use force in the furtherance of that act’: See 2009 ICC-IMB-PRC Annual Report.

30 LJ Siegel, *Criminology: Theories, Patterns and Typologies* (11th edn Wadsworth, Belmont 2013) 6-7.

31 RC Beckman ‘The Piracy Regime under UNCLOS: Problems and Prospects for Cooperation’ in RC Beckman, JA Roach (eds.) *Piracy and International Maritime Crimes in ASEAN: Prospects for Cooperation* (Edward Elgar Publishing, Oxon 2012) 17; GR Constantinople ‘Towards a New Definition of Piracy: *The Achille Lauro* Incident’ (1986) 26 *Va.J.Int’l L.* 724, 745-748; EC Stiles ‘Reforming Current International Law to Combat Modern Sea Piracy’ (2004) 27 *Suffolk Transnat’l L.Rev* 299, 322; PA Buhler, ‘New Struggle with an Old Menace: Towards a Revised Definition of Maritime Piracy, (1999) 8 *Currents Int’l Trade L.J* 61,67; CH Crockett ‘Towards A Revision of the International Law of Piracy’(1977) 26 *DePaul L Rev.* 78,84; (Graham Gerard Ong-Webb ‘Ships Can be Dangerous, Too: Coupling Piracy and Terrorism in Southeast Asia’s

years, the world has seen a dramatic decrease in such crime in the Straits of Malacca. Hence, the central question of the entire thesis is to determine to what extent the present international law, instruments, policies and the Malaysian legal framework is adequate to respond to the challenges of piracy and armed robbery in the Straits of Malacca from the Malaysian perspective.

1.3 RESEARCH METHODOLOGY

This thesis undertakes a qualitative study that mainly involves documentary, library and internet resource research of previous literature, documents and official documents of the United Nations, IMO and annual reports of IMB and the Government of Malaysia on piracy and armed robbery at sea. Apart from the legal analysis, a historical perspective is also emphasised to fully understand the nature and concept of the law in context, to determine its adequacy and relevancy in the current situation. Since the thesis focuses on piracy and armed robbery in the Straits of Malacca from the Malaysian perspective, several interview sessions with Malaysian government officers and representatives of national maritime institutions including National Security Council of Prime Minister department, Royal Malaysian Navy (RMN), Malaysian Maritime Enforcement Agency (MMEA) officers and the Prosecuting Officers in the Attorney General Office were also undertaken in Malaysia to obtain their unofficial view on the government policy in order to support some arguments in the thesis and to ascertain their standpoint on this issue. This thesis studies the individual and cooperative efforts of states, particularly Malaysia, in combating piracy and armed robbery against ships, in an attempt to determine the

Maritime Security Framework' in d Johnson and M Valencia (eds.) *Piracy in Southeast Asia, Status, Issues, and Responses* (ISEAS, Singapore 2005) 53.

adequacy of current policies in dealing with piracy and armed robbery against ships in the Straits. It also examines and analyses the cooperative measures involving the littoral states and the stakeholders which have contributed to the decrease in piracy and armed robbery incidents, as measured in the statistical data of the IMB Piracy Reporting Centre.

1.4 WHY IS THE STRAITS OF MALACCA THE FOCUS OF THIS THESIS?

SIGNIFICANCE OF THE STRAITS OF MALACCA

As the Straits contribute considerably to the maritime and shipping industry of the world in general and its coastal states in particular, it is important to highlight the fundamental factors that lead to this vital contribution before further examining the legal framework that covers this area and the crime of piracy and armed robbery that arises due to congestion in the strategic location of the Straits. Thus, this chapter points out the significance of the Straits in terms of three contexts: geographical, climatic and historical. These two factors have boosted the economic development of the littoral States. The historical context of the Straits is accentuated to present an overview of the past status of the Straits.

1.4.1 GEOGRAPHICAL CONTEXT

The Straits have long been accepted as one of the most important and busiest shipping lanes in the world.³² Ptolemy's geography indicates that the Malay Peninsula (including Malacca) was known as the 'Golden Khersonese'.³³ The 'golden' description appended to the word 'Khersonese', which is used in reference to the Malay Peninsula, signifies the economic importance of the Malay Peninsula.³⁴



Picture 1: Map of the Straits of Malacca³⁵

³² HM Ibrahim and HA Husin (eds), *Profile of the Straits of Malacca: Malaysia's Perspective* (Maritime Institute of Malaysia, Kuala Lumpur 2008) xiii; DB Freeman, *The Straits of Malacca: Gateway or Gauntlet?* (McGill-Queen's University Press, Montreal 2003) 7.

³³ P Wheatley, *The Golden Khersonese: Studies in the Historical Geography of the Malay Peninsula before A.D 1500* (University of Malaya Press, Kuala Lumpur 1961) 144-146; R Braddell, *A Study of Ancient Times in the Malay Peninsula and the Straits of Malacca and Notes on Ancient Times in Malaya* (MBRAS, 1980) 460; Thomas Suarez, *Early Mapping of Southeast Asia* (Tuttle Publishing, North Clarendon 1994) 84.

³⁴ Wheatley (1961) 145. See also Freeman (2003) at 54. Grotius also mentioned the 'Golden Chersonesus', which he believed referred to Japan: RVD Magoffin (tr), *The Freedom of the Seas: The right which belongs to the Dutch to take part in the East Indian trade. A Dissertation by Hugo Grotius* (OUP, New York 1916) 41.

³⁵ The picture of the map of straits of Malacca is taken from:
<www.welt-atlas.de/map_of_strait_of_malacca_6-847> accessed 20 May 2011.

Geographically, the Straits are defined as a funnel-shaped passage stretching from the Asian mainland, between the Pacific and Indian Oceans, and connecting the eastern and western continents.³⁶ The Straits are strategically located between the coastline of Malaysia and Singapore to the east and the Indonesian Island of Sumatra to the west. The Straits stretch for approximately 600 miles, becoming narrower in the southern part. At its narrowest it is less than 3km wide, between the Riau Islands of Southern Sumatra and Singapore. At its shallowest, the reported depth is only 25 metres.³⁷ It is difficult for large vessels to pass through these Straits at normal speed, but the aim of minimizing transport costs outweighs the technical difficulties that might be faced in passing through this shallow waterway.³⁸

Notwithstanding the funnel shape and the shallowness of the Straits, about 600 commercial vessels laden with a variety of valuable commodities and half of the world's oil are estimated to use the Straits each day.³⁹ This is three times higher than

³⁶ Freeman (2003) 7; U Nihan, 'Current Legal Developments Straits of Malacca: Protecting the Straits of Malacca and Singapore against Piracy and Terrorism' (2006) 21 Int'l J. Marine & Coastal L. 539; M Leifer, (1978) at 52.

³⁷ The length of the Straits consists of the Malacca and Singapore Straits, measured together. See M George, *Legal Regime of the Straits of Malacca and Singapore* (LexisNexis Malaysia, Petaling Jaya 2008) 6; Leifer (1978) 52; Freeman (2003) 7; A H Ansari and N A Kamal, 'Prevention, Abatement and Control of Pollution of Straits: An Appraisal with special reference to the Straits of Malacca' [2005] 3 Malaya Law Journal 37; CS Kuppusamy, 'Straits of Malacca: Security implication' South Asia Analysis Group, Paper No.1033 <www.saag.org/papers11/paper1033.html> accessed 20 August 2007. Some writers prefer to measure these Straits individually. For example Ong-Webb describes the length of Malacca Strait as 805 kilometres at the northern part, added to the 105 kilometres of the Singapore Strait at its southern part: GG Ong-Webb, 'Introduction, Southeast Asian Piracy: Research and Developments' in GG Ong-Webb (ed), *Piracy, Maritime Terrorism and Securing the Malacca Straits* (ISEAS, Singapore 2006) xxxvi; Ana G.Lopez Martin, *International Straits: Concept, Classification and Rules of Passage* (Springer, Madrid 2010) 104.

³⁸ Freeman (2003) 6.

³⁹ JS Burnett, *Dangerous Waters Modern Piracy and Terror on the High Seas* (Penguin, New York 2003) 1-2; HM Ibrahim, HA Husin and D Sivaguru 'The Straits of Malacca: Setting the Scene' in HM Ibrahim and HA Husin (eds), *Profile of the Straits of Malacca: Malaysia's Perspective* (Maritime Institute of Malaysia, Kuala Lumpur 2008) 32; IISS 'Shipping in South-

the volume of vessels which passed through the Straits each day 32 years ago.⁴⁰ It is predicted that the number of vessels transiting the straits annually will rocket from 70,000 vessels in 2007 to 140,000 by 2020.⁴¹ The types of vessels using the Straits include general cargo ships, bulk carriers, very large crude carriers (VLCC), Liquefied Petroleum Gas (LPG) and Liquefied Natural gas (LNG) carriers and other types of vessels including naval and fishing vessels. Around thirty to forty per cent of all the transit vessels are oil tankers.⁴² Japan alone contributes to almost eighty per cent of the oil shipped.⁴³

It may therefore be submitted that the Straits can justifiably claim to be ranked among the most valuable and critical trade routes, not only for maritime nations and international users but also for the surrounding littoral states. However, the continuing increase in the number of vessels using the Straits daily also potentially adds to the vulnerability of, and hazards to, the areas surrounding the Straits. The foreseen and real peril is not limited merely to the environmental aspect of the Straits but also extends to the safety and security of the Straits from maritime crime such as piracy, armed robbery and maritime terrorism.

East Asia: Going for the jugular' (Singapore, 10 June 2004); --'Malaysia says joint patrols with Indonesia, Singapore in Malacca Straits can be examined', *The Star* (Kuala Lumpur, 17 April 2007); EL Teck, 'Straits of Malacca and Singapore: Past, Present and Future Cooperation', <www.mima.gov.my/mima/htmls/conferences/som04/papers/lim.pdf>, accessed 30 September 2007.

⁴⁰ *Malaysian Digest*, Kuala Lumpur, 15 August 1976.

⁴¹ Ibrahim and Husin (2008) xiv; Ibrahim, Husin and Sivaguru (2008) 35.

⁴² Freeman (2003) 114.

⁴³ *ibid.* See also: H Ahmad, *The Straits of Malacca: International Cooperation in Trade, Funding and Navigational Safety* (Pelanduk Publications, Petaling Jaya 1997) 87.

1.4 .2 CLIMATIC CONTEXT

Apart from the advantage of their strategic location, the Straits also reaps the advantages of the monsoon winds.⁴⁴ The monsoon was among the contributing factors in the development of shipping technology and international commerce between the east and west trade routes in the fifteenth century. The wind patterns directly facilitate the navigation of voyagers and traders.

The north-east monsoon winds normally start in the month of November and last until March.⁴⁵ Historically, merchants and traders from Arabia and India would have been brought to the Malay Peninsula during this period with the aid of the monsoon winds. Long regarded as a strategic location joining the Indian and Pacific Oceans, ports adjacent to the Straits were ideal transit points for traders and voyagers. While waiting for the south-west monsoon, which normally lasts from June to September and which would have blown them towards the South China Sea, the traders took the opportunity to do business and trade with other foreign and local traders in the ports.⁴⁶ One of the factors which encouraged foreign traders to sail for the Malay Peninsula during one monsoonal wind system and then return to their home countries a few months later by means of another was that they were able to shelter from the variable winds during April and May.⁴⁷ Thus, traders in this era were well-versed as to the patterns of monsoonal wind circulation. While traders were sheltering from the monsoon winds, this transit period was also an opportunity for foreign merchants to meet their

⁴⁴ Ibrahim and Husin (2008) xiv; George (2008) 7.

⁴⁵ Freeman (2003) 21.

⁴⁶ Freeman (2003) 21, Wheatley (1980) xviii.

⁴⁷ Wheatley (1980) xx; AJ Halimi, *Perdagangan dan Perkapalan Melayu di Selat Melaka* (Dewan Bahasa dan Pustaka, Kuala Lumpur 2006) 15.

counterparts and exchange goods efficiently at such a strategic entrepôt.⁴⁸ This eventually made the Malay Peninsula, especially the port of Malacca, into a famous trading centre and entrepôt for long-distance trade in that era.

1.4.3 HISTORICAL CONTEXT

The strategic location of Malacca and the reliable monsoon wind system have been acknowledged as factors that led to economic prosperity and political stability in Malacca. Pires states that:

Men cannot estimate the worth of Malacca, on account of its greatness and profit. Malacca is a city that was made for merchandise, fitter than any other in the world; the end of monsoons and the beginning of others. Malacca is surrounded and lies in the middle, and the trade and commerce between the different nations for a thousand leagues on every hand must come to Malacca.⁴⁹

The achievement of Malacca during the era of sail was immense, and might be associated with its having had a great ruler or a far-sighted founder. Thus, the need to have some idea of the origin of Malacca is apparent in order to understand its early history.

Although there are not many recorded facts concerning the history of the Kingdom of Malacca, the sources of Tome Pires,⁵⁰ the Malay Annals,⁵¹ Fei Hsin⁵² and the Ma

⁴⁸ The word entrepôt is French and refers to a port or other place which acts as a centre for import and export. This word is commonly used during the eighteenth century to the early nineteenth century: See *The Oxford Dictionary of English* (OUP, Oxford, 2000); Freeman (2003) 22; N Husin 'Historical Development of Coastal Ports and Towns in the Straits of Malacca' in HM Ibrahim and HA Husin (eds), *Profile of the Straits of Malacca: Malaysia's Perspective* (MIMA, Kuala Lumpur 2008) 11.

⁴⁹ A Cortesao (ed), *The Suma Oriental of Tome Pires: An Account of the East from the Red Sea to Japan, written in Malacca and India in 1512-1515 and The Book of Francisco Rodrigues: Rutter of a voyage in the Red Sea, Nautical Rules, Almanack and Maps, Written and Drawn in the East Before 1515* (2nd series Hakluyt Society, London 1944) 286.

⁵⁰ Cortesao (1944) 286.

Huan⁵³ are principal references for the early history of Malacca. However, it should be noted that the early history of Malacca in these sources is quite confused. The sources are in conflict with one another in some aspects of the story, including the question as to who was the founder of Malacca. This is probably due to the differences in translations of the primary sources.⁵⁴

According to Halimi, one of the main commentators, Malacca was founded by the Prince of Palembang,⁵⁵ Parameswara, during the year 1400.⁵⁶ Parameswara left Palembang after being attacked by the King of Java. He fled to Singapore and stayed there for about five years. After hearing that the King of Siam wanted to attack Singapore, he fled to near the river of Muar before moving to Bretam,⁵⁷ now a part of Malacca. This, however, differs from the account of Pires who asserts that the town of Malacca was founded by Chaquem Daraxa (Muhammad Iskandar Shah), the son of

⁵¹ This is the only recorded source available in the Classic Malay language written in the fifteenth century. It was believed to have been first compiled and edited by *Tun Sri Lanang*, the Prime Minister of the Royal Court of Johor in 1612 (although some scholars argue that it was written before 1536) The Annals are entitled *Sulalatus Salatin* in Arabic, meaning the genealogy or descent of kings: see CB Kheng & AR Ismail (tr), *Sejarah Melayu, The Malay Annals* (MBRAS, Kuala Lumpur 1998).

⁵² R Ptak (ed), JVG Mills (tr): *Hsing Ch'a Sheng Lan, The Overall Survey of the Star Raft by Fei Hsin* (revd Harrossowitz Verlag, Wiesbaden 1996).

⁵³ JVG Mills (ed), Ma Huan (1414-1451), Feng, Chengjun (1885-1946), *Yingyai Shenglan: 'The Overall Survey of the Oceans Shores* [1433] (Thailand White Lotus, Bangkok 1997).

⁵⁴ See Ptak (1996) 53: There were differences in the translation of the words *Shan Ku* which, according to Mills, means 'a single hill' which suggests that Malacca's topography was mainly dominated by one single hill. cf. Wheatley (1961) 324, who has translated this sentence as 'the coast is rocky and desolate, the population sparse' which seems to imply 'the hills are deserted.' However, this discrepancy in the intriguing story of the early history of Malacca will not be discussed in detail.

⁵⁵ Palembang is located at the South of the Indonesian Island of Sumatra. See also: N Husin 'Historical Development of Coastal Ports and Towns in the Straits of Malacca' in HM Ibrahim and HA Husin (eds), *Profile of the Straits of Malacca: Malaysia's Perspective* (MIMA, Kuala Lumpur 2008) 8-23.

⁵⁶ Halimi (2006) 65; Freeman (2003) 83; RO Winstedt, 'The Malay Founder of Medieval Malacca' (1948) 12 Bulletin of the SOAS 726-729.

⁵⁷ Cortesao (1944) 229-232.

Parameswara, who later became his successor.⁵⁸ Muhammad Iskandar Shah had decided to settle on the hill of Malacca after he saw a mouse deer get the better of a dog and believed that this was a good sign for the place.⁵⁹

After Parameswara died, Muhammad Iskandar Shah ordered the people of Bretam to come to Malacca and he appointed the Celate mandarins as his guards. It is important to note that the people of Celates or Bugis⁶⁰ were among the earliest inhabitants of Malacca. They were originally people of Macassar Island who were described by Pires as the ‘greatest thieves than any in the world’ and as corsairs.⁶¹ These Celate mandarins served the Sultanate of Malacca with whole-hearted loyalty. With their assistance, Muhammad Iskandar Shah successfully expanded the population of Malacca and attracted wealthy merchants from other countries, including India and Arabia.⁶² He established a good reputation with neighbouring countries such as Java and Pasai at Sumatra. By 1409, the historian Fei Hsin stated that the Empire of Malacca had been awarded the title of ‘country’ by the Emperor of China.⁶³ The respectful relationship between Muhammad Iskandar Shah and the Emperor of China enabled Malacca to flourish and to become among the busiest and the most important port in the world, and the title ‘the throat of Venice’ was used by Pires to describe the importance of Malacca.⁶⁴

⁵⁸ *ibid.* at 236-237; Cf the founder of Malacca was Parameswara and not his son. See S H Hoyt, *Old Malacca* (OUP, Kuala Lumpur 1993) 1-2.

⁵⁹ Cortesao (1944) 236-237.

⁶⁰ ‘The Javanese call them Bugis and the Malays call them this and Celates’: Cortesao (1944) 227.

⁶¹ Cortesao (1944) 226.

⁶² Cortesao (1944) 240.

⁶³ Mills (1997) 108-109.

⁶⁴ Cortesao (1944) 287; see also Halimi (2006) 65.

Although scholars have differed in some points on the early history of Malacca, such as the identity of the founder of Malacca, they are agreed that the second ruler of Malacca was the one who brought economic prosperity to Malacca and made the country a peaceful and convenient place for the establishment of the port. The Malacca Sultanate lasted for about one hundred years until defeated in 1511 by the Portuguese, led by Afonso de Albuquerque.⁶⁵ The intervention of a colonial power in this lucrative area is believed to have occurred for commercial reasons, so that Portugal could exercise dominion over the eastern trade routes.⁶⁶ Freeman has argued that, although the Malay Peninsula was called the 'Golden Khersonese', the main reason which induced the Western countries such as Portugal, England and The Netherlands to colonize Southeast Asia was not gold.⁶⁷ It was in fact the spice trade which had motivated them to travel to the East.⁶⁸ Nonetheless, following the intervention of these countries, there were substantial changes in the political, cultural and economic structure of Malacca and other states in Southeast Asia, particularly the Malay Archipelago. Malacca had become part of the Federation of Malay States (Malaya) before it was declared an independent state on 31 August 1957. The Federation of Malaya changed its name to Malaysia in 1963.⁶⁹ Singapore had previously joined Malaysia in 1963 but two years later quit the Federation to form its own sovereign state.⁷⁰ Despite the change of reign and administration of the littoral

⁶⁵ Halimi (2006) 37; Leifer (1978) 8.

⁶⁶ Ram Prakash Anand, *International and Developing Countries: Confrontation or Cooperation* (Martinus Nijhoff, Boston 1987) 54; Leifer (1978) 9.

⁶⁷ Freeman (2003) 54.

⁶⁸ The term 'spice trade' usually refers to European motives for navigating to Asia. See EJ Hamilton, 'The Role of Monopoly in the Overseas Expansion and Colonial Trade of Europe Before 1800' (1948) 38 *American Economic Review* 36-38.

⁶⁹ RS Milne, 'Malaysia' (1964) *Asian Survey* 695.

⁷⁰ *ibid.*

states, the Straits of Malacca have continued to prosper as an important waterway in the world.

1.5 LIMITATIONS OF THE RESEARCH

Since the thesis mainly focuses on the act of piracy and armed robbery against ships in the Straits of Malacca, current controversial issues such as the potential of nexus between piracy and terrorism and the UN Security Council resolutions to deal with the piracy problem in the Horn of Africa are not discussed in detail. The thesis mainly emphasises the perspective of Malaysian, other littoral States' view or legal frameworks will not be highlighted in details unless it renders necessary. The analysis of the statistical data of piracy reports is limited to ten years beginning 2001 because the cut off date of the data collected is until December 2010. It is noteworthy that, despite the few centres that report incidents of piracy globally or regionally,⁷¹ the thesis mainly extracted piracy reports from the IMB. This is because the quarterly and annually piracy and armed robbery report of the IMB is a well-known source available online to the shipping industries, media and international community which was established in 1992.

1.6 ORGANISATION OF THE THESIS

The reason for choosing the Straits of Malacca for this study is first highlighted in the **introductory chapter**. The significance and crucial importance of the Straits to the world's shipping industry has continuously attracted the attention of the international community to any danger be it real, such as piracy and armed robbery against ships, or

⁷¹ IMB, IMO and ReCAAP.

potential, such as maritime terrorism. The historical and legal analysis of the Straits of Malacca as Straits used for international navigation is discussed in **chapter two**. This chapter determines the juridical status of the Straits after examining the evolution of the International Law of the Sea and related rights and duties of state that are derived from it. This is due to the legal implication of the right of passage in territorial seas which are considered as straits used for international navigation is different from those which are not. The **third chapter** focuses on the main topic of this research, namely piracy and armed robbery against ships generally in the context of public international law. The historical background and the development of international law of the sea and piracy are highlighted in order to fully appreciate the nature of this age-old crime and its definitional issue which remains unsolved. The reality of contemporary piracy, the relevance of universal jurisdiction and the attempt to assimilate it with maritime terrorism is also discussed briefly without delving too deeply into the crime of terrorism. In analysing these issues, the main references are the 1982 Convention and SUA Convention.

While these two chapters form Part One of the thesis which mainly discusses the general principles of the international law of the sea regarding the regime of strait and piracy, Part Two of the thesis will focus on the development of law and policy in safeguarding the Straits of Malacca against such crime, in particular on the Malaysian response. The first chapter in Part Two namely **chapter four**, commences the discussion on the issue of safety and security in the Straits of Malacca from the historical overview before embarking on the present threat of piracy and armed robbery against ship. Since the Straits has long been recognised as an important

waterway, the crime of piracy has also been its inherent problem since time immemorial. The extent of risk and threat of piracy in the Straits is assessed by evaluating the incidences of attack, types and vulnerability of vessels. The extra-legal factors underlying piracy and armed robbery and the different types of piracy attacks are also examined in order to identify its root problem. Once these issues are identified, the response of the stakeholders at regional and national level are examined to study how far the cooperative and enforcement mechanism are undertaken to tackle the issue of piracy and armed robbery in the Straits. **Chapter five** discusses the response of regional and extra-regional bodies and states in securing the Straits such as the Association of Southeast Asian Nation (ASEAN), ASEAN Regional Forum (ARF), the Malacca Straits Patrol (MSP), The Regional Maritime Security Initiative (RMSI) and the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP).

Since the thesis mainly investigates the perspectives of Malaysia in securing the Straits from piracy and armed robbery, **chapter six** thoroughly examines Malaysian legal framework and response on this. The emergence of the Malaysian Maritime Enforcement Agency (MMEA) and its challenge as the sole enforcement agency for Malaysia is a central discussion in this chapter. Then, the jurisdiction of court to punish piracy and armed robbery against ships in the Straits which is provided under the 1964 Court of Judicature Act, the Penal Code and the 1971 Firearms (Increased Penalties) Act, is examined with elaboration on few example of incidents which have taken place in the Straits. The chapter concludes with a brief discussion on the current

development of the Malaysian first experience in prosecuting high seas piracy. Finally, **chapter seven** provides the conclusions and recommendations of the thesis.

1.7 CONCLUSION & CONTRIBUTION TO LITERATURE.

The thesis attempts to answer the research question on the adequacy of law and enforcement mechanism that deal with piracy armed robbery against ships through analysis of general principles of international law and instruments, analysis of risks and threat of piracy and armed robbery in the Straits, the trends and types of reported attacks and extra-legal factors underlying these acts. Although Malaysia does not have a special law on piracy and is not a contracting party to the 1988 SUA Convention and ReCAAP, the thesis has found that Malaysia has an enforcement capability and adequate law to suppress piracy and armed robbery in the Straits. However, it is suggested that as a matter of convenience, Malaysia has to enact specific laws on piracy and armed robbery against ship. Due to scarcity of academic research on piracy and armed robbery in the Straits of Malacca from the Malaysian perspective, it is hoped that such a legal analysis which is intended to provide a holistic view on the legal framework governing piracy and armed robbery at international, regional and state level may enlighten any controversial issues arising out of this.

CHAPTER TWO

A LEGAL AND HISTORICAL ANALYSIS OF STRAITS OF MALACCA AS STRAITS USED FOR INTERNATIONAL NAVIGATION

The aim of this chapter is to analyse historical and legal developments in the law of the sea and straits used for international navigation with special reference to the legal status of the Straits. It begins with a discussion of the evolution of the international law of the sea and the general principles of public international law on straits used for international navigation. It then determines the legal status of the Straits prior to and after the adoption of the 1982 Convention and the issue of rights of passage conferred on this Straits. Finally, the document concludes by evaluating the Straits as straits used for international navigation and the inherent problems which remain unsolved.

2. PUBLIC INTERNATIONAL LAW PRINCIPLES ON DEVELOPMENT OF MARITIME JURISDICTION ZONE

The study of the chronological development of the international law of the sea is essential before the issue of piracy and armed robbery against ships in the Straits is analysed. This study provides the historical background that led to the establishment of the present legal framework on the maritime breadth and the regime of passage in the strait used for international navigation in general and the Straits of Malacca in particular. Although most commentators have suggested that the present 1982 Convention on the law of the sea is inadequate, the difficulties and the lengthy and

painstaking process of reaching a consensus on some provisions of law¹ have demonstrated the unfeasibility of drastically amending this final convention.²

2.1 PRE-UNITED NATIONS CONVENTIONS ON THE LAW OF THE SEA

2.1.1 THE CONTROVERSY OVER MARE LIBERUM AND MARE CLAUSUM

After careful examination of the background history of Malacca, it might be inferred that the development of the principles of the freedom of the seas has a connection with the Portuguese intervention in the east-west trade route during the sixteenth century. This is evident from the dissertation written by Hugo Grotius on the theory of freedom of the seas, *Mare Liberum*.³ Grotius, the eminent Dutch jurist, is regarded as the ‘father of the science of International Law.’⁴ It is undeniable that his original purpose in writing this legal opinion was to challenge Portuguese and Spanish domination⁵ of the sea routes to the East Indies.⁶ Indeed, Grotius was a lawyer who was retained by the Dutch East India Company (DEIC) to deal with this matter.⁷ According to Scott, in

¹ Hudson also describes the United Nations Convention on the Law of the Sea as ‘the world’s largest and longest conference...’: R Hudson ‘The International struggle for a Law of the Sea’ *Bulletin of the Atomic Scientists* (December 1977) 14.

² See discussion on the weakness of the 1982 Convention in Chapter 3.3.

³ Published in 1608. See RR Churchill & AV Lowe, *The Law of the Sea* (3rd edn Manchester University Press, Manchester 1999) 3-4; RVD Magoffin (tr), *The Freedom of the Seas: The right which belongs to the Dutch to take part in the East Indian trade. A Dissertation by Hugo Grotius* (OUP, New York 1916) 7-11.

⁴ W Rattigan, ‘The Great Jurists of the World: Hugo Grotius’ (1905) 6 *J.Soc.Comp.Legis.* 1, 78.

⁵ At that time Portugal had been united with Spain. See RP Anand, ‘Maritime Practice in South-East Asia until 1600 AD and the Modern Law of the Sea’ (1981) 30 *ICLQ* 442.

⁶ DP O’Connell (IA Shearer (ed.)) *The International Law of the Sea* (vol 1, Clarendon Press Oxford 1982) 9; E Fletcher, ‘John Selden (Author of *Mare Clausum*) and His Contribution to International Law’ (1933) 19 *Transactions of the Grotius Society, Problems of Peace and War* 7; MB Vieira ‘*Mare liberum* vs. *Mare Clausum*: Grotius, Freitas, and Selden’s Debate on Dominion over the seas’, (2003) 64 *Journal of the History of Ideas*, 361; PB Potter, *The Freedom of the Seas in History, Law and Politics* (Longmans, Green and Co, London 1924) 57.

⁷ O’Connell (1982) 9; Francis W Kelsey (tr), Hugo Grotius, *De Jure Belli Ac Pacis libri tres* (vol 2, Clarendon Press, Oxford 1925) xi.

the commentary of the *De Jure Pradae*,⁸ it is believed that Grotius was retained by the DEIC to justify the capture of a Portuguese galleon by a Dutch vessel, which occurred in 1602 near the Straits of Malacca,⁹ during the war between the Dutch and Spanish.¹⁰ The Portuguese galleon *Santa Catharina* was brought to Amsterdam to be sold as a prize and this had triggered dissatisfaction among the Portuguese. Following this, Grotius propounded his theory of the ‘freedom of the seas’, which he regarded as *res nullius*. The sea, being the property of no-one, can be possessed in common, as *res communes*.¹¹ Grotius stated that:

For do not the oceans, navigable in every direction with which God has encompassed all the earth, and the regular and the occasional winds which blow now from one quarter and now from another, offer sufficient proof that nature has given to all peoples a right of access to all other people.¹²

The basis of Grotius’s theory is derived from the natural law which he claimed was equal for all nations. In fact, his theory was based mainly on arguments by Cicero, Ovid, Ulpian and Vasquez.¹³ He believed that the right to trade on the sea, which by its nature is not capable of appropriation, might be considered a feature of the *jus gentium*.¹⁴ Nevertheless, Grotius’s theory in *Mare Liberum* attracted the emergence of an opposite view. John Selden, an English jurist who propounded the theory of maritime dominion, had commenced writing his remarkable work, *Mare Clausum*,

⁸ The manuscript of *De Jure Pradae* which was written by Grotius in the year 1604-1605 was discovered in 1868. *Mare Liberum* was considered to be the twelfth chapter of *De jure Pradae*:Vieira (2003) 361; Rattigan (1905) 76.

⁹ JB Scott, introductory note in Kelsey (1925) xi; O’Connell (1982) 9; The capture of the *Santa Catharina* occurred in 1602: Anand, (1987) 7.

¹⁰ Portugal was part of the Spanish empire: Anand (1987) 7 & 54.

¹¹ *Res Communes* is understood as ‘things common to all’ and is derived from the Roman Emperor Justinian’s classification of *res* (things): see WW Buckland (rev P Stein), *A text-book of Roman Law from Augustus to Justinian* (3rd edn Cambridge University Press, Cambridge 1966) 182-183.

¹² Magoffin (1916) 7.

¹³ See Magoffin (1916) 23-28; Freitas disagreed with the argument of Grotius based on a passage from Ulpian which Freitas believed was truncated by Grotius to favour his conclusion: Vieira (2003) 374.

¹⁴ O’Connell (1982) 9.

around 1617 or 1618, and this was finally published in 1635.¹⁵ His work had taken into account the *Mare Liberum* and *De Jure Belli ac Pacis* of Grotius. In fact, Selden started writing his thesis on *Mare Clausum* as a consequence of the capture of Dutch fishing vessels in Greenland waters.¹⁶ This area was claimed to be the property of England. However, only seventeen years later, during the reign of King Charles I, there was an order for *Mare Clausum* to be published.¹⁷ The two key points of *Mare Clausum* as pointed out by Galdorisi and Vienna are, first, that the sea is capable of being a private dominion as it is not common property to all men and, second, that the King of England is lord of the sea.¹⁸ This is different from the view of Grotius.¹⁹ The basis for Selden's view was quite extensive as he had referred to many views from ancient times, including those of Antiochus IV,²⁰ the people of Tyre,²¹ the people of the Levant²² and Minos.²³ In the second part of his treatise, Selden argued that the British had secured dominion at sea ever since pre-Roman times. He had adduced all relevant evidence from English history to prove the existence of British power, which included their fishing areas.²⁴ Although the discussion put forward by Selden has evidenced the possibility of maritime dominion, as a matter of legal right it was

¹⁵ DJ Padwa, 'On the English Translation of John Selden's *Mare Clausum*' (1960) 54 AJIL 157; PB Potter, *The Freedom of the Seas in History, Law and Politics* (Longmans, Green and Co, London 1924) 58.

¹⁶ Fletcher (1933) 8.

¹⁷ *ibid.*

¹⁸ G Galdorisi and KR Vienna, *Beyond the Law of the Sea: New Directions for US Oceans Policy* (Greenwood Press, London 1997) 16.

¹⁹ Vieira (2003) 362.

²⁰ Antiochus IV, Epiphanies, was the King of Syria in 176 BC, and is quoted as saying 'are not both the sea and the land mine?' See Potter (1924) 12.

²¹ The people of Tyre had practised absolute dominion of the sea which they called 'a Tyrian sea.' See Potter (1924) 12.

²² The people of the Levant had recognised the possibility of controlling the sea: Potter (1924) 11.

²³ Minos had been mentioned by Thucydides, Diodorus Siculus and Aristotle as having exercised maritime dominion which was believed to have existed in pre-Christian times. See Potter (1924) 13.

²⁴ Rattigan (1905) 80; Fletcher (1933) 8-10. Potter takes the view that Selden's work was superior to Grotius in term of historical study of the existence of sea dominion prior to the year 1650: Potter (1924) 64.

uncertain whether this theory had been recognized by all nations.²⁵ Grotius' theory was not as famous as that of Selden during his time. Only in the late eighteenth or early nineteenth centuries, in the era of colonization, did the theory of the 'free sea' become popular.²⁶

To sum up, it can be considered that the arguments put forward by both Grotius and Selden were used to justify the interests of the country or the company to which they belonged. However, their work has contributed significantly to the development of the international law of the sea. Although Grotius clearly mentioned the acceptance of freedom of navigation in the Indian Ocean since medieval times, his discussion on the theory of maritime dominion and maritime liberty is primarily concerned with the Western practice. The long traditions of Eastern countries, particularly in the Indian Ocean, on the freedom of navigation and liberty of commerce have not been thoroughly examined.²⁷ Indeed, the rival theories of Selden and Grotius were used by the countries they represented to extend their rights over the adjacent sea and to justify their right to trade in other parts of the world.

2.1.2 THE CANNON-SHOT RULE AND THE THREE-MILE FIXED LIMIT OF THE TERRITORIAL SEA

Although the debates over the theory of freedom of seas in *Mare Liberum* versus the sovereignty of the seas in *Mare Clausum* occurred over many centuries, this has since led to a more realistic and practical understanding of the notion of a territorial sea.

²⁵ Selden was sceptical of the universality of Roman law as proposed by Grotius and Gentili. Gentili was the author of the work *De Jure Belli ac Pacis*. See MA Ziskind, 'Criticism and Affirmation of the Common Law Tradition' (1975) 19 *American Journal of Legal History* 1, 37.

²⁶ See Anand (1981) 450; AL Sanguin, 'Geopolitical scenarios, from the *Mare Liberum* to the *Mare Clausum*: The High Sea and the Case of the Mediterranean Basin' (1997) 2 *Geoadria* 52.

²⁷ Anand (1981) 442, 447.

Neither the absolute freedom of the seas nor complete maritime dominion has been accepted in total. The prevailing view accepts the coherent status of land and water of a sovereign state and is evidenced by state practice on the law of the coastal sea.²⁸

When states realized the importance of the natural resources of the sea, the practice of expanding the jurisdiction of a state to the surrounding waters became expedient. However, the question of the actual breadth of the territorial waters remained unsettled until serious debate was undertaken in the twentieth century.

It is worth mentioning that attempts to limit sovereignty over the sea had been mentioned even before Grotius and Selden wrote their treatises. As early as 1400, Baldus Ubaldus²⁹ had suggested sixty miles as being the limit of sovereign rights over the seas.³⁰ This suggestion was not widely discussed until the doctrine known as the ‘cannon-shot rule’ was formulated. The cannon-shot rule was propounded by Cornelius van Bynkershoek, a Dutch jurist, in his work *De Dominio Maris*, published in 1702.³¹ This rule suggests that the coastal states’ maritime rights were the distance that cannon could fire from shore.³² Bynkershoek’s ideas can be considered a blend of the two famous theories of the freedom of the seas and the theory of state sovereignty over its adjacent waters.³³ Bynkershoek proposed two maxims. The first was *mare terra proximum* which refers to the capability of states to include certain portions of

²⁸ O’Connell (1982) 124; C Phillipson, ‘Cornelius Van Bynkershoek’ (1908) 9 *Journal of the Society of Comparative Legislation* 36.

²⁹ He was a student of Bartolus, an Italian jurist. See Scott C Truver, *The Straits of Gibraltar and the Mediterranean*. (Sijthoff & Noordhoff, Alphen aan den Rijn The Netherlands, 1980). Some commentators state his name as Baldus de Ubaldis. For the detail backgrounds and contributions of Baldus see: JD Wilson, ‘Baldus de Ubaldis’ (1902) 12 *Yale Law Journal* 8-20.

³⁰ RS Trigg, ‘National Sovereignty over Maritime Resources’ (1950) 99 *University of Pennsylvania Law Review* 82-83.

³¹ Phillipson (1908) 27; 34.

³² A hypothetical cannon-shot is defined by Brownlie as ‘a belt over which cannon could range if they were placed along the whole seaboard’: Brownlie (2003) 175.

³³ Churchill & Lowe (1999) 72.

the seas under their exclusive jurisdiction. The second was that the ‘seas are entirely surrounded by the neighbouring territory of any particular state, with an outlet into the ocean, of which both shores are exclusively occupied by it.’³⁴ The examples he gave included the fact that the Mediterranean belonged to the Roman Empire and, during his own time, the Black Sea belonged to Turkey. The marine league based on the distance that the cannon could fire from shore, proposed by Bynkershoek, was largely accepted and regarded as the first to solve the problem of the limits of the territorial sea.³⁵

However, O’Connell has suggested that the fixed criterion of three miles for the standard measurement of a state’s jurisdiction over the water adjacent to it evolved as early as the cannon-shot rule:

It is possible that the cannon-shot rule was a southern European device, while the idea of fixed limits, representing roughly the range of vision, was a northern European one, and that the two existed in uneasy conjunction until late in the eighteenth century.³⁶

The jurist commonly associated with the three-mile rule is Fernando Galiani.³⁷ It is interesting to note that there were several arguments regarding the origin of the three-mile rule. One argument stated that it has been considered the contemporary range of the cannon shot.³⁸ Other observers, such as Brittin, believed that the three-mile rule was not related to the cannon-shot rule but instead ‘originated from the line of sight

³⁴ Phillipson (1908) 36.

³⁵ *ibid.*

³⁶ O’Connell (1982) 130. Baty also considered that three miles or the range of cannon-shot was ‘not alternative rule, but an alternative description,’ see Thomas Baty, ‘The Three-Mile Limit’ (1928) 22 AJIL 504.

³⁷ Galiani was an Italian jurist. See: KM Ioannou, ‘The Greek Territorial Sea’ in Theodore C Kariotis, *Greece and the Law of the Sea* (Kluwer Law International, London 1997), 120; Brownlie (2003) 175; Trigg (1950) 83.

³⁸ Sanguin (1997) 53; O’Connell (1982) 152.

from the shoreline, which, at sea level, is approximately three miles'.³⁹ Somehow or other, the three-mile fixed limit subsequently became the rule accepted by many states.⁴⁰

In the United States the three-mile limit had been adhered to in mostly inter-state relations. The first evidence indicating the acceptance of the three-mile rule can be seen in the United States Diplomatic Note to Britain and France dated 8 November 1793.⁴¹ In fact, during and after the Napoleonic wars, British and American prize courts had translated the cannon-shot rule as the three-mile rule.⁴²

It might be argued that the American and British practice in this matter does not necessarily reflect the customary rule of all states in the world. This is obvious because practice differs from one state to another.⁴³ Nevertheless, the implication of the major support of the Anglo-American society on this rule led to it eventually being regarded as a rule of customary international law. This will be considered further in the following section on the development of the international law of the sea.

³⁹ Galdorisi & Vienna (1997) 17.

⁴⁰ There were also other views suggested and practised by states such as the Soviet Union (1921) which adopted a 12-mile limit for fishing in Arctic water and the White Sea; a Statute of 1927 also mentioned 12 miles from the State boundary. Legislation in 1960 also fixed 12 miles as the breadth of territorial sea unless otherwise stated in the third party agreement: see O'Connell (1982) 155.

⁴¹ Brownlie (2003) 175; Louisiana General Statute 1938, International Law - Power of a State to Extend its Boundary beyond the Three Mile Limit (1939) 39 Columbia Law Review 321.

⁴² In American practice, the cannon-shot rule was translated into the three-mile rule in the United States Neutrality Act 1794. In British practice it was acknowledged in the decisions of Lord Stowell between 1800 and 1805 for the Prize Jurisdiction of the Court of Admiralty: see O'Connell (1982) 131-132; Brownlie (2003) 175. Generally on the law of prize and Lord Stowell's recognition of the cannon shot rule etc, see *Vrouw Anna Catharina (Mahts)* (1803) 5 C Rob 15; 165 ER 681 and the analysis in Henry J Bourguignon, *Sir William Scott, Lord Stowell: Judge of the High Court of Admiralty, 1798-1828* (CUP, 1987) 175 et seq - KB 52.S7 in the Library.

⁴³ O'Connell (1982), 161.

2.2 THE EVOLUTION OF THE INTERNATIONAL LAW OF THE SEA

It could be concluded from the historical context that the evolution of law, particularly the law of the sea, has been influenced or shaped by changes in politics, societies, economics and even the geography of the world. The need for pragmatic legal rules of the sea is thus apparent in meeting the varying interests of different countries. Before the establishment of the League of Nations in 1919,⁴⁴ an attempt to codify the rules of customary international law was undertaken by non-governmental learned societies⁴⁵ during the nineteenth century. Important issues regarding territorial waters, the sea bed, piracy and international straits were already highlighted at this stage. However, it was not until the twentieth century that an attempt to codify the international law of the sea was seriously undertaken. The complexity inherent in regulating the oceans is portrayed in the series of discussions instigated by the League of Nations.⁴⁶

2.2.1 THE HAGUE CODIFICATION CONFERENCE 1930

In 1924, the League of Nations sought to codify the peacetime rules of the International Law of the Sea with reference to the topics of nationality, state responsibility and territorial waters.⁴⁷ Preparation was made for consideration at The Hague Conference 1930 which included a report based on the replies of the states on

⁴⁴ The League of Nations was established after the First World War under the Treaty of Versailles 'to promote international cooperation and to achieve peace and security'. See www.un.org/aboutun/history.htm accessed 10 May 2008. See also MD Dubin, 'Transgovernmental Processes in the League of Nations' (1983) 37 *International Organisation* 469-493.

⁴⁵ The International Law Association (1873), Institute of International Law (1873), Harvard Law School and the American Law Institute were regarded as the important bodies contributing to the international law of the sea preceding the establishment of the United Nations: Churchill and Lowe (1999) 13-14.

⁴⁶ In 1945, the League of Nations was replaced by the United Nations: see Leland M Goodrich, 'From League of Nations to United Nations' (1947) 1 *International Organisation* 3; The work of the International Law Commission 1 (6th edn 2004) untreaty.un.org/ilc/ilcintro.htm accessed 2 December 2007; Churchill and Lowe (1999) 15.

⁴⁷ O'Connell (1982) 157-158.

their policy and practice. Thus, the delegates at the Conference would have had before them the report provided by the League of Nations' Committee of Experts for the Progressive Codification of International Law.⁴⁸ The maritime matter which may be considered as the central issue for resolution at that time was the issue of the breadth of territorial sea. It has been argued that the 1930 Conference 'had taken no decision as to whether existing international law recognized any fixed breadth of the territorial sea.'⁴⁹

The Conference, although not fully successful, was influential in founding the body which was then known as the International Law Commission (ILC).⁵⁰ One of its functions was to prepare draft articles related to the law of the sea, particularly on territorial waters and the high seas.⁵¹ The work of the ILC became the basis of discussion at the first United Nations Convention on the Law of the Sea in 1958.

2.2.2 GENEVA CONVENTION ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE 1958 (1958 GENEVA CONVENTION)

The ILC Report was extensively used at the first Conference on the Law of the Sea which was held in 1958.⁵² As noted earlier, the central issue to be dealt with concerned the breadth of territorial sea. Following the 1930 Hague Codification

⁴⁸ PC Jessup, 'The United Nations Conference on the Law of the Sea' (1959) 59 Columbia Law Review 235.

⁴⁹ Statement made by Mr Hudson in the Summary Record of the 169th meeting, A/CN.4/SR.169, (1952) 1 Yearbook of the International Law Commission 170.

⁵⁰ The ILC was established in 1948 pursuant to Art 13 of the Charter of the United Nations which obliged the General Assembly to encourage 'the progressive development of international law and its codification': see <www.un.org/law/ilc/> accessed 10 May 2008; H Lauterpacht 'Codification and Development of International Law' (1955) 49 American Journal of International Law 16; Jessup (1959) 235-236.

⁵¹ Churchill and Lowe (1999) 15. See the Report of International Law Commission in the eight session in (1957) 51 AJIL 154.

⁵² Jessup (1959) 234.

Conference, almost all governments were inclined to regard the distinction between the regimes of the territorial sea and the high sea as that prescribed in *mare clausum* and *mare liberum*.⁵³ The question of the extent of the territorial sea remained unanswered, while the high seas were recognized as free for all nations.⁵⁴ In the eight sessions of the 1958 Convention, none of the proposals⁵⁵ pertaining to the question of the breadth of the territorial sea was successfully reached by a majority vote. It was then decided by the United Nations General Assembly to postpone the question to a further Conference in 1960. Although the issue of the breadth of territorial sea remained unresolved, the 1958 Convention might nevertheless adequately be considered a successful conference for the development of the law of the sea as it was able to adopt four conventions.⁵⁶

2.2.3 UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 1960 (1960 CONFERENCE)

Although there was a clear divergence of views and practice, the vigorous arguments concerning the limits of the territorial sea actually became a drawback throughout the conference. As time went by, more and more states sought to expand the breadth of territorial sea from the customary state practice of three nautical miles to twelve nautical miles and up to 200 nautical miles.⁵⁷ It was not clear, however, whether the

⁵³ Commentary to the Arts concerning the law of the sea, report to the General Assembly (1956) 2 *Yearbook of the International Law Commission* 265 (hereinafter referred to as the 1956 Commentary).

⁵⁴ *ibid.*

⁵⁵ *ibid.* 266 paras 5 and 6.

⁵⁶ The four conventions are: the Convention on the Territorial Sea and the Contiguous Zone; the Convention on the High Seas; the Convention on the Continental Shelf; and the Convention on Fishing and Conservation of the Living Resources of the High Seas.

⁵⁷ HB Robertson 'Passage through International Straits: A Right Preserved in the Third United Nations Conference on the Law of the Sea' (1980) 20 *Va.J.Int'l L* 804; Table of claims to Maritime Jurisdiction (as at 29 December 2006) :

claims made by many states were limited to fishery limits or were general sovereign limits. In order to prevent the unilateral extension of jurisdiction by states and at the same time proceed with the existing issue on the breadth of territorial sea, the second Law of the Sea Conference was convened in 1960 at Geneva. Unfortunately, no definite conclusion was reached concerning the breadth of the territorial sea.⁵⁸

2.2.4 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982 (1982 CONVENTION)

Although the second Geneva Convention in 1960 failed to arrive at an agreed limit on the territorial sea, the endeavour and commitment shown by the ILC was unrelenting. In 1973, the first session of a meeting was held with the objective of improving the 1958 formulation of the law of the sea, and to meet the concerns of the majority of the members of the states attending the meeting.⁵⁹ In consequence of the various backgrounds of the states, estimated to be about 156, negotiations became lengthy, causing difficulties in adopting voting measures. The best approach was suggested to be negotiation by consensus.⁶⁰ This method was believed to be necessary in order to satisfy certain criteria, especially with regard to the controversial questions of the breadth of territorial sea and the right of passage in the international straits.⁶¹ As a result of the non-uniformity of international practice on this matter, the ILC agreed in

<www.un.org/Depts/los/LEGISLATIONANDTREATIES/claims.htm> accessed 24 April 2007. See O'Connell (1982) 161: 'Lauterpacht was the principal defender of the three-mile limit. Kozhevnikov thought the limit might differ from country to country, the Latin-American members were opposed to any fixed limit.'

⁵⁸ LT Lee, 'The Law of the Sea Convention and the third States' (1983) 77 AJIL 551.

⁵⁹ The substantial number of newly independent states which had not been involved in the 1958 Convention had insisted that the Conference review the previous law of the sea: Churchill and Lowe (1999) 18-19.

⁶⁰ B Buzan, 'Negotiating by consensus: Development in technique at the United Nations Conference on the Law of the Sea' (1981) 75 AJIL 324-348.

⁶¹ The resolution for the question of the extent of territorial sea, although considered 'the most difficult for codification', was very important and urgent: see O'Connell (1982) 158.

the draft text that international law recognized an extension of territorial waters from three to twelve miles.⁶² The idea of fixing the limit at twelve miles was proposed in the drafts of the United Kingdom and the Eastern European bloc⁶³ and was later incorporated into Article 3 of the Caracas Draft Convention 1980 before being adopted in the 1982 Convention.

Despite many challenges, tensions and difficulties faced in securing international agreement on the law of the sea, which took almost a decade, the adoption of the Third Law of the Sea Convention in 1982 can be considered a remarkable achievement in the history of the international law of the sea. The Convention was adopted by 130 affirmative votes, with 4 votes against⁶⁴ and 17 abstentions,⁶⁵ on 30 April 1982. Eight months later, on 10 December 1982, the Convention was opened for signature at Montego Bay in Jamaica.⁶⁶ Within two years, about 159 states and organizations signed the Convention. As required by Article 308, the 1982 Convention might only enter into force after twelve months following the date of deposit of the sixtieth instrument of ratification. Accordingly, the accession of Guyana on 16 November 1993 brought the Convention into force on 16 November 1994.⁶⁷ To date, 165 countries have become parties to the 1982 Convention.⁶⁸ Although some

⁶² 'In practice the claims to the territorial sea ranged from 3, 4, 6, 12 nautical miles to 200 nautical miles...' : HZ Zhang, 'The Adjacent Sea' in Mohammed Bedjaoui, *International Law, Achievement and Prospects* (Martinus Nijhoff, London 1992) 854.

⁶³ O'Connell (1982) 164; Robertson (1980) 822.

⁶⁴ United States, Turkey, Israel and Venezuela.

⁶⁵ United Kingdom, USSR, Ukraine, Thailand, Spain, Poland, The Netherlands, Mongolia, Luxembourg, Italy, Hungary, the Federal Republic of Germany, the German Democratic Republic, Czechoslovakia, Byelorussia, Bulgaria and Belgium.

⁶⁶ Arts 305-307 of the 1982 Convention.

⁶⁷ Chronological lists of ratifications of, accessions and successions to the United Nations Law of the Sea Convention 1982 and the related Agreement as at 23 January 2013 can be found on <www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.html>, accessed 14 June 2013; Churchill and Lowe (1999)19.

⁶⁸ *ibid.* The latest country to ratify the Convention was Timor-Leste on 8 January 2013.

states, including some major maritime states such as the United States, have not yet ratified the 1982 Convention, they have asserted that some principles of the 1982 Convention, especially on the freedom of transit and overflight through and over international straits, have become part of customary international law⁶⁹ and consequently have become binding upon them.⁷⁰ As a matter of fact, the special regime of transit passage in straits used for international navigation was originally proposed by the United States. Thus, the attitude of ‘pick and choose’⁷¹ exhibited by the United States, which voted against the Convention for not accommodating its interest in Part XI,⁷² but declared its right over the regime of transit passage in part III, has been widely criticized by numerous states.⁷³ The following part will further analyze the historical and contemporary issue of the regime of straits in international law generally and then will specifically refer to the Straits of Malacca.

2.3 STRAITS USED FOR INTERNATIONAL NAVIGATION

A strait may be defined as a ‘narrow stretch of water connecting two seas’⁷⁴ or ‘a narrow stretch of sea connecting two extensive areas of sea’.⁷⁵ However, this definition merely reflects the geographical character of a strait and does not necessarily address the legal implications, especially in international law.⁷⁶ This is

⁶⁹ George (2008) 115; See also KY Koo ‘Transit Passage Regime Controversy Revisited: An Appraisal and Analysis on the Legal Ambiguities and Recent Trends’ (1992) 37 *Korean J. Int’l L.*, 79-95, 79.

⁷⁰ George (2008) 115; United Nations Law of the Sea 20th Anniversary (1982-2002) ‘Constitution of the Sea, Bring Order to the Ocean’ <www.un.org/issues/docs/documents/losenbk.pdf> accessed 2 December 2007.

⁷¹ Koo (1992), 79.

⁷² T B Koh, ‘The Third United Nations Conference on the Law of the Sea: What was accomplished?’ (1983) 46 *Law and Contemporary Problems* 5, 9.

⁷³ JA de Yturriaga, *Straits Used for International Navigation: A Spanish Perspective* (Martinus Nijhoff, London, 1991) 3; Koo (1992), 79.

⁷⁴ *The Oxford Dictionary of English* (Oxford University Press, Oxford, 2000).

⁷⁵ WG Moore, *A Dictionary of Geography* (2nd edn, Black, London, 1975).

⁷⁶ BB Jia, *The Regime of Straits in International Law* (Clarendon Press, Oxford 1998) 3.

because different straits have different roles and importance. Some straits become very important as a conduit of strategic lanes of communications while others possess no such criteria. Thus, the fact that not all straits are of major concern for the international community led to the transformation of customary international law right of innocent passage in the straits used for international navigation to the right of transit passage in the 1982 Convention.⁷⁷ Its legal implication is twofold. First, it accords more freedom of navigation to foreign ships transiting the straits, making such freedom almost the same as passing the high seas.⁷⁸ Second, it has deteriorated the sovereign rights of the coastal states, as compared to previous rights of innocent passage in the customary international law.⁷⁹ As a matter of fact, the right of transit passage conferred in Part III of the 1982 Convention remains the rule for foreign vessels transiting straits used for international navigation. It is, however, pertinent to discuss the sequential development of the regime of straits prior to and after the 1982 Convention in order to identify the juridical status of the Straits of Malacca as straits used for international navigation before further discussion on the issue of piracy and armed robbery against ships in these Straits is undertaken.

⁷⁷ George (2008) 3.

⁷⁸ Art 37 of the 1982 Convention confers the transit passage right 'not to be impeded' as long as the passage through the strait is 'solely for the purpose of continuous and expeditious transit.'

⁷⁹ Although Art 34 preserves the legal status of waters forming straits used for international navigation, the straits state cannot impeded the passage of foreign vessels unless they breach local regulations made under the provisions of Art 42 of the 1982 Convention, namely maritime traffic, pollution, fishing and custom and immigration rules; George (2008) 26.

2.3.1 THE CRITERIA FOR INTERNATIONAL STRAITS

Historically, the idea of setting up a legal framework to govern the regime of straits was proposed by the Institut de Droit International in 1894.⁸⁰ Later, when the sub-commission of the Hague Codification Conference 1930 was considering some technical aspects of measuring the breadth of territorial sea, the issue of straits was again highlighted.⁸¹ The key issue which remained unresolved was the question of what constituted an international strait and the right of passage derived from it. Although various tests were suggested to answer to this question,⁸² the legal position of a strait was ambiguous until the first judgement of the International Court of Justice (ICJ) in the Corfu Channel Case 1949.⁸³

2.3.1.1 DEFINITION OF CUSTOMARY INTERNATIONAL LAW: THE *CORFU CHANNEL CASE*

The case arose from the incident in which damage was caused to the British warships HMS *Saumarez* and HMS *Volage* by the minefield in the Corfu Strait. The question

⁸⁰ Office for Ocean Affairs and the Law of the Sea, United Nations, *The Law of The Sea: Straits Used for International Navigation, Legislative History of Part III of the United Nations Convention on the Law of the Sea*, vol. I (United Nations, New York 1992) 1 [hereafter referred to as '*Legislative History of the Regime of Straits*'].

⁸¹ In the 1930 Conference it was suggested that the coastal state should not prevent the passage of foreign vessels in straits used for international navigation: *ibid.* at 1-2.

⁸² See for example; the definition of straits as being those which did not exceed double the territorial sea in width, while an international strait was distinguished by the formula 'habitual passage for a route which is indispensable for maritime communications', The Institut de Droit International 1894-1912: O'Connell (1982) 301; There was no need for definition of a strait as the Shucking Report to the Committee of Experts suggested that the right of passage be based on the difference between the territorial waters and internal waters which rely upon the singularity or plurality of states. Only in the latter category has the right of innocent passage existed. Sub-Commission II of The Hague Codification Conference 1930: see *Legislative History of the Regime of Straits* (vol 1) 2-4.

⁸³ (*Great Britain v Albania*) (Merits) [1949] ICJ Rep 4; see also [1949] ICJ Rep 99 (Judge Azevedo).

before the ICJ was to decide on the status of straits used for international navigation and the right of passage over such straits.⁸⁴ The ICJ in this case ruled that:

It is in the opinion of the Court, generally recognized 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 authorization 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.⁸⁵ (Underline added)

The underlined words are intended to show three important principles that may be derived and argued from this case. The first is that the judgment is believed to be the decisive step that confirmed the customary international law rules of innocent passage relating to straits used for international navigation that connect two parts of the high seas. Wolfke pointed out that the words ‘generally recognized and in accordance with international custom’ indicate the existence of established rules of international custom universally accepted.⁸⁶ Also, the view expressed by Munro that straits which connect two portions of the high seas have ‘the force of international common or customary law’ whereby ships should not be prohibited or suspended from passing through territorial waters, is inclined to generalize the law for all straits.⁸⁷ In a practical sense, international practice or custom is variable and subjective, in accordance with the historical background and customary practice of a state or a

⁸⁴ The issues involved were: ‘(1) Whether the Corfu Channel constituted an international strait or not; (2) whether the UK was entitled to send their warships through the channel and claim the right of innocent passage for the same; and (3) whether there was a violation of Albanian Sovereignty as Albania claimed to require notification and authorization for passage by foreign warships and merchant vessels’: see George (2008) 28.

⁸⁵ *ibid.*

⁸⁶ K Wolfke, *Custom in Present International Law* (2nd edn Martinus Nijhoff, London 1993), 27-29; see also Art 38 (1)(b) of the Statute of International Justice: the Court shall apply *inter alia* ‘international custom as evidence of a general practice accepted as law.’

⁸⁷ HA Munro, ‘The Case of the Corfu Minefield’ (1947), 10 MLR 372. It is to be noted that this article was published before the 1949 judgement on the Corfu Channel.

region.⁸⁸ Therefore, the court, in simply giving its opinion on the binding force of the international custom without stating the grounds on which it was based, was unjustified.⁸⁹

The second and third principles derived from the case were on the definition of international strait and the nature of passage through such a strait. Albania had contended that there were at least two types of straits, one being a natural route of passage connecting two parts of the high seas and the other being crucial and necessary for international commerce. Albania argued that only those straits which were important to commerce and linked two parts of the high seas, making passage through them indispensable, were international straits.⁹⁰ Although Britain did not dispute Albania's contention, it argued that so long as a strait provided a 'necessary or natural route for international maritime traffic', that particular strait could be considered an international strait.⁹¹ Britain further argued that the Corfu Channel met this criterion because it was of 'not inconsiderable importance to the Mediterranean navigation'.⁹² Both parties tried to support their arguments by pointing out the functional aspects⁹³ of the Corfu Channel as well as the weight of interests in the

⁸⁸ It has been emphasized that there was no uniform regime for straits in international law: see *Legislative History of the Regime of Straits* (vol 1) 7 para. 36.

⁸⁹ As compared to *the Corfu Channel Case*, *the North Sea Continental Shelf* case is probably the best example on how the court determines a particular practice to become a customary international law. See discussion in B Cheng, *Custom: The Future of General State Practice in a Divided World* in R St J Macdonald and DM Johnston (eds), *The Structure and Process of International Law* (Brill 1986) 513-554.

⁹⁰ ICJ Pleadings, iv 383.

⁹¹ ICJ Pleadings, iv 550.

⁹² *ibid.*

⁹³ Jia suggested that there existed agreement on both sides that one of the criteria of international straits was that such straits must demonstrate appreciable use: Jia (1998) 38.

international community. In discussing this issue, George also lists seven criteria that were relevant in order to determine whether a strait is an international strait.⁹⁴

1. it was of great navigational importance;
2. the volume of traffic was high;
3. the traffic was international, national or mixed;
4. the strait was the only route;
5. the strait was a necessary route;
6. the strait was the alternative route; and
7. the strait was a useful route.

Despite all other possible criteria for establishing the status of a strait, only two criteria were considered important by the ICJ, namely that it connected two parts of the high seas coupled with the fact that it was used for international navigation.⁹⁵ The fact that the Channel was only used by a few flag states had sufficiently qualified such a Channel to be an international strait in which the right of innocent passage for all ships, including warships, was applied.⁹⁶ The simplification of the case, as Kaye asserts, 'led many publicists to the conclusion that any waters used periodically by international shipping were subject to a right of innocent passage...'.⁹⁷ Thus, although a strait was merely providing an alternative route for ships' navigation, as in the case of the Corfu Channel, it would still be regarded as an international strait. It is suggested that, although it may be agreed that the judgement in the Corfu Channel Case nearly solved the issue on determining the legal status of international strait, this may not have been applicable to all international straits in the world at that time.⁹⁸

⁹⁴ George (2008) 28.

⁹⁵ ICJ Rep 1949 28-29.

⁹⁶ S Kaye, 'Regulation of Navigation in the Torres Strait: The Law of the Sea Issues' in D Rothwell & S Bateman (eds.) *Navigational Rights and Freedoms and the New Law of the Sea* (Kluwer Law International, The Netherlands 2000), 121.

⁹⁷ *ibid.* See also: George (2008) 27.

⁹⁸ The debate on this case is discussed in paragraph 3.1.2 below. For example, Mr Zourek argued that, 'it was wrong to base a general rule' on a decision of the ICJ in the Corfu Channel Case and 'especially to apply the rule formulated by the Court to all straits...' See Summary Record of the 273rd meeting UN Doc. A/CN.4/SR.273.

Therefore, a legal regime for straits was still needed to clear up the ambiguity of the law relating to straits used for international navigation.

2.3.1.2 THE REGIME OF STRAITS IN THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: INNOCENT PASSAGE AND TRANSIT PASSAGE

It is unsurprising that, during the progress meeting of the Geneva Convention 1958, the geographical test applied by the ICJ as the decisive criterion in determining the status of international straits led to disagreement among those delegations present.⁹⁹ It has been argued that it is wrong to rely totally on the decision of the ICJ in the Corfu Channel Case on the definition of straits and to apply the principle in this case to all straits equally.¹⁰⁰ This is particularly important when it is realized that there are more than 260 straits in the world.¹⁰¹ Thus, it is clear that some straits will be significant because of geographical factors such as strategic location. Others will be insignificant for international trade, for instance those straits which lead to the internal waters of a state. During the 308th meeting of the 1958 Convention, it was noted that there were three types of straits. The first of these was subject to international conventions. The second was not subject to international conventions, but was important to international navigation. The third was not used for international navigation.¹⁰² Although there was some suggestion that the most appropriate and flexible question for determining the

⁹⁹ Yearbook of ILC 1955, vol.1, 151; S Rosenne, *League of Nations Conference for the Codification of International Law*, The Hague, 1930 (Oceana Publications, New York, 1975), ii, 58. Jia (1998) 24, 34; for discussion prior to the Corfu Channel case see P Cobbett, *Cases on International Law* (6th edn W Walker, Stevens, London 1947) I 165.

¹⁰⁰ Yearbook of the ILC (vol.1 United Nations publication 1954) 272nd meeting paras 47-48 and 273rd meeting, paras 33-34,38; *Legislative History of the Regime of Straits* (vol 1) 6-7.

¹⁰¹ P Boisson, *Safety at Sea Policies, Regulations and International Law* (Bureau Veritas, Paris 1999) 5.

¹⁰² *Yearbook of the ILC*, 1955 vol.1 (United Nations publication) 308th meeting, paras 14 and 15; *Legislative History of the Regime of Straits* (vol 1) 7; O'Connell (1982) 314.

criteria for international straits was the ‘degree of importance’¹⁰³ as a functional aspect of the straits for international commerce,¹⁰⁴ a proposal to reject the notion of international strait as defined in the Corfu Channel Case was defeated during the 1958 Convention. The rule in favour of innocent passage for foreign vessels, including warships, in straits used for international navigation which was laid down in the Corfu Channel Case was adopted in Article 16 (4) of the 1958 Convention.¹⁰⁵ The provision of Article 16(4) reads as follows:

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 seas of a foreign State.¹⁰⁶

Similar to the ICJ decision, the above provision derives two principles. The first is the geographical aspect of the straits in that they are connecting one part of the high seas and another part of the high seas or the territorial seas of foreign states.¹⁰⁷ The second is the right of passage for foreign ships through such a strait. It does not give any specific and direct definition of a strait. Moore pointed out that this type of provision had not reached certainty over the definition of straits used for international navigation.¹⁰⁸ It merely restated the existing customary international law which deals with the right of innocent passage through the strait. The meaning of innocent passage is described in Article 14 (4) of the 1958 Convention as a passage that is ‘not

¹⁰³ Jia (1998) 34.

¹⁰⁴ *ibid.* The Netherlands acknowledged that there was in customary international law the ‘right of free passage for all ships only in straits which may be regarded as main routes of communication.’ This statement was made in reply to the Hague Questionnaire before the 1930 Codification Conference: see S Rosenne (1975) 58.

¹⁰⁵ JN Moore, ‘The Regime of Straits and the Third United Nations Conference on the Law of the Sea’ (1980) 74 AJIL 112.

¹⁰⁶ Emphasis added.

¹⁰⁷ Art 16(4) is different from the ICJ decision in the Corfu Channel case in the sense that it extended the right of passage through straits to include not only the straits connecting ‘two parts of the high seas’ but also ‘the territorial sea of a foreign state’.

¹⁰⁸ Moore (1980) 112.

prejudicial to the peace, good order or the security of the coastal State. Interestingly, this provision has identical wording to Article 19 of the 1982 Convention. It would appear that, despite having similar meanings of innocent passage, the applicability of this right in the respective Conventions was different. Unlike the right of innocent passage in the 1958 Convention, a similar right provided in Article 19 of the 1982 Convention is not extended to the straits used for international navigation. It only provides the right of innocent passage in the territorial sea.¹⁰⁹ It is suggested that the right of innocent passage applicable for straits as stated at the 1958 Geneva Convention protects the interests of coastal states as it requires foreign ships to comply with the laws and regulations enacted by the coastal state while in transit.¹¹⁰

However, for the maritime states, the wording of the provision in the 1958 Convention was very subjective and left room for interpretation by coastal states.¹¹¹ The hypothetical issue was that states could justify the suspension of foreign shipping for security purposes.¹¹² Although this had never happened, it was a real concern of the maritime states.¹¹³ They argued that to assimilate the right of passage through straits used for international navigation with the regime of innocent passage in the territorial sea is a constraint on the freedom of passage of foreign vessels.¹¹⁴ Thus, although the

¹⁰⁹ Section two, Part II of the 1982 Convention

¹¹⁰ See Art 17 of 1958, which stipulates that 'Foreign ships exercising the right of innocent passage shall comply with the law and regulations enacted by the coastal state...'

¹¹¹ Art 23: 'If any warship does not comply with the regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance which is made to it, the coastal State may require the warship to leave the territorial sea'. See too Leifer (1978) 89.

¹¹² Moore stated that, 'To permit strait states discretion to control shipping or aircraft could lead to expanded conflict': Moore (1980) 81. See also Anand (1987) 206.

¹¹³ RJ Dupuy & D Vignes, *A Handbook on the New Law of the Sea* (Martinus Nijhoff 1991) 972; Moore (1980) 79; 81.

¹¹⁴ The government of Israel had suggested that the passage through straits (even those that lead to the harbour of a state) may be assimilated to the high seas because the interest of the international community had to have absolute priority over those of the coastal states. See: *Yearbook of ILC* (1956) vol. 2 (doc A/CN.4/99) 52.

Geneva Convention of 1958 adopted the right of innocent passage through straits used for international navigation, which has its roots in the judgement of the ICJ in the Corfu Channel case, this has been widely criticised, especially by maritime states.¹¹⁵

The emergence of newly independent countries, and the consequent changes in geography, requires a comprehensive and universal law to govern the sea and at the same time to improve the shortcomings of the 1958 Convention.¹¹⁶ In 1971, the task of dealing with the issue of the breadth of the territorial sea and the regime of straits was assigned by the General Assembly to Sub-Committee II of the Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction (Seabed Committee). The right of innocent passage conferred by the 1958 Convention was thought to be no longer adequate. This can be seen in a series of discussions prior to the 1982 Convention, for example in the statement made by the representative of the United States at the beginning of the Conference in 1971.¹¹⁷ ‘The regime of innocent passage is unsatisfactory when applied to international straits’.¹¹⁸ For the maritime states, any restriction on the right of navigation, especially in straits used for international navigation, was a handicap which might have had a severe effects on their economic, political, and military interests.¹¹⁹ Thus, a separate regime for straits was necessary. O’Connell shares this view as he believes that to recognize

¹¹⁵ Leifer (1978) 90. The term ‘Maritime States’ refers to the states whose economic interest largely depends on maritime trade.

¹¹⁶ Official records of the 1982 Convention, vol.1, Summary Records of meeting of the 2nd session, Caracas 1973; A Boyle ‘Further development of the 1982 Convention on the law of the sea: Mechanisms for change’, in D Freestone, R Barnes and DM Ong, *The Law of the Sea; Progress and Prospects* (Oxford University Press, Oxford 2006) 43.

¹¹⁷ It is to be noted that the United States is a party to the 1958 Convention on the Territorial Sea and the Contiguous Zone which establishes a general regime of ‘innocent passage’ for transit through the territorial water. However it is not a party to the 1982 Convention.

¹¹⁸ De Yturriaga (1991) 241.

¹¹⁹ KM Burke and DA DeLeo ‘Innocent Passage and Transit Passage in the United Nations Convention on the Law of the Sea’ (1983) 9 Yale J. World Pub.Ord. 389, 400.

the regime of innocent passage in international straits, as envisaged in the 1958 Convention, had ‘potentially degraded’ the standard of passage in customary law.¹²⁰ This opinion seems to contradict the proposition that the 1958 Convention is a product of customary law laid down in the Corfu Channel Case.¹²¹ In his evaluation, O’Connell explained that the 1958 Convention failed to differentiate between an autonomous institution of straits in customary law and the rule of innocent passage in territorial seas.¹²² Indeed, passage through the strait is neither high sea passage nor innocent passage through territorial seas. On the other hand, Churchill and Lowe regarded the provisions on the right of innocent passage in the 1958 Convention as being a corollary to the customary practice of many states.¹²³ They further argued that:

In relation to this core of disagreement over the precise legal status of international straits and rights of passage through them, the balance of juristic opinion seemed to favour the conclusion that customary law prior to UNCLOS III accorded only a non-suspendable right of innocent passage through them. (Underline Added)

It appears that the views of O’Connell and of Churchill and Lowe are reflections of the arguments put forward, respectively, by the maritime states and the states bordering the straits. Despite the competing interests on this issue, by the end of the 1982 Convention, consensus over the right of passage in those straits used for international navigation was finally reached. Article 37 employs two key criteria for the regime of straits - a strait must be used for international navigation and must connect two parts of the high seas or EEZ. De Yturriaga points out three constructed elements of the words ‘straits as used for international navigation’ established under

¹²⁰ O’Connell (1982) 299.

¹²¹ See discussion at page 25-27 above; Churchill & Lowe (1999) 84.

¹²² O’Connell (1982) 314.

¹²³ Churchill & Lowe (1999) 84.

the provisions in Part III of the 1982 Convention.¹²⁴ There are a geographical element, a legal element and a functional element. The geographical element, for him, is not as crucial as the functional element. He further argued that, although the 1982 Convention enshrines the fact that a strait in which the regime of transit passage applies must be one that is ‘used for international navigation’, the degree of use is not clarified. While he successfully analyzed the scholarly view on this issue, he clearly did not suggest any solution pertaining to this. It is therefore submitted that the lack of definition given to the words ‘straits used for international navigation’ may be the best approach to avoid future conflicts inherent in different types of straits. Koh expressed a similar view when he commented upon the proposition made by Arvid Pardo – to list all straits that have been considered as straits used for international navigation in an annex to the Convention – by saying that such a suggestion might ‘freeze what is essentially a dynamic situation’.¹²⁵ By this, he refers to the plausible situation in which a strait that is not being used for international navigation at present might be so used in the future. Thus, the general meaning of straits in the 1982 Convention is sufficient to determine the legal status of straits used for international navigation.

Unlike the 1958 Convention, which prescribed equal rights of innocent passage through straits as well as territorial seas, the 1982 Convention distinguished between these two rights by highlighting the geographical importance and legal nature of a strait as an international highway. The right of passage adopted in the 1982 Convention gives all ships and aircraft of user states the ‘freedom of navigation and

¹²⁴ Yturriaga (1991) 8.

¹²⁵ T B Koh, ‘The Territorial Sea Contiguous Zone, Straits and Archipelagoes under the 1982 Convention on the Law of the Sea’ 29 (1987) MLR 163, 180.

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' under the regime of transit passage.¹²⁶ Such right shall not be impeded.¹²⁷ Koh commented that the exception to the 'continues and expeditious' requirement may be illustrated in the case of ships coming from the Indian Ocean and then transiting through the port of Singapore before proceeding into the South China Sea.¹²⁸ In such a case, the non-continuance of the navigation of the ships is not against the transit passage regime. Burke and DeLeo point out that 'this provision apparently supplies the basic guarantee of freedom of navigation sought by maritime nations' which is applicable without discrimination to all ships and aircraft.¹²⁹ The words 'all ships and aircraft' in the 1982 Convention are inserted with the intention of clarifying the freedom of navigation and overflight in straits used for international navigation, which includes warships and military vessels and aircraft. Although, at a glance, such rights are akin to the right of passage over the high seas in Article 87 of the Convention and Article 2 of the 1958 Convention on the High Seas, the duties imposed on foreign vessels and aircraft to 'proceed without delay'¹³⁰ and to 'refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of states bordering the strait, or in any

¹²⁶ Art 38 of the 1982 Convention: 1. In straits referred to in Art 37, all ships and aircraft enjoy the right of transit passage, which shall not be impeded; except that, if the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if 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. Art 37 describes the scope of the transit passage.

¹²⁷ *ibid.*

¹²⁸ Koh (1987), 182.

¹²⁹ KM Burke and DA DeLeo 'Innocent Passage and Transit Passage in the United Nations Convention on the Law of the Sea' (1983) 9 Yale J. World Pub.Ord. 389, 402; See also Robertson 'Passage Through International Straits: A Right Preserved in the Third United Nations Conference on the Law of the Sea' (1980) 20 Va.J. Int'l L. 801,837.

¹³⁰ Art 39 (1) (a).

other manner in violation of the principles of international law¹³¹ are sufficient to differentiate between the passage through the straits and that over the high seas.

Notwithstanding the recognition of the right of transit passage of foreign vessels and the rule that coastal states should not hamper and suspend transit passage,¹³² the 1982 Convention confirms that this will not affect the sovereignty or jurisdiction of states bordering the straits.¹³³ Moreover, the ships exercising this right are bound to refrain from the threat or use of force against States bordering the straits or in any other manner which violates the principles of international law embodied in the UN Charter.¹³⁴ The transit passage right is also required to be exercised in normal modes of continuous and expeditious transit unless rendered necessary by force majeure or distress.¹³⁵ In the absence of the breach of these duties, there is no right prescribed for the coastal states to hamper the passage of foreign vessels.¹³⁶

However, the duties of ships which need to be observed by the user states during transit passage as set forth in Article 39 has been criticized by some commentators as fruitless.¹³⁷ It is construed by Reisman as having similar weight to the regime of

¹³¹ Art 39, para. 1 (b).

¹³² Art 44.

¹³³ Art 34.

¹³⁴ Art 39,(1)(b) of the 1982 Convention.

¹³⁵ Art 39(1)(c) of the 1982 Convention. Some commentators argue on the question of whether a submerged submarine has similar transit passage right to traverse the strait since there is lack of provision concerning this in the 1982 Convention. Some propose that what is normal to the mode of passage for a particular vehicle is presumably permitted. But for others, such right of passage of a submarine may be inferred to derogate the sovereignty and security of the coastal state: Burke and DeLeo (1983) 403; Reisman (1980) 71; SN Nandan and DH Anderson 'Straits used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea 1982' in H Caminos (ed.) *Law of the Sea* (Dartmouth Publishing, Hants 2001) 92.

¹³⁶ *ibid.*

¹³⁷ Burke and DeLeo (1983) 403.

innocent passage.¹³⁸ Reisman considers that the provision of Article 44, for example, conferred on a state a right to refuse passage to a foreign ship if the passage of such a ship clearly departs from those duties.¹³⁹ His attempt to distinguish the duty not to hamper 'transit passage' in Article 44 of the Convention from the 'passage' in general is criticized by Moore as illogical conferment of power on strait states.¹⁴⁰ Shaw also agrees with Moore that, in a transit passage regime, foreign vessels cannot be suspended for security or indeed any other reasons.¹⁴¹ Shaw also added that, despite the absence of provision for 'innocent' in a transit passage regime, some provisions appear to subject such a regime to the same constraints as with innocent passage.¹⁴² As for Churchill and Lowe, the failure to observe the 'criterion of innocence'¹⁴³ may become factors that incorporate the right of transit passage into the general provision of innocent passage.¹⁴⁴

Despite the above arguments which are clearly made in favour of maritime nations or user states, the sovereignty of the strait states in regulating the rule for transit passage is not absolute. The argument put forward by Moore and Shaw may seem unfair to the states bordering the straits. If the passage of a foreign vessel in the Straits of Malacca threatens the security of the coastal state or that of other vessels, the denial of the right to exercise the power of state sovereignty is detrimental to such states. A hypothetical

¹³⁸ *ibid*; W Michael Reisman, 'The Regime of Straits and National Security: An Appraisal of International Lawmaking (1980) 74 AJIL 48, 70.

¹³⁹ Reisman (1980) 70.

¹⁴⁰ JN Moore, 'The Regime of Straits and the Third United Nations Conference on the Law of the Sea' (1980) 74 AJIL 112: 'It does not follow as a matter of logic that the existence of flag state duties in Art 39 gives strait states a right to determine violations of such duties unilaterally and to seek to enforce them by denial of passage.'

¹⁴¹ MN Shaw, *International Law* (5th edn Cambridge University Press, Cambridge 2003) 514.

¹⁴² *ibid*.

¹⁴³ They refer to Art 44 of the 1982 Convention.

¹⁴⁴ RR Churchill and AV Lowe, *The Law of the Sea* (Manchester University Press, Manchester 1999) 91.

case may be drawn in the case of armed robbery at sea. A vessel from the Indian Ocean passing through the Malaysian territorial sea may pretend to be in transit passage towards the South China Sea; however in the course of transiting, it may suddenly start attacking other vessels. In such a situation the need to suspend such a vessel seems crucial. Thus it is submitted that the right of coastal states to exercise enforcement power in a case like that illustrated above is rather problematic if it has to be dealt with under the regime of transit passage.¹⁴⁵ Although Article 38, paragraph 3, expressly states that ‘any activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of this Convention’,¹⁴⁶ the issue at stake remains the difficulty of differentiating whether passages of ships or aircraft represent transit passage or innocent passage. This is particularly relevant to the Straits of Malacca, since they are wholly situated in the territorial sea of Malaysia, Indonesia and Singapore.

In addition to this, the strait states may find themselves under pressure to ensure that the ships transiting the straits have a safe navigation. For example, Article 42 provides that the States may adopt the laws and regulations relating to transit passage in respect of safety of navigation and the regulation of maritime traffic, prevention and control

¹⁴⁵ It is noteworthy that, under the regime of transit passage, the coastal states may only adopt law and regulations in four situations. The first is to establish a traffic separation scheme that is approved by IMO for navigational safety; the second is to adopt a law for the purpose of prevention of pollution in the strait; the third is on fishing vessels and final one is on the loading and unloading of commodities, currency and persons: see Art 42; Beckman argued that the right of a coastal state to enforce its law over the vessel in transit passage is very limited. If the foreign ship violates its duties in Art 39 outside the port of a coastal state and the violation causes only minor damage to the surrounding environment of the Straits, the State still cannot arrest the ships. Nevertheless the State may make ‘formal complaint to the flag state’ or use the ‘compulsory binding dispute settlement under part XV of the 1982 Convention’. See R Beckman, ‘Transit Passage Regime in the Straits of Malacca: Issues for consideration’ MIMA Conference, Kuala Lumpur, 11-15 October 2004, 5.

¹⁴⁶ Illegal acts such as armed robbery or piratical activity occurring in the Straits may be dealt with by the relevant state under the regime of innocent passage, as in Part II of the 1982 Convention in which the state may enforce its law on the criminal.

of pollution, fishing and security in regard to smuggling, illegal immigration, and fiscal or sanitary laws.¹⁴⁷ In fact, the States are expected to give due publicity to that law¹⁴⁸ and any possible danger to navigation and overflight because any act of hampering the passage of foreign vessels transiting the straits which the States believe have breached their law is unjustified if no publicity on such laws is provided.¹⁴⁹

It may be submitted that, under the 1982 Convention, passage through straits used for international navigation is not a codification of customary law but merely a treaty or contractual relationship as a result of a successful compromise between the interests of most of the participating states.¹⁵⁰ The right guarantees the freedom of navigation of foreign ships through the straits used for international navigation while at the same time taking into account the interests of coastal states.¹⁵¹

¹⁴⁷ Art 42(1)(a)-(d) of the 1982 Convention.

¹⁴⁸ Art 42(3) of the 1982 Convention.

¹⁴⁹ Art 44 of the 1982 Convention.

¹⁵⁰ For example: the littoral states in the Straits of Malacca and the maritime states e.g. the USA and the UK had agreed on matters relating to the safety of navigation and prevention of pollution, *Legislative History of the Regime of Straits* (vol 2) 143. See also Dupuy & Vignes (1991) 972; T Treves 'Notes on Transit Passage through Customary Law' in A Bos and H Siblezy (eds) *Realism in Law-Making* (Martinus Nijhoff, The Hague 1986) 247.

¹⁵¹ MJ Valencia, *Malaysia and The Law of the Sea: The Foreign policy issues, the options and their implications* (Institute of Strategic and International Studies, Malaysia 1991) 126-131.

2.3.1.3 THE RIGHT OF PASSAGE FOR NON-PARTY STATES TO THE 1982 CONVENTION

Having been largely adopted and ratified by the 165 States,¹⁵² the issue arises as to whether this newly-created regime might become customary international law after its adoption by most of the states in the world. Although this issue is irrelevant to the parties of the 1982 Convention who are definitely bound by its terms, it is of great concern to the non-parties to the Convention. The US, for example, while still not a party to the 1982 Convention, expressly declared that the basic rule of transit passage through straits used for international navigation in the 1982 Convention had undergone a transformation into customary international law due to the ‘practice of States, supported by the broad consensus achieved at the Third United Nations Conference on the Law of the Sea.’¹⁵³ Jia opposed this view since the consensus to establish the transit passage regime for straits used for international navigation in the 1982 Convention is for the benefit of states that have signed and ratified the Convention.¹⁵⁴ The refusal of other states, non-parties to the 1982 Convention, to sign and ratify the Convention reflects their unwillingness to implement the provisions in such a Convention. Similar to Jia, George also discusses the US view on this issue by highlighting several commentators’ opinions.¹⁵⁵ Caminos’s view is in line with the US, as he believes that the consistent practice of transit passage is well on the way to creating the emergence of a customary international law.¹⁵⁶ Unlike Caminos, De Yturriaga does not give an absolute view but his opinion is that the answer lies in the

¹⁵² To date, 165 states have already ratified the 1982 Convention. The latest is Timor-Leste which ratified the 1982 Convention on 8 January 2013: see www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm accessed on 14 June 2013.

¹⁵³ BB Jia *The Regime of Straits in International Law* (Clarendon Press Oxford 1998) 207.

¹⁵⁴ *ibid.*

¹⁵⁵ George (2008) 115.

¹⁵⁶ Caminos (1987) 231-232. See also Jia (1998) 208 and George (2008) 118.

trend on this issue in state practice.¹⁵⁷ A similar view is held by Shaw who states that, since state practice on transit passage is uncertain, the view that this regime has slipped into customary international law is unconvincing.¹⁵⁸ Meanwhile, Pastor clearly rejected the view that transit passage is now customary, as he considers that the principles in the Corfu Channel Case for a conventional rule must be fulfilled.¹⁵⁹ He insists that, although the new regime reflects general customary law, it has no binding effect on the non-party states.¹⁶⁰ Zou shares this view by arguing that the states not party to the 1982 Convention are not bound by its terms.¹⁶¹

It is submitted that the careful opinion of Churchill and Lowe is most timely. Although the general right of transit passage has not yet become an established customary international law, in some parts of straits that are important for navigation, an equivalent legal regime to transit passage does in fact exist.¹⁶² However, to affirm the view that the transit passage regime in the 1982 Convention has been crystallised into customary international law due to the large practice of states is considered inapt. As Churchill and Lowe rightly argue, it is difficult to determine ‘whether a State party to the Convention permits passage because it considers itself obliged by customary

¹⁵⁷ JA de Yturriaga, *Straits Used for International Navigation: A Spanish Perspective* (Martinus Nijhoff, London, 1991) 308-330.

¹⁵⁸ MN Shaw, *International Law* (5th edn Cambridge University Press, Cambridge 2003) 514. See also George (2008) 116.

¹⁵⁹ George (2008) 118. See also P Tillman ‘Straits of Malacca and the Law of the Sea’ (1994) 68 *Australian Law Journal* 885, 887.

¹⁶⁰ *ibid.*

¹⁶¹ Keyuan Zou, ‘Seeking effectiveness for the Crackdown of Piracy at Sea’ (2005) 59 *Journal of International Affairs*, 117 at 123.

¹⁶² For example, at the time when the UK extended its territorial sea from three to twelve miles, the UK and France entered an agreement to grant rights equivalent to a right of transit passage in the Straits of Dover to other states: Joint Declaration of 2 November 1988, (1989) 14 *LOS* 14; see also Churchill and Lowe *The Law of the Sea* (3rd Edn Manchester University Press Manchester 1999) 112-113. DH Anderson, ‘The Strait of Dover and the Southern North Sea: Some Recent Legal Developments’ (1992) 7 *IJECL* 85-98.

law to do so or because it is bound by the Convention to so.’¹⁶³ Thailand, although previously affirming the right of transit passage through straits bordered by Thailand to ships of all states¹⁶⁴ has recently, on 15 May 2011, ratified the 1982 Convention.¹⁶⁵ It may be considered that the recent ratification by Thailand may negate the view that the regime of transit passage in straits has become customary international law. Moreover, the United Nations still calls upon all states that have not become party to the 1982 Convention to do so ‘in order to achieve the goal of universal participation.’¹⁶⁶ It may be summed up that, for the non-party states, the principle previously applied to the international straits is the customary international law for them, namely the right provided in the Corfu Channel Case, unless and until they ratify the 1982 Convention or enter into an agreement with particular coastal or strait states.

¹⁶³ Churchill and Lowe (1999) 112.

¹⁶⁴ *ibid.* 113.

¹⁶⁵ Chronological list of ratification of 1982 Convention in <www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm> accessed on 6th June 2011; see also ‘foreign Minister confirms Thailand’s readiness in promoting maritime security’ in the website of Ministry of foreign Affairs Kingdom of Thailand <www.mfa.go.th/web/2642.php?id=39528> accessed on 6th June 2011.

¹⁶⁶ See Maritime Space: Maritime Zones and Maritime Delimitation (updated 08 January 2010) in <www.un.org/Depts/los/LEGISLATIONANDTREATIES/status.htm> accessed on 6th June 2011.

2.4 THE LEGAL REGIME OF THE STRAITS OF MALACCA

Throughout history, some straits have continuously possessed the criteria of straits used for international navigation. The Straits of Malacca, as previously discussed,¹⁶⁷ is one of the most important and strategic straits in the world. Since the 1982 Convention does not give any particular definition to the straits used for international navigation, the general meaning to be deduced from Article 37 of the 1982 Convention is that the regime of straits in Part III is applicable to straits which are used for international navigation between one part of the high seas or an EEZ and another part of the high seas or an EEZ. Apart from the geographical context, the regime of straits under Part III requires that the straits are not to be governed by any long-standing international convention,¹⁶⁸ and there must not exist any high seas or EEZ routes through such straits.¹⁶⁹

In general, the fact that the Straits of Malacca provide the shortest and most convenient route between the Indian and Pacific Oceans, coupled with their importance to navigation since time immemorial, has arguably placed the Straits under Part III of the 1982 Convention. Indeed, the strategic location of the Straits has made them increasingly important to international trade and communication. A considerable number of ships traverse the Straits in both directions.¹⁷⁰ Moreover, the exceptions to

¹⁶⁷ See the earlier discussion on the significance of the Straits of Malacca in their geographical, climatic and historical context in Chapter 1(para 1.4).

¹⁶⁸ Art 35 (c) of the 1982 Convention. See, for example, the Montreux Convention of 1936 which deals with the Turkish Straits.

¹⁶⁹ Art 36 of the 1982 Convention.

¹⁷⁰ In 2010, there was a total of 74,136 vessels passing through the Straits of Malacca as compared to 55,957 vessels ten years before: 'Type and Total of Vessels Movement Report to Klang VTS' (From January 1999 to December 2010), released by Marine Department, Peninsula Malaysia; See also Leifer (1978) 32, 51; N Unlu, 'Current Legal Developments- Straits of Malacca' (2006) 21 Int'l J. Marine & Coastal L, 539.

the general rule in Part III are undoubtedly not applicable to the Straits of Malacca. George points out that, although the regime of innocent passage previously prevailed for foreign vessels transiting the Straits,¹⁷¹ the coming into force of the 1982 Convention and the ratification of this Convention by the littoral States has consequently made the regime of transit passage contained in the Convention binding upon these States.¹⁷²

2.4.1 THE EFFECT OF EXTENSION OF THE BREADTH OF THE TERRITORIAL SEA TO THE STRAITS OF MALACCA: REVISITED

The right of passage, whether innocent passage or transit passage, differs according to the context, that is, whether there is absolute sovereign control by the coastal states. According to Anand, the right of innocent passage through the Straits of Malacca was a customary right that had long been practised by Southeast Asian states,¹⁷³ as should be evident from the existence of the Maritime Code of Malacca (*Undang-Undang Laut Melaka*), which had regulated the commercial usage and maritime practice among the traders in the Malacca Straits. This Code had laid down rules to maintain law and order on the high seas and also described the captain of a vessel as being sovereign at sea until the vessel entered a State port.¹⁷⁴ In other words, whereas previously there existed the freedom of navigation in the high seas, such freedom becomes limited when the vessel enters the territorial waters of coastal states. Although the territorial limit of the coastal states during that time was definitely less than the present limit, which gave foreign vessels more freedom of navigation, the

¹⁷¹ George (2008) 3.

¹⁷² Indonesia, Singapore and Indonesia ratified the 1982 Convention on 3 February 1986, 17 November 1994 and 14 October 1996 respectively.

¹⁷³ Anand (1981) 442.

¹⁷⁴ *ibid.* at 446.

nature and the volume of ships passing through the Straits at that time perhaps did not put the Straits at as great a risk as they may face today. Perhaps the terminology ‘innocent passage’ and ‘transit passage’ do not adequately describe the right of passage guaranteed by the states bordering the straits at that time.

The issue of the regime of straits is closely interrelated with the issue of the breadth of the territorial sea. The number of states participating in the progress meetings of the 1982 Convention was nearly double that of the 1958 Convention and this also lengthened discussion on this matter. The increase resulted from the emergence of the new developing states of the post-colonial period. Malaysia, Singapore and Indonesia had not participated in the formation of the 1958 Convention. However, they were actively involved in the deliberations leading to the 1982 Convention, which they later ratified. In fact, Tommy Koh, the permanent representative of Singapore to the negotiating conference, was appointed as the last president of the 1982 Conference on the Law of the Sea.

In dealing with the issue of the breadth of the territorial sea for the states bordering the Straits of Malacca, Malaysia confirmed in the 1971 session of the United Nations Seabed Committee that the national law of Malaysia had established a twelve-mile limit for its territorial sea.¹⁷⁵ This was pursuant to Regulation 3 of the 1969 Emergency (Essential Powers) Ordinance¹⁷⁶ which reads as follows:

¹⁷⁵ Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction, Summary Records of 58th meeting (UN Doc. A/AC.138/SR.45-60) at 71; *Legislative History of the Regime of Straits* (vol 1) 24.

¹⁷⁶ The need to fix a territorial sea limit for Malaysia was regarded as urgent at that time. Thus, because of the suspension of parliament in 1969, the government of Malaysia extended its

1. The breadth of the territorial waters of Malaysia shall be 12 miles and such breadth shall, except in the Straits of Malacca, the Sulu Sea and the Celebes Sea be measured in accordance with Articles 3, 4, 6, 7, 8, 9, 10, 11, 12 and 13 of the Geneva Convention on the Territorial Sea and Contiguous Zone 1958...
3. In applying the aforesaid articles, the expression 'Territorial Sea' occurring therein shall be construed as 'Territorial Waters'.

However, Malaysia further declared that the twelve-mile territorial sea would not affect the right of innocent passage for foreign ships.¹⁷⁷ Apart from Malaysia, it was estimated that since 1960 about 40 newly independent states had claimed a territorial sea of twelve miles.¹⁷⁸ Indonesia¹⁷⁹ declared in 1961 that,

The Indonesia territorial sea is a maritime belt of a width of 12 nautical miles, the outer limit of which is measured perpendicular to the baselines or points on the baselines which consist of straight lines connecting the outermost islands comprising Indonesian territory with the provision that in case of Straits of a width of no more than 24 nautical miles and Indonesia is not the only coastal state the outer limit of the Indonesian territorial sea shall be drawn at the middle of the Strait.¹⁸⁰

The narrowness of this Strait had caused an overlap of the territorial sea between Malaysia and Indonesia at the southern part.¹⁸¹ Therefore, Indonesia and Malaysia had agreed on a territorial sea boundary between the two states in the Straits of Malacca

territorial sea limit from three miles to twelve miles by the emergency ordinance. See Leifer (1978) 30.

¹⁷⁷ UN Doc. A/AC.138/SR.45-60, 58th meeting at 71; *Legislative History of the Regime of Straits* (vol 1) 24.

¹⁷⁸ Jia (1998) 10; cf. '[S]tate practice showed that by February 1969 as to the breadth of territorial sea...25 States claimed between 6 and 12 miles territorial sea..' SP Jagota, *Maritime Boundary* (1985 Martinus Nijhoff, Lancaster) 25.

¹⁷⁹ Indonesia had not only issued a declaration seeking recognition of the extension of its territorial water to 12 miles, but also used the concept of straight baselines on its archipelago principles which have later been recognized in the 1982 Convention. See Part IV of the 1982 Convention on the Archipelagic States.

¹⁸⁰ By Art 1, subsection 2 of the Act 4 of 18 February. The case in which 'Indonesia is not only the coastal state' particularly refers to the Straits of Malacca.

¹⁸¹ CR Woolley, 'Piracy in the Straits of Malacca without degrading the Sovereign Rights of Indonesia and Malaysia' [2010] *Santa Clara J. Int'l L*, 447,450; Leifer (1978) 53-54.

and south of One Fathom Bank on 17 May 1970 which came into force on 10 March 1971.¹⁸² In the case of Singapore, the 1878 United Kingdom Territorial Waters Jurisdiction Act is still applicable.¹⁸³ This Act conferred upon Singapore the territorial sea of one marine league, which is equivalent to three nautical miles.¹⁸⁴

The effect of these national enactments was that there was no longer a belt of high seas in the Straits of Malacca. The debate centred around the increasing number of states claiming a wider limit on the breadth of their territorial seas, and in this context the need for a regime of passage through straits used for international navigation became obvious. It was noted that the extension of the twelve-mile territorial sea breadth would result in the high seas corridor in some important straits ceasing to exist.¹⁸⁵ This was affirmed in a statement¹⁸⁶ made during the progress of the 1982 Convention that there were over 100 important international straits which would be impinged on by the extension of a twelve-mile territorial sea limit.¹⁸⁷ The impact of this was considered disastrous for maritime states because of their main concerns on

¹⁸² Leifer (1978) 30.

¹⁸³ English Common Law, equity and Statutes in force as at 27 November 1826 were adopted by Singapore pursuant to the 1878 Civil Law Ordinance, later developed as the Civil Law Act. Section 5 of the Civil Law Act was repealed on 12 November 1993 by the enactment of the Application of English Law Act Cap 7A. Section 4 of this Act specifies which English enactments continue to apply in Singapore and these include the 1878 United Kingdom Territorial Waters Jurisdiction Act.

¹⁸⁴ Office for Ocean Affairs and the Law of the Sea, United Nations, 'The Law of the Sea: National Claims to Maritime Jurisdiction, Excerpts of Legislations and Table of Claims' (New York, United Nations 1992) 118; Singapore's 3 nautical miles territorial sea claim dates from 1957: No.1485-SINGAPORE MARITIME ZONES (Government Gazette of 30 May 2008) (see Law of the Sea Bulletin No. 67).

¹⁸⁵ See Robertson (1980) 841-842.

¹⁸⁶ Made by a member of the United Kingdom delegation at the 29th meeting of the 1982 Convention: Official Records, vol.1 2nd session of meeting in Caracas.

¹⁸⁷ Official Records, vol.1 2nd session of meeting in Caracas; See also: YL Lee, 'Two views of the Malacca Strait', in LY Leng, *Southeast Asia: Essays in Political Geography* (Singapore University Press, Singapore 1982) 73-104; The ambassador for the United States opined that there were about 116 important international straits that would be affected by a twelve-mile rule. The above statement was made in order to explain the effects of a wider territorial sea claim on the straits which had taken place shortly before the 1960 Conference commenced: See Jia (1998) 9.

freedom of passage through straits used for international navigation which they claimed to be founded on rules of customary international law.¹⁸⁸

2.4.2 THE DEVELOPMENT OF THE REGIME OF PASSAGE IN THE CONTEXT OF THE STRAITS OF MALACCA

The denial of the notion of internalization of straits emerged when the United States in its draft proposal¹⁸⁹ insisted that it would agree on the twelve-mile rule only if a non-discriminatory right of unimpeded passage were guaranteed, particularly in straits used for international navigation.¹⁹⁰ The draft proposal of the United States literally required the same freedoms of navigation and overflight for all ships, including warships, through straits as they had in respect of the high seas.¹⁹¹ This proposal was opposed by many states, especially coastal states. Nevertheless, it has been argued that although, in the notion of free transit, the draft article posited a similar right as for the high seas, the freedom sought was actually less than that.¹⁹² This was explained by the Soviet Union representative, who had similar views to those of the United States, i.e. that such passage would also respect the sovereignty and the rules of the coastal states.¹⁹³ Somehow, the campaign by maritime states against the regime of innocent

¹⁸⁸ The representative of the Soviet Union during the second session in 1973 stated that the freedom of navigation in the important straits such as Straits of Malacca, Gibraltar and Bab al Mandeb was founded on a rule of customary international law. Cf. the argument of the representative of Spain who argued that the statement of the Soviet Union caused confusion: see the *Legislative History of the Regime of Straits* (vol.1) 124.

¹⁸⁹ United States Draft Article on breadth of Territorial Sea, Passage through Straits and Fisheries in the 1971 Session of the Seabed Committee.

¹⁹⁰ *Legislative History of the Regime of Straits* (vol 1) 11. The United Kingdom also asserted a similar proposition. Robertson (1980), 808-813.

¹⁹¹ Draft Articles on the Breadth of the Territorial Sea, Straits and Fisheries Submitted to Sub-Committee II by the United States of America, UN Doc A/8421/Annex IV (1971).

¹⁹² Robertson (1980), 812.

¹⁹³ Jia (1998), 133; Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction, Summary Records of the twenty-fifth to the twenty-seventh meetings (UN Doc A/AC.138/SCII/SR33-47), 1972 (statement by John R Stevenson) at 25-27 [hereinafter cited as *Report of the Seabed Committee 1972*].

passage had been regarded by some coastal states as ‘beneficial only to naval power’.¹⁹⁴ It was stated by the Malaysian representative that to deny the regime of innocent passage would mean ‘to sacrifice their national security interests to the global interests of merely a few states’.¹⁹⁵ Furthermore, Indonesia expressed its view that there was no basis for arguing that the regime of innocent passage through straits used for international navigation would be detrimental to the navigational freedoms of the international community.¹⁹⁶ The right of innocent passage in the Straits of Malacca had never caused any difficulties for international trade. Indeed, the right of innocent passage could balance the interests of both coastal and user states.¹⁹⁷ It is suggested that such a statement clearly reflects that the regime of transit passage proposed by United States was not a customary right, rather, it was a creation of new law to secure right of passage through this vital sea lane. Although it may otherwise be argued that the position of Singapore was neutral and sometimes to a degree inclined towards the view of maritime states,¹⁹⁸ such a reaction did not negate the long practice of innocent passage in the Straits of Malacca. Moreover, although the representatives of Singapore had termed their state a ‘strait state’, the fact that Singapore is one of the major ports in the world whose economic growth is largely dependent upon international trade has equally put the state in the position of being a user state.¹⁹⁹ The geographical situation of Singapore, which is surrounded by the territorial seas of its neighbouring states, has

¹⁹⁴ This was the view of Spain and Tanzania in 1972: Jia (1998), 133.

¹⁹⁵ This was referred to the maritime powers during that time, such as the United States and the Soviet Union: *Legislative History of the Regime of Straits* (vol 1) 95.

¹⁹⁶ *Legislative History of the Regime of Straits*, (vol 1) 93-94.

¹⁹⁷ *ibid.* 134.

¹⁹⁸ In commenting on the conflict of interest between the states bordering the strait and the maritime or user states, Singapore pointed out that generally both parties were agreed that in any situation freedom of navigation for foreign commercial vessels should be guaranteed: *Legislative History of the Regime of Straits* (vol. 2). 56.

¹⁹⁹ *Legislative History of the Regime of Straits*, (vol. 2) 7.

positioned the Straits of Malacca as a vital entrance to its port.²⁰⁰ Consequently, this argument may justify the position and stand of Singapore over the conflict between the coastal states and the maritime states.

The Straits of Malacca increasingly became a matter of international contention when, on 16 November, 1971, the Governments of Indonesia and Malaysia jointly declared that the Straits of Malacca and Singapore were not international straits, although they recognized the use of the straits for international navigation under the principle of innocent passage.²⁰¹ In this regard Singapore only took note of its neighbour's position,²⁰² but shared the view that the Straits of Malacca were the sole responsibility of the three coastal states.²⁰³ The objective of the joint statement was to adopt a common position on matters relating to the Straits of Malacca, which is a vital link in sea communication. It is interesting to note that the declaration was made almost simultaneously with the convening of the third United Nations Convention on the Law of the Sea. The excellent work of Leifer and Nelson before the end of the 1982 Convention had examined the legality of the joint statement and suggested that:

...the right of innocent passage by foreign ships in international straits forming part of the territorial sea of coastal states is limited by the obligation to observe the relevant laws of the coastal state during passage. The legality of the joint declaration by Indonesia and Malaysia rests on their claim to a territorial sea of twelve miles. It can

²⁰⁰ *Legislative History of the Regime of Straits* (vol. 2) 56.

²⁰¹ The joint statement was announced simultaneously on Tuesday 16 November 1971 in Jakarta, (at 12 noon), Kuala Lumpur and Singapore (at 12.30pm): See Joint Statement of Indonesia, Malaysia and Singapore on the Straits of Malacca (1972) 5 *NYU Journal of International Law and Politics* 425.

²⁰² Mr Rajaratnam, the Foreign Minister of Singapore explains his government's position: 'Singapore...could not go any further than take note of the views of our two neighbours. The reason is that, in Singapore's view, the status of the Straits of Malacca...should not be considered in isolation but in conjunction with the status of some 114 straits scattered throughout the world...': *Parliamentary Debates*, Singapore, 17 March, 1972.

²⁰³ Joint Statement of Indonesia, Malaysia and Singapore on the Straits of Malacca (1972) 5 *NYU Journal of International Law and Politics* 425.

be argued that such claim does not violate the prevailing customary norms of international law because of the substantial number of states which have adopted such limit. In its narrows, the Straits of Malacca fall within the territorial seas claimed by the coastal states. It can be submitted therefore that the joint declaration conforms with the *lex lata* of the seas. In consequence, foreign vessels...can only enjoy innocent passage through such waters...²⁰⁴

Logaraj, however, has a different view on the issue of the internalization of straits. He believes that to argue that the Straits of Malacca are not international is a misconception,²⁰⁵ especially if the claim of a wider territorial sea limit had eliminated the high seas. Thus, the erosion of coastal states' sovereignty and absolute power over international straits is unavoidable. However, it is submitted that to refuse the internalization of the Straits in the joint declaration of 1971 was not a wrong idea. Having regard to the nature of the straits, their narrowness and shallowness and the volume of vessels that pass through them every day, the anxiety of coastal states in relation to the security and safety of navigation as well as to the marine resources in the straits is to be expected. Moreover, the claim of a twelve-mile territorial sea limit by Malaysia and Indonesia is lawful before the international law, and the right customarily conferred within the territorial sea, namely innocent passage, is consistently recognized by these States.

It was apparent that a controversial issue regarding this matter concerned the most appropriate terminology that should be used to avoid misconceptions. Consequently the issue of international straits was considered by the ILC under the notion of 'straits used for international navigation' rather than giving a definition for 'international

²⁰⁴ M Leifer and D Nelson, 'Conflict of Interests in the Straits of Malacca' (1973) 49 International Affairs 190-203, 197 (emphasis added).

²⁰⁵ Logaraj, N, 'Navigational Safety, Oil Pollution and Passage in the Straits of Malacca' (1978) 20 MLR 287, 288.

straits'.²⁰⁶ Thus the argument that the term 'international strait' should not be employed for fear that it might be interpreted as a strait belonging to the international community was solved.²⁰⁷ The term 'straits used for international navigation' remained acceptable terminology for describing the role of straits rather than their state of ownership.²⁰⁸

While the littoral States had successfully persuaded other states to use the term 'straits used for international navigation' rather than 'international straits,' they had failed to convince them that the customary right of innocent passage was the most suitable regime for straits used for international navigation. Although, during the Convention discussions, Indonesia and Malaysia had insisted that the right of passage through the straits used for international navigation should be similar to the right applicable in the territorial sea, they later abandoned their absolute sovereignty rights over their territorial sea in the Straits of Malacca in order to compromise on the regime of transit passage to the Straits,²⁰⁹ a regime which is believed to have effectively struck a balance between two conflicting interests.²¹⁰

²⁰⁶ There was a suggestion to substitute the words 'used for international navigation' with 'indispensable to international navigation'. However this idea was rejected in fear of the subjective meaning of 'indispensable': see *Yearbook of ILC 1955* vol.1, paras 45, 48 and 50.

²⁰⁷ H Djalal, 'The Law of the Sea Convention and Navigational Freedoms' in D Rothwell and S Bateman (eds), *Navigational Rights and Freedoms, and the New Law of the Sea* (Kluwer Law International, The Netherlands, 2000), 121.

²⁰⁸ *ibid.*

²⁰⁹ The United Kingdom's proposal had attempted to neutralise the competing interest between the coastal states and the maritime states. Consequently, this proposal had been largely adopted by the 1982 Convention.

²¹⁰ Nandan's view that looking at the 'entrenched positions of the two sides (namely coastal states and maritime states), it appeared that a resolution of the issue was impossible. See Nandan (1982), 394.

Apart from their worries over the lack of sovereign power, the basis of the coastal states' reluctance to accept this regime at an early stage lies in their concern over the issue of safety of navigation and the environmental protection of the Straits. Thus, before ratifying the 1982 Convention, Malaysia, on behalf of Indonesia and Singapore, had addressed this issue in a letter to the President of the 1982 Convention on the common understanding of Article 233, taking into account the 'peculiar geographic and traffic conditions in the Straits.'²¹¹ This was subsequently acknowledged by the maritime states, namely the USA, the UK, Japan, France, Australia and the Federal Republic of Germany,²¹² and was termed by Dupuy and Vignes a successful 'bargain' between the two competing groups of states.²¹³ In fact Nandan also holds the view that the 1982 Convention was mainly influenced by those issues and problems particularly referring to the Straits of Malacca. He further points out several provisions in the 1982 Convention which specifically deal with the particular interests of Singapore, Indonesia and Malaysia.²¹⁴ However, Nandan merely draws attention to this matter without explaining his view in detail. As a result of their ratification of the 1982 Convention on the Law of the Sea,²¹⁵ they are bound by its

²¹¹ *Legislative History of the Regime of Straits* (vol 2 1992) 143-145.

²¹² *ibid.* See too Dupuy & Vignes (1991) 972.

²¹³ 'Acceptance by the latter of the environmental and navigational concerns of the former in return for acceptance by the straits states of the rules of transit passage': *ibid.*

²¹⁴ For example, 'Special provision to ensure that vessels coming to and from Singapore across the territorial seas and exclusive economic zones of its neighbours are hampered; Malaysia succeeded in incorporating in the regime for straits used for international navigation a provision which ensures that the regime of passage through such straits does not in any way affect the status of the waters within a strait (Art 34)...; The regime of archipelagic water itself is very much tailored to meet a number of concerns expressed by Indonesia...(Art 53); In the context of archipelagic waters, Singapore's right to undertake certain activities in waters which were previously high seas but which became part of archipelagic waters was preserved (Art. 51).': Nandan (1998) 396.

²¹⁵ Indonesia was the first of the littoral states to ratify the 1982 Convention on 3rd February 1986, followed by Singapore on 17th November 1994 and Malaysia on 14th October 1996. For detailed information on the chronological list see http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm accessed on 4th June 2011.

provisions which have formulated the new regime of transit passage for straits used for international navigation. Most of the straits in the world, including the Straits of Malacca, that are affected by the extension of the territorial sea limit to twelve miles fall within the ambit of Part III of the 1982 Convention which deals with the right of transit passage in straits used for international navigation. Such legal innovation clearly departs from the customary international law which was retained in the earlier 1958 Geneva Convention on the Law of the Sea.²¹⁶

2.5 CONCLUSION

The Straits of Malacca are, without doubt, a vital sea lane of communication with the geographical advantage of linking the Indian and Pacific Oceans. The history of the Malacca Sultanate clearly shows that the Straits have been of great significance to international shipping and trade since the fifteenth century. Indeed, Hugo Grotius' great treatise, *Mare Liberum*, was initiated as a legal opinion to justify the capture of a Portuguese galleon in the Straits during the seventeenth century. To arrive at their present legal status as straits used for international navigation, several attempts were made, beginning with The Hague Codification Conference of 1930, and continuing through the Geneva Convention of Territorial Sea and Contiguous Zone of 1958, the Geneva Convention of 1960 and, finally, the United Nations Convention on the Law of the Sea of 1982. Throughout this period, the limits of the territorial sea and the nature of passage in straits used for international navigation had become a most contentious and challenging issue. These problems derived from the conflicting interests of the coastal and maritime states over the nature of passage in straits and the

²¹⁶ M George, *Legal Regime of the Straits of Malacca and Singapore* (LexisNexis Malaysia, Petaling Jaya 2008) 3.

extension of the territorial sea of a state. Although, at the beginning of the 1982 Conference, Malaysia and Indonesia had clearly expressed their reluctance to accept the regime of transit passage and jointly declared in 1971 that the Malacca Straits were not international straits, the fact that they eventually ratified the 1982 Convention would appear to have changed their legal status in regard to the Straits. Since the states bordering the Straits are all parties to the 1982 Convention, the provisions contained in the 1982 Convention are binding upon them.²¹⁷ It may perhaps be argued that, if the littoral States are non-parties to the Convention, the right of passage through the Straits remains the regime of innocent passage. However, the contention of the United States, as non-parties to the 1982 Convention, that they may also enjoy the regime of transit passage as it become customary international law, may negate the argument.²¹⁸ As a conclusion, it may be useful to note Beckman's statement that 'while user states benefit from the safe passage through the Straits, littoral states – Indonesia, Malaysia and Singapore – bear the risks associated with potential accidents and pollution.'²¹⁹ The expression of this view is timely considering the present situation in the Straits. In fact, the risk is expanded to the rampant attacks by pirates or armed robbers who take the opportunity to prey on ships in such congested Straits. As an important strait of the world, the safety and security of navigation in the Straits is a paramount consideration for the stakeholders and the littoral states. Thus, any threat to users, especially piracy and armed robbery against ships in the Straits, must immediately be eradicated or at least reduced as much as

²¹⁷ Indonesia, Singapore and Indonesia ratified the 1982 Convention on 3 February 1986, 17 November 1994 and 14 October 1996 respectively.

²¹⁸ Cross refer to Chapter 2 (para 2.3.1.3)

²¹⁹ East Asian Seas (EAS) Congress Bulletin (vol 131 International Institute for Sustainable Development, 13 December 2006) 3. In www.iisd.ca/ymb/easc2006/html/ymbvol131num1e.html accessed 15 July 2008.

possible. At this point, having discussed the significance and legal status of the Straits, elaboration on the general principles and legal framework relating to the law of piracy in international law and international instruments is now undertaken in chapter three in order to build an understanding of the development of its concept and legal framework generally.

CHAPTER THREE

PIRACY UNDER INTERNATIONAL LAW AND CURRENT DEVELOPMENTS

3.1 INTRODUCTION

Piracy has been a constant problem to sea trade for many centuries, including in the Straits of Malacca. It is said to have existed since the beginning of maritime commerce and shipping.¹ It is in fact a continuous concern to stakeholders of the maritime industry, territorial states and the maritime nations. The safety and security of seafarers is sometimes put at stake when they are attacked by pirates. Yet the law has apparently been developing and changing over time. Consequently it is not surprising that the law on piracy has been subject to constant debate even after the conclusion of the Law of the Sea 1982.

Chapter three will constitute an introduction to the development of the international law of piracy and its intrinsic definitional problem, before a detailed discussion on Piracy and Armed Robbery in the Straits of Malacca is undertaken in the following chapter. This chapter will first examine the original meaning of piracy in classical times. It then describes the evolution of piracy in international law from the early twentieth century until the conclusion of United Nations 1982 Convention on the Law of the Sea. The definitions of piracy drawn by the international instruments are also covered. Then the thesis highlights the problems embedded in the legal definition of

¹ JL Jesus, 'Protection of foreign ships against piracy and terrorism at sea: Legal aspects' (2003) 18 Int'l J Marine & Coastal L 364; JL Lenoir 'Law and Modern Piracy'(1936) 18 Com.L.J 18; JM Goodwin, 'Universal Jurisdiction and the Pirate: Time for an old Couple to Part' (2006) 39 Vanderbilt Journal of Transnational Law 977.

piracy including universal jurisdiction, legal provision on hot pursuit and the potential nexus between piracy and maritime terrorism. Finally, it concludes by suggesting alternative approaches to overcome the shortcomings in the definition of piracy.

3.2 THE EVOLUTION OF PIRACY IN INTERNATIONAL LAW

In the *Oxford Dictionary of Law* piracy is defined as:

‘any illegal act of violence, detention or robbery committed on a private ship for personal gain or revenge, against another ship, people, or property on the high seas...Piracy is an international crime and all nations may exercise jurisdiction over pirates, regardless of the nationality of the ship or the pirates.’²

The above definition has similar rudiments to the law of piracy in international law which is also known as *Piracy Jure Gentium*.³ It has deliberately distinguished between an act of piracy that occurs on the high seas and one that occurs within a state’s territory. In practice, offences that fall under the definition of piracy under international law do not necessarily fall within the definition of municipal law. In the *Oxford English Dictionary* the word ‘pirate’ is defined as a person who attacks and robs ships at sea, while the word ‘piracy’ refers to the practice of attacking and robbing ships at sea and is assimilated with the act of hijacking.⁴ Definitely, this vernacular meaning of piracy could not be applied to all acts of robbing at sea, since piracy in international law bears an exclusive legal implication, namely the universal jurisdiction.⁵ This is a jurisdiction that applies to a situation where ‘the nature of (an)

² Elizabeth A Martin (ed), *Oxford Dictionary of Law* (4th edn OUP, Oxford 1997).

³ It means, ‘Piracy by the law of nations.’ *Jure Gentium* is a Latin term which means by International Law; see Halsbury Law of England (vol. 18(2)(reissue) (i) The High Seas/B.Piracy/732; George R Constantinople ‘Towards a New Definition of Piracy: The Achille Lauro incident’ (1986) 26 Va.J.Int’l L. 724; *ibid*.

⁴ D Johnson, E Pladdet & M J Valencia, ‘Introduction: Research on Southeast Asian Piracy’ in *Piracy in Southeast Asia, Status, Issues and Responses* (ISEAS, Singapore 2005) x.

⁵ Joshua Michael Goodwin, ‘Universal Jurisdiction and the Pirate: time for an Old Couple to part’ (2006) 39 Vand. J. Transnat’l L.973.

act entitles a State to exercise its jurisdiction to apply its laws, even if the act has occurred outside its territory, has been perpetrated by non-national, and even if (its) nationals have not been harmed by the acts.’⁶ Throughout history, a series of attempts to formulate the law on piracy have been made; however, the problem of piracy remains unsolved and is likely to persist in the future. This is especially true in Southeast Asian and Horn of Africa waters inclusive of the Straits of Malacca and Somali waters respectively. The following discussion on the evolution of the concept of piracy and its legal framework is intended to provide necessary knowledge on this criminal activity, before more specific attention is drawn to the contemporary issues of piracy.

3.2.1 PIRACY IN THE ANCIENT AND CLASSICAL PERIOD

Dubner classifies piracy into two main types.⁷ The first type is ‘classical piracy’ and the second type is ‘modern-day piracy’. Piracy *jure gentium* is the classical type of piracy. This type of piracy is regarded as the crime of an enemy against mankind or *hostes humani generis*.⁸ This means that, if the crime is committed on the high seas, or outside the jurisdiction of any state, the offender is assumed to have lost the protection of his national state and may be punished by all nations.⁹ This phrase is associated with Cicero, the Roman politician and philosopher, and later became a

⁶ The Executive Council, ‘Report of the Commission on the Use of the Principle of Universal Jurisdiction by some Non-African States as Recommended by the Conference of Ministers of Justice/ Attorney General’ Thirteenth Ordinary Session, 24-28 June 2008, Sharm El-Sheikh, Egypt, 1; see also Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, Oxford 1994) 57.

⁷ Barry H Dubner ‘Piracy in Contemporary National and International Law’ (1991) 21 California Western International Law Journal 139-140.

⁸ Latin term which translates to English as ‘Common Enemies of All Mankind’: JM Goodwin (2006) 993. See also Jacob W.F Sundberg, *The Crime of Piracy*, in M Cherif Bassiouni, *International Criminal Law* (Transnational Publishers Inc, New York 1998) 441.

⁹ O’Connell (1984) 966.

principle of international law. However, some scholars opined that the evolution of the phrase '*hostes humani generis*' into modern piracy meant that it had departed from its original meaning as intended by Cicero.¹⁰ The phrase used by Cicero was primarily deployed for the sake of his political career. The original maxim mentioned by him is: '*pirata non est ex perduellium numero definitus, sed communis hostis omnium*' which translates as 'piracy is not a crime directed against a definite number of persons, but rather aggression against the community as whole.'¹¹ This maxim is commonly phrased as '*pirata est hostis generis humani*.'¹² De Souza noted that Cicero regularly used the word 'pirate' to describe his political opponents such as Verres.¹³ He had once described Verres in the course of a speech as someone who had 'plundered the inhabitants of all the places' and also as a 'worse evil than pirates.' Thus, although it is widely believed that the English word 'pirate' is derived from the classical Latin term '*Pirata*'¹⁴ which derives ultimately from the Greek term '*peirates*'¹⁵ or '*peirato*',¹⁶ it may be submitted that the original meaning used in ancient times has no legal consequences in modern times. The meaning has surely changed over time as it was intended to apply to different people at different times. That is why Rubin declined to attribute the modern meaning of piracy to the ancient or post-ancient usage

¹⁰ AP Rubin, *The Law of Piracy* (University Press of the Pacific, Honolulu, 1988) 83-84; JM Goodwin 'Universal Jurisdiction and the Pirate: Time for an Old Couple to Part' (2006) 39 *Vanderbilt Journal of Transnational Law* 989.

¹¹ DR Burgess, 'Hostis Humani Generi: Piracy, Terrorism and a New International Law' (2006) 13 *U.Miami Int'l & Comp. L.Rev* 302.

¹² Bassiouni (1998) 441.

¹³ Verres was a proconsul of Sicily during his time. Philip De Souza, *Piracy in the Graeco-Roman World* (Cambridge University Press, 2002) 150-152.

¹⁴ The misconception of the citation of Cicero's classical definition of piracy that claimed to have its origin in the Latin term '*pirata*' is also highlighted by Rubin. See Rubin (1988) 4.

¹⁵ This means attack or attempt, cognate to *peril* or the adventurer who attacked a ship: Johnson, Pladdet and Valencia (2005) x.

¹⁶ Cf. Rubin opposed Coleman Phillipson's writing on the meaning of piracy which according to Phillipson means '*peirato*' in Greek term. In fact, none of the original Greek cited by him had used the term '*peirato*'. See Rubin (1988) 3.

just because it had been frequently repeated by learned authors.¹⁷ According to him, the word '*pirata*' had never appeared in ancient texts but exists only in the nineteenth and twentieth centuries, mostly bearing a non-legal translation.¹⁸ In fact, the intention was to label rebels or '*hostes in bello*'¹⁹ as '*pirata*' to show contempt for their act, rather than the robbers or '*praedones/latrones*'²⁰ who had clearly not been outlaws previously. This view is shared with Goodwin who explains that the Romans' use of the word pirate was to describe 'communities that did not follow the rules of war because they did not go through the formalities of declaring war before attacking.'²¹ Thus, for both Goodwin and Rubin, the phrase '*hostes humani generis*' may be suitable for describing piracy in ancient times, although it may be too lacking in a legal sense for it to continue to be applied in modern times.²²

3.2.2 PIRACY IN THE TWENTIETH CENTURY: A LEGAL AND HISTORICAL ANALYSIS

Despite disagreement among scholars on the original meaning of piracy and its essence, the world in the twentieth century had already accepted that piracy in international law is traditionally the enemy of humankind and is subject to the jurisdiction of any state. In 1927, Moore J of *The Lotus Case* stated that:

Piracy by law of nations, in its jurisdictional aspects, is *sui generis*.²³ Though statutes may provide for its punishment, it is an offence against the law of nations; and as the scene of the pirate's operations is the high seas, which it is

¹⁷ Rubin (1988) 2-3.

¹⁸ Rubin (1988) 2-3.

¹⁹ It means enemies in war: Rubin (1988) 84.

²⁰ It means robbers by Roman jurists: Rubin (1988) 84.

²¹ Goodwin (2006) 978-979.

²² Rubin (1988) 84; Goodwin (2006) 1011.

²³ It is defined in the Oxford Dictionary as unique, or literally means 'of its own kind.' It is *Sui Generis* because it is unique and the law prescribed for piracy is very special compared to other laws. See Keyuan Zou *Law of the Sea in East Asia Issues and Prospects* (Routledge, London 2005) 141. It is defined in the Oxford Dictionary as unique, or literally means 'of its own kind.'

not the right or duty of any nation to police, he is denied the protection of the flag which he may carry, and is treated as an outlaw, as the enemy of mankind - *hostis humani generis* - whom any nation may in the interest of all capture and punish.²⁴

Generally, the crime of piracy must be allied with acts committed at sea²⁵ and must be beyond any state territorial jurisdictions. It has also been regarded as *sui generis* before the international law because it is committed on the high seas, thus placing the pirates beyond the protection of their national state. This is an important element that distinguishes between piracy in international law and piracy in municipal law. A similar conclusion was reached by O'Connell when he said that 'it is the area of jurisdiction that establishes the difference between international and municipal law.'²⁶ Thus, the question of universal jurisdiction will not arise in cases where piracy occurs in territorial waters of a sovereign state.

Since there was no authoritative definition of international piracy,²⁷ Brierly, an international law jurist, had suggested three important elements to constitute an act of piracy.²⁸ Firstly, it must involve an act of violence. Then, it must be committed at sea. Finally, the act must not be backed by any authority.²⁹ In other words, an act of piracy committed for a political purpose would not fall under the legal meaning of piracy.

²⁴ *The Case of the S.S Lotus (France v Turkey)* (1927) P.C.I.J, (Ser. A) No.9 at 70 (*The Lotus Case*).

²⁵ For detailed discussion on this see Malvina Halberstam 'Terrorism on the high seas: The Achille Lauro, 'Piracy and the IMO Convention on Maritime Safety' (1988) 82 AJIL 269.

²⁶ O'Connell (1984) 966.

²⁷ Joseph W Bingham, Harvard Research in International Law, Comment to the Draft Convention on Piracy (1932) 26 AJIL Supp.749,750.

²⁸ JL Brierly, *The Law of Nations: An Introduction to the international law of peace* (6th edn Oxford Clarendon Press 1963) 31; JL Brierly, *The Law of Nations* (1928) 154. See also the judgment of Story J in the case of *United States v Smith* (1820)18 US (5 Wheat) 153,154; Dr Lushington's statement in *The Magellan Pirates* (1853) 1 Sp Ecc & Ad 81 (164 ER 47); the Privy Council decision in *In re Piracy Jure Gentium* (1934) 49 Lloyd's List L.R 411; George R Constantinople 'Towards a New Definition of Piracy: The Achille Lauro incident' (1986) 26 Va J Int'l L 727-731; O'Connell (1984) 966-969.

²⁹ Brierly (1928) 154.

This seems indistinguishable from a case of a recognized act of piracy in the sixteenth century. For example, Sir Francis Drake, who attacked Spanish vessels in peacetime, was regarded as a national hero by the Queen of England.³⁰ Goodwin attributes the royal recognition to the fact that such an act had increased the royal treasury and could thus be justified. Nonetheless, this kind of piracy was no longer acceptable in later centuries.

However, privateering had then become a famous activity that was authorised in England during the eighteenth and nineteenth centuries. The acts of a privateer were no doubt similar to those of piracy except that they became legal only because the privateer carried a letter of marque from the crown legalising his act. The profit gained would also be shared with the state.³¹ Privateering was then no longer acceptable and the English authorities began to crack down on it due to the desire of states to overcome the problem of piracy. Despite the existence of the Law of Piracy in municipal law, the central legal framework at the international level was seen as necessary to provide a basis of jurisdiction for the crime of piracy. In consequence, in the early twentieth century, the League of Nations began its important role of codifying the international law, which includes the law on piracy.

³⁰ This case happened in 1579 and Drake was knighted by Queen Elizabeth in 1581. See Goodwin (2006) 979-980.

³¹ Goodwin (2006) 980-981; Rubin (1988) 17.

3.2.2.1 PIRACY IN THE LEAGUE OF NATIONS AND THE HARVARD CONVENTION 1932

Piracy was chosen as one of the most important subjects to be considered for the purpose of codification of international law as proposed by Council of the League of Nations in 1924. Initially, in 1926, the Committee of Experts for the Progressive Codification of International Law proposed a ‘Draft Provisions for the suppression of Piracy.’ The report of the Rapporteur, M.Matsuda, produced eight key provisions relating to the codification of piracy law; among them were the requirements to be on the high seas,³² for the purpose of private gain³³ and universal jurisdiction³⁴ over a pirate. This report, however had made no reference to any cases, state practice and juristic opinion in consequence of which the Draft was considered a proposed draft of new treaty or *de lege ferenda*.³⁵ Yet, the question of discrepancy between the draft and learned juristic and historical analysis was irrelevant since it was permissible in such progressive codification.³⁶ The response of governments to the Draft report revealed the difficulty of concluding a universal agreement on the subject of the international law of piracy.³⁷ As a result, this Draft report was not invoked in the subsequent Codification Conference.

Following the failure to regard the issue of piracy as one of interest to all states in the Resolution of the Assembly of the League of Nations in 1927, an attempt to define the

³² Art 1 of the Draft Provisions for the Suppression of Piracy proposed by the Committee and drafted in form by M Matsuda on 26 January 1926.

³³ *ibid.*

³⁴ *ibid.* Art 5, Art 7.

³⁵ It means ‘a proposal for new law regardless of history and theory’. See Rubin (1988) 307.

³⁶ Rubin (1988) 307.

³⁷ These were originally the words of the Polish Representative, M Zaleski, which were approved by the League Council on 13 June 1927. See Rubin (1988) 308.

international law of piracy was made again in the 1932 Harvard Draft of International Convention.³⁸ This was said to be an independent research effort by the League.³⁹ It was unsurprising that the legal formulation of piracy in the Draft Convention was considered to be the most difficult one to draft. Article 3 of the Draft Convention⁴⁰ read as follows:

Piracy is any of the following acts, committed in a place not within the territorial jurisdiction of any state:

1. Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without bona fide purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air. If the act is connected with an attack which starts from on board ship, either that ship or another ship which is involved must be a pirate ship or a ship without national character.
2. Any act of voluntarily participation in the operation of a ship with knowledge of facts which make it a pirate ship.
3. Any act of instigation or of intentional facilitation of an act described in paragraph 1 or 2 of this article.

The key element of this article seems to reiterate the earlier requirement of ‘private end’ in M.Matsuda’s report. No requirement of ‘high seas’ is stated but it requires piracy to be committed ‘in a place situated outside the jurisdiction of any state.’⁴¹

Rubin points out some weaknesses of the Harvard Research Draft.⁴² For him, some of the Draft articles were historically and legally wrong due to lack of evidence and

³⁸ Harvard Research in International Law, Draft Convention on Piracy with comments (1932) 26 AJIL Supp 768.

³⁹ Rubin (1988) 308.

⁴⁰ Harvard Research in International Law, Draft Convention on Piracy with comments (1932) 26 AJIL Supp 739,743; See too Ethan C Stile, ‘Reforming Current International Law to Combat Modern Sea Piracy’ (2004) 27 Suffolk Transnational Law Review 305-307; PA Buhler, ‘New Struggle with an Old Menace: Towards a Revised Definition of Maritime Piracy’ (1999) 8 Current Int’l Trade L.J 61-65.

⁴¹ *ibid.* See Art 3(1) and Art 4(1).

⁴² For further discussion refer Rubin (1988) 313-317.

support and had ignored the idea of general international law.⁴³ Despite this criticism, the Harvard Convention might be regarded as an important and useful starting point in the development of the international law on piracy because it provides the basis for a discussion of piracy, the central issue of which is common to the law of most individual states.⁴⁴

3.2.2.2 PIRACY IN THE REGIME OF THE UNITED NATIONS

The subject of piracy has continuously been discussed concurrently with developments in the Law of the Sea on the subject of territorial seas and the high seas. While it is recognized that piracy is a crime against a nation, the definition of piracy is complicated, in reality making it difficult if not impossible to enforce laws to deal with it. The definition of piracy in the current 1982 Convention is mainly taken from Article 15 of the 1958 Convention.⁴⁵ Article 101 of the 1982 Convention gives the definition of piracy. It is important for certain fundamental requirements to be fulfilled before the act can be regarded as piracy in international law. This Article reads 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 a private aircraft, and directed:

⁴³ Rubin (1988) 316.

⁴⁴ George R Constantinople 'Towards a New Definition of Piracy: The Achille Lauro incident' (1986) 26 Virginia Journal of International Law 732.

⁴⁵ Art 15 of the 1958 Geneva Convention is in *pari materia* (similar exactly) with Art 101 of the 1982 Convention.

- (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
- (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any state;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b). (Underline Added)

The above definition underlines some important features of piracy under international law, the basis of which are long-established principles dating back hundreds of years. This is not startling in view of the fact that most of the provisions in the 1982 Convention were replicated from the regime of piracy in the 1958 Geneva Convention, with only minor changes.⁴⁶ The most important features are that the intention must be for private ends, the act must be carried out on the high seas and it must be against other ships. The issues arising from these requirements will be discussed in detail below.

3.2.3 PIRACY IN THE INTERNATIONAL INSTRUMENTS: INTERNATIONAL MARITIME ORGANISATION (IMO) AND INTERNATIONAL MARITIME BUREAU (IMB)

The IMO is an intergovernmental organization and a specialized agency established under Article 57 of the United Nations Charter with the motto “Safer ships and cleaner oceans”.⁴⁷ The subject of piracy and armed robbery at sea is assigned to the Maritime Safety Committee of the IMO. The definition of piracy in the IMO is the duplication

⁴⁶ Compare the provisions in the 1958 Geneva Convention and 1982 Convention. See also Jesus (2003) 373, 375.

⁴⁷ See IMO website at <<http://www.imo.org>>; Philippe Boisson, *Safety at Sea: Policies, Regulations and International Law*, Paris: (Bureau Veritas, Paris 1999) 59-61.

of the United Nations' definition in the 1982 Law of the Sea Convention. Thus, any crime or illegal act resembling piracy which occurs within the territorial sea of a state is known rather as 'armed robbery against ships.' This is defined in the Code of Practice for Investigation of the Crimes of Piracy and Armed Robbery against Ships⁴⁸ as follows;

Armed Robbery against Ships means 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 ship, within a State's jurisdiction over such offences.

In IMO Resolution A.1025 (26) 'Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships' armed robbery means any of the following acts:⁴⁹

1. any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a State's internal waters, archipelagic waters and territorial sea;
2. any act of inciting or of intentionally facilitating an act described above

Both definitions given by IMO above reflect the legal implications of similar acts but in different locations. Such an act that occurs in the territorial waters of a state would fall under the exclusive jurisdiction of that particular state. However, this greatly depends on the availability of municipal law and regulation of the local states.

⁴⁸ See IMO, MSC.4/Circ.95 (19 December 2006), quoting Resolution A.922 (22), annex paragraph 2.2.

⁴⁹ IMO Resolution A.1025(26); IMB Annual Piracy Report, 3.

On the other hand, the International Maritime Bureau (IMB), which was established in 1981 as a division under the International Chamber of Commerce (ICC)⁵⁰, gives a broad definition of piracy. This reads as follows:

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.

Obviously, the above definition deviates from the legal definition of piracy provided under the 1982 Convention. While piracy is consensually accepted by most of the participating states in the said Convention as a universal crime that may only occur on the high seas and in a place outside the jurisdiction of any state, piracy as defined by the IMB disregards the state's local jurisdiction. This definition has become a controversial issue among the local authorities, especially for those states that are alleged to be piracy hotspots.⁵¹ However, the IMB has commented that the definition given by them is only for statistical purposes. They are looking at the current situation in which the majority of attacks against ships occur within the territorial waters and jurisdiction of a sovereign state.⁵² It further urges that the meaning of 'armed robbery against ships', which was stated by the IMO at its 74th meeting of MSC, in article 2.2 of the Draft Code of Practice for the investigation of crimes of piracy and armed robbery against ships⁵³, has more legal implications in international law. In fact, the objective of setting up the Piracy Reporting Centre (PRC) in Kuala Lumpur Malaysia

⁵⁰ See www.icc-ccs.org/ accessed on 20 February 2009.

⁵¹ Malaysia and Indonesia have denied the accuracy of IMB reports on piracy attacks in their respective territorial waters including the Straits of Malacca. They argue that the attacks are only sea robberies and not piracy according to international law. Such piracy reports, if not distinguished, might affect the states' credibility and sovereignty in the eyes of the international community: Interview with Captain Maritime Mamu Said Alee, Director of Maritime Policy and International Relation, Malaysian Maritime Enforcement Agency (Kuala Lumpur 23rd February 2009).

⁵² Boisson (1999) 72.

⁵³ The IMO Code of Practice: MSC/Circ.984.

in October 1992 was to assist the shipping industry and to report to local authorities, helping them to deal with piracy and armed robbery problems.⁵⁴ In this context, the pirates' attack against MV *Alondra Rainbow* in 1999 was a clear example of the efficiency of the IMB-PRC in playing its role.⁵⁵ Its prompt action in issuing alerts to ships at sea to respond to the missing ship, *Alondra Rainbow*, and its later reporting of that missing ship's possible location to the local authority was commendable and expected for the suppression of piracy and armed robbery against ships.⁵⁶

As far as the statistics of piracy are concerned, it is important to differentiate between the reports produced by the IMO, IMB and the local authority of a coastal state. One might be confused by the discrepancies in these reports but this is to be expected due to the incongruity of individual definitions of piracy and the number of reports received from the victims. Moreover, some incidents go unreported. In conclusion, it should be highlighted again that, while the IMO definition of piracy is similar to the 1982 Convention and only covers acts of piracy on the high seas, the IMB definition covers both piracy and armed robbery regardless of where the event occurs. On the other hand, the definition given by the littoral or coastal states comes under the ambit of municipal law and varies enormously between states.

⁵⁴ This is done by issuing daily status reports on piracy and armed robbery to ships via broadcasts on the Immarsat-C SafetyNET service. See ICC-IMB, 'Piracy and Armed Robbery against ships', Report for the period 1 January-30 September 2006, 2.

⁵⁵ RS Vasan 'Alondra Rainbow revisited, A Study of related issues in the light of the recent judgment of Mumbai High Court' paper no.1379 issue 13.05.2005 by South Asia Analysis Group <<http://www.southeastasiaanalysis.org/papers14/paper1379.html>>

⁵⁶ *ibid.*

3.3 ANALYSIS OF ADEQUACY OF THE LAW OF PIRACY IN THE 1982 CONVENTION

Although the international law has undergone gradual changes, with the 1982 Convention generally presumed to have solved the significant issues in the law of International Sea Piracy, some incidents that have occurred since the adoption of the Convention demonstrate that some sensitive issues have been overlooked.⁵⁷ It was expected that the 1982 Convention would bring some changes to piracy law; however, it still has some loopholes and a narrow definition which might not be sufficient to tackle the piracy problem in certain situations.⁵⁸

3.3.1 DEFINITION OF PIRACY: REVISITED

Generally, pirates commit robbery, plunder and sometimes even murder and rape. The main argument for not challenging the existing piracy law which has evolved from the traditional piracy norms is that the law of piracy has universal consensus and thus should not be altered.⁵⁹ Rubin, in his book *'The Law of Piracy'*, criticized the existing international law on piracy for its lack of juristic and scholarly interpretation.⁶⁰ His study on the historical and legal background of piracy in international law indicates that no codification was made on the law of piracy. Instead, the regime of piracy in the 1982 Convention is a product of the earlier disputed work by the Committee of Experts for the Progressive Codification of International Law in 1924, whose proposal on Draft Provisions for the Suppression of Piracy was not invoked due to lack of

⁵⁷ Dubner (1979) 471. Constantinople (1986) 745-748 suggested that the *Achille Lauro* incident could be a lesson on the need for a more comprehensive definition of piracy. In other words, the present definition of piracy is outdated and needs to be revised to suit contemporary society.

⁵⁸ The definition of piracy given in Art 101 would exclude piracy that occurs in the territorial sea and acts of mutiny by ships' crews.

⁵⁹ Ibid. 475.

⁶⁰ AP Rubin, *The Law of Piracy* (University Press of the Pacific, Honolulu, 1988).

universal agreement, and also the 1932 Harvard Draft Convention. In fact, the 1982 Convention derives its model from the 1958 Geneva Convention which follows major aspects of the Harvard Convention. It would appear that criticisms of the definition of piracy in the present 1982 Convention are aimed primarily at the issues of private ends, high seas and two-ship requirements.⁶¹ In fact the conflicting opinions of scholars in this matter have existed since the very beginning of discussions on the law of piracy.⁶²

Significantly, the first essential feature in paragraph (a) of Article 101 of the 1982 Convention requires such criminal act, detention or depredation to be committed 'for private ends'. This definition would definitely exclude governmental or political acts as well as insurgency and belligerence in support of political ends from being treated as piracy under international law.⁶³ Crockett considers that, were common jurisdiction to be imposed on state-sponsored piracy, its consequences would probably be more detrimental to international peace and stability in the sense that 'maybe a state whose interests [had] not been directly infringed [would seek] to punish a state which authorised an act of piracy.'⁶⁴ Thus, the decision to exclude state acts from the definition of piracy is sound and reasonable after weighing the potential impact associated with such inclusion. Dubner also agrees with Crockett on limiting the

⁶¹ EC Stiles 'Reforming Current International Law to Combat Modern Sea Piracy' (2004) 27 *Suffolk Transnat'l L.Rev* 299, 322; PA Buhler, 'New Struggle with an Old Menace: Towards a Revised Definition of Maritime Piracy' (1999) 8 *Current Int'l Trade L.J* 61-65,67; CH Crockett 'Towards A Revision of the International Law of Piracy'(1977) 26 *DePaul L Rev.* 78,84; (GG Ong 'Ships Can be Dangerous, Too: Coupling Piracy and Terrorism in Southeast Asia's Maritime Security Framework' in d Johson and M Valencia (eds.) *Piracy in Southeast Asia, Status, Issues, and Responses* (ISEAS, Singapore 2005) 53.

⁶² Jesus (2003) 38; Crockett (1977) 92-93.

⁶³ WP Willig, Comment, The *Santa Maria* Incident: A grey zone between unrecognised insurgency on the high seas and Piracy *Jure Gentium* (1961) 25 *Alb. L.Rev.* 299-312.

⁶⁴ Crockett (1977) 88.

definition merely to ‘private ends’ in order to avoid political difficulties and to preserve the theory of sovereign equality and the presumption that interfering with government ships on the basis of suspicion of piracy might have greater consequences.⁶⁵ It may be noted that this kind of politically motivated act could be considered one of the popular bases for rejecting the definition of piracy by some states for lack of coverage.

As a result of the private end requirement, the crime of maritime terrorism which has become infamous lately is also automatically excluded from the legal meaning of piracy.⁶⁶ But, for Halberstam, a terrorist act such as the hijacking of the Italian Cruise Liner *Achille Lauro* in 1985 is not exempt from the definition of piracy until and unless it is directed against a particular state.⁶⁷ To this day, the debate about incorporating acts of terrorism within the ambit of the definition of piracy still endures. Burgess argues that, were terrorism to be proved to have similarities with piracy, the universal jurisdiction created for piracy might be applicable to terrorism too.⁶⁸ In fact he believes that, when tracing the history of piracy, both piracy and the act of terrorism are profound.⁶⁹ While Burgess is devoted to applying the universal jurisdiction of piracy over maritime terrorism,⁷⁰ Rubin and Goodwin would prefer to discourage or abolish this established principle of jurisdiction as it no longer makes sense.⁷¹ The reasons put forward by the latter are quite convincing. The reality, in this

⁶⁵ *ibid* 262; Dubner (1979) 476.

⁶⁶ Dubner (1979) 473.

⁶⁷ Malvina Halberstam. *Terrorism on the High Sea: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, [1988] 82 AJIL 276.

⁶⁸ Douglas R Burgess ‘Hostis Humani Generi: Piracy, Terrorism and a new international law’ (2005-2006) 13 U. Miami Int’l &Comp.L.Rev 299.

⁶⁹ Burgess (2006) 308.

⁷⁰ Burgess (2006) 340-341.

⁷¹ Rubin (1988) 343, Goodwin (2006) 973-1011.

twenty-first century, is that the rights of people always have priority. Hence, to allow universal jurisdiction to be applied may indirectly abuse the due process of law.⁷² It is agreed that the universal jurisdiction may have been the best rule a hundred years ago, but it no longer suits contemporary society.⁷³ Furthermore, to avoid applying the universal principle to the crime of piracy does not mean that pirates might escape punishment. There are still other types of jurisdiction available in international law such as the flag-state principle, nationality principle and the passive personality principle that are more relevant and practical nowadays as a means of establishing jurisdiction.⁷⁴

The second feature of piracy in Article 101 of the 1982 Convention requires that the act must be committed on the high seas or at a place outside the jurisdiction of any state. It is not mentioned clearly in the definition of piracy in Part VII of the 1982 Convention whether the international law of piracy may be applied in Exclusive Economic Zones. This issue appears to be divided into two sections. Those who would restrict the application of the law of piracy only to the high seas and a place outside the jurisdiction of any state justify this with the plain meaning of Article 101 of the 1982 Convention. The intention to limit the coverage area for piracy in international law to that extent is a result of the assumption that piracy, if it occurs within the territorial sea of a state or the EEZ where the state has sovereign rights to the economic exploitation of the sea, should be dealt with exclusively by the affected

⁷² Goodwin (2006) 973-1011.

⁷³ *ibid*; Cross refer to Chapter 3(para 3.3.2).

⁷⁴ Cross-refer to the discussion on the Incident of *MT Bunga Laurel* in Chapter 6 (para 6.4.4). The most recent case of an attack by Somali Pirates on the Malaysian Charter Ship *Bunga Laurel* in the Gulf of Aden has raised the issue of jurisdiction on piracy.

states. They argue that Article 58(3) conferred ‘regulatory power to the coastal states over the enforcement rights of all states’, to suppress piracy in the EEZ.⁷⁵ This article reads as follows:

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

It is assumed that, if a state has exclusive power in an EEZ, including the right to combat piracy, this might reduce the conflict of jurisdictions among states because the coastal state would have exclusive rights to prosecute piracy occurring within its area. Moreover, the coastal state’s duty to police its maritime zone would be undertaken efficiently without disputes arising with other foreign states. Otherwise, state may argue that the foreign state has encroached in its EEZ area with the reason to police and repress piracy. Djalal supports this view.⁷⁶ Despite agreeing that freedom of navigation must be guaranteed in the EEZ as required by Article 58 (1) and Article 87, he considers that an act of piracy occurring within an EEZ would fall under the national jurisdiction of the coastal state since the high seas requirement in Article 101 is generally understood to refer to an area beyond the EEZ.⁷⁷ This would definitely encourage cooperation among states. Zou also suggests that ‘since piracy is closely related to the safety of navigation, states could assume corresponding duty or right to

⁷⁵ J Ashley Roach ‘Agora:Piracy Prosecutions, Countering Piracy Off Somalia: International law and International Institutions’ (2010) 104 AJIL 3, 397-416,398.

⁷⁶ Hashim Djalal ‘Combating Piracy:Co-operation Needs, efforts, and Challenges’ in DJohnson and M Valencia, *Piracy in Southeast Asia, Status, Issues and Responses* (ISEAS, Singapore 2005)144.

⁷⁷ *ibid.*

suppress piracy in the EEZ of other states provided that anti-piracy measures taken by such states are inadequate.’⁷⁸ In other words, it means that if a state is capable to repress piracy in its EEZ it is not appropriate for other states to encroach into that area of EEZ.

Those who oppose this demonstrate their ambivalent views by referring to other related provisions contained in the 1982 Convention itself. Many commentators suggest that the international law of piracy extends not only to the high seas and areas beyond the territory of any state, but also includes the exclusive economic zones (EEZ) by virtue of Article 58(1) and (2).⁷⁹ These Articles read as follows:

Article 58(1):

‘In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation....’;

Article 58(2):

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

Article 87:

‘The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States

- a) freedom of navigation;
- (b) freedom of overflight....’;

All states have been given the freedom of navigation in the EEZ to a similar level as on the high seas. Article 58(2) has directly embraced the application of the definition

⁷⁸ Keyuan Zou, ‘Seeking Effectiveness for the Crackdown of Piracy at sea’ (2005) 59 Journal of International Affairs, 117,122-123.

⁷⁹ Vladimir Golitsyn, ‘Maritime Security (Case of Piracy)’ in HP Hestermeyer, et al (eds.) Coexistence, Cooperation and Solidarity (Martinus Nijhoff, Leiden 2011) at page 1162; Keyuan Zou ‘Enforcing the Law of Piracy in the South China Sea’ (2000) 31 Journal of Maritime Law and Commerce 107, 111.

of piracy in Article 101 to include the EEZ. This appears to indisputably confirm the extension of the obligation of a state to cooperate in the repression of piracy as requested in Article 100 to the EEZ area.⁸⁰ Even though the coastal states are given certain sovereign rights in the EEZ, this right is limited to economic exploitation of the sea as provided in Article 56 of the 1982 Convention:

‘for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds.’⁸¹

Kontorovich regards any attempt to exclude EEZ from the jurisdiction for repressing piracy, as required by the 1982 Convention, without proper justification as misleading.⁸² Roach agrees with this and regards it strictly as an unquestionable issue.⁸³ Although, previously, the international customary law required the act of piracy to have occurred on the high seas, the expansion in the 1982 Convention of the maximum breadth of territorial sea to 12 nautical miles and the additional right to exploit the EEZ within 200 nautical miles of the baseline could not possibly refute the application of the 1982 Convention to piracy in the EEZ.⁸⁴ Beckman also supports

⁸⁰ Art 100 of the 1982 Convention: ‘All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State’.

81 Art 56(1)(a). As for the limitation of jurisdiction of coastal states in EEZ refer to Art 56(1)(b) and (c):

- (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
 - i) the establishment and use of artificial islands, installations and structures;
 - ii) marine scientific research;
 - iii) the protection and preservation of the marine environment;

⁸² Eugene Kontorovich, ‘A Guantanamo on the sea: The Difficulty of Prosecuting Pirates and Terrorists’, (2010) 98 CAL. L.EV. 243,253.

⁸³ J Ashley Roach ‘Agora: Piracy Prosecutions, Countering Piracy Off Somalia: International law and International Institutions’ (2010) 104 AJIL 3, 397-416,398.

⁸⁴ Roach (2010) 398; Martin Murphy, ‘Piracy and UNCLOS: Does International Law Help Regional States Combat Piracy?’ in Peter Lehr (ed.), *Violence at Sea: Piracy in the Age of Global Terrorism*, (Oxon,Taylor & Francis, inc, 2007)161-63, 155.

this view when he argues that the international law of piracy has established 'extraordinary exceptions' to the general principles governing jurisdiction of a state.⁸⁵ Thus, so long that the act of piracy is committed outside the territorial jurisdiction of any states, the right to arrest and prosecute the pirates extends to all states.

It is submitted that the application of the piracy provisions in the EEZ areas would definitely allow the exercising of universal jurisdiction by foreign states in order to catch and prosecute piracy, but it would limit the power of the coastal states over such areas. In the event of piracy attacks in these areas, foreign states will assume equal powers for the purpose of suppressing the crime of piracy in the EEZs of other states. This might have little significance for unstable states such as Somalia but, for other sovereign states such as those bordering the Straits of Malacca, apart from having the right to exploit the EEZ area, the exclusive right to pursue pirates within this area is crucial. Furthermore, the vast maritime area left for common jurisdiction over piracy would still not resolve the problem deriving from it. This is especially true considering the pattern of piracy attacks in the Southeast Asian region. It would appear that the majority of attacks occurred within a 12-mile radius of a state's territorial sea on ships anchored, berthed or steaming.⁸⁶ This is an area where the implications of the definition of piracy and armed robbery given by the 1982 Convention and IMB Piracy Reporting Centre are distinguished. Legally speaking, an act of piracy that occurs within the territorial waters of a state is called armed robbery against a ship rather than

⁸⁵ RC Beckman 'The Piracy Regime under UNCLOS: Problems and Prospects for Cooperation' in RC Beckman, JA Roach (eds.) *Piracy and International Maritime Crimes in ASEAN: Prospects for Cooperation* (Edward Elgar Publishing, Oxon 2012) 20-21.

⁸⁶ See 2010 Annual Report of the ICC-IMB-PRC; Taylor G. Stout, 'Piracy and the Law of the Seas,' Spring (2011) International Judicial monitor: see (www.judicialmonitor.org/current/generalprinciples.html) accessed on 23 June 2011.

piracy.⁸⁷ Although the elements and tactics of the crime and even the offenders are the same, the significant legal factor that differentiates between these two under international law is the location of the attacks. In other words, the elements or act of the crime of piracy will be determined by referring to the extent of various maritime zones.

Another requirement in the 1982 Convention which stipulates that the attack must be mounted against another private ship⁸⁸ automatically excludes mutiny by the crew and privateering from being considered as piracy.⁸⁹ Jesus takes the view that the two-ship requirement is clearly stated in the 1982 Convention. This prevents foreign warships from interfering in the ship's affairs, even if the crew's seizure or a takeover of the ship has been reported by the crew. He further argued that, in order for states to deal with piracy and maritime crime including terrorism efficiently, this requirement should be amended.⁹⁰

Therefore, it can be submitted that the 1982 Convention may need to be reviewed, especially in this contemporary world where the advances in technology utilized by the pirates run parallel with the technology of the coastal states and shipping industry. Nonetheless, the lack of definition should not be treated as an obstacle to a state's attempts to curb the piracy and armed robbery issue to its fullest extent. Young's opinion on this issue is very much welcomed. For him, the general definition of piracy

⁸⁷ Art 101 of the 1982 Convention; IMO Resolution A.1025 (26) in its 26th Assembly session.

⁸⁸ Art 101 (a) of the 1982 Convention.

⁸⁹ United Nations, 'Article concerning the Law of the Sea with commentaries', text adopted by ILC at its 8th session (1956) 2 Year Book of the International Law Commission 265.

⁹⁰ JL Jesus, 'Protection of Foreign Ships Against Piracy and Terrorism at Sea: Legal Aspects' (2003) 18 International Journal of Marine and Coastal Law, 363, 376.

has ‘subjective values’ which may suit different times, places and cultures. Such values would ‘provide a way to avoid some of the biases in the use of the term.’⁹¹ Thus, even though there are so many criticisms and comments on the suitability of the said jurisdiction in current society, many other compromises may be reached to finally fulfil the need to punish the offender. For example, the mutiny of a crew on board a ship or an act of terrorism may be dealt with similarly to other types of crimes, such as robbery, causing harm or murder, which can be punished using relevant domestic laws or through extradition under the 1988 SUA Convention, provided that the states involved are party to that Convention.⁹²

3.3.2 PIRACY AS AN INTERNATIONAL CRIME AND THE RELEVANCE OF UNIVERSAL JURISDICTION

The long-established principle has not given other states the right to police or enforce jurisdiction in other states’ territorial water including over foreign-flagged ships on the high seas. This is because the foreign-flagged ships that navigate the high seas are bound exclusively by the jurisdiction of their flag states. However, because of the globally accepted view on the importance of combating piracy, the perpetrators of which has been regarded as an enemy of mankind or *hostes humani generis*,⁹³ this principle has had to accommodate exceptions which allow the involvement of all

⁹¹ AJ Young, ‘Roots of Contemporary Maritime Piracy in Southeast Asia’ in D Johnson and M Valencia *Piracy in Southeast Asia: Status, Issues and Responses* (ISEAS Singapore 2011) 3.

⁹² See further discussion in Chapter 3 (para 3.3.4).

⁹³ In the 16th Century, the Italian jurist Gentili wrote: ‘Pirates are common enemies, and they are attacked with impunity by all, because they are without the pale of law. They ought to be crushed by us and by all men. This is warfare shared by all nations.’ And in 18th Century, Judge Bee in *United States v Robins* (1799) stated that ‘[a] pirate, under the law of nations, is an enemy of the human race. Being the enemy of all, he is liable to be punished by all. See: Keyuan Zou ‘Enforcing the Law of piracy in the South China Sea’ (2000) 31 *Mar.L & Com.* 107; See also: BA Wortley, ‘Pirata Non Mutat Dominium’ (1947) *Brit. Y.B Int’l L* 258: ‘A pirate is *hostis humani generis*, punishable by any state.’

states in prosecuting the perpetrators.⁹⁴ In fact, piracy was the first crime to be criminalised under international law and is considered the oldest international offence.⁹⁵ Bantekas and Nash point out that international criminal law is a combination of international law and domestic criminal law.⁹⁶ These two legal disciplines are complementary to each other since international rules would exist merely in a theoretical vacuum without the help of national legislation and enforcement authorities.⁹⁷ On the other hand, Cryer and others, while recognizing a plethora of definitions of international criminal law, explain that an international crime ‘may also be defined as an offence which is created by international law itself, without requiring the intervention of domestic law.’⁹⁸ In such cases, the international criminal responsibility will be directly imposed on an individual personality.⁹⁹ However, Cryer and others also believe that, in terms of enforcement, domestic legislation becomes part and parcel of international criminal law,¹⁰⁰ particularly, in the implementation of international treaties. For example, the international law may simply provide the drafting of the commonly accepted rules on a criminal act, but it relies on states that are parties to the treaties to further execute its provisions. As Bantekas and Nash further comment, this execution or enforcement of international law by the domestic courts will ‘not necessarily be in identical manner, but with a

⁹⁴ JL Jesus, ‘Protection of Foreign Ships Against Piracy and Terrorism at Sea: Legal Aspects’ (2003) 18 *International Journal of Marine and Coastal Law*, 363, 373-4.

⁹⁵ I Bantekas and S Nash, *International Criminal Law* (3rd edn Routledge-Cavendish, London 2007) 176; traditionally piracy on the high seas is regarded as one of the first international crimes, grounded on the violation of international customary law: Xavier Phillippe, ‘The Principles of Universal Jurisdiction and Complementarity: How Do The Two Principles Intermesh?’ (2006) 88 *Int’l Rev of the Red Cross* 862, 375,377-8

⁹⁶ Ilias Bantekas and Susan Nash, *International Criminal Law*, (3rd edn Routledge-Cavendish, London 2009) 1.

⁹⁷ Bantekas and Nash (2009) 2.

⁹⁸ Robert Cryer and others, *An Introduction to International Criminal Law and Procedure*, (Cambridge University Press, Cambridge 2007) 5.

⁹⁹ Cryer and others (2007) 2.

¹⁰⁰ Cryer and others (2007) 3.

certain degree of consistency and uniformity based on the object and purpose of each particular treaty.’¹⁰¹ Thus, it is unsurprising that, in practice, the law and penalties for such crime vary from state to state, so long as the objective of the criminalization of crime is achieved.

Bantekas and Nash illustrate this relationship by pointing to the crime of piracy, which is generally accepted in international customary law and international treaties as a crime against humankind.¹⁰² As discussed above, piracy, as it is defined in Article 101 of the 1982 Convention, is limited to acts that occur on the high seas, EEZ or in places beyond the jurisdiction of any state. Apparently, these are the only maritime zones where piracy under international law might take place. The legal implication of the piracy provisions would empower every state to catch and punish pirates since they are dangerous to all ships regardless of their nationality.¹⁰³ The principle of universal jurisdiction is classically defined as ‘a legal principle allowing or requiring a state to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim.’¹⁰⁴ Churchill and Lowe comment that the piracy provisions are one of the exceptions to the jurisdiction on the high seas¹⁰⁵ in which the general rule is that the exclusive right to exercise power and

¹⁰¹ Bantekas and Nash (2009) 1.

¹⁰² The treaties refer to the 1982 Convention and its related predecessor.

¹⁰³ Because they are enemies of all mankind thus they no longer enjoy the privileges of law: Goodwin (2006) 992; Per Moore J, *The Case of the S.S Lotus (France v Turkey)* (1927) PCIJ, (Ser. A) No.10 at 10.

¹⁰⁴ Xavier Phillippe, ‘The Principles of Universal Jurisdiction and Complementarity: How Do The Two Principles Intermesh?’(2006) 88 *Int’l Rev of the Red Cross* 375,377; KC Randall, ‘Universal jurisdiction Under International Law,’ *Texas Law review*, No.66 (1988) 785-8.

¹⁰⁵ R.R Churchill and A.V Lowe, *The Law of The Sea* (3rd edn Manchester University Press, 1999) 209.

enforce jurisdiction lies with a flag state.¹⁰⁶ For Crockett, who gave his view in 1977 before the adoption of the 1982 Convention, this common jurisdiction for piracy is the best means of enforcing international law against crime that occurs beyond any state jurisdiction.¹⁰⁷ In fact, after the adoption of that Convention, hardly any changes were made to the provisions for piracy. As Bantekas and Nash correctly point out, the reason why piracy is regarded as a universal crime is because it has long been associated with acts that occur on the high seas or in places that are not owned by any sovereign state¹⁰⁸ and it has been widely acknowledged as an international offence by all nations.

Goodwin suggests seven reasons for the relevance of application of universal jurisdiction to classical piracy.¹⁰⁹ However, these reasons are no longer relevant for contemporary piracy, and he further advocates the need to remove such jurisdiction. He opines that this universal jurisdiction if widely applied may create tension among states and may deprive the accused pirates of human rights and due process of law.¹¹⁰ The Princeton Principles put forth by Goodwin sufficiently illustrate this.¹¹¹

¹⁰⁶ The flag State is a State which has granted to a ship the right to sail under its flag. This rule is derived from Art 6 of the 1958 Convention and Art 92 of 1982 Convention.

¹⁰⁷ CH Crockett 'Towards a Revision of the International Law of Piracy' (1977) DePaul L.Rev 78, 99.

¹⁰⁸ An exception was made recently beginning in 2008 by Resolutions 1816, 1838 and 1846 of the United Nations which dealt exclusively with piracy on the high seas or similar acts in the territorial seas of Somalia: See UN DOC/S/RES/1816 (2008); UN DOC/S/RES 1838 (2008); UN DOC S/RES/1838 (2008), UN/DOC/S/RES/1897 (2009) : see in < <http://www.un.org/documents/scres.htm> > accessed on 20 June 2011.

¹⁰⁹ See Goodwin (2006) 987-1002: 1. Statelessness 2. Pirates are *Hostis Humani Generis* 3. Heinousness 4. Uniform Punishment 5. Narrowly-defined Offence 6. Piracy directly threatens or harms many nations 7. Summation.

¹¹⁰ Goodwin (2006) 1003.

¹¹¹ Princeton Project on Universal Jurisdiction, The Princeton Principles on Universal Jurisdiction 45 (2001); MC Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice, (2001) 42 Va. J. Int'L, 81, 108; to allow continuous application of universal jurisdiction might carry the risk of a state exercising that power for political purposes: see Eugene Kontorovich, 'Implementing *Sosa v Alvarez-Machain*: What

Improper exercises of criminal jurisdiction, including universal jurisdiction, may be used merely to harass political opponents, or for aims extraneous to criminal justice.

Similar to this view, Rubin also discourages the use of universal jurisdiction over contemporary piracy as, although suitable in the past, it is no longer suitable for today's society.¹¹² This is particularly true in this twenty-first century, especially when most of the attacks reported worldwide occur either in territorial seas, internal waters or ports of a state rather than on the high seas or outside the jurisdiction of any state. Thus, the onus of ensuring safety and security of navigation will fall on the sovereign coastal states. Philippe, in commenting on this issue, considers that, although international law empowered and mandated states to punish such crime, the implementation of this international law is complicated as it would involve national legislation, political will, sufficient resources and assets, and efficient enforcement power from that particular state. He suggests three essential ways to achieve proficient operation of the universal jurisdiction:

1. 'The existence of a specific ground for universal jurisdiction;
2. a sufficiently clear definition of the offence and its constitutive elements, and;
3. national means of enforcement allowing the national judiciary to exercise their jurisdiction over these crimes.'¹¹³

In the absence of any one of these, there will be a lack of practical sense for the application of universal jurisdiction. Despite concerns expressed by some commentators on the difficulties of implementing this jurisdiction, it has until now

Piracy Reveals About the Limits of the Alien Tort Statute,' (2004) 80 Notre Dame L.Rev.111, 139.

¹¹² AP Rubin, 'The Law of Piracy' (1988) 63 US Naval War C.Int'l L Stud. 343; Cross-refer to page 75; Rubin (1988) 84, Goodwin (2006) 1011.

¹¹³ Xavier Phillippe, 'The Principles of Universal Jurisdiction and Complementarity: How Do The Two Principles Intermesh?'(2006) 88 Int'l Rev of the Red Cross 375,379.

been associated with the crime of piracy. The 1982 Convention requested all states to cooperate ‘to the fullest possible extent’ in the suppression of piracy.¹¹⁴ However, states have normally accepted the universal jurisdiction as a voluntary commitment.¹¹⁵ Due to the lack of a precise definition of piracy and incomplete enumeration of the duty, most often, only states whose national or territorial interests are affected by the crime will take action against the criminal.¹¹⁶

The commendable empirical research by Kontorovich and Art found that the exercise of universal jurisdiction over piracy throughout the world during the ten-year period from 1998 to 2008 accounts for no more than 1.47 per cent of the total number of prosecutions.¹¹⁷ Only four states, namely China, India, Kenya and Yemen have used universal jurisdiction to prosecute piracy.¹¹⁸ Indeed, the slight rise of 0.94 per cent in the exercising of universal jurisdiction over piracy since 2008 has been mainly caused by the recent sharp increase in Somali piracy.¹¹⁹ Despite the legitimacy of universal jurisdiction for combating piracy, states are reluctant, hesitant or perhaps unwilling to invoke universal jurisdiction for many reasons, one of which is the potential for abuse of universal jurisdiction. Bassiouni opined that:

¹¹⁴ Art 100 of 1982 Convention: ‘All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.’

¹¹⁵ Phillippe (2006) 387.

¹¹⁶ Except in Art 100, all other provisions on piracy in the 1982 Convention use the word ‘may’ which has discretionary effect. It ‘does not expressly limit the set of states that may cooperate in suppressing a particular act of piracy; nor does it expressly set forth any priority among the affected states such as the flag state of the pirated vessel, the state(s) of nationality of the crew of the pirated vessel, the state of nationality of the pirates, the state(s) of nationality of the cargo interests, or the flag state of the warship that seized the pirate ship.’: see JA Roach ‘Countering Piracy Off Somalia: International Law and International Institutions,’ (2010) 104 AJIL 397,403.

¹¹⁷ E Kontorovich and S Art, ‘An Empirical Examination of Universal Jurisdiction for Piracy’ (2010) 104 AJIL 436.

¹¹⁸ Kontorovich and Art (2010) 437.

¹¹⁹ From 0.53 per cent (four cases) from 1998 to 2008 to 1.47 per cent in 2009. See Kontorovich and Art (2010) 437.

Unbridled universal jurisdiction can cause disruptions in world order and deprivation of individual human rights when used in a politically motivated manner or for vexatious purposes. Even with the best of intentions, universal jurisdiction can be used imprudently, creating unnecessary frictions between States, potential abuses of legal processes, and undue harassment of individuals prosecuted or pursued for prosecution under this theory. Universal jurisdiction must therefore be utilized in a cautious manner that minimizes possible negative consequences, while at the same time enabling it to achieve its useful purposes.¹²⁰

It is suggested that, although universal jurisdiction is a recognised jurisdictional basis for dealing with piracy,¹²¹ states normally use diplomacy or invoke other means of establishing their jurisdiction in order to avoid controversial prosecution, especially since the 1982 Convention is silent on the method of prosecution and imposition of punishment and has not specified any penalties for the pirates. It leaves the matters of enforcement action, which relate to substantive and procedural process, to the individual state, meaning that such a universal crime would be subject to the municipal law of an individual state.¹²² However, enforcement might be difficult or impossible to implement if a state does not have any local law regulating piracy or crimes resembling it. Thus, states need to further incorporate relevant law pertaining to the crime of piracy into their domestic legislation and to establish jurisdiction of the local courts to try such crimes. Having said that, it is not expected that each state will have similar, precise and identical rules of enforcement. Rather, it will be sufficient for states to have consistent practical laws that meet the ultimate goal of the

¹²⁰ Cherif Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice', (2001-2002) 42 *Virginia Journal of International Law* 81, 82.

¹²¹ In the absence of any new law or rules, the incorporation of customary international law of piracy to the present 1982 Convention may also mean justifiably continuing with the concept of universal jurisdiction.

¹²² Dubner (1979) 488.

Convention, which is to prosecute and punish the pirates or armed robbers who prey on ships.

3.3.3 PROBLEMS WITH THE RIGHT OF HOT PURSUIT

Despite the mandate of the 1982 Convention to all states to combat piracy on the high seas, there is a problem when the pursued pirates enter the territorial waters of their own nationality or the territorial waters of other states. State territorial sovereignty is a very recognized principle in international law. Foreign ships will be said to infringe this principle if they breach the limit set out. For that reason, the 1982 Convention provides the right of hot pursuit with some limitations.¹²³ Paragraph three of Article 111 provides that: ‘the right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own state or a third state.’ This is actually the concept of fresh pursuit that was practised by Anglo-Americans during the 19th century.¹²⁴ Poulantzas considers that, although the concept of hot pursuit has extended the rights of states into the high seas, it has not impaired the freedom of the high seas when carried out properly and accordingly.¹²⁵ The idea and recognition of this, which was evidenced by the state practice, had later been incorporated into Articles 23 and 24 of the 1958 Convention. This then became Article 111 of the 1982 Convention.

The right of hot pursuit is limited to the infringements of municipal law that commence while a foreign ship is in the state jurisdictional area of internal and territorial sea. It also applies to continental shelf and EEZ in cases of violation of the

¹²³ Art 111 was taken from Art 23 of the 1958 High Seas Convention.

¹²⁴ Brownlie (2003) 235; Poulantzas (2002) 4-6.

¹²⁵ NM Poulantzas, *The Right of Hot Pursuit in International Law* (2nd edn Kluwer Law International, The Hague 2002) 127.

right of a coastal state within this area.¹²⁶ In order to enforce its law a state has been given power to continue pursuing the foreign vessel without interruption with a condition that ‘a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship’.¹²⁷ In fact, only warships, military aircraft or government-authorized ships have the right to conduct hot pursuit¹²⁸, which might include customs and police vessels.¹²⁹

Although paragraph one of Article 111 of the 1982 Convention recognised the coastal state’s right to extend its power beyond the territorial sea by maintaining an uninterrupted chase of a fleeing foreign ship due to having ‘good reason to believe that the (foreign) ship has violated the laws and regulations of that state’¹³⁰ while that ship was within a state’s sovereignty, the case of piracy under international law is somewhat different. Merely having ‘good reason to believe’ or suspecting that a particular ship is a pirate ship does not give the coastal state the right of hot pursuit of the suspected ship. This is due to the constraint provided in Article 101 of the 1982 Convention which requires the existence of an act of violence or depredation that is¹³¹ committed by one ship against another ship. Moreover, piracy, as defined

¹²⁶ Art 111 (2) of 1982 Convention reads as follows: ‘The right of hot pursuit shall apply *mutatis mutandis* to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations...’

¹²⁷ Art 111 (4) of 1982 Convention reads as follows: Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship is within the limits of the territorial sea, or as the case may be, within the contiguous zone or the exclusive economic zone or above the continental shelf. The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship: Brownlie (2003) 236.

¹²⁸ Art 111 (5) of 1982 Convention reads as follows: The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

¹²⁹ Brownlie (2003) 236.

¹³⁰ Art 111 (1) of the 1982 Convention.

¹³¹ Art 100 of the 1982 Convention.

internationally, is limited to the area of the high seas,¹³² which gives equal right to all nations to repress such an enemy of mankind. Consequently, in spite of being located on the high seas where no-one can claim sovereignty, any warship has the right to pursue a pirate ship that has committed or attempted to commit piracy. However, such a right would still cease immediately when the pirate ship enters its own territorial state or any other third-party state. Article 111 also protects the rights of innocent foreign ships, which merit compensation if they are mistakenly suspected by the coastal state's authority or if there is a lack of evidence to justify such a pursuit.¹³³

Dubner long ago suggested the need to extend and allow hot pursuit provisions into the territorial waters of foreign coastal states for more effective enforcement action against piracy.¹³⁴ Although this might be a good way of capturing the pirates, intrusion into a state's sovereign territory may create tension between states. Such consequences will threaten international peace and worsen international relations between states. It has been suggested that more diplomatic means, such as cooperation and bilateral or trilateral agreements between surrounding states might create good relations and produce an efficient solution to capture pirates. The bilateral and trilateral agreement to coordinate law enforcement between Malaysia, Indonesia and Singapore, which includes an agreement to extend the right of hot pursuit up to five miles within one another's territorial waters, has proved to be a good mechanism to

¹³² Cross-refer to Chapter 3 for a comprehensive discussion on the definition of piracy.

¹³³ Art 111(8) of 1982 Convention reads as follows: Where a ship has been stopped or arrested outside the territorial sea in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained.

¹³⁴ BH Dubner, *The Law of International Sea Piracy* (Martinus Nijhoff, The Hague 1980) 8.

combat piracy.¹³⁵ Apart from cooperative measures, the right of hot pursuit has recently been extended to the territorial sea of Somalia, following the sharp increase in piracy incidents off the coast of Somalia and the Gulf of Aden.¹³⁶ This is actually a new approach and an unprecedented right.¹³⁷ The purpose of this is very straightforward, namely to catch and prosecute pirates and suppress piracy. On 16 December 2008, the UN Security Council decided that:

‘...States and regional organizations cooperating in the fight against piracy and armed robbery at sea off Somalia’s coast - for which prior notification had been provided by Somalia’s Transitional Federal government to the Secretary General - could undertake all necessary measures ‘appropriate in Somalia’...’

Nevertheless, it is noteworthy that this exceptional right is solely applicable to Somali territory and does not create any international customary right.¹³⁸ The rationale behind this resolution is the political instability, weak governance and ineffective enforcement power of Somalia to suppress such crime alone. This resolution has proved to be a challenge to the International Law of the Sea which may be seen as a weak tool for combating maritime crime, especially piracy.

¹³⁵ Cross-refer to Chapters 4 and 5 for further discussion on cooperation mechanism of the three states in combating piracy in the Straits of Malacca; See also: UK House of Commons Transport Committee, Eighth Report of Session 2005-06, Piracy, at page 16 and Annex D, Ev29 at <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmtran/1026/1026.pdf> accessed on July, 12 2011.

¹³⁶ IMO Assembly in November 2007 adopted Resolution A.1002 (25) which, among other things, requested the UN Security Council to seek the consent of Somalia’s Transitional Federal Government (TFG) for warships or military aircraft to enter its territorial sea, to engage in operations against pirates or suspected pirates and armed robbers.

¹³⁷ The UN Security Council SC/9541 ‘Security Council authorizes states to use land-based operations in Somalia as part of the fight against piracy off the coast, unanimously adopting Resolution 851 (2008).

¹³⁸ See UN Resolution. See <http://www.un.org/News/Press/docs/2008/sc9541.doc.htm>

3.3.4 THE CONFLATION OF PIRACY AND MARITIME TERRORISM AND THE 1988 SUA CONVENTION

The fact that piracy is becoming increasingly violent with the use of more sophisticated weapons, to the extent of callously inflicting injury and death on the crew members of the attacked ship, has widened the scope of maritime security.¹³⁹ Indeed, some commentators have equated piracy attacks with terrorism at sea, especially as there has been an increase in the number of hijackings in piracy incidents.¹⁴⁰ Ong lists four main grounds for possible overlapping or interconnecting areas between piracy and maritime terrorism based on the implication of both threats for global security; tactics and approaches or *modus operandi* employed; similarity of armory used to achieve their objectives (hijacking ships); and, finally, the increasing use of violence.¹⁴¹ However, the main obstacle to these perceived similarities and connexions between pirates and terrorists that has been strongly upheld by antagonists of this perspective is the different motives of the pirates and terrorists.¹⁴²

Terrorism is distinct from piracy in a straightforward manner. Piracy is a crime motivated by greed, and thus predicated on financial gain. Terrorism is motivated by political goals beyond the immediate act of attacking or hijacking a maritime target. The motivating factor for

¹³⁹ See: Table 8 'Types of Violence to Crew and Passengers, Jan-Dec 1994-2005' in IMB Annual Piracy Report 2005 and Table 8 'Types of Violence to Crew, Jan-Dec 2005-2009' in IMB Annual Piracy Report 2010.

¹⁴⁰ JL Jesus, 'Protection of Foreign Ships Against Piracy and Terrorism at Sea: Legal Aspects' (2003) 18 *International Journal of Marine and Coastal Law*, 363, 387; Leticia Diaz & Barry Hart Dubner 'On the problem of utilizing unilateral action to prevent acts of sea piracy and terrorism: A proactive approach to the evolution of International law,[2004-2005] 32 *Syracuse J Int'l L & Com* 1; GG Ong 'Ships can be Dangerous, too: Coupling Piracy and Terrorism in Southeast Asia's Maritime Security Framework' in D Johnson and M Valencia *Piracy in Southeast Asia: Status, Issues and Responses* (ISEAS, Singapore 2005) 45, 49; Helmut Tuerk, [2007-2008] 15 *Miami Int'l & Comp. L. Rev.* 337-368, 343.

¹⁴¹ GG Ong 'Ships Can be Dangerous, Too: Coupling Piracy and Terrorism in Southeast Asia's Maritime Security Framework' in D Johnson and M Valencia (eds.) *Piracy in Southeast Asia, Status, Issues, and Responses* (ISEAS, Singapore 2005) 58.

¹⁴² Ong (2005) 59.

terrorists is generally political ideology stemming from perceived injustices, both historical and contemporary.¹⁴³

It is a well-established principle that the goal of piracy and armed robbery at sea is to achieve financial or private gain, whereas terrorism is carried out for political or ideological purposes and is always coupled with the threat of mass devastation.¹⁴⁴

Apart from perpetrating the act for private gain, pirates always try to avoid attention and will only use harm if necessary to accomplish their mission while terrorists always call attention to themselves and will inflict as much harm as they can.¹⁴⁵

When commenting on maritime terrorism, Young and Valencia prefer to use political piracy as its working definition. Just as the definition of piracy has been problematic, maritime terrorism also has no internationally accepted definition.¹⁴⁶ Indeed some scholars prefer to use Article 3 of the SUA Convention as an operational definition for maritime terrorism.¹⁴⁷

Jesus believes that the absence of specific rules on maritime terrorism probably stems from the fact that ‘terrorism at sea has never been a serious international problem, in contrast to piracy and armed robbery.’¹⁴⁸ The *Achille Lauro* incident of October 1985 may be considered the first case to trigger the alertness of the international community

¹⁴³ AJ Young and Mark J Valencia, ‘Piracy and Terrorism Threats Overlap,’ *The Washington Times* (Honolulu, 6 July 2003) www.washingtontimes.com/news/2003/jul/6/20030706-104801-9949r/print/ accessed on 27 June 2011.

¹⁴⁴ Tammy M Sittnick ‘State responsibility and maritime terrorism in the Straits of Malacca: Persuading Indonesia and Malaysia to take additional steps to secure the straits’ [2005] 14 *Pac Rim L & Pol J* 743,751; Leticia Diaz & Barry Hart Dubner ‘On the problem of utilizing unilateral action to prevent acts of sea piracy and terrorism A proactive approach to the evolution of International law [2004-2005] 32 *Syracuse J Int’l L & Com* 1.

¹⁴⁵ *ibid.*

¹⁴⁶ Ong (2005) 61.

¹⁴⁷ *ibid.* See Art 3 in Chapter 3 (para 3.3.4.1).

¹⁴⁸ Jesus (2003) 387.

on the *lacuna* of law dealing with maritime terrorism.¹⁴⁹ This Italian-flagged cruise ship was hijacked on the high seas by four Palestinians who held the crew and passengers hostage, threatening to blow up the ship should any rescue operation be undertaken.¹⁵⁰ One passenger was killed when their demand for the release of fifty Palestinian prisoners by Israel was not fulfilled.¹⁵¹ Certainly, the involvement of various nationals and conflicts of jurisdiction in such a high-risk or fatal incident requires a more comprehensive international legal framework. The absence of international law to deal with the increasing and potential risk of modern maritime terrorism and the inadequacy of existing international law on sea piracy met with a rapid response by the International Maritime Organisation one and a half months after the *Achille Lauro* incident. It started by providing a resolution on measures to prevent unlawful acts that threaten the safety of ships and the security of their passengers and crews.¹⁵² Tuerk comments that the adoption of practical measures, no matter how stringent, is insufficient to deter such crime, especially when several national jurisdictions are involved. Thus, a practical legal deterrent to make the criminal duly accountable is vital and urgent.¹⁵³

¹⁴⁹ RC Beckman, 'The 1988 SUA Convention and 2005 SUA Protocol: Tools to Combat Piracy, Armed Robbery and Maritime Terrorism' in R Herbert-Burns, S Bateman and P Lehr *Lloyd's MIU Handbook of Maritime Security* (CRC Press, New York 2008) 192. JD Simon, 'The Implications of the *Achille Lauro* Hijacking for the Maritime Community' The Rand Paper Series (1986):

<http://www.rand.org/pubs/papers/2008/P7250.pdf> accessed on 30 June 2011.

¹⁵⁰ Malvina Halberstam. Terrorism on the High Sea: The *Achille Lauro*, Piracy and the IMO Convention on Maritime Safety, [1988] 82 AJIL 269.

¹⁵¹ Brad J Kierserman, 'Preventing and Defeating Terrorism at Sea: Practical Considerations for the Implementation of the Draft Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA), in Myron H Nordquist, John Norton Moore & Kuen Chen Fu, eds. *Recent Developments in the Law of the Sea and China (2005)* 425, 425 ; Glen Plant, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, [1990] 39 Int'l & Comp L.Q.27.

¹⁵² Resolution A584 (14); Tuerk (2008) 340.

¹⁵³ Tuerk (2008) 340.

In reviewing the *Achille Lauro* incident, it is apparent that several conditions required by Article 100 of the 1982 Convention to establish the accountability of piracy under international law were not fulfilled. First and foremost is the condition pertaining to the intention of the attacker or hijacker, which has already been highlighted. The ultimate purpose of the criminals was to serve their ideological and political needs rather than any financial end.¹⁵⁴ Secondly, Article 101(a) (i) states that the seizure must be made by one ship against another ship. However, in this case there was no other ship involved as the cruise ship was hijacked by passengers pretending to be tourists on the ship.¹⁵⁵ Despite the fact that the thorough evaluation of Article 101 of the 1982 LOSC on the incidence of maritime terrorism, particularly the case of the *Achille Lauro*, would suggest that there is no possible nexus between these crimes primarily because of the different motives of pirate and terrorist, the lack of comprehensive rules of law on maritime terrorism has resulted in this theory. It is noteworthy that, at that time, there were already laws to suppress unlawful acts with respect to civil aviation such as the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft and the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.¹⁵⁶ It might be suggested that the absence of law on maritime terrorism was due to the fact that it had not previously been seen as crucial and vital to the international community until the real occurrence of the *Achille Lauro* tragedy sparked its urgency.

¹⁵⁴ Art 101(a) of the 1982 Convention.

¹⁵⁵ Art 101 (a)(i) of the 1982 Convention.

¹⁵⁶ Tuerk (2008) 343.

Thus, as a result of the strenuous efforts of states including Italy, Austria and Egypt together with the full cooperation and support of the IMO, the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA) was finally adopted consensually in Rome on 10 March 1988. It was remarkable that such a Convention was successfully adopted less than three years after the *Achille Lauro* incident. In fact, the 1988 SUA Convention came into force on 1 March 1992, which was two years earlier than the 1982 Convention.¹⁵⁷ Later on, in the aftermath of the September 11, 2001 terrorist attack on New York's Twin Towers, the international community was once again shocked by the realization that a mode of transportation had been used as a weapon of mass destruction.¹⁵⁸ The IMO called for a review of the 1988 SUA Convention in order to strengthen maritime security.¹⁵⁹ This review was necessary in highlighting concern over the possibility of a ship being used as a means of destroying an important waterway or port in the same manner as the planes were used by terrorists in the September 11 tragedy.

¹⁵⁷ IMO Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Mar 10, 1988.

¹⁵⁸ In the September 11, 2001 attack, planes were used as weapons to attack the Twin Towers in New York.

¹⁵⁹ Apart from the review of the SUA Convention, a Conference on Maritime Security was also held in December 2002 which discussed, among other things, the amendment of Chapter XI of the SOLAS Convention for the adoption of ISPS Code, strict requirements on shipping companies and a requirement to install automatic communication through an alert system on board a ship: Jesus (2003) 389-390.

3.3.4.1 THE 1988 SUA CONVENTION & 2005 PROTOCOL AS AN ALTERNATIVE TO ADDRESS INADEQUACY OF 1982 CONVENTION ON PIRACY

It is recognized that one of the reasons for adopting the SUA Convention in 1988 was to rectify the shortcomings of the regime of piracy in the 1982 Convention, leading to the private and financial motives of the criminals and the two-ship rule being relinquished.¹⁶⁰ Unlike the 1982 Convention which stipulated that piracy is a crime of the high seas, the SUA Convention disregards the whereabouts of the occurrence of the unlawful and illegal acts. In other words, this Convention broadens the scope of crime that is not covered by the 1982 Convention including the seizing of a ship, violence against individuals on ships and causing destruction on ships that might endanger the safety of navigation.¹⁶¹ Article 3 of the SUA Convention provides as follows:

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 of 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
 - (c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or

¹⁶⁰ Tuerk (2008) 345-346; ND Korolyova, 'International Legal Issues of Cooperation between States in Suppressing Piracy and Terrorism: Some Aspects, in Moscow Symposium on the Law of the Sea' in Thomas A Clingan, Anatoly L Kolodkin (eds.) (Law of the Sea Institute, University of Hawaii 1988) 174, 177.

¹⁶¹ Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation. Concluded at Rome on 10 March 1988 <<http://untreaty.un.org/English/Terrorism/Conv8.pdf>>; Stuart Kaye 'Interdiction and Boarding of Vessels at Sea: New Developments and Old Problems' in R Herbert-Burns, S Bateman and P Lehr (eds.) *Lloyd's MIU Handbook Maritime Security* (CRC Press, New York 2008) 207.

- (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 endangers or is likely to endanger the safe navigation of that ship; or
 - (e) destroys or seriously damage maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger 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 person, in connection with the commission or the attempt commission of any of the offences set forth in subparagraphs (a) to (f).
2. Any person also commits an offence if that person:
- (a) Attempts to commit any of the offences set forth in paragraph 1; or
 - (b) Abets the commission of any of the offences set forth in paragraph 1 perpetrated by any person or is otherwise an accomplice of a person who commits such an offence; or
 - (c) Threatens, with or without a condition as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing so any act, to commit any of the offence set forth in paragraph 1, subparagraphs (b), (c) and (e), if that threat is likely to endanger the safe navigation of the ship in question.

In order to remedy the inadequacy of the 1982 Convention, the SUA Convention merely describes what would become 'unlawful acts' as listed above, rather than

defining maritime terrorism or political piracy.¹⁶² The wider scope of this provision will definitely place many kinds of unlawful acts under the ambit of the SUA Convention including acts of piracy and armed robbery against ships that occur in the territorial sea of a sovereign state but excluding internal or inland waters.¹⁶³ With two sets of international rules in place, namely the 1982 Convention and the SUA Convention, pirates will not escape prosecution even in cases in which a coastal state is unable or unwilling to assert its jurisdiction and prosecute the offenders.¹⁶⁴ This is due to the fact that, under the SUA Convention, the state party has a duty to extradite the offender to one of the states that has jurisdiction under such circumstances.¹⁶⁵ Moreover, the main aim of the SUA Convention is to ensure the offenders are punished and pay the price for their deeds. Jesus points out that, in the regime of piracy, there is no obligation on states to prosecute and extradite the offenders. However, he suggests that the rule of 'extradite and prosecute' has been a 'solid root in international terrorism law.'¹⁶⁶ Thus, it may have a binding effect on the non-state parties of the SUA.¹⁶⁷ State jurisdiction to prosecute the non-state parties may be based on four internationally recognised jurisdictional bases. The first is the territoriality-based jurisdiction in which the unlawful act was committed. This is a common basis accepted by states. Second is the nationality-based jurisdiction which takes into account the citizenship of the offender or the flag state of the ships.¹⁶⁸ Third is the passive nationality jurisdiction or extraterritorial jurisdiction, in which the

¹⁶² Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation. The preamble reads: 'Acknowledging the terrorist acts threaten international peace and security...'; RC Beckman (2008) 192.

¹⁶³ Tuerk (2008) 345; ND Korolyova [1988] 174, 177.

¹⁶⁴ Jesus (2003) 392.

¹⁶⁵ Art 6 of the SUA Convention.

¹⁶⁶ Jesus (2003) 392.

¹⁶⁷ Jesus (2003) 392.

¹⁶⁸ Art 6(1) (a) of the SUA Convention.

victim's citizenship is considered. Fourth is the universal jurisdiction, which has been used in very limited internationally recognised crime, such as piracy.¹⁶⁹ In addition to these bases of jurisdiction, the SUA Convention also established two more jurisdictions, namely the habitual residence jurisdiction for those who have no nationality or are stateless persons¹⁷⁰ and the target state jurisdiction in cases where the offence 'is committed in an attempt to compel that state to do or abstain from doing any act.'¹⁷¹

3.4 CONCLUSION

The threats of piracy and armed robbery at sea in this twenty-first century are relatively challenging. The image of a flag with skull and crossbones along with a heroic character of a pirate captain is just a fiction that is no longer appropriate in this century or maybe centuries ago. Piracy is clearly a real menace to shipping industries, local authorities and stakeholders. Looking at the recent dramatic increase in contemporary piracy all over the world, it is certain that the provisions available to suppress piracy in the Convention are still inadequate. The adoption of the 1982 Convention has not totally solved the problems of piracy. It merely describes piracy under international law, without further explaining its procedural law such as the method of arrest, prosecution and punishment. It also lacks legal coverage as almost all modern piracy, especially in Southeast Asian waters, occurs within the territorial seas of coastal states, and in ports, harbours and anchorages. Subsequently, when it comes to dealing with the real problem in contemporary society, the existing

¹⁶⁹ Art 6(4) of the SUA Convention; Cross-refer to Chapter 3 (para 3.3.2) for a detailed discussion on universal jurisdiction over the crime of piracy.

¹⁷⁰ Art 6(2) (a) of the SUA Convention.

¹⁷¹ Art 6 (2) (c) of the SUA Convention.

international law of piracy might provide a good theoretical framework, but it is almost impossible to enforce it efficiently.

Nonetheless, on closer examination of the definition of piracy, which has its roots in the previous literature, discussion and practice teach us that such a definition of a universal crime on which it is relatively difficult to reach a universal consensus among nations, should preferably be retained. The discrepancy of opinions from ancient times to the present day is unavoidable. Obviously, the lack of a legal definition of piracy does not mean that it is the sole reason why piracy cannot be curtailed. It is not bizarre that piracy still exists today, as the crimes of robbery on land, murder and so forth have not been eliminated totally either. While the law and regulations such as the 1982 Convention and 1988 SUA Convention are considered tools for combating piracy and armed robbery against ships, other methods of preventing and controlling this crime, such as cooperation among states and regions, the active role of coastal guards, navy, marine police, and enforceable sets of municipal laws are much needed. Hence, this is not the time to be overly concerned with the technical problem of the definition; rather, it is timely to find the best solution to rectify and improve the weaknesses in the existing international laws. The following chapters will discuss the issues of piracy that affect maritime safety and security in the Straits of Malacca. The regional response will be highlighted first before national legal frameworks and littoral states' cooperative measures are addressed.

PART II

REGIONAL AND DOMESTIC LEGAL AND POLICY RESPONSES ON THE
THREAT OF PIRACY AND ARMED ROBBERY IN THE STRAITS OF
MALACCA: THE MALAYSIAN PERSPECTIVE

CHAPTER FOUR

PIRACY AND ARMED ROBBERY AGAINST SHIPS:

A THREAT TO MARITIME SAFETY AND SECURITY

IN THE STRAITS OF MALACCA

4.1 INTRODUCTION

The twenty-first century has seen a constant and rapid growth in seaborne trade supplying various goods and energy products including petroleum and gas. This has led to a need for sophisticated ships equipped with high-security facilities and modern technology.¹ The growth of the shipping industry also gives rise to increasing risks of maritime crime and violence, ship collisions and marine environmental degradation, especially on the busiest trade navigation routes.

The rapid expansion of trade globally and shifts in trade flows into the Asia-Pacific region in the 21st century indicate the significance of regional maritime trade routes for the world's economy. In fact, the rapid economic growth of the East Asian region has doubled world trade.² As commented by Ho and Raymond, a parallel movement of 'the economic centre of gravity' and shift of maritime power to the Asia Pacific region is unavoidable due to the importance of sea-borne trade and access to marine resources to this region.³ Consequently, straits that have been used for international navigation, in particular the Straits of Malacca, are becoming ever more important

¹ Craig H Allen, Revisiting the Thames Formula: The evolving role of the IMO and its member states in implementing the 1982 LOS, (2009) 10 San Diego International Law Journal 265-334.

² J Boutilier, 'The Global Maritime Outlook 2004' in J Ho and CZ Raymond (eds.) *The Best of Times, The Worst of Times: Maritime Security in the Asia-Pacific* (IDSS, Singapore 2005) 15.

³ J Ho and CZ Raymond (eds.) *The Best of Times, The Worst of Times: Maritime Security in the Asia-Pacific* (IDSS Singapore 2005) 1.

strategic sea lanes of communication (SLOCs) for the maritime community; however, more sinister challenges await.⁴

Undoubtedly the Straits of Malacca, a vital maritime gateway connecting the Indian and Pacific Oceans, is one of the world's vital straits. This is clearly evidenced by the volume of commercial vessels passing through the Straits annually. Yohei Sasakawa, the Chair of the Nippon Foundation⁵, has estimated that:

The traffic volume in the Malacca-Singapore Straits is four times that of the Suez Canal and more than ten times that of the Panama Canal. By 2020, we can expect a sixty percent increase in traffic, from the current 4 billion deadweight tons to 6.4 billion deadweight tons. The number of vessels will rise by fifty percent, from the current number of **94,000**, to 141,000...⁶

Furthermore, a statistic given by the Marine Department of Malaysia has shown a remarkable increase in traffic density in the Straits during the twelve-year period of 1999 to 2010 based on the types and total of vessels report to Klang VTS.⁷ Container and tanker vessels are contributing most to this dramatic increase. In fact, the number of container vessels passing through the Straits was seventeen times higher in 2010

⁴ MT Yasin, 'Security of Sea lanes of Communication (SLOCS) through the Straits of Malacca: The need to secure the Northern approaches' in D Rumley, S Chaturvedi and MT Yasin *The Security of Sea Lanes of Communication in the Indian Ocean region* (MIMA, Kuala Lumpur 2007) 225.

⁵ 'Development towards a New World Maritime Community, a Cooperative Framework for the Future of the Malacca and Singapore Straits' addressed note in the Symposium of the enhancement of safety of navigation and the environmental protection of the Malacca and Singapore, 13-14 March 2007, 2. For other views compare with: About 93,000 merchant vessels traversing the Straits annually: See J Boutilier (2005) 15. Traffic transiting the region is considerably heavy, reported to be approximately 60,000 vessels a year: J Ashley Roach 'Enhancing Maritime Security in the Straits of Malacca and Singapore' (2005) *Journal of International Affairs* 59, 97; 50,000 ships per year, nearly a quarter of the world shipping: David W Munn 'Old Danger Becomes New Threat on the Open Seas' *US Navy Sea Power Magazine* Oct 2004.

⁶ *ibid.* (emphasis added).

⁷ See Appendix.

than twelve years ago.⁸ While the escalating volume of commercial vessels passing through the Straits could be regarded as a notable sign of the growth of the global economy in this region, the threat and risks it poses to the coastal states are equally significant.

The increasing dependence on the Straits by the seaborne trade has meant that the challenges of ensuring safety and security are more critical than ever. While the 1982 Convention is concerned with environmental degradation and pollution mainly caused by oil spills, ships colliding and traffic density in the prominent waterway, the maritime security threats such as piracy, armed robbery, ship hijacking and potential maritime terrorism are arguably the most vital security concerns that must be dealt with immediately. This chapter analyses the threat of piracy and armed robbery ships in the Straits based on the statistics of the IMB. The analysis of the risk or the risk assessments will explicate the magnitude of the risk and threat of piracy and armed robbery in the Straits. The types of piracy and the extra-legal factors that contribute to this crime are also examined to provide a holistic view on the implications of these crimes on navigational safety and security in the Straits of Malacca. The comprehensive nature of the terms ‘safety’ and ‘security’ in the maritime context are firstly discussed in brief before relating them to piracy and armed robbery.

⁸ In 1999, there were 14521 container vessels passing through the Straits, as compared to 253405 in 2010: See Appendix.

4.2 MARITIME SAFETY OR SECURITY? TWO SIDES OF THE SAME COIN

The growing role of the sea as an avenue for trade and energy transportation will never be free of the increasing risk and threat of maritime perils to humans and ecological concerns.⁹ The inherent and persistent risk to maritime security and the safety of the shipping-related industry has been widely discussed. According to a commentator, the maritime security issue in Southeast Asia covers broad issues including port security, freedom of navigation, safety of the sea lines of communication (SLOCs), piracy and armed robbery against ships, as well as maritime terrorism.¹⁰ A clear understanding of the term is thus important to provide a foundation for cooperation among states.¹¹

As far as the 1982 Convention on the Law of the Sea is concerned, its adoption more than two decades ago has been criticized for its lack of coverage of the above issues, and this has not been dealt with satisfactorily, particularly the issue of what constitutes maritime safety and security.¹² Although both terms are used several times in the provisions of the Convention, there is no definition in the 1982 Convention of the meaning of security and safety at sea.¹³ Perhaps this definition is intentionally omitted to cater for general usage and common interpretation. Moreover, the constitutive

⁹ Craig H Allen, Revisiting the Thames Formula: The evolving role of the IMO and its member states in implementing the 1982 LOS, (2009) 10 San Diego International Law Journal 265(-334).

¹⁰ RC Banlaoi 'Maritime Security Outlook for Southeast Asia' in J Ho and CZ Raymond *The Best of Times, The Worst of Times: Maritime Security in the Asia-Pacific* (IDSS, Singapore 2005) 59-79, 59.

¹¹ *ibid.*

¹² Cross refer to Chapter 3 (para 3.3).

¹³ See United Nations Convention on the Law of the Sea 1982 <<http://www.imo.org>> accessed on 12 November 2009.

character of the 1982 Convention which provides a legal regime that is expected to be complemented by other rules of international law.¹⁴ Desker observes that maritime safety and maritime security should not be differentiated.¹⁵ He argues that the past practice of making a distinction between maritime safety under the aegis of the International Maritime Organisation (IMO) on the one hand, and maritime security under the authorities of States on the other hand, is no longer relevant.¹⁶ In fact, ‘maritime safety is now an integral part of maritime security’.¹⁷ However, the IMO’s Current Awareness Bulletin May 2009 is another example of the distinction drawn by this organisation between ‘maritime safety’ and ‘maritime security’.¹⁸ It divides maritime news into several categories such as casualties, IMO, law and policy, marine technology, maritime safety, maritime security, navigation and communications, pollution, ports and harbours, seafarers, shipbuilding and recycling of ships, shipping, special reports and sources. The only matter relating to ships’ compliance with safety rules and the like comes under the section of maritime safety, whereas the maritime security section covers the topic of sea crime such as piracy and armed robbery. In the recent IMO strategic plan, the Organisation proclaims that:

The mission of the International Maritime Organization (IMO) as a United Nations specialized agency is to promote safe, secure, environmentally sound, efficient and sustainable shipping through cooperation. This will be accomplished by adopting the highest practicable standards of *maritime safety and security*, efficiency of

¹⁴ Craig H Allen, (2009) 274; William T Burke, State Practice, New Ocean Uses and Ocean Governance under UNCLOS in Thomas S Mensah ed. (1996) *Ocean Governance: Strategies and Approaches for 21st Century*, 219-222; See also Art 311 of 1982 Convention and its preambles.

¹⁵ Barry Desker - foreword note in S Bateman, CZ Raymond and J Ho ‘Safety and Security in the Malacca and Singapore Straits: An Agenda for Action’ IDSS Policy Paper, May 2006.

¹⁶ cf. ‘Maritime security is an integral part of IMO’s responsibilities.’ However, maritime security here is referring to security measures on ships, such as the 2002 amendment to the 1974 Safety of life at sea Convention (SOLAS) and the International Ship and Port Facility Security Code (ISPS Code). See <<http://www.imo.org/Safety/>> accessed on 12 November 2009.

¹⁷ *ibid.*

¹⁸ IMO Maritime Knowledge Centre, Current Awareness Bulletin vol.XXI no.5 May 2009. 7 & 8.

navigation and prevention and control of pollution from ships, as well as through consideration of the related legal matters and effective implementation of IMO's instruments with a view to their universal and uniform application.¹⁹

This Strategic Plan promotes the importance of maintaining and sustaining safety and security in the maritime context through cooperation which may help to improve both safety and security at the same time. Although the IMO is arguably attempting to distinguish these two terms, the objectives of the IMO's regulations or plans are ultimately to promote and ensure that both 'maritime safety' and 'maritime security' are well-maintained.²⁰

According to the *Oxford English Dictionary's* definitions of security²¹ and safety²², there is a similarity between these two terms in that both use the words 'protection of something or from something'. Thus, in usual and plain meaning, it might be assumed that, whenever the issue of maritime safety is discussed, it might also encompass maritime security and vice versa. In the view of Desker, the terms 'safety' and 'security' are complementary and normally have a common objective. If an important sea route lacks security measures, the safety of navigation is probably in a state of jeopardy. It is therefore submitted that, despite some views that attempt to distinguish between the meanings of maritime safety and security, the plain meaning that both

¹⁹ IMO Strategic Plan (2008-2013) (emphasis added).

²⁰ IMO 2004: 'Focus on Maritime Security', 7; Craig H Allen 'Revisiting the Thames Formula: The evolving role of the IMO and its member states in implementing the 1982 LOS' [2008-2009] 10 San Diego International Law Journal, 265-334.

²¹ 'The activities involved in protecting a country, building or person against attack, danger...' C Soanes and A Stevenson (eds.) *Oxford Dictionary of English* (OUP Oxford 2005).

²² 'The state of being safe and protected from danger or harm; the state of not being dangerous; a place where you are safe' C Soanes and A Stevenson (eds.) *Oxford Dictionary of English* (OUP Oxford 2005).

terms are interrelated is rather preferred for the purpose of this thesis in which piracy is the central issue.²³

4.3 PIRACY AS A THREAT TO MARITIME SAFETY AND SECURITY IN THE STRAITS OF MALACCA: A GROWING OR DECLINING RISK?

The preliminary and historical aspects of piracy and armed robbery against ships are first discussed in order to appreciate the reasons for the enduring nature of piracy incidents in the Straits in this modern and contemporary world in spite of the rapid development of laws, regulations and conventions dealing with this crime.

4.3.1 HISTORICAL OVERVIEW: THE ORIGIN OF PIRACY IN THE STRAITS

Piracy and armed robbery against ships is one of the most prominent threats to maritime security in the Southeast Asia region. Piracy has existed in this region even before the European countries conquered the Indian Ocean.²⁴ Pirates were also famously known as ‘*orang laut*’ or ‘*pengembara laut*’ (sea adventurers) during the late eighteenth century and they used to conduct operations in the South China Sea, Sulu Sea and the Straits of Malacca.²⁵ Among Malays, piracy is called ‘*lanun*’ which means ‘*perompak laut*’ or ‘*bajak laut*’ (the person who robs at sea).²⁶ The word originated with the native people of Tasik Lanao and Teluk Ilanun of the Pulau

²³ Maritime security is rather self-explanatory: it means security concerns related to the maritime realm. See AJ Young (2005) 1 & 25.

²⁴ RC Beckman, CG War and VL Forbes ‘Acts of Piracy in the Malacca and Singapore Straits’ in *IBRU Maritime Briefing* (IBRU, 1994) 1. Cf to Andrin Raj, ‘Japan Initiatives in security cooperation in the Straits of Malacca on Maritime Security and in Southeast Asia: Piracy and Maritime Terrorism’ The Japan Initiative for International Affairs (JIIA) Tokyo Japan 2009, 8.

²⁵ Ahmad Jelani Halimi, *Perdagangan dan Perkapalan Melayu di Selat Melaka* (Dewan Bahasa dan Pustaka, Kuala Lumpur 2006) 188-189; Nicholas Tarling, *Piracy and Politics in the Malay World: A Study of British Imperialism in nineteenth-century South-east Asia* (FW Cheshire, Sydney 1963) 21 and 9.

²⁶ Teuku Iskandar, *Kamus Dewan* (Dewan Bahasa dan Pustaka, Kuala Lumpur 1970).

Mindanao, Southern Philippines. Due to the rampant acts of sea robbery perpetrated by people from Tasik Lanao and Teluk Ilanun, Malay communities had assimilated the act of robbery at sea with their name of origin, namely ‘iranun’ or ‘illanun.’²⁷ The term ‘lanun’ is believed to have entered common usage only after the nineteenth century.²⁸ The vernacular meaning of the word suggests that the piratical act, which usually refers to the crime of sea robbery, may take place anywhere at sea. In other words, it does not differentiate the act of piracy and armed robbery against ships and thus does not reflect the legal meaning as in Article 101 of the 1982 Convention.²⁹ As long as the robbery occurs at sea, Malay society will usually call it ‘lanun.’

4.3.1.1 PIRACY IN THE PRE-COLONIAL PERIOD

During the era of the Malacca Sultanate, between the fourteenth and fifteenth centuries, the Malay Peninsula and the Straits of Malacca had already been recognised as a pirate choke point.³⁰ Despite the word ‘lanun’ only being widely used after the nineteenth century, the piratical activities that are synonymous with this word are known to have existed ever since the beginning of sea trading and voyaging.³¹ As early as the fifth century, there is the account of the journey of Shih Fa-Hsien who passed through the Straits of Malacca and claimed that ‘this sea was surrounded with pirates who might cause death.’³² Although the original documentation of this account was written in Chinese, the English translation used to describe the sea robbers in this

²⁷ See also JF Warren, *The Sulu Zone, 1768-1898* (Singapore University Press, Singapore 1981)149.

²⁸ *ibid.*

²⁹ The international legal meaning of piracy is normally highlighted to identify the jurisdiction of prosecuting states in case of piracy or armed robbery against ships. Cross-refer to chapter 3 too.

³⁰ Wheatley (1980) 82.

³¹ R Braddell, ‘A Study of Ancient times in the Malay peninsula and The Straits of Malacca’ (1980) MBRAS, 27.

³² Wheatley (1980) 37-38; See also AJ Young (2005) 7.

case as pirates. Later, in the second half of the fourteenth century, Ibn Battutah, an Arab voyager who was believed to be physically present in this sea during that time, asserted that the junks passing through this sea were usually ready for ‘piratical raids.’ According to Young, this kind of ‘piratical raid’ was referring to the extraction of taxes rather than attacks by robbers or pirates. As Tome Pires wrote, that such an act was a normal source of income for Parameswara (a Malay ruler) when he first found Muar and Malacca.³³ However, when the Straits became a famous entrepôt during the fifteenth century, the local government had tried to suppress piracy in order to protect the foreign traders. Interestingly, the local authorities sometimes appointed the pirates as their naval force to restrain other unauthorised pirates from interfering with the foreign traders.³⁴

4.3.1.2 PIRACY IN THE STRAITS IN THE POST-COLONIAL PERIOD

It is noteworthy that the fall of the Malacca Sultanates at the end of 15th century due to political disruption and instability, commercial decay and the interference of the colonial power increased the level of piracy and sea robbery attacks in the Straits of Malacca. Jelani, Halimi³⁵ and Tarling³⁶ argued that piracy swiftly increased during the era of Western colonisation.³⁷ In fact, the raids by the Malay ruler on the commercial ships doing business with the colonial power in Malacca were condemned by the colony as acts of piracy.³⁸ Young highlights that it was normal for the leaders of the

³³ Armando Cortesao (1944) 232.

³⁴ Halimi (2006) 192.

³⁵ *ibid.*

³⁶ Tarling (1963) 2: Marsden, in the ‘History of Sumatra’, stated that “the whole of the inhabitants on that Coast are addicted to piracy...” see also Tarling (1963) 13.

³⁷ Rubin (1988) 17; Tarling (1963) 10-13.

³⁸ William Dampier believed that the Malays are a bold people and are not addicted to robbery. They had actually been provoked by the Dutch. The robbery was done deliberately as revenge on the Dutch who had been restraining their trade. See Tarling (1963) 11.

traditional societies to be ‘engaged in a competitive prestige system that participated in maritime raiding’ or piracy.³⁹ Rubin also agreed by pointing out some of the views of the British Colonial Officials regarding this issue.⁴⁰ These included Colonel Anson, Commander Robinson and Commander Blomfield who insisted that they preferred the use of the word ‘piracy’ in this context for purely political purposes. This might include ‘rebels or others who interfered with British actions in the peninsula.’⁴¹ On the other hand, Maxwell suggested that the rulers or Rajahs who had been fighting for local power should not be treated as pirates notwithstanding their abetment the pirates.⁴² This is clearly because, for the local Ruler whose land had been occupied by others, such acts might be considered legitimate. In comparing these views, Rubin opines that the colonial powers had tried to use ‘piracy’ as a ‘word of art in public international law’ to justify their involvement in the political and administrative area of the Malay Peninsula.⁴³ This opinion is shared by Tarling who argues that, although sea robbery was rampant at that time, to some extent piracy was used as a means of resisting the involvement of foreigners in local jurisdiction.⁴⁴ Nevertheless, to equate the crime of piracy with the act of insurgency against foreign traders by the Malacca Ruler, who was understandably resistant to Western interference, is quite intricate.

It has therefore been submitted that the word piracy, which commonly used to refer to the acts of the Ruler at that time, was politically manipulated. Hence, it departed from

³⁹ AJ Young ‘Roots of Maritime Piracy in Southeast Asia’ in D Johnson and M Valencia (eds.) *Piracy in Southeast Asia: Status, Issues and Response* (ISEAS, Singapore 2005) 8; G Teitler ‘Piracy in Southeast Asia: A Historical Comparison’ 1 (2002) MAST, 67-83, available at <<http://www.marecentre.nl/mast/documents/GerTeitler.pdf>> accessed on 20 January 2012 69.

⁴⁰ See Rubin (1988) 250-258.

⁴¹ Rubin (1988) 250-258.

⁴² *ibid.*

⁴³ *ibid.*

⁴⁴ Tarling (1963) 2.

the meaning of piracy as intended by international law. However, it is acknowledged that armed robbery in the Straits of Malacca still exists to this day, but not piracy. Undoubtedly, this stand is insisted upon by the littoral states, namely Malaysia and Indonesia. In other words, when applying a customary international law to the definition of piracy that has its root in the evolution of a Western concept, one should take into account the local context. This is what Young believes regarding the need for caution to avoid inexact application of the legal term.⁴⁵ Different places, times and cultures might bring different understandings and implications of the term altogether.

In this present day, most incidents of attacks on ships, particularly in the Straits, cannot truly be classified as piracy in the legal sense. The main reason is not the existence of a political motive but the location of the Straits of Malacca which are situated within the territorial waters and EEZ of Malaysia and Indonesia. The expansion of the territorial sea to 12 nautical miles by both states meant that the high seas corridors in these Straits ceased to exist.⁴⁶ In fact, it appears that most of the attacks in the Straits occurred within a 12-mile radius of a state's territorial sea, on ships that were anchored, berthed or streaming.⁴⁷ Although the governments of Malaysia and Indonesia continue to admonish the media not to label the attacks in the Straits as piracy, as they are actually armed robbery against ships, these governments together with other neighbouring states such as Singapore and Thailand continuously cooperate in increasing patrols in the Straits to ensure the safety and security for navigation. The positive and proactive response of these states is reasonable since the differences between piracy and armed robbery are merely definitional distinctions. A

⁴⁵ Young (2005) 10 and 11.

⁴⁶ Cross-refer to Chapter 2(Para 2.4.1); See also Woolley [2010] 450 and Leifer (1978) 53-54.

⁴⁷ Cross-refer to Chapter 3.3.1; See 2010 Annual Report of the ICC-IMB, 9-10.

more important issue that needs to be tackled, in the view of Mukundan, is the effect of the crime on the victims.⁴⁸ For them, regardless of whether the perpetrator is a pirate or a sea robber as defined in law, the implication of the attacks on them in most cases is more or less the same.

4.3.2 THE THREAT OF CONTEMPORARY PIRACY: ASSESSMENT OF RISKS

It has been alleged that most parts of the world continue to face serious threats of piracy and armed robbery. Globally, attacks have risen sharply every year since 2006; the figures rose from 239 incidences in 2006 to 445 in 2010.⁴⁹ Looking at the upsurge in incidents reported worldwide, many commentators have raised the issue of the adequacy and sufficiency of laws on maritime piracy at both international and domestic levels. Irrefutably, Southeast Asia has been a globally notorious hotspot for piracy ever since reported incidents were first organised and recorded.⁵⁰ Due to the rampant increase piracy incidents reported in the region, particularly in the Straits, there have been many allegations and arguments on the level of safety and security of ships navigating the Straits. In fact, the credibility of the littoral States in tackling the issue has also been questioned.⁵¹ The anxiety raised by the international community is

⁴⁸ P Mukundan 'An Analysis of Current Reporting Systems for Piracy' (paper presented in 'Global Challenge, Regional Responses: Forging a Common approach to Maritime Piracy on April 18-19,2011 at Dubai,UAE) 71.

<http://www.dsg.ae/LinkClick.aspx?fileticket=b3yNp2iSPZk%3D&tabid=988&mid=1532>

accessed on 29 October 2011.

⁴⁹ 'Reports on 'Act of Piracy and Armed Robbery against Ships' 2010 Annual Report of the ICC-IMB, 5-6.

⁵⁰ Only after 2006 does the report show the sharp increase of piracy attacks in the waters off Somalia annually as compared to the Southeast Asian sea as discussed below: The alarming reports of piracy and armed robbery attacks against ships in this region are mainly taken from the ICC-IMB's Piracy Reporting Centre (PRC).

⁵¹ TM Sittnick 'State Responsibility and Maritime Terrorism in the Straits of Malacca: Persuading Indonesia and Malaysia to take additional Steps to Secure the Strait' (2005) 14 Pacific Rim Law & Policy Journal 743, 761-767.

reflected in the media reports and general studies conducted by several international organisations and maritime institutes. The intense scrutiny applied by maritime nations such as United States of America and Japan is due to their critical reliance on the Straits as the important waterway connecting the Pacific and Indian Oceans for their maritime trade. The lack of research on the assessment of risk of the piracy and armed robbery attacks specifically focusing on the regional problems is believed to be an actual problem that over-emphasises the reality of the incidents.

In the mid-twenty-first century, the issue was over-dramatised. However, the title of the world's most dangerous pirate-infested area has now shifted to the African region, particularly off Somali waters. The trend in the number of incidents of armed robbery in the Straits and in the territorial waters of the littorals has been declining over the last few years. In 2010 alone, 1181 seafarers were taken hostage in piracy incidents worldwide, with nearly ninety per cent of such acts attributed to Somali pirates.⁵² Although the attacks occurred rampantly in a few piracy-infested areas, they are believed to have affected and endangered the maritime safety and security of the international community at large.

In order to understand the threat and risk of piracy in the Straits, the following paragraph explains the reports on piracy and armed robbery at sea during the ten-year period of 2000 to 2010; the details are taken mainly from the IMB Piracy Reporting Centre's Annual Report. Although the data show the escalating number of piracy and armed robbery incidents worldwide, special reference is given to the reported piracy

⁵² 'Reports on Act of Piracy and Armed Robbery against Ships' 2010 Annual Report of the ICC-IMB, 11-12.

incidences in the Straits. Apart from the legal analysis of the legal regime in international law⁵³ and the domestic laws focusing on Malaysia, the statistical data are used later in the thesis as a benchmark for determining the efficacy or, at least, the adequacy of laws, action and cooperation of the littoral States in preserving and maintaining a comprehensive security environment in the management of the Straits.⁵⁴ This will help to test the supposition that adequate law, action and cooperation among states will help to reduce piracy and armed robbery in the Straits.

4.3.2.1 ANALYSIS OF INCIDENCES OF PIRACY IN THE STRAITS

Before an elaboration of the statistics from IMB Annual Reports on piracy and armed robbery against ships is undertaken, it is important to note that the total number of actual and attempted attacks reported by the IMB includes the crimes of petty theft in ports and on ships anchored off ports.⁵⁵ Therefore, not all attacks were piracy as legally defined in Article 101 of the 1982 Convention. Consequently, the attacks or incidents that took place in this area have no legal implication in international law.⁵⁶ Nevertheless, they cannot be left unpunished as such crimes will definitely fall under the coastal states' jurisdiction, which will be discussed in the following chapter.

⁵³ Discussed in Part 1 of the thesis.

⁵⁴ This is parallel with the aspiration of Malaysia: see Keynote Address by Mohd Najib Abd Razak, at the launching of the Centre for Straits of Malacca on 21 October 2008, in MIMA Bulletin vol 15 (3) 2008, 31.

⁵⁵ Cross-refer to Chapter 3 (para 3.2.3).

⁵⁶ The objective of setting up the Piracy Reporting Centre (PRC) in Kuala Lumpur Malaysia in October 1992 is to assist the shipping industry and to report and help local authorities to deal with piracy and armed robbery problems. See ICC-IMB, 'Piracy and Armed Robbery against ships', Report for the period 1 January-30 September 2006, 2.

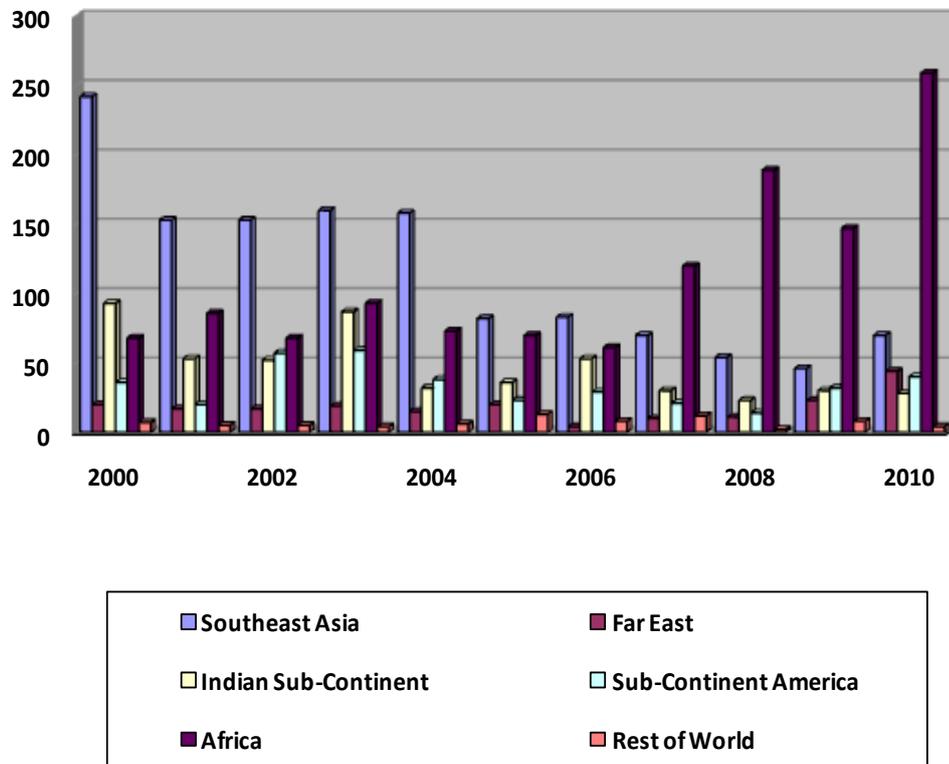


Figure 1: Numbers of actual and attempted piracy and armed robbery attacks from the year 2000 until 2010.⁵⁷ This figure shows the shift of the major magnitude of the crime from Southeast Asia to the African region.

⁵⁷ This calculation of the number of attacks according to region is based on the 2005 and 2010 Piracy and Armed Robbery against Ships Annual Report of the IMB.

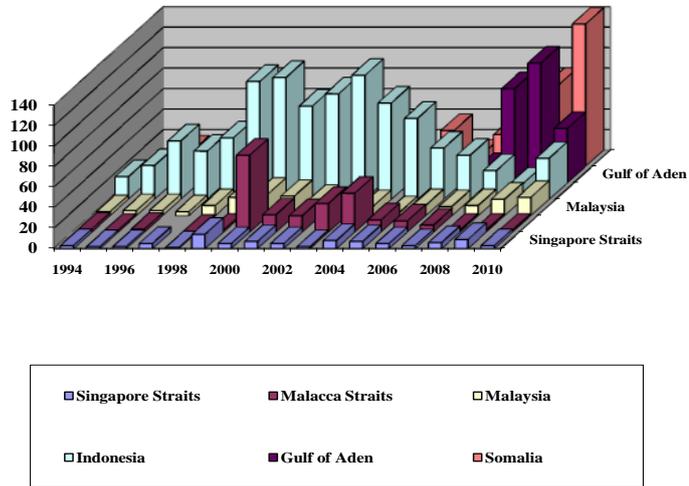


Figure 2: Numbers of actual and attempted piracy and armed robbery attacks from the year 1994 until 2010.⁵⁸

⁵⁸ This is based on the 2005 and 2010 Piracy and Armed Robbery against Ships Annual Report of the IMB.

The 1997 Asian economic crisis triggered piracy and armed robbery attacks in the Southeast Asia region at an alarming rate.⁵⁹ It became an enormous problem, and during that time, the region suffered the highest rate of attacks compared to other regions.⁶⁰ The rise in the number of incidents and the increased publicity provided by the media and commentators designated this region as the main piracy-prone area and most dangerous region in the world during this period.⁶¹ The IMB-PRC report, the main source of reference for the shipping industry on piracy and armed robbery incidents, has inevitably agitated the concerns of the international community over the safety and security of the area. This is especially true since IMB, in its definition of piracy, made no distinction between piracy and armed robbery against ships.⁶² Apparently, one consequence of this over-emphasised threat was the listing of the Straits of Malacca as a war-risk zone by the Joint War Committee (JWC) of Lloyd's Market Association (LMA) on June 20, 2005.⁶³ This happened because the increasing incidence of piracy and armed robbery, including cases of organised crime such as the *Dewi Madrim* which was reported to have been attacked and hijacked by ten pirates in 2003 using sophisticated weapons, has made such acts indistinguishable from terrorism.⁶⁴ In other words, the attacking of the *Dewi Madrim* by a group of pirates

⁵⁹ JD Pena 'Maritime Crime in the Straits of Malacca: Balancing Regional and Extra-Regional Concerns' (Spring 2009) 2 Stanford Journal of International Relations vol.X., 3.

⁶⁰ See Figure 1. Most of the incidents take place in the area of Eastern Sumatra, in the northern and southern entrances to the Straits and in the Phillip Channel off Singapore.: S Bateman, CZ Raymond and J Ho 'Safety and Security in the Malacca and Singapore Straits: An Agenda for action' in IDSS Policy Paper, May 2006 at page 20.

⁶¹ Ong (2005) 47; N Khalid 'Security in the Straits of Malacca' Japan Focus (June, 1 2006) <<http://japanfocus.org/Nazery-Khalid/2042> > accessed on 29 October 2011.

⁶² Cross-refer to Chapter 3 (para 3.2.3).

⁶³ Lloyd's insurance market, the Joint War Committee (JWC) declared the Malacca Straits and 20 other areas including the adjacent waters in Indonesia, Iraq, Lebanon, Somalia and Nigeria as War-Risk Zones and related perils based on the advice of the security consultancy group Aegis Defence Services (ADS): see IDSS; N Khalid 'Security in the Straits of Malacca' Japan Focus (June, 1 2006) <<http://japanfocus.org/Nazery-Khalid/2042> > accessed on 29 October 2011.

⁶⁴ TM Sittnick 'State Responsibility and Maritime Terrorism in the Straits of Malacca: Persuading Indonesia and Malaysia to take additional Steps to Secure the Strait' (2005) 14 Pacific Rim Law

had raised the theory of conflation between piracy and terrorism because of the similarities in their actions.⁶⁵ Thus, according to the JWC, the Straits were properly regarded as a vulnerable and dangerous area. Once declared, these listed areas will be associated with ‘war, strikes, terrorism and related perils’, the implications of which will burden the transiting ships with extra costs in war risk premiums. Raymond believes that the economic impact of the imposition of war insurance premiums on ships could be as severe as in Yemen⁶⁶ or maybe more severe because of the area’s importance to the world.⁶⁷

This controversial declaration has caused dissatisfaction not only to the shipping industry transiting the Straits⁶⁸ but also to the littoral States whose credibility in maintaining and guarding the Straits seems to have been disparaged. They believed that this declaration was unfounded since they have steadfastly, through unilateral, bilateral and multilateral agreements and cooperation compromised their individual state and national interest in order to ensure the security and safety of the Straits which have benefited all the users. Mere theoretical linking of piracy and terrorism does not necessarily prove the actual fact of the Straits’ vulnerability. The case of the

& Policy Journal 743, 744; Gal Luft and Anne Korin, ‘Terrorism Goes to Sea’ (Nov/Dec 2004) 83 Foreign Affairs 6, 61-71; CZ Raymond, ‘Storm over the Malacca Strait’ *Asia Times* (Indonesia August 25, 2005) <http://www.atimes.com/atimes/Southeast_Asia/GH25Ae03.html>

⁶⁵ It was suggested that the *Dewi Madrim* tanker was hijacked and used by the terrorists to learn how to sail a ship. However, it was later revealed that the hijacking of the *Dewi Madrim* did not involve terrorists.

⁶⁶ Yemen was listed as war risk zone following the attack against the *MV Limburg*, a French Supertanker in 2002.

⁶⁷ CZ Raymond ‘The Threat of Maritime Terrorism in the Malacca Straits’ (February 9, 2006) Vol.4 Terrorism Monitor issue 3. Available at: <[http://www.jamestown.org/programs/gta/single/?tx_ttnews\[tt_news\]=670&tx_ttnews\[backPid\]=181&no_cache=1](http://www.jamestown.org/programs/gta/single/?tx_ttnews[tt_news]=670&tx_ttnews[backPid]=181&no_cache=1)>; CZ Raymond, ‘Storm over the Malacca Strait’ *Asia Times* (Indonesia August 25, 2005).

⁶⁸ For example, the Federation of ASEAN Shipowners’ Association described the decision as ‘misguided.’ : N Khalid ‘Security in the Straits of Malacca’ Japan Focus (June, 1 2006) <<http://japanfocus.org/Nazery-Khalid/2042>> accessed on 29 October 2011.

Dewi Madrim mentioned above clearly shows the misconception and misguidance of the media reports that relied on the brief reports published by a Private Security Company (PSC). This is what is regarded by the littoral states as the over-reporting of security in the Straits.⁶⁹ The work by Liss is very helpful in clarifying this situation.⁷⁰ She believes that the comment made by the PSC personnel has negatively affected the public perception of maritime security issues. The true facts about the *Dewi Madrim* chemical tanker incident were narrated by the Singapore-based manager of this Indonesian-owned vessel, Captain Chan Kok Leong, who stated that the ship had been boarded by ten pirates armed with machine guns and knives on 26 March 2003. The master and crew, realizing that the pirates were coming, had tried to hide in the cabin and bridge but were later threatened by the pirates. The captain was forced to open the safe which contained USD 21,000. Apart from the cash, the pirates also took cigarettes, watches and other valuables but showed no interest in the cargo carried by the tanker. After that, the pirates left the ship without even trying to steer it. It was said that at no point was the ship left unattended and uncontrolled.⁷¹ Surprisingly, the publicity given to this incident by the international media told a totally different story. The *Dewi Madrim* incident had suddenly become the model case to prove the conflation between piracy and terrorism in the Straits. This was reported in *The Economist* as follows:

But according to a new study by Aegis Defence Service, a London defence and security consultancy, these attacks represent something altogether more sinister. The temporary hijacking of the *Dewi Madrim*

⁶⁹ Interview with Mohd Helmy Ahmad, Principal Assistant Secretary, Maritime Security and Sovereignty Division, Prime Minister's Department (Putrajaya, 20 February 2009, 11 November 2010, 10 January 2011)

⁷⁰ Carolin Liss, *Oceans of Crimes: Maritime Piracy and Transnational Security in Southeast Asia* (ISEAS, Singapore 2011) 342-345.

⁷¹ Liss (2011) 342.

was by terrorists learning to drive a ship, and the kidnapping (without any attempt to ransom the officers) was aimed at acquiring expertise to help the terrorists mount a maritime attack. In other words, attacks like that on the *Dewi Madrim* are equivalent of the al-Qaeda hijackers who perpetrated the September 11th attacks going to flying school in Florida.⁷²

These words in *The Economist* were also referred to by Minter in his attempt to suggest a link between the piracy attack on the *Dewi Madrim* and the acts of al-Qaeda terrorists.⁷³ Minter raised Choong's concern over this issue on the plausibility of a terrorist group using a chemical tanker such as this as a weapon.⁷⁴ Also, Singapore's Deputy Prime Minister said that "this may signal the start of serious preparations for a maritime terrorist attack as terrorists learn to navigate tankers to use them as floating bombs against other vessels, key installations, naval bases or port facilities."⁷⁵ In addition, Luft and Korin gave a controversial and misconceived account of terrorist pirates' possible involvement in the case of the *Dewi Madrim*.⁷⁶ While, one by one, numerous commentaries were offered in support of speculation on the theory of the nexus between piracy and terrorism, the investigations into the incident of the *Dewi Madrim* by the IMB proved otherwise. It appeared that no one had been kidnapped and there was no attempt by the perpetrators to learn to steer the chemical tanker.⁷⁷

⁷² 'Peril on the Sea: are Terrorists now aiming to block shipping lanes and disrupt the flow of oil and other goods?' *The Economist* (Oct 2nd, 2003) < <http://www.economist.com/node/2102424/print> > accessed on 3 November 2011.

⁷³ Richard Minter, *Shadow War: The Untold Story of How America is Winning the War on Terror* (Eagle Publishing, Washington 2004) 119-121.

⁷⁴ Minter (2004) 121.

⁷⁵ Ibid.

⁷⁶ Gal Luft and Anne Korin, 'Terrorism Goes to Sea' (Nov/Dec 2004) 83 *Foreign Affairs* 6, 61-71:

⁷⁷ Liss (2011) 343; GG Ong 'Piracy in Maritime Asia' in Peter Lehr *Violence at Sea: Piracy in the age of Global Terrorism* (Routledge Taylor & Francis Group, New York 2007) 87, 243; Carolin Liss 'Private Security Companies in the fight against Piracy in Asia,' Murdoch University Asia Research Centre Working Paper No.120 June 2005 (Revised September 2005) 11, in

This was confirmed by the owners of the vessel to the IMB.⁷⁸ In fact, when the Aegis Defence Service was contacted to explain the inconsistencies of the issue, Dominic Armstrong⁷⁹ merely acknowledged inaccurate information on the kidnapping issue and blamed the journalists, stating that it was their responsibility to ensure the accuracy of their sources.⁸⁰ In addition, Bateman, Ho and Mathai noted the misquoted accounts of the incident and suggested that the size of the vessel be considered in regard to the possibility that it had been used by terrorists to learn how to steer.⁸¹ They said that the chemical tanker was very small with a capacity of only 737 gross tons; it would require no specific skills to steer it.⁸² Unfortunately, despite the rectification of these factual errors by the owner of the *Dewi Madrim*, the incident has still been referred to by some commentators to support their arguments.⁸³ In fact, Aegis Defence Services, which was the body responsible for recommending the inclusion of the Straits in JWC Hull War, Strikes, Terrorism and Related Perils Listed Areas in June 2005, made no attempt to retract their maritime terrorist theory of the case.

<<http://www.arc.murdoch.edu.au/wp/wp120.pdf>> accessed on 13 June 2010; Keith Bradsher, 'Attacks on Chemical Ships in Southeast Asia Seem to be Piracy, not Terror.' *The New York Times*.

<<http://www.uscib.org/index.asp?documentID-2527>>

⁷⁸ Sam Bateman, 'Outlook' in Peter Lehr *Violence at Sea: Piracy in the age of Global Terrorism* (Routledge Taylor & Francis Group, New York 2007) 242-243; M Richardson, *A Time Bomb for Global Trade-Maritime-related Terrorism in an age of Weapons of Mass Destruction*. (iseas, Singapore 2004) 32-33.

⁷⁹ Managing Director of AEGIS Research and Intelligence.

⁸⁰ Liss (2011) 343.

⁸¹ S Bateman, J Ho and M Mathai 'Shipping Patterns in the Malacca and Singapore Straits: An Assessment of the Risks to Different Types of Vessel. (2007) 29 *Contemporary Southeast Asia* 2, 309 at 310.

⁸² *ibid.*

⁸³ Gal Luft and Anne Korin, 'Terrorism Goes to Sea' (Nov/Dec 2004) 83 *Foreign Affairs* 6, 61-71; GG Ong-Webb (2007) 87; Pirates and terrorists could join forces. In particular, terrorists could employ the pirate's great wealth of maritime knowledge to carry out a devastating attack on a commercial port or a shipping operation (*The Business Times Singapore*, May 21, 2004).

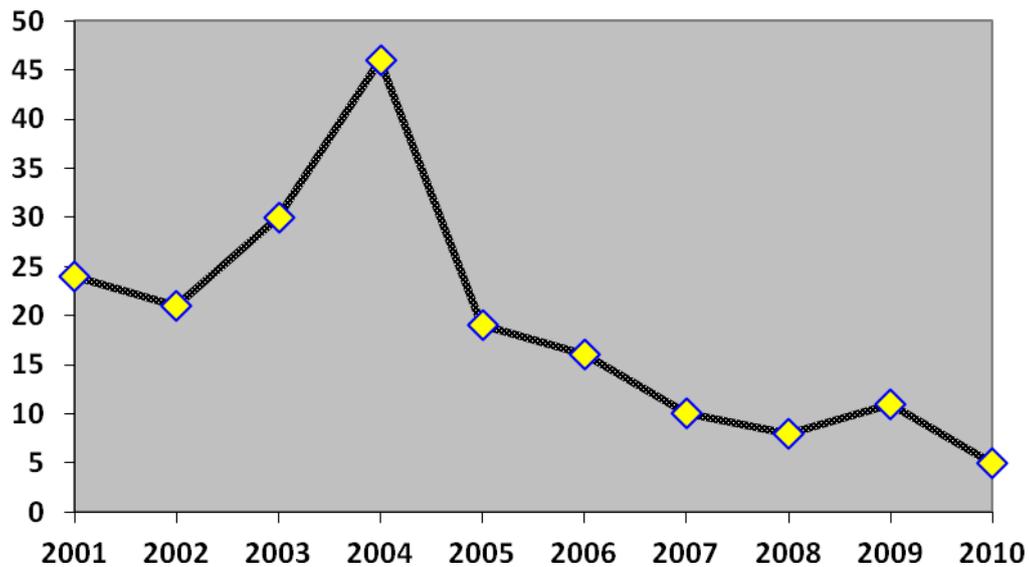


Figure 3: Comparison by year on actual and attempted attacks in the Straits of Malacca. Source: IMB Annual Report of 2005-2010.

The Straits had been included on the JWC's list despite the 'sharp reduction in piratical attacks and zero incidences of terrorist attacks on ships sailing through the Straits.'⁸⁴ According to Khalid, the risk of reported attacks in the Straits was less than 0.001 per cent of its total traffic volume.⁸⁵ Meanwhile, Raymond agreed when she highlighted the finding that, of the total number of alleged terrorists attacks worldwide, maritime terrorist attacks have accounted for only 2 per cent and no

⁸⁴ Gal Luft and Anne Korin, 'Terrorism Goes to Sea' (Nov/Dec 2004) 83 *Foreign Affairs* 6, 61-71; GG Ong-Webb (2007) 87; Pirates and terrorists could join forces. In particular, terrorists could employ the pirate's great wealth of maritime knowledge to carry out a devastating attack on a commercial port or a shipping operation (*The Business Times Singapore*, May 21, 2004).

⁸⁵ N Khalid 'Security in the Straits of Malacca' *Japan Focus* (June, 1 2006) <<http://japanfocus.org/Nazery-Khalid/2042>> accessed on 29 October 2011.: based on 38 attacks in the Straits against 63,636 ships traversing the Straits in 2004 as reported in 2004 Annual Report of the ICC-IMB; Cf, S Bateman, CZ Raymond and J Ho 'Safety and Security in the Malacca and Singapore Straits: An Agenda for Action' (May 2006) IDSS Policy Paper, 20: 'the proportion of ships attacked ... ranges from 0.06 percent to 0.19 percent of the total number of ships using the Straits annually, but these are predominantly on vessels on local voyages.'

terrorist acts have ever taken place in the Straits.⁸⁶ This clearly proves that the intense efforts to suppress piracy and armed robbery at sea have been successful.

Thus, the governments of Malaysia, Singapore and Indonesia initiated several discourses with JWC to review their decision accordingly.⁸⁷ Unsurprisingly, in view of the significant improvement in the security environment in the Straits, on 7th August 2006 the JWC removed the Straits from its war-risk list.⁸⁸ The re-evaluation was welcomed since the number of reported attacks had declined remarkably in the years following the declaration. In 2005, only twelve attacks were reported compared to thirty-eight attacks in 2004. The number of attacks dropped constantly with eleven attacks in 2006, seven in 2007 and only two in three consecutive years of 2008, 2009 and 2010.⁸⁹

Therefore, it is noteworthy that the Straits is no longer a piracy-prone area. Although piracy and armed robbery incidents have not been totally eliminated, at least the risk has been reduced. Thus, the possibility of maritime terrorism might also be claimed to have diminished considering that no actual or even attempted terrorist act has ever occurred in this Straits. Furthermore, the level and types of violence used by the

⁸⁶ Apart from a small number of hostage-taking incidents: CZ Raymond 'The Threat of Maritime Terrorism in the Malacca Straits' (February 9, 2006) Vol.4 Terrorism Monitor issue 3. Available at:

[http://www.jamestown.org/programs/gta/single/?tx_ttnews\[tt_news\]=670&tx_ttnews\[backPid\]=181&no_cache=1](http://www.jamestown.org/programs/gta/single/?tx_ttnews[tt_news]=670&tx_ttnews[backPid]=181&no_cache=1) >

⁸⁷ CZ Raymond, 'Storm over the Malacca Strait' *Asia Times* (Indonesia August 25, 2005) <http://www.atimes.com/atimes/Southeast_Asia/GH25Ae03.html>

⁸⁸ MN Anis, Wed August 9, 2006 'Straits no more a war risk zone' in the Star online, <<http://thestaronline.com/news/story.asp?file=/2006/8/9/nation/15087436&sec=nation> > accessed on 20 October 2011.

⁸⁹ 'Reports on Act of Piracy and Armed Robbery against Ships' 2010 Annual Report of the ICC-IMB, 5. In the 2008 and 2010 Annual Reports of the ICC-IMB, it was reported that during those years the two figures were only attempted attacks and not actual attacks.

perpetrators against the crews of the ships are not as cruel as those used in other regions, particularly in the horn of Africa.⁹⁰ It is timely for the media, the maritime nations and the shipping industry to pay attention to the importance of this waterway to give an accurate assessment of the risks of piracy attacks and maritime terrorism, as suggested by the Institute of Defence and Strategic Studies (IDSS).⁹¹ Relying solely on media reports may lead to ‘exaggeration and misinterpretation of the problem.’⁹² The lack of evidence on the existence of a link between piracy and maritime terrorism coupled with the fact that typical pirates or armed robbers in the Straits are mostly unorganised petty criminals suggests that the risk and threat of piracy is tiny in relation to the number of vessels passing through the Straits.

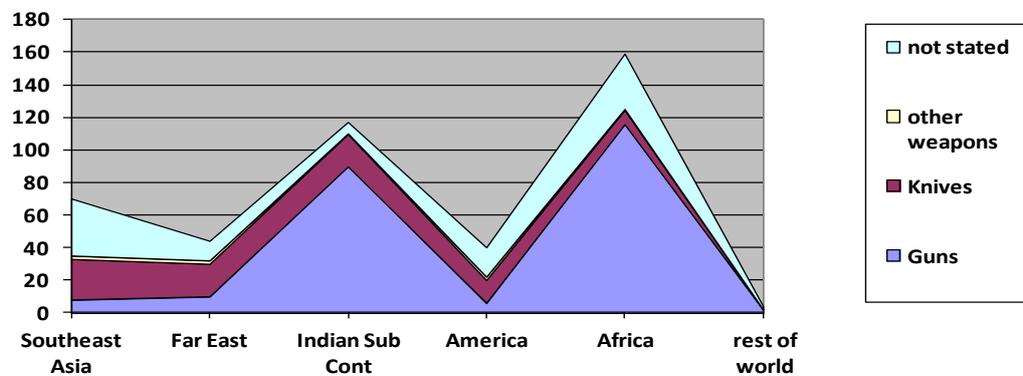


Figure 4: Types of arms used by geographical location, from January-December 2010
Source: IMB Piracy Annual Report 2010

⁹⁰ See figure 4 and figure 5.

⁹¹ S Bateman, CZ Raymond and J Ho ‘Safety and Security in the Malacca and Singapore Straits: An Agenda for Action’ (May 2006) Institute of Defence and Strategic Studies Policy Paper, 23.

⁹² *ibid.*

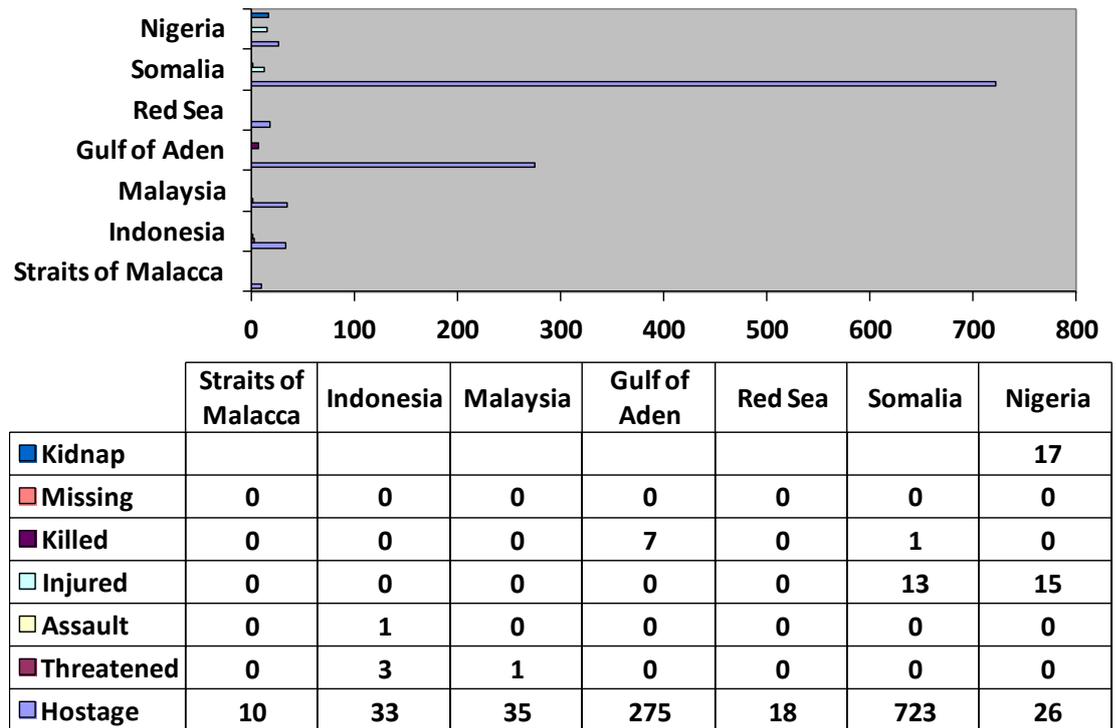


Figure 5: Types of violence against crews by notorious locations of attacks, from January-December 2010. Source: IMB Piracy Annual Report 2010.

4.3.2.2 ASSESSMENT OF RISKS: TYPES OF SHIPS AND VULNERABILITY OF VESSELS

An analysis of the shipping patterns in the Straits of Malacca is very important in order to assess the vulnerability of the type of vessels passing through the Straits. Many commentators who rely on media reports of piracy in the Straits tend to generalise the possible risks and threat of piracy to all types of vessels. This perception is somewhat inaccurate. It is presumed by Young that the tendency to generalise the threat may be due to the lack of important information on the local

details.⁹³ This may be true since the nature and trend of the attacks differ from one region to another. In Southeast Asia most of the attacks are considered armed robbery against ships as opposed to piracy. The attacks are mainly mounted against ships within states' territorial seas, in ports or at anchorage.

The vulnerability of the ships will vary according to the types and sizes of the vessels when they are under way.⁹⁴ While they are in ports or at anchorage the magnitude of the risk of been attacked or robbed is the same regardless of the size of the vessels.⁹⁵ The IDSS analysis of attacks on vessels revealed that most incidents reported in the Straits involved medium-sized or small vessels such as gas carriers, chemical and product tankers, tugs and barges as well as fishing boats.⁹⁶ As compared to the larger vessels such as container ships, LNG and car carriers, the vulnerability of the smaller ships is more obvious in the Straits due to three possible main factors as suggested by Bateman, Ho and Mathai.⁹⁷ Firstly, the larger vessels are normally travelling at considerable speed which may make it difficult for the attackers to board a ship that is under way. However, the large bulk carriers may still face the risk of attacks if they are slower or less able to take precautionary measures.⁹⁸ Second, the smaller numbers

⁹³ AJ Young, *Contemporary Maritime Piracy in Southeast Asia: History, Causes and Remedies*. (Singapore, ISAS, 2007) 5.

⁹⁴ *ibid.*

⁹⁵ 'Reports on Act of Piracy and Armed Robbery against Ships' 2010 Annual Report of the ICC-IMB; S Bateman, J Ho and M Mathai 'Shipping Patterns in the Malacca and Singapore Straits: An assessment of the Risks to Different Types of Vessel. (2007) 29 *Contemporary Southeast Asia* 2, 309 at 310-311; PW Birnie 'Piracy, Past, Present and Future Marine Policy July 1987 163-183, 173.

⁹⁶ S Bateman, CZ Raymond and J Ho, 'Safety and Security in the Malacca and Singapore Straits: An Agenda for Action' (IDSS Policy Paper, May 2006) 19.

⁹⁷ S Bateman, J Ho and M Mathai 'Shipping Patterns in the Malacca and Singapore Straits: An assessment of the Risks to Different Types of Vessel. (2007) 29 *Contemporary Southeast Asia* 2, 309 at 327.

⁹⁸ *ibid.*

of crew members in smaller ships might attract the pirates.⁹⁹ There are normally more crew members in the larger vessels and they are usually competent to defend the ship. The third factor is the precautionary guidelines recommended by the IMO which are usually adopted and practised on the larger vessels rather than on the smaller vessels. These three reasons are without doubt reasonable and practical. In addition, Bateman, Ho and Mathai, when analysing the risks of piracy for different types of vessel, also argue that local vessels including fishing vessels are more vulnerable compared to the international vessels.¹⁰⁰

Looking at the incidents of piracy in this region, which occur mostly within the territorial sea and against smaller ships,¹⁰¹ more attention should be paid to improving the domestic legal framework and maritime policy. While international law in the 1982 Convention has established an obligation on all States to suppress piracy on the high seas, the capability and competency of the littoral States to patrol their sea area needs to be tested and balanced. This is very important because, once their internal responsibility has been established and strengthened; these States will definitely be able to tackle the security problem beyond their area, whether individually or collectively.

In conclusion, it appears that analysing these trends is very important in order to accurately assess the risk to a particular region or location. It also aids an understanding and identification of regional and national maritime security

⁹⁹ IMO, *Actions to be taken to Prevent Acts of Piracy and Armed Robbery* 2011 Edition, Module Course 3.23, 30.

¹⁰⁰ *ibid.*

¹⁰¹ Banlaoi (2005) 61.

requirements, especially in developing legal frameworks. The tendency to generalise the risks to the Straits by referring solely to general reports of dramatic increases in piracy incidents worldwide may lead to a different perception and thus needs to be rectified. Apart from assessing the risks of piracy incidents, one also needs to understand the types of piracy and the extra legal factors in respect of piracy in particular regions.

4.3.2.3 TYPES OF PIRACY IN THE STRAITS OF MALACCA

The phenomenon of piracy which has become endemic and affects almost all parts of the world is normally elicited by the opportunities that exist.¹⁰² However the methods of attack differ slightly from one place to another. For states such as Malaysia, it is pertinent to identify the nature and types of attack in every incident of piracy in order to determine the most appropriate cause of action for charging or prosecuting the perpetrator under the domestic law of the relevant state. Although piracy is considered a crime against humankind and is subject to universal jurisdiction, in the end the perpetrator will be judged and sentenced in accordance with domestic rules of law.

Beckman, Grundy-Warr and Forbes point out four types of piracy that have occurred in Southeast Asian waters: ‘traditional piracy against modern shipping’, ‘politically-motivated piracy’, ‘piratical acts of violence against refugees’, and ‘yacht piracy.’¹⁰³ Traditional piracy and piratical acts against refugees¹⁰⁴ and fishing vessels are the most prevalent types of piracy in these waters. However, the IMB classifies the types

¹⁰² Murphy (2009) 24.

¹⁰³ RC Beckman, C Grundy-Warr, VL Forbes ‘Maritime Briefing: Act of Piracy in the Malacca and Singapore Straits’ (1994) Vol 1 (no.4) IBRU, 10.

¹⁰⁴ This refers to the Vietnamese refugees during the late 1970s and 1980s which mostly occurred in the Gulf of Thailand.

of pirate attacks into three groups.¹⁰⁵ The first type of piracy usually occurs in ports while at anchorage or berthed. This type of piracy bears a resemblance to the common act of theft on land, where the perpetrator usually grabs any opportunity to take cash or any portable thing that can easily be taken from the ship. This has also been called petty theft. This kind of so-called piracy is defined by IMB as ‘low-level armed robbery’ (LLAR) which normally involves small groups or gangs.¹⁰⁶ However, it is still counted as piracy in the IMB piracy report, and this has caused dissatisfaction among coastal states. The lack of port security control and corrupt port officials have been identified as escalating factors in such crime.¹⁰⁷

However, Eklof describes the low-level armed robbery or petty piracy as a ‘quick hit and run’ tactic.¹⁰⁸ This, according to him, normally takes place whilst the ship is under way between midnight and 4 am.¹⁰⁹ The slow speed of the ship, at about 15 knots during those hours, makes it easier for the pirate boat travelling at twice the speed of the ship to board the ship, remove the safe and booty, and disembark in less than half an hour. This kind of incident involves a small group of seamen usually armed with knives or blades and, sometimes, simple firearms. They normally avoid injuring the crew members unless they are confronted and will attempt to attack more than one

¹⁰⁵ Stuart W Smead ‘A Thesis on Modern Day Piracy’ in <http://www.angelfire.com/ga3/tropicalguy/piracy-modernday.html> accessed on 20 December 2011; Peter Chalk ‘Africa suffers wave of Maritime Violence’ (April, 1 2001) Jane’s Intelligence Review.

<<http://www.rand.org/commentary/2001/04/01/JIR.html>> accessed on 20 December 2011

¹⁰⁶ P Corbett (Captain MNI MRIN), *A Modern Plague of Pirates: Protect Your Ship and Your Crew, a Practical Guide for Avoiding Contemporary Piracy on the High Seas* (Offshore & Marine Publications, Essex 2009) 37-38; Bojan Mednikarov and Kiril Kolev, ‘Terrorism on the Sea, Piracy and Maritime Security’ [2006] 19 *Information and Security, An International Journal* 102-114, 108.

¹⁰⁷ Dana R Dillon ‘Maritime Piracy: Defining the Problem’ (2005) 25 SAIS Review Winter/Spring 157; Cross-refer to Chapter 4 (para 4.3.4).

¹⁰⁸ Stefan Eklof (2006) 46.

¹⁰⁹ *ibid.*

ship in one night.¹¹⁰ It should be noted that large vessels such as super tankers are of no interest to them since they make it difficult for them to act quickly. Types of vessels that have been reported to be their targets include tugs and barges, bulk carriers and general cargo vessels. This form of low-level armed robbery appears to be rampant in Southeast Asia, particularly in the Straits of Malacca, Indonesia, Malaysia and Singapore. Most of the pirates or armed robbers of this kind are believed to be Indonesians operating from Indonesian islands such as Batam, Aceh and Riau.¹¹¹

The second type of piracy is defined as ‘Medium-level assault and robbery’ (MLAR). Corbett refers to this type of piracy as West African Piracy because of the rampant and common attacks of this kind in that area.¹¹² The pirates usually have their own well-organised gangs and work from a ‘mother’ ship to attack a ship under way. It normally involves an armed assault with violence or threats of violence which could cause serious injury or even death.¹¹³

The hijacking of a ship is referred to as a ‘Major Criminal Hijack’ (MCHJ) to differentiate this act from the common attack of piracy. Corbett believes that this type of piracy is common in the South China Sea.¹¹⁴ In addition, the purpose of this crime is normally to convert the ship to a ‘phantom ship’ for the purposes of illegal trading and maritime fraud.¹¹⁵ This type of piracy needs a very careful plan and an established link with organised crime syndicates as well as with corrupt officials. Once they have

¹¹⁰ Stefan Eklof (2006) 46.

¹¹¹ *ibid.* 47-48 and 54.

¹¹² Corbett (2009) 37.

¹¹³ *ibid.*

¹¹⁴ *ibid.* 38.

¹¹⁵ Stuart W Smead ‘A Thesis on Modern Day Piracy’ in <http://www.angelfire.com/ga3/tropicalguy/piracy-modernday.html> accessed on 20 December 2011.

succeeded in hijacking a ship, the pirates will divert it from its destination in order to repaint and rename it with false documentation. Zou argued that the loophole in the rules of the ‘Flag of Convenience (FOC)’¹¹⁶ has been used by the pirates to re-register the stolen ships easily. Although it helps the ship owners to maximise their profits while minimizing their operating costs due to the very low charge for registering ships for the FOC, the ships’ lack of protection and safety make them more vulnerable to piracy attacks. The hijacking of the *MV Cheung Son* south of Taiwan in the South China Sea in November 1998, on its way from Shanghai to Malaysia, might explain the modus operandi used in this type of attack.¹¹⁷ This case is considered one of the most brutal cases of piracy ever reported, as it involved the murder of twenty-three Chinese crewmen on board who were then dumped into the sea. The criminals already had sufficient information on the ship, sending a well-trained and heavily armed gang to attack and seize the ship. The cargo in the ship was transferred to another ship with the purpose of disposing of it on the black market. The ship was repainted and re-registered; it was never recovered. However, the thirteen pirates, twelve of them Chinese and one Indonesian, were finally caught and sentenced to death.¹¹⁸ Although the South China Sea and Southeast Asia used to be classified as the most vulnerable area for ship hijacking in the early twenty-first century,¹¹⁹ the trend is now downward

¹¹⁶ Flag of Convenience (FOC) is the Flag of any country allowing the registration of foreign-owned and foreign-controlled vessels under conditions which, for whatever reasons, are convenient and opportune for the persons registering the vessels: See Richard MF Coles and Nigel P Ready, *Ship Registration*, (Lloyd’s Shipping Law Library, London 2002)15.

¹¹⁷ ‘Reports on Act of Piracy and Armed Robbery against Ships’ 2010 Annual Report of the ICC-IMB.

¹¹⁸ Guangdong Higher Court, ‘Court Judgment of ‘The Case of Wei Siliang and Soni Wee and Others, Total 38 Suspects’, in Renmen Fayuan Caipan Wenshu Xuan [The Selected Court Judgments] Beijing: Falu Chubianshe, 2001: is referred to by Xu Ke ‘Myth and Reality: The Rise and Fall of Contemporary Piracy in the South China Sea’ in Shicun Wu and Keyuan Zou (eds), *Maritime Security in the South China Sea, Regional Implications and International Cooperation* (Corbett Centre for Maritime Policy Studies Series, Ashgate, Surrey) 81-98, 87.

¹¹⁹ Between 1999 and 2002 the IMB recorded that 71 per cent of the incidents of ship hijacking occurred in Southeast Asia: Stefan Eklof Amirell ‘Maritime Piracy and Raiding in Southeast

and has declined sharply in this region. In 2010 alone, out of 53 incidents of hijacking reported by IMB worldwide, only three incidents occurred in Southeast Asia and one in the South China Sea.¹²⁰ The remaining incidents were all in the African region, especially the Gulf of Aden and Somalia, with fifteen and thirty-three incidents reported respectively.

4.3.4 EXTRA-LEGAL FACTORS UNDERLYING PIRACY AND ARMED ROBBERY GENERALLY AND IN THE STRAITS OF MALACCA

Although, generally, the nature and purpose of piracy have not changed, namely to gain valuables and monetary income, the factors or reasons for the flourishing of modern-day piracy in the Straits may not be entirely similar to those during the period from the 16th to the 19th centuries.¹²¹ Unlike pirates in the past, who were assumed to have noble and prestigious reputations,¹²² this is no longer the case. The social status of piracy nowadays has changed to that of a dangerous maritime criminal whose liberty is not protected under international law.¹²³ Young points out the necessity of appreciating the distinction between piracy in the past and in the present.¹²⁴ He believes and highlights that contemporary piracy, particularly in Southeast Asia, has been largely shaped by political, economic and social functions of the local people and

Asia: Local and Global Perspectives in Terence Chong (ed) *Globalisation and its Counter-forces in Southeast Asia* (ISAS, Singapore 2008) 207- 224, 212.

¹²⁰ 2010 Annual Report of the ICC-IMB-PRC.

¹²¹ G Teitler 'Piracy in Southeast Asia: A Historical Comparison' 1 (2002) MAST, 67-83, available at <<http://www.marecentre.nl/mast/documents/GerTeitler.pdf>> accessed on 20 January 2012. cf. Murphy (2009) 21.

¹²² Adam J Young 'Roots of Contemporary Maritime Piracy in Southeast Asia' in D Johnson and M Valencia (eds.) *Piracy in Southeast Asia: Status, Issues and Responses* (ISEAS Singapore 2005) 8-9.

¹²³ *ibid.* 10-11.

¹²⁴ *ibid.* 2,15.

is thus conceptually different from its historical roots.¹²⁵ Although it is believed that the modus operandi of piracy differs from one place to another, more often than not, they share certain aspects that enable the act of piracy to flourish.¹²⁶

Murphy, for example, lists seven major reasons for piracy.¹²⁷ They are as follows: first, legal and jurisdictional weakness; second, favourable geography; third, conflict and disorder; fourth, under-funded law enforcement and inadequate security; fifth, permissive political environments; sixth, cultural acceptability; and, last but not least, the promise of reward.¹²⁸ Meanwhile, Young proposes four broad reasons for contemporary piracy, namely economic crisis, political instability, physical geography, and technology and globalisation, all of which fall under Murphy's categorisation.¹²⁹

Banlaoi considers it important to identify the root cause of piracy as it may make the task of resolving the risk of piracy easier.¹³⁰ This idea is very sensible and acceptable. Banlaoi highlights five factors that have enabled piracy and armed robbery to prosper, especially in the waters of Southeast Asia. For him, 'pervasive poverty' is the first motivator of piracy and the increase in piracy attacks during the 1997 Asian financial crises is evidence of this premise. This is followed by 'weak governance' or political instability as the second factor. The lack of strong political will and unstable governance will give the pirates the strength to attack ships. The third factor is the

¹²⁵ *ibid.*

¹²⁶ *ibid.* at 1-25.

¹²⁷ MN Murphy, *Contemporary Piracy and Maritime Terrorism: The Threat to International Security* (London, IISS 2007) 13.

¹²⁸ *ibid.*

¹²⁹ Young (2005) 10-11.

¹³⁰ Banlaoi (2005) 62.

‘huge coastline and weak port security’. Thus, it is unsurprising that two of the largest archipelago states in the world, Indonesia and the Philippines, have been recognised as piracy hot spots which provide plenty of hideouts for pirates.¹³¹ The ‘weak maritime forces’ are the fourth cause of piracy. This refers to the lack of capacity-building and enforcement power to deter such criminal acts as well as the insufficient wages paid to members of the maritime security forces. This actually relates to the attitude of government officers themselves. While one can argue that corruption might not occur were officers to be paid a sufficient amount, this is still a subjective matter which depends greatly on one’s integrity. The fifth cause is the weakness of cooperation among states. This is again based on the political views or priorities of a state.¹³²

While Murphy and other commentators point out several reasons for contemporary piracy with special reference to Southeast Asia, Peter Chalk, a policy analyst, constructs seven factors accounting for the emergence of contemporary piracy generally.¹³³ The first is the use of a ship’s carcass¹³⁴ which means fewer crew members, thus enabling pirates to easily board a ship. This view is shared by Teitler¹³⁵ and is also elucidated in the IMO Module Course on Preventing the Acts of Piracy and Armed Robbery against Ships.¹³⁶ The second is the high cost of maritime surveillance. It is obvious that the cost of maintaining security at sea including sea surveillance

¹³¹ Eklof Stefan, *Pirates in Paradis: A Modern History of Southeast Asia Marauders* (Copenhagen: NIAS Press 2006) 5.

¹³² Banlaoi (2005) 62-63.

¹³³ Peter Chalk, ‘Maritime Piracy: Reasons, Danger and Solutions’ RAND’s Testimony February 4 2009 in <www.rand.org> 20 January 2009.

¹³⁴ The structural framework of a building, ship, or piece of furniture: Refer to Oxford Concise Dictionary, Thesaurus & Quotations (Digital Dictionary).

¹³⁵ G Teitler ‘Piracy in Southeast Asia: A Historical Comparison’ 1 (2002) MAST, 67-83,72. Available at <<http://www.marecentre.nl/mast/documents/GerTeitler.pdf>> accessed on 20 January 2012.

¹³⁶ IMO, Actions to be taken to Prevent Acts of Piracy and Armed Robbery, 2011 Edition, Module Course 3.23, at p.30.

systems, capacity building programs and logistic facilities has increased every year. This cost, of course, has to be borne by the local coastal states. For the littoral states of the Straits, the cost is multiplying, considering the increasing volume and density of the traffic in the Straits. The third is the inadequacy of maritime police forces, training and equipment in ports and along coasts to deal with low-level piracy or harbour thefts. Fourth is the common reason of corruption among officials, especially in regard to high-level piracy. Fifth is the unstable political situation exemplified by the waters off Somalia where piracy has become a hotspot with the highest number of reported incidents worldwide since 2008.¹³⁷ Sixth is the prospect of ransom income from the ships' owners who are willing to pay the pirates as long as they can retrieve their ships and cargoes. The final factor is the wide availability and proliferation of small arms including pistols, rifles and machine guns which pirates normally use to assault and frighten their victims.¹³⁸

It may be inferred that, more often than not, these reasons and factors that have led to the flourishing of contemporary piracy have been agreed upon by almost all commentators although they vary in terms of elaboration, priority and perception. Based on the reasons listed by the commentators above, it is suggested that the extra-legal factors or causes underlying piracy and armed robbery in the Straits can be assigned to four major categories, namely political instability or inefficient governance, poor economic conditions, geographical attributes, and social and cultural circumstances. If the problems that cause these categories can be addressed, the

¹³⁷ Somalia is regarded as 'failed state' which is since 1990s under the management of Transitional Federal Government (TFG): see DR Rothwell and T Stephens *The International Law of the Sea* (Hart Publishing, Oxford 2010) 432.

¹³⁸ Chalk [2009] 1-3.

number of piracy and armed robbery incidents might be controlled and reduced consistently as evidenced in the reports of piracy incidents by IMB, IMO and ReCAAP in recent years.

4.3.4.1 POLITICAL INSTABILITY OR WEAK GOVERNANCE

The best evidence of a stable political community is the ‘existence of effective government, with centralised administrative and legislative organs.’¹³⁹ It may be said that a steady political state and good governance is the backbone of and key to economic growth, effective inter-state cooperation and efficient enforcement of law and jurisdiction. An effective political power usually reacts quickly to any possible security threat to its people. Thus, almost all commentators regard political instability of a state as a good ground for the emergence of piracy.¹⁴⁰ While, historically, in Southeast Asia piracy was either a sign of the vitality of a society or indicated the decline and destruction of a regime, nowadays it is normally symptomatic of weak political control.¹⁴¹ Banlaoi regards Indonesia and Philippines as examples of States with such political instabilities as a result of which piracy is rampant.¹⁴² Indonesia has also been regarded as a country lacking an effective navy and coast guard control.¹⁴³ It is suggested that the shortcomings of these two States are mainly caused by the archipelagic character of their territorial waters which embrace vast and complex

¹³⁹ Brownlie (2003) 71.

¹⁴⁰ MJ Valencia (2006) 87; Peter Chalk (2009); MN Murphy *Contemporary Piracy and Maritime Terrorism: The Threat to International Security* (London, IISS 2007) 13; Young (2005) 2; Banlaoi (2005) 62.

¹⁴¹ Young (2005) 21; see also Barbara Andaya ‘The Role of the Anak Raja’7 *Journal of Southeast Asia Studies* (1976) 167; Gene M Chenoweth ‘Melaka, Piracy and Modern World System’ [1996-1999] 13 *Journal of Law and Religion* 107-125, 110.

¹⁴² Banlaoi (2005) 63.

¹⁴³ ‘Piracy in Straits highlights need for Maritime Security’, American Forces Press Service, 5th June 2005.

coastlines.¹⁴⁴ Indonesia has been trying to improve the maritime security of its part of the Straits by cooperating in the trilateral agreement between the littoral States. The strong desire for good governance to police the Straits has also helped to reduce the crime of armed robbery against ships within the territorial sea¹⁴⁵ although some episodes of piracy have undeniably occurred within its territorial waters.¹⁴⁶ The current situation in Southeast Asian countries is arguably not as bad as in Somalia. That's why Sittnick's suggestion to impose responsibility on the littoral States that breach their international obligations to exercise due diligence in securing the safety and security of other nationals within their territory is unjustifiable.¹⁴⁷ Of course, when Sittnick commented on this issue in 2005,¹⁴⁸ the cooperative efforts between the littoral States had only just begun. Moreover, a fruitful outcome may not emerge for quite some time.

However, Banlaoi does not deny that, although a state may have good governance, as in Singapore, it is still exposed to the threat of piracy due to the weak governance of its neighbours.¹⁴⁹ This view, however, is still debatable. The most crucial and ostensible factor that not only leads to piracy but also may form an obstacle to cooperation among states is the concern over the erosion of sovereignty over territorial waters. This is apparently not a new issue. It has been raised ever since the negotiations to establish the international regime of the law of the sea decades ago.¹⁵⁰

¹⁴⁴ Young (2005) 21-22.

¹⁴⁵ Annual Report of the ICC-IMB-PRC from 2000-2010.

¹⁴⁶ *ibid.*

¹⁴⁷ See TM Sittnick 'State Responsibility and Maritime Terrorism in the Straits of Malacca: Persuading Indonesia and Malaysia to take additional Steps to Secure the Strait' (2005) 14 *Pac. Rim L. & Pol'y J* 743, 761-767.

¹⁴⁸ *ibid.*

¹⁴⁹ Banlaoi (2005) 63.

¹⁵⁰ Cross-refer to Chapter 3 (para 3.2) on the evolution of Piracy in the International Law.

Nevertheless, again, the sharp decrease in the number of pirate attacks in the Straits of Malacca in recent years may provide evidence of the existence of a strong political will among the littoral states of the Straits to cooperate in combating piracy.¹⁵¹ The willingness of the littoral states to cooperate with one another is commendable and could be seen as an optimistic initiative to ensure the security of the Straits. They have set aside their internal political issues and have shown the capability to responsibly manage and maintain safety and security of the Straits, one of the most important waterways in the world.

4.3.4.2 ECONOMIC FACTORS AND LACK OF FUNDING

This category flows directly from the first factors. Although Asian countries are currently undergoing economic growth and dynamism,¹⁵² the unequal distribution of wealth is proposed by Young as one factor that leads to the crime of piracy. People who live by the sea are usually the victims of this inequality and are left in poverty by the States.¹⁵³ Banlaoi agrees, stating that ‘poverty incidences in the region range from 16 to 55 percent and it is this poverty in Southeast Asia that has prompted people to resort to piracy as an alternative means of livelihood’.¹⁵⁴ The Minister Mentor of Singapore, Lee Kuan Yew, observes that the problem of poverty, especially in some part of Indonesia, needs to be solved in order to fight the threat of piracy in the Straits.¹⁵⁵ The 1997 economic crisis in Asia saw a large number of piracy incidents in

¹⁵¹ See Annual Report of the ICC-IMB-PRC from 1997-2007; John McFarlane ‘Regional and International Cooperation in tackling transnational crime, terrorism and the problems of disrupted states’ (2005) 12 (4) *Journal of Financial Crime* 301-309.

¹⁵² Jose L Tongzon ‘Whither the Malacca Straits?’ in GG Ong-Webb *Piracy, Maritime Terrorism and Securing the Malacca Straits* (Singapore, ISEAS 2006) 202.

¹⁵³ Jose Luis Jesus ‘Protection of Foreign Ships Against Piracy and Terrorism at Sea: Legal Aspects’ [2003] 18 (3) *International Journal of Marine and Coastal Law* 363-400, 365.

¹⁵⁴ Banlaoi (2005) 62.

¹⁵⁵ Marcus Hand, ‘Poverty blamed for Piracy’, *Lloyd’s List* 23 June 2006.

Southeast Asia, particularly Indonesia and the Straits of Malacca.¹⁵⁶ Daxecker and Prins, in their research on ‘institutional and economic opportunities for maritime piracy’, found that, in addition to weak governance, the absence of legal forms of employment creates economic opportunities for piracy.¹⁵⁷ Piracy is seen as a profitable ‘job’, the benefits from which can be gained within a short time or a few hours. Thus, it is not surprising that Burnett,¹⁵⁸ Frecon¹⁵⁹ and Murphy¹⁶⁰ discovered that most of the Southeast Asian pirates are fishermen, taxi-boat drivers and sailors. They have the skills and experience as well as equipment to attack ships. Their knowledge of local sea areas, shipping patterns and climatic conditions are advantageous when attempting an attack. Although not the sole reason, financial or economic crisis is believed to be a significant driver of acts of piracy.¹⁶¹

Apart from the desperate economic conditions that encourage the flourishing of piracy, local governments often have limited funds for capacity-building. This funding is very important for providing effective training for the maritime forces and to buy assets for the purpose of patrolling the ships.¹⁶² Whether a state gives high priority to

¹⁵⁶ Maritime brokers recruiting pirates for Asian crime syndicates as their side business during the 1997 Asian financial crisis. See Peter Gwin ‘The Straits of Malacca Dark Passage’ in *National Geographic* October 2007, 127-149,138; MJ Valencia ‘The Politics of Anti-Piracy and Anti-Terrorism Responses’ in GG Ong-Webb, *Piracy, Maritime Terrorism and Securing the Malacca Straits*(Singapore, ISEAS 2006) 87; The increase of piracy in the Straits of Malacca coincided with the Asian financial crisis: John S Burnett, *Dangerous Waters: Modern, Piracy and Terror on the High Seas* (New York, Dutton 2002) 117.

¹⁵⁷ Ursula Daxecker and B Prins ‘Insurgents of the Sea: institutional and Economic Opportunities for Maritime Piracy’ (2012) *Journal of Conflict Resolution*. At <<http://jcr.sagepub.com/content/early/2012/08/14/0022002712453709>> assessed on December 4, 2012.

¹⁵⁸ Burnett (2002) 25.

¹⁵⁹ Frecon (2005) 25.

¹⁶⁰ Martin N Murphy *Small Boats, Weak States, Dirty Money: Piracy and Maritime Terrorism in the Modern World* (London, Hurst Publisher 2009) 370.

¹⁶¹ Banlaoi (2005) 62.

¹⁶² Indonesia is identified as having a weak maritime force and the lowest defence budget in Southeast Asia. See Banlaoi (2005) 63; CZ Raymond ‘Maritime Terrorism, A Risk Assessment:

combating piracy and boosting maritime security might be seen from its management of funds and budget. As far as the Straits is concerned, the increasing volume of vessels passing through this narrow channel and the high cost of maintaining its safety and security, a burden falling on the coastal or littoral states alone, may provide their justification for the lack of funding. Comprehensive surveillance, although it may deter piracy, may be difficult to sustain.¹⁶³ Murphy points out that, during 1992, cooperation in patrolling the Straits proceeded wholeheartedly, but it lasted for just six months due to the states' inability to bear the expensive cost.¹⁶⁴ The states have to provide sufficient resources, and costs include enforcement assets such as boats, aircraft and coordination facilities as well as knowledge and intelligence.¹⁶⁵ Otherwise the enforcement force becomes weak, uncontrolled and less efficient.

4.3.4.3 FAVOURABLE GEOGRAPHY

It has been repeated in many instances that the geographical attributes of a coastal state, particularly in Southeast Asia, has become a main factor contributing to the rampant increase in piracy.¹⁶⁶ Archipelagic states such as Indonesia and the Philippines, which comprise thousands of islands and a complex topography, may

The Australian Example' in J.Ho and CZ Raymond (eds) *The Best of Times the Worst of Times* (IDSS, Singapore 2005) 198.

¹⁶³ Sam Bateman, CZ Raymond and Joshua Ho, 'Safety and Security in the Malacca and Singapore Straits' Policy Paper, IDSS Singapore, May 6, 2006.

¹⁶⁴ MN Murphy *Contemporary Piracy and Maritime Terrorism: The Threat to International Security* (IISS, London 2007) 15.

¹⁶⁵ Martin N Murphy *Small Boats, Weak States, Dirty Money: Piracy and Maritime Terrorism in the Modern World* (Hurst Publisher, London 2009) 24, 32. Peter Chalk 'Threats to the Maritime Environment: Piracy and Terrorism' *Presentation to RAND Stakeholder Consultation*, 28-30 Oct 2002, 3.

¹⁶⁶ Charles J Reinhard 'Maritime Piracy: Sign of a Security Threat?' *Mercer on Transport & Logistics* 16-19; Freeman (2003) 176; Eklof Stefan, *Pirates in Paradis: A Modern History of Southeast Asia Marauders* (NIAS Press, Copenhagen 2006) 5.

have difficulty in enforcing the law.¹⁶⁷ Such geographical areas provide strategic hideouts for pirates. Moreover, the cost of maintaining security throughout these coastlines would also be very expensive, especially for the developing countries. Banlaoi addresses this issue perfectly when he compares the high budgets allocated by the developed countries such as the United Kingdom and the United States to the protection of their coastlines with the developing states which have huge coastlines entailing even higher costs.¹⁶⁸ The capability of a state to defend the security of its coastlines and ensure the safety of navigation in the Straits, particularly in the area around Indonesia, is also affected by the vast numbers of small islands which normally involve high-cost maintenance and surveillance. As a result, the countless islands that provide plenty of hideouts for these opportunistic pirates and armed robbers¹⁶⁹ may at the same time influence the effectiveness of a state's capacity-building in suppressing piracy and armed robbery against ships.

4.3.4.4 SOCIAL AND CULTURAL CIRCUMSTANCE

It may be frustrating when the act of piracy and sea robbery is regarded as an acceptable cultural activity in some States in Southeast Asia.¹⁷⁰ But, for some commentators such as Murphy and Vagg, there really exists a form of society that

¹⁶⁷ The total numbers of Islands in these archipelagos are over 20,000. CZ Raymond (2005); 'Southeast Asian countries have a combined coastline length of 92,451km which is 15.8 percent of the world's total. The archipelagos of Indonesia and Philippines (the two largest in the world with more than 20,000 islands combined) alone contribute 59 and 24 percent, respectively, to the region's coastlines. See Banlaoi (2005) 63.

¹⁶⁸ Banlaoi (2005) 66; See also Banlaoi 'Maritime Piracy in Southeast Asia: Current Situation, Countermeasures, Achievements and Recurring Challenges' in www.counterpiracy.ae/briefing_papers/Banlaoi_Maritime_Piracy_in_Southeast_Asia.Pdf . Accessed on 1 December 2011.

¹⁶⁹ The opportunistic pirates or armed robbers come from a relatively small minority of local fishermen: see Stefan Eklof, *Pirates in Paradise: A Modern History of Southeast Asia's Maritime Marauders* (NIAS Press, Copenhagen 2006) 18-19.

¹⁷⁰ Jon Vagg 'Rough Seas? Contemporary Piracy in Southeast Asia' (1995) 35 *British Journal of Criminology* 67-68; Murphy (2009) 42.

makes piracy its main source of family income.¹⁷¹ Historically, piracy has been a ‘part-time calling’ of merchants and rulers.¹⁷² However, this is still the case, to the extent that it has been related to the corruption of law enforcement officials or other patrons of wealthy bodies.¹⁷³ It is suggested that corruption among port authorities is the most expensive maritime crime.¹⁷⁴ According to Dillon, extortion and collusion with criminals are the two main forms of corruption indulged in by port officials.¹⁷⁵ He describes several instances of reported attacks which received no response from the port authority; alternatively, the criminals were caught but then released without any action being taken against them.¹⁷⁶

Gwin’s interview with a pirate¹⁷⁷, who was caught together with nine others when trying to hijack the *Nepline Delima* in 2005, provides a good explanation for this.¹⁷⁸ Ariffin, or as he called himself, ‘John Palembang’, told Gwin that the attack on the *Nepline Delima* was a plot. It was first planned in a coffee shop in Batam when a shipping executive approached his friend Lukman, an Indonesian sailor, to recruit a crew to hijack the tanker. As it was hard to find work, he agreed to join Lukman in this plot. Although the attack began as planned, one of the tanker’s crewman fled with

¹⁷¹ *ibid.*

¹⁷² Freeman (2003) 178; Patrons of piracy have existed historically and still exist today, Young (2005) 20.

¹⁷³ Murphy, MN, *Small Boats, Weak States, Dirty Money: Piracy and Maritime Terrorism in the Modern World* (London, Hurst Publisher 2009) 42;

¹⁷⁴ Dana R Dillon ‘Maritime Piracy: Defining the Problem’ (2005) 25 SAIS Review No. 1 Winter/Spring 157.

¹⁷⁵ *ibid.* 155-165.

¹⁷⁶ For example, the tanker *Jaladoot* was attacked on Jan 7, 2003 while berthed; the ship’s master reported this to the local coastguard but received no response. Also, a case of collusion occurred following an attack on the chemical tanker *Bunga Siantan* when the uniformed authorities were seen chasing the pirates, only to release them later: Dillon (2005) 158.

¹⁷⁷ He is called ‘*lanun*’ in the Malay language; according to the Court interpreter there is no direct English equivalent. But, for Gwin, the imperfect answer is that *lanun* is ‘pirate’ in English. Peter Gwin ‘The Straits of Malacca Dark Passage’ *National Geographic* October 2007, 127-149, 132.

¹⁷⁸ Gwin (2007) 132.

their speedboat and managed to obtain help from the Malaysian marine police in Langkawi. He and nine others were caught and the shipping executive and the complicit crew members were arrested.¹⁷⁹

This interesting story shows the reality of the life of a pirate, who is sometimes a normal seaman and sometimes a pirate or, legally speaking, a sea robber. Their own desperation coupled with weak enforcement action, crooked patrons of the act, the promise of rewards and other factors discussed above may trigger their boldness in attacking ships in this lucrative target area.¹⁸⁰ An archipelagic area will provide strategic hideouts for them should their small boats be chased by the authorities. In Southeast Asian waters, particularly in the Straits of Malacca, those pirates who have been successfully arrested are mostly Indonesian; however, in order to tackle the problem, such transnational crimes require the full cooperation of all the littoral states and stakeholders, especially in a complex geographical area such as Indonesia.

4.4 CONCLUSION

Globalisation and the vast increase in international trade have highlighted the importance of the sea lanes of communication, especially in the Straits of Malacca. This significance has made the threat of piracy and armed robbery against ships and the challenge to maritime safety and security in this area a matter of great concern to the international community, particularly the stakeholders. In the Straits, this threat has represented an endless challenge to the littoral states since before the colonial period. The vulnerability to the threat became apparent when the IMB attempted to

¹⁷⁹ Gwin (2007) 148-149.

¹⁸⁰ Murphy agrees that 'For most, piracy is a low-risk, high-paying job when compared to other lines of work they qualify for'. See Murphy (2009) 45.

establish a piracy reporting centre in 1992. The quarterly and annual piracy reports from IMB and other organisations such as IMO have become the main source of reference for the international community to assess the fluctuating risks of piracy and armed robbery at sea throughout the world. It is obvious that exaggeration and over-dramatisation of the threat of piracy and armed robbery against ships has severely affected the reputation of the littoral states to manage the safety and security of the Straits. Although it is undeniable that, according to the annual IMB piracy reports, the Straits saw escalating rates of piracy and armed robbery incidents in the years between 2000 and 2006, subsequent years have seen a sharp decline in such incidents.

Apart from the impressive tripartite cooperation between Malaysia, Indonesia and Singapore recently, which is evidenced by the decline in the number of attacks in the Straits,¹⁸¹ it is suggested that, were the root causes of piracy to be tackled, this problem might be totally eradicated or at least reduced and handled efficiently. Appreciating the basic causes and types of piracy in the region that have been highlighted in this chapter is very important in order to provide a backdrop to an understanding of the issue of piracy and armed robbery in the Straits, before examining the adequacy of laws and mechanisms provided in the local context in the next chapter.

¹⁸¹ Annual Report of the ICC-IMB-PRC from 2000-2010.

CHAPTER 5

COOPERATIVE ACTION IN SECURING THE STRAITS: MALAYSIAN RESPONSES IN REGIONAL, EXTRA-REGIONAL AND BILATERAL INITIATIVES

5.0 INTRODUCTION

The persistent threat of piracy and armed robbery has become a central issue that directly afflicts the coastal states and indirectly affects regional security. The increase in the number of piracy and armed robbery incidents in the twenty-first century has required an urgent reaction by the states and regional bodies involved. As discussed in an earlier chapter, despite some weaknesses pointed out by various commentators,¹⁸² the 1982 Convention has successfully provided a legal foundation for a regional cooperative framework, especially for the suppression of piracy and armed robbery against ships in the Southeast Asian region. The states themselves need to do more in order to materialise this cooperative framework. In order to achieve this, states have to compromise on their legitimate interests and sovereign rights as well as fulfil their moral duties in order to achieve international maritime peace and safety of navigation.

Given that piracy is often a transnational crime, cooperation between states is the best method of securing the sea, especially in the congested areas upon which maritime trade depends. The Southeast Asian region is home to six of the world's top twenty-five container ports.¹⁸³ This is apparently indicative of the intense maritime traffic and

¹⁸² Cross-refer to Chapter 3 (para 3.3.1).

¹⁸³ Tamara Renee Shie 'Maritime Piracy in Southeast Asia: The Evolution and Progress of Intra-ASEAN Cooperation' in GG Ong-Webb *Piracy, Maritime Terrorism and Securing the Malacca Straits* (ISEAS, Singapore 2006) 163-189, 164. 'Southeast Asia's ports and waterways are

the heavy reliance of international trade on the important sea routes of the region. This waterway is traversed by thousands of vessels, luring the opportunist pirates and robbers whose activities are transnational in nature. As the challenges to maritime security grow, the collective collaboration and cooperative action requires a prevailing operation and dynamic strategy. The cooperative basis in Article 100 of the 1982 Convention could be a stepping-stone to encouraging cooperation among states.¹⁸⁴ Although collaboration between states is often hampered by concerns over sovereignty and individual national security interests, the threat of piracy and armed robbery, particularly in the Straits of Malacca, is believed to have so far been tackled wisely.¹⁸⁵

5.1 REGIONAL MARITIME SECURITY INITIATIVES

5.1.1 SECURITY COOPERATION IN THE ASSOCIATION OF SOUTHEAST ASIAN NATIONS (ASEAN)

Simon points out that the establishment of ASEAN in the immediate post-cold war years had the original rationale of protecting each member state's sovereignty.¹⁸⁶ Their objective is to promote cooperation between newly independent and developing countries in Southeast Asia.¹⁸⁷ It has been seen as a 'diplomatic association' that

essential to international maritime trade. Six of the world's top twenty-five container ports are located in Southeast Asia: Singapore, Port Kelang (Malaysia), Tanjung Priok (Indonesia), Tanjung Pelepas (Malaysia), Laem Chabang (Thailand), and Manila (the Philippines).

¹⁸⁴ Art 100 of the 1982 Convention: 'All States shall cooperate to the fullest possible extent'

¹⁸⁵ See discussion on assessment of risk in Chapter 4.

¹⁸⁶ Sheldon Simon, 'ASEAN and Multilateralism: The Long, Bumpy Road to Community' [2008] 30 *Contemporary Southeast Asia*, 264,268.

¹⁸⁷ See <http://www.aseansec.org/64.htm> accessed on 20 February 2010. As set out in the ASEAN Declaration, the aims and purposes of ASEAN are:

1. To accelerate the economic growth, social progress and cultural development in the region through joint endeavours in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of Southeast Asian Nations;

concentrates on regional cooperation and avoidance of intra-regional disputes.¹⁸⁸ As the first Prime Minister of Malaysia, Tunku Abd Rahman, once said:¹⁸⁹

‘the initial thrust of ASEAN should be economic and cultural matters and if these initiatives proved successful then efforts could be made towards establishing a far-reaching organisation which could extend to political as well as security fields.’

Originally, ASEAN, which was founded by Malaysia, Indonesia, Singapore, Thailand and the Philippines, made its first cooperative declaration of solidarity on 8 August 1967 in Bangkok, Thailand. It was then joined by Brunei seventeen years later, followed by Vietnam in 1995, Laos and Myanmar in 1997, and then Cambodia in 1999. Simon Tay and Jesus Estanislao, as well as Redha, divide ASEAN development into three stages. The first stage starts from the year of its formation in 1967 until 1976, which they described as the years of ‘highly decentralised structure.’¹⁹⁰ This

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2. To promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries of the region and adherence to the principles of the United Nations Charter;
 3. To promote active collaboration and mutual assistance on matters of common interest in the economic, social, cultural, technical, scientific and administrative fields;
 4. To provide assistance to each other in the form of training and research facilities in the educational, professional, technical and administrative spheres;
 5. To collaborate more effectively for the greater utilisation of their agriculture and industries, the expansion of their trade, including the study of the problems of international commodity trade, the improvement of their transportation and communications facilities and the raising of the living standards of their peoples;
 6. To promote Southeast Asian studies; and
 7. To maintain close and beneficial cooperation with existing international and regional organisations with similar aims and purposes, and explore all avenues for even closer cooperation among themselves.

¹⁸⁸ AH Redha @ Redo Abduh. ‘ASEAN Security Cooperation: Challenges and the Way Ahead’ 1 (2010) *Journal of Defence and Security*, 1; Sheldon Simon, ‘ASEAN and Multilateralism: The Long, Bumpy Road to Community’ [2008] 30 *Contemporary Southeast Asia*, 264,268; ADH Poole ‘Cooperation in Contention: The Evolution of ASEAN MORMS’ YCISS working paper number 44 Jan 2007 p.1-2 in www.yorku.ca/yciss/whatsnew/documents/WP44-Poole.pdf accessed on 30 January 2011.

¹⁸⁹ Redha (2010)1.

¹⁹⁰ Simon SC Tay and Jesus Estanislao, ‘The Relevance of ASEAN: Crisis and Change’ in Simon SC Tay, Jesus Estanislao and Hadi Soesastro *A New ASEAN in a New Millennium*, (Jakarta, Centre for Strategic and International Studies, 2000) 10-11; AH Redha@Redo Abduh. ‘ASEAN

was a period of inter-state conflicts that threatened the stability and security of the region. This is certainly expected from an embryonic organisation¹⁹¹ whose founders were also newly-formed self-governing states at that time. Although still decentralised, the second stage, covering the years 1976 to 1992, saw a steady improvement in this regional organisation, especially in inter-governmental political relations, economic mutual understanding and diplomacy. The third stage began in 1997 and has continued into the new millennium; it has generated more cooperation and joint efforts, as well as bilateral and trilateral declarations, especially in dealing with regional security issues. These three stages demonstrate ASEAN's positive progress as revealed through its statements, communiqués, plans of action and visions.

On the other hand, Shie classifies the development of ASEAN into three phases, but with different time periods, namely early ASEAN (1976 to 1992), ASEAN expansion (1992 to 2001) and ASEAN new millennium (2001 until the present).¹⁹² It was in the early phase that ASEAN countries showed great concern about any possible intimidation or external interference in individual states' affairs. Consequently, the Bangkok Declaration of 8 August 1967 reaffirmed the aims of the United Nations charter to protect nations from external interference.¹⁹³ This principle of 'non-interference' has since become the trademark and non-constitutive norm of the ASEAN states. Despite this early anxiety, ASEAN's members explicitly showed their commitment to security cooperation in the 1976 Declaration of ASEAN Concord

Security Cooperation: Challenges and the Way Ahead' 1 (2010) *Journal of Defence and Security*, 1,1

¹⁹¹ Michael Leifer, 'ASEAN's search for regional order' (Singapore National University Singapore 1987) 4; Jones and Smith [2007] 148-184, 151.

¹⁹² Shie (2006) 166.

¹⁹³ Art 2 (7) of the UN Charter.

(1976 Declaration) and the Treaty of Amity and Cooperation (TAC). The 1976 Declaration emphasised ‘the continuation of cooperation on a non-ASEAN basis between the member states in security matters in accordance with their mutual needs and interests.’¹⁹⁴ However, the attitude of the ASEAN members towards the ideas of multilateral security cooperation is reflected in the words of TAC which highlights the following:

Article 2

In their relations with one another, the High Contracting Parties shall be guided by the following fundamental principles:

- a. Mutual respect for the independence, sovereignty,
- b. equality, territorial integrity and national identity of all nations;
- c. The right of every State to lead its national existence free from external interference, subversion or coercion;
- d. Non-interference in the internal affairs of one another;
- e. Settlement of differences or disputes by peaceful means;
- f. Renunciation of the threat or use of force;
- g. Effective cooperation among themselves. (Underlined added)

The preoccupation with mutual respect for sovereignty and equality as well as non-interference in the internal affairs of any state that is absorbed in the TAC has been repeated consistently.¹⁹⁵ This signifies that the ASEAN states’ willingness to embrace a regional cooperation mechanism would still be subjected to this norm. As a result,

¹⁹⁴ Declaration of ASEAN Concord 1976. Available at < www.aseansec.org >. Accessed on 10 Feb 2011; The Treaty of Amity and Cooperation (TAC) in Southeast Asia was formally signed in Bali, on 24 February 1976. The full text of the TAC is available on the ASEAN Secretariat website at <<http://www.aseansec.org/1217.htm>>

¹⁹⁵ DM Jones and MLR Smith ‘Making Process, Not Progress: ASEAN and the Evolving East Asian Regional Order’ (2007) 32 International Security 154.

the relevancy and credibility of ASEAN has been criticised because it has been unable to constitute an effective vehicle for regional cooperation. It has also been argued that ASEAN has never been able to provide a mechanism for resolving conflicting territorial claims among its members. Rather, for Jones and Smith, this non-constitutive fundamental norm has been identified as one of the elements that impair ASEAN's credibility regarding its ability to implement its declaration and planning, especially in terms of maritime security which includes transnational crimes such as piracy and terrorism.¹⁹⁶ This is simply because suppressing such crimes requires some deterioration of the principle of non-interference in internal affairs.¹⁹⁷

This is again reiterated by Martin who believes that ASEAN is simply 'making a process and is not making progress.'¹⁹⁸ Their bureaucratic process in preserving their fundamental norms is very complex. Many commentators are emphasizing that ASEAN regionalism, while frequently stating the need for mutual cooperation in tackling the security issues, has not really implicated it in actual practice.¹⁹⁹ This has in fact been accentuated in the Report of Eminent Persons Group on the ASEAN Charter: 'ASEAN's problem is not one of lack of vision, ideas, or action plans. The problem is one of ensuring compliance.'²⁰⁰

¹⁹⁶ *ibid.*169; ADH Poole 'Cooperation in Contention: The Evolution of ASEAN Norms' YCISS working paper number 44 Jan 2007, 1-2 in www.yorku.ca/yciss/whatsnew/documents/WP44-Poole.pdf accessed on 30 January 2011

¹⁹⁷ Sheldon Simon (2008) 268.

¹⁹⁸ Jones and Smith (2007) 171.

¹⁹⁹ *ibid.*164; Liss (2011) 305; Evelyn Goh 'Great Powers and Hierarchical Order in Southeast Asia: Analysing Regional Security Strategies' [2008] 32 *International Security*, 113-157, 117.

²⁰⁰ ASEAN Secretariat 'Report of Eminent Persons Group on the ASEAN Charter' December 2006 on page 3. <<http://www.aseansec.org/19247.pdf>> accessed on 20 February 2010; Jones and Smith (2007) 171, 169.

Liss shared this view by pointing out that, apart from unresolved disputes and interstate tension between ASEAN States, the ‘ASEAN way’ style of diplomacy has become the main obstacle to addressing the security challenges in the region.²⁰¹ These factors not only impair cooperation in combating piracy but also affect political and security-related cooperation in general.²⁰² The central issue remains on the question of ‘whether ASEAN countries have common security interests and wills sufficient to provide a basis for security cooperation beyond the current bilateral arrangement?’²⁰³ According to Shie, some previous studies have shown that the Southeast Asian states appreciated and recognised that the anti-piracy efforts of the extra-regional stakeholders were more effective than the intra-regional defence and security efforts.²⁰⁴ The intra-ASEAN defence and security actions were regarded as completely inadequate and ineffective. Shie presumed that, as the ASEAN states relied on the outside or extra-regional help, ASEAN was considered an unsuccessful means of tackling and curbing piracy problems regionally.²⁰⁵ Simon, pondering ASEAN’s future, insists that ‘ASEAN cannot be a change agent, nor was it ever intended to be a collective security regime.’²⁰⁶ Again, he points out that, in such crimes, the

²⁰¹ Carolin Liss ‘States’ Responses to Piracy’ in Carolin Liss, *Oceans of Crime: Maritime Piracy and transnational Security in Southeast Asia and Bangladesh* (ISEAS Singapore 2011) 305.

²⁰² *ibid.*

²⁰³ AH Redha@Redo Abduh. ‘ASEAN Security Cooperation: Challenges and the Way Ahead’ 1 (2010) *Journal of Defence and Security*, 1,2.-3; Goh (2007/08) 117.

²⁰⁴ Shie (2006) 166: China, India, US and Japan have increasingly shown interest in the maritime security of Southeast Asia, primarily because of their dependence on oil and other supplies shipped through the region’s sea lanes. These States have offered the ASEAN States, particularly those littoral to the Straits of Malacca, assistance with capacity building and training and maritime patrols; Goh (2008) 115: many of these States distrust Chinese intentions for reason of geographical proximity, historical enmity and interference, contemporary territorial disputes and rising economic competition.

²⁰⁵ Shie (2006) 167.

²⁰⁶ Sheldon Simon, ‘ASEAN and Multilateralism: The Long, Bumpy Road to Community’ [2008] 30 *Contemporary Southeast Asia*, 274.

cooperation among states is primarily bilateral.²⁰⁷ Furthermore, item number 5 of the 1987 Manila Declaration states that security issues have not become a formal ASEAN agenda but a responsibility of each individual state, which needs to resolve them separately.²⁰⁸ In other words, the idea of regional multilateral security cooperation is limited to bilateral agreements between members.

Despite this sceptical view, Severino comments that, for decades, ASEAN attained considerable achievements in terms of realising certain regional goals.²⁰⁹ For example, ASEAN convened the first Conference on Transnational Crime, which includes piracy as one instance of a regional problem, in 1997.²¹⁰ This was subsequent to the first Informal Summit in November 1996, at which the ASEAN leaders called upon the relevant bodies to study the possibility of regional cooperation in tackling such crime.²¹¹ The awareness of ASEAN about the detrimental impact of transnational crime on the member states has inspired the need to tackle and fight such crimes by enhancing regional cooperation. The specific objectives of the 1999 Plan of Action (POA) to Combat Transnational Crime are to urge the ASEAN member countries to:

1. Develop a more cohesive, regional strategy aimed at preventing, controlling and neutralising transnational crime;

²⁰⁷ *ibid.* 264, 270. For example, during the communist insurgencies, cooperation occurred bilaterally between Thailand and Malaysia and Malaysia and Singapore.

²⁰⁸ “While each Member State shall be responsible for its own security, cooperation on a non-ASEAN basis among the Member States in security matters shall continue in accordance to their mutual needs and interests.” The full text of the Manila Declaration is available on the ASEAN Secretariat website at <<http://www.aseansec.org/5117.htm>> accessed on 20 February 2010.

²⁰⁹ Rodolfo C Severino ‘Southeast Asia’s Security Outlook, ASEAN: New Charter, New Optimism’ in Ian Storey, Lee Poh Onn (eds) *Regional Outlook: Southeast Asia 2009-2010* (ISEAS, Singapore 2009) 7.

²¹⁰ 1997 ASEAN Declaration on Transnational Crime. See ASEAN Secretariat website at <<http://www.aseansec.org/5640.htm>> and <<http://www.asean.org/16133.htm>> accessed on 20 February 2010; See also Shie (2006) 171.

²¹¹ ASEAN Plan of Action to Combat Transnational Crime adopted on 23 June 1999 in Yangon, Myanmar by the Ministers responsible for transnational crime at <<http://www.asean.org/16133.htm>> accessed on 22 February 2011.

2. Foster regional cooperation at the investigative, prosecutorial, and judicial level as well as the rehabilitation of perpetrators;
3. Enhance coordination among ASEAN bodies dealing with transnational crime;
4. Strengthen regional capacities and capabilities to deal with the sophisticated nature of transnational crime; and
5. Develop sub-regional and regional treaties on cooperation in criminal justice, including mutual legal assistance and extradition.²¹²

This POA was very timely, especially at the close of the twentieth century when the maritime security threats from piracy and armed robbery attacks had become increasingly alarming.

In the wake of the September 11, 2001, attacks, Southeast Asian States were also forced to be more serious and diligent in tackling the issues of maritime security. In 2001, the ASEAN Special Projects was formed in Jakarta with the aim of dealing with Transnational Crimes including piracy, terrorism, trafficking in persons, trafficking in drugs, arms smuggling and money laundering.²¹³ In 2002, the Senior Officials Meeting on Transnational Crime (SOMTC) in Kuala Lumpur agreed to deal exclusively with the issue of piracy, which was rampant at that time.²¹⁴ It was at this

²¹² ASEAN Plan of Action to Combat Transnational Crime adopted on 23 June 1999 in Yangon, Myanmar by the Ministers responsible for transnational crime at <<http://www.asean.org/16133.htm>> accessed on 22 February 2011.

²¹³ Shie (2006) 176.

²¹⁴ ASEAN Plan of Action to Combat Transnational Crimes adopted in Kuala Lumpur on 17 May 2002: See <www.asean.org>..... ; Shie (2006) 176.

2002 SOMTC meeting that the special plan of actions to combat Transnational Crime was adopted. The SOMTC had proposed to implement the following initiatives:²¹⁵

1. Establish a compilation of national laws and regulations of ASEAN member countries pertaining to piracy and armed robbery at sea, which is to lead towards establishing a regional repository of such national laws and regulations to be made available on the ASEANWEB.
2. Exchange of information and enhanced cooperation with the International Maritime Organisation (IMO) as well as with other bodies involved in combating piracy and armed robbery at sea such as the International Maritime Bureau (IMB), the Federation of ASEAN Shipowners Association (FASA) and ASEANAPOL.
3. Compile national studies to determine trends and the “modus operandi” of piracy in Southeast Asian waters.
4. Consider the feasibility of developing multilateral or bilateral legal arrangements to facilitate apprehension, investigation, hot pursuit, prosecution and extradition, inquiry, seizure and forfeiture of the proceeds of the crime in order to enhance mutual legal and administrative assistance among ASEAN Member Countries.
5. Enhance coordinated anti-piracy patrols.
6. Enhance coordinated and coordination in law enforcement and intelligence sharing of piracy and armed robbery at sea and that of other transnational crimes.
7. Strengthen and enhance existing co-operation among National Focal Points of ASEAN Countries involved in combating and suppressing piracy and armed robbery at sea.
8. Enhance and seek training programmes within ASEAN and with the ASEAN Dialogue Partners to equip maritime, customs, the police,

²¹⁵ *ibid.*; see also H Djalal ‘Combating Piracy: Cooperation Needs, Efforts and Challenges in D Johnson and MJ Valencia *Piracy in Southeast Asia, Status, Issues and Responses* (ISEAS, Singapore 2005) 150-151.

port authority and other relevant officials for the prevention and suppression of sea piracy and other maritime crimes.

9. Seek technical assistance from users of the waterways and relevant specialised agencies of the United Nations and other international organisations, particularly with regard to training and acquisition of effective communication equipment and assets; this would be in accordance with the 1982 UNCLOS Article 43.
10. Obtain financial assistance for increased patrolling of particularly vulnerable sea areas and for training programmes for maritime law enforcement officials and the agencies concerned.

It was believed that the plan would facilitate the ASEAN states in developing multilateral or bilateral legal arrangements and conducting training programmes and joint exercises for law enforcement in more efficient ways.²¹⁶ These include an agreement to work together to combat piracy in areas such as information exchange, cooperation in legal matters and law enforcement, training, institutional and capacity-building and extra-regional cooperation. Furthermore, the adoption of the ASEAN Charter in 2007²¹⁷ enabled ASEAN to be more effective and expeditious in dealing with common regional problems in order to ensure regional peace and stability.²¹⁸ The Charter is expected to be a tool for inter-governmental negotiations, especially in regional maritime security.²¹⁹

²¹⁶ ASEAN Plan of Action to Combat Transnational Crimes adopted in Kuala Lumpur on 17 May 2002; Shie (2006) 177.

²¹⁷ The Charter entered into force thirty days after the deposit of the tenth instrument of ratification; so, with Thailand having deposited with the Secretary-General the tenth and last instrument of ratification, the Charter came into force on 14 December 2008.

²¹⁸ Severino (2010) 7-9.

²¹⁹ The Charter entered into force thirty days after the deposit of the tenth instrument of ratification; so, with Thailand having deposited with the Secretary-General the tenth and last instrument of ratification, the Charter came into force on 14 December 2008.

Thus, to disregard ASEAN's efforts in tackling transnational issues such as piracy would be to overlook this organisation's capability and potential competency. Although facing challenges on intra-ASEAN multilateral security cooperation, the bilateral defence and security ties have undergone a speedy expansion.²²⁰ Redha believes that, despite ASEAN's shortcomings as a regional security organisation, it has been regarded as an umbrella under which member states may take up bilateral or multilateral security initiatives.²²¹ More often than not, ASEAN states are able to compromise and put aside their self-interests to show their commitment to security cooperation, especially when the threat exists in their own areas. For example, the Philippines and Malaysia managed to put aside their dispute over the claim on Sabah and agreed to enter bilateral military cooperation with Malaysia to conduct naval patrols in the agreed area. Shie's view on the ASEAN states' over-reliance on the anti-piracy efforts provided by the extra-regional stakeholders perhaps overshadows the intra-ASEAN efforts to fortify the cooperative action among member States to address the problems either bilaterally or trilaterally.²²²

5.1.2 ASEAN REGIONAL FORUM (ARF)

The ASEAN Regional Forum (ARF) was established a year after ASEAN formally acknowledged 'the necessity of regional security cooperation' in the Singapore Declaration, namely during the Twenty-Sixth ASEAN Ministerial Meeting and Post Ministerial Conference on July 1993. ARF, which is also regarded as ASEAN's offspring, has the dictum of 'promoting peace and security through dialogue and

²²⁰ AH Redha@Redo Abduh. 'ASEAN Security Cooperation: Challenges and the Way Ahead' (2010) 1 *Journal of Defence and Security*, 3.

²²¹ *ibid.* 1, 2.

²²² Shie (2006) 171.

cooperation in the Asian Pacific.²²³ Unlike ASEAN, whose initial members are Southeast Asian countries, ARF is not limited to regional states. Although all ASEAN states automatically become members of ARF, it is also open for participation by other countries as long as certain criteria are met. Currently, about twenty-seven states are participating in the ARF, including other regional and maritime powers such as China, the United States (US) and European Union States (EU).²²⁴ The participation of these states, despite their geographical location, meets the prescribed criteria and is considered relevant since the security of the Asian region indirectly affects these countries.²²⁵ However, ARF would not approve the participation of too many countries as members in order to ensure that the effectiveness of the Forum is not impaired.

Many of the ARF's concerns over the issue of piracy and armed robbery against ships are the same as those of other regional bodies or parties to multilateral agreements whose members are the same countries. The ARF motto demonstrates the objectives of the Forum to provide a platform for discussion of common-interest issues, particularly the issue of maritime security. The ARF has been defined in the Chairman's Statement as:

[A] high-level consultative forum aiming at conducting constructive dialogue on political and security issues in Asia-Pacific region, and

²²³ Sheldon Simon, 'ASEAN and Multilateralism: The Long, Bumpy Road to Community' [2008] 30 *Contemporary Southeast Asia*, 264, 278.

²²⁴ The current members in the ARF are as follows: Australia, Bangladesh, Brunei Darussalam, Cambodia, Canada, China, European Union, India, Indonesia, Japan, Democratic People's Republic of Korea, Republic of Korea, Laos, Malaysia, Myanmar, Mongolia, New Zealand, Pakistan, Papua New Guinea, Philippines, Russian Federation, Singapore, Sri Lanka, Thailand, Timor Leste, United States, and Vietnam. <<http://www.aseanregionalforum.org>> accessed on 2 March 2010.

²²⁵ There are four ARF criteria for participation which were adopted in July 1996: Commitment, Relevance, Gradual expansion and Consultations. See <<http://www.aseanregionalforum.org>> accessed on 2 March 2010.

carrying out cooperation in confidence-building measures, nuclear non-proliferation, peacekeeping, exchange of non-classified military information, maritime security and preventive diplomacy.²²⁶

In its 10th Post-ministerial Conferences in 2003, ARF adopted a Statement on Cooperation against Piracy and other threats to Maritime Security. The Statement considered maritime security ‘an indispensable and fundamental condition for the welfare and economic security of the ARF region’.²²⁷ It does not define maritime security, describing it only as the ‘main eventual reason’ for ensuring security in the region. It might be inferred that the security issue, which has been given special attention in the Statement, seems to be confined to the crime of piracy and armed robbery against ships.²²⁸ Therefore, close cooperation with the international instruments such as IMO and IMB-PRC has been fully encouraged. In addition, the implementation of the existing international anti-piracy legal frameworks and guidelines at the national level is necessary and urgent. Although it is obvious from the Statement that the cooperation of all States in the region is a matter of the utmost importance without which welfare and economic security may be at stake,²²⁹ the duty to cooperate is merely on a voluntary basis.²³⁰ Such a basis might result in a lack of willingness on the part of States to further implement the statement especially when it involves matters of sovereignty, sovereign power and territorial integrity.²³¹ This is

²²⁶ See: <<http://www.mfa.gov>> accessed on 10 December 2009; Chairman’s Statement of ASEAN Regional Forum, in <<http://www.aseanregionalforum.org>.> Accessed on 12 December 2009.

²²⁷ ARF Statement on ‘Cooperation against Piracy and other Threats to Maritime Security’, Phnom Penh, Cambodia, 16-20 June 2003. <<http://www.aseanregionalforum.org>> accessed on 20 November 2009; MJ Valencia ‘Piracy and Terrorism in Southeast Asia’ in D Johnson and M Valencia (eds), *Piracy in Southeast Asia: Status, Issues and Responses* (ISAS, Singapore 2005) 96.

²²⁸ *ibid.*

²²⁹ This is parallel with Art 100 of 1982 Convention where States are required to cooperate to their fullest capacity to combat piracy at sea.

²³⁰ Valencia (2005) 96.

²³¹ *ibid.*

similar to the spirit of Article 43 of the 1982 Convention which recommends burden-sharing between the coastal states and users without any obligation imposed on the latter.

Thus, when it comes to cooperation in combating piracy, ARF members may simply raise their security concerns over such threats but may not contribute effectively to its prevention. Valencia argues that there have been no detailed discussions on the mechanism to control and prevent such piracy and maritime terrorism in ARF.²³² Therefore, it might be difficult to put such 'good intentions' into action.²³³ In sharing this view, Beckman suggests that political will is essential for implementing any recommendation or statement of cooperation; without it, nothing will be achieved.²³⁴ In many cases maritime issues have not been given high priority in Southeast Asia, as Mak commented.²³⁵ Certainly, resistant states will become a barrier to the implementation of effective security measures. In fact, the clash and conflict of interests are likely to hinder the transparency of cooperation among states.²³⁶

Malaysia has responded positively to the ARF dialogue on security. Mohd Najib Tun Abd Razak, the current Prime Minister of Malaysia, stated during the 10th ARF Head of Defence Universities/Colleges Meeting in Malaysia in 2006 that:

Despite our [e]ncouraging development and convincing economic growth, we have got a long way to go towards becoming an

²³² ibid; JN Mak 'Unilateralism and Regionalism' in GG Ong-Webb *Piracy, Maritime Terrorism and Securing the Malacca Straits* (ISEAS Singapore 2006) 108.

²³³ ibid. See also Jurgen Haacke 'The ASEAN Regional Forum: from dialogue to Practical Security Cooperation?' [2009] 3 Cambridge Review of International Affairs, 427-449.

²³⁴ Beckman 'Combating Piracy and Armed Robbery Against Ships in Southeast Asia' 326; Beckman, Grundy-Warr and Forbes 'Acts of Piracy in the Malacca and Singapore Straits' 15-20.

²³⁵ Mak (2006) 134.

²³⁶ Mak (2006) 135.

industrialised nation. We place security as an important agenda in our national development. We are sharing land and sea borders with the majority of the ASEAN members which requires us to have continued bilateral and multilateral working relations for our future well-being. We will continue to participate in regional forums and be actively involved in peace missions such as the International Monitoring Team (IMT) and peacekeeping missions under the United Nations Umbrella.²³⁷

National security is a significant issue in the Malaysian policy and legal framework. Furthermore, Malaysia also believes that the cooperation and coordination among ARF members, either in international or multilateral agreements, is very important in ensuring the security of the ocean sectors. Although ARF does not have a specific regional enforcement body to suppress piracy and maritime terrorism, the cultivation of possible efforts and exchange of ideas as well as the shared development of capacity-building among the members has more or less created an awareness among states of the importance of intensifying efforts and improving capacity at national level before joining forces with other countries. This is a considerable achievement by ARF and it should be complimented for it. Thus, Malaysia, as an active member of ARF, has shown commitment towards realizing its motto of 'promoting peace and security through dialogue and cooperation in the Asian Pacific' through the maritime security agenda, especially in controlling piracy and armed robbery in the region.

²³⁷ See < <http://www.pmo.gov.my/>> accessed on 20 December 2009.

5.1.3 TRILATERAL AND BILATERAL SECURITY ARRANGEMENTS IN THE STRAITS

According to Shie, security measures have been more difficult to address in the ASEAN forum than economic and cultural interests.²³⁸ As the concerns over the escalating number of piracy and armed robbery attacks in the Straits, especially during the Asian financial crisis in the late 1990s were attracting increasing worldwide media coverage, the efficacy of regional maritime anti-piracy and terrorism initiatives was questioned. During the crisis, some ASEAN countries experienced widespread poverty and low incomes, particularly in Indonesia and Thailand.²³⁹ Consequently, their ability to combat piracy in the region was hampered by this crisis. Since piracy in the Southeast Asia region is perpetrated mainly within the territorial states by cross-border criminals, which is known legally as armed robbery against ships, the contention over the importance of trilateral and bilateral cooperative action among the littoral states appears to be the central issue.²⁴⁰ In many instances, the littoral states are blamed for failing to ensure the safety and security of navigation for those states using the Straits. Fort suggests six important challenges that need to be met by the states to cope effectively with cross-border threats such as piracy:²⁴¹

1. Understanding the true nature of the problem;
2. Resolving bureaucratic inefficiencies;
3. Dealing more effectively with root causes;

²³⁸ Shie (2006) 173.

²³⁹ For example, during the crisis Indonesia's defence budget was reduced by 65 per cent: See Shie (2006) 173-174.

²⁴⁰ For example, during the communist insurgencies, the cooperation occurred bilaterally between Thailand and Malaysia and Malaysia and Singapore. See Sheldon Simon, 'ASEAN and Multilateralism: The Long, Bumpy Road to Community' [2008] 30 *Contemporary Southeast Asia*, 264,270; Liss (2006) 105: the vast majority of pirate attacks in Asia are sea robberies.

²⁴¹ Brian Fort 'Transnational Threats and the Maritime Domain' in GG Ong-Webb (ed.) *Piracy, Maritime Terrorism and Securing the Malacca Straits* (ISEAS, Singapore 2006) 23-35, 31; See also Kimberly L.Tachuk and Sam J Tangredi 'Transnational Threats and Maritime Responses' in Sam J Tangredi (ed.) *Globalisation and Maritime Power* (National Defence University Press: Washington DC 2002) 57-78.

4. Improving intelligence sharing;
5. Closing the security gap between military and law enforcement authorities in situations where their competencies overlap; and
6. Engaging in a more comprehensive threat assessment.

Like the 1999 ASEAN Plan of Action and the 2002 SOMTC initiatives discussed earlier, the process of overcoming the challenges to the suppression of piracy and armed robbery suggested above will primarily need a strong maritime force and political will by the affected states. It is obvious that the states that possess sufficient funds and naval resources, actionable capacity-building and intelligence as well as effective law enforcement and judicial strength will have the ability to provide an effective deterrent to such threats. Apart from the littoral states' effort, which has its limitations, the assistance of the international community, particularly the Straits' users, is very welcome. As the Deputy Prime Minister of Malaysia, Najib Abd Razak, said during the conference in Singapore in June 2005:

‘The littoral states must be in the driver’s seat in maintaining regional maritime security and they retain primary responsibility for implementation of any measures designed to strengthen safe passage. While the need for greater cooperation extends to states using the Straits, good intentions are best translated in terms of financial support, intelligence sharing, training and provision or loaning equipment such as ships and aircraft.’²⁴²

Najib’s statement above appears to reassert the 1971 joint statement which emphasised that the management of the implementation of measures to strengthen security and safe passage in the Straits should be the primary responsibility of the

²⁴² GG Ong-Webb ‘Introduction’ in GG Ong Webb (ed.) *Piracy, Terrorism and Securing the Malacca Straits* (ISAS, Singapore 2006) xxix; Z A Ahmad ‘No Need For Foreign Escorts Says Najib.’ *The Star* 6 June 2005.

littoral states.²⁴³ It may be said that this statement derives from the spirit of the maritime security agenda of the ASEAN states, which are reluctant to allow any external interference, especially when it involves matters of national security and sovereignty.

One clear example of successful regional cooperation is that shown by Malaysia, Indonesia and Singapore in the bilateral and trilateral security arrangements for coordinated patrols against piracy and armed robbery against ships in the Straits. The efforts began in 1992 in response to the 1992 Singapore Declaration of ASEAN on the importance of strengthening regional cooperation in dealing with security issues. Initially, the arrangement for coordinated patrols in the Philip Channel, the southern entrance to the Straits, was made between Indonesia and Singapore. Meanwhile, for the northern entrance and along the Straits towards the southern part, Malaysia and Indonesia have implemented bilateral strategies known as the Maritime Operation Planning Team.²⁴⁴ Both bilateral agreements (between Indonesia and Malaysia and Indonesia and Singapore) have authorised cross-border 'hot pursuit' which to some extent solved issue inherent in Article 111 of the 1982 Convention.²⁴⁵ But, there is no

²⁴³ Joint statement 16 Nov 1971; Valencia, MJ, 'The Politics of Anti-Piracy and Anti-Terrorism Responses' in GG Ong-Webb, *Piracy, Maritime Terrorism and Securing the Malacca Straits* (Singapore, ISEAS 2006) 148.

²⁴⁴ TR Shie, 'Maritime Piracy in Southeast Asia: The Evolution and Progress of Intra-ASEAN Cooperation' in GG Ong *Piracy, Maritime Terrorism and Securing the Malacca Straits* (Singapore, ISEAS 2006) 174.

²⁴⁵ Art 111 read as follows:

1. The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within a contiguous zone, as defined in Art 33, the pursuit may only be undertaken

bilateral agreement to allow cross-border hot pursuit between Malaysia and Singapore. Thus, the rule of Article 111 that requires a state to ask permission for hot pursuit is still applicable between Malaysia and Singapore. It is assumed that, such bilateral agreement with Indonesia is very important as compared to between Malaysia and Singapore because most of the pirates or armed robbers arrested are Indonesian.²⁴⁶ Moreover, vast area of ocean space with thousands of islands makes it difficult for Indonesian enforcement agency to police its maritime zone. Nevertheless, as pointed out by Shie, this initial cooperative action contributed to the considerable reduction in the number of reported attacks in the Straits and the territorial sea of the littoral states during that time.²⁴⁷

In the closing years of the twentieth century, the aftermath of the Asian financial crisis was identified as a main factor contributing to the rise of piracy. This trend continued until the mid-2000s but started to decline sharply after the littoral States fortified their cooperative action in response to the tension among the international community over the dramatic increase in piracy in the Straits. Issues such as the nexus between piracy and maritime terrorism that began to be discussed immediately after the 11 September, 2001, terrorist attacks on the United States have been given wide coverage

if there has been a violation of the rights for the protection of which zone was established.

3. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third States.

See discussion on hot pursuit in Chapter 3 (para 3.3.3); Also Yann-Huei Song, 'Regional Maritime Security Initiative (RMSI) and Enhancing Security in the Straits of Malacca: Littoral States' and Regional Responses in Shicun Wu and Keyuan Zou (eds.) *Maritime Security in the South China Sea: Regional Implications and International Cooperation* (2009 Ashgate Publishing Ltd, Surrey) 109, 125.

²⁴⁶ Stefan Eklof (2006) 47-48 and 54.

²⁴⁷ Shie (2006) 174; 2009 Annual Report of the ICC-IMB-PRC, 5.

by the media and academic commentators.²⁴⁸ At the same time, the shocking number of piracy and armed robbery attacks in 2001, coupled with the increase in violence used during the attacks, inevitably led to the allegation that the Straits were vulnerable and a potential target for maritime terrorists.²⁴⁹ As a result, the littoral States have been put under pressure to ensure safety and security of navigation along the Straits. Thus, the littoral States increased their individual and joint patrols to enhance cooperation in managing security in the Straits.²⁵⁰ In 2004 the three littoral States reached a trilateral agreement on the coordinated patrols of warships together with aerial surveillance which was launched on 13 September 2005. The former is known as MALSINDO (Malaysia-Singapore-Indonesia) while the latter is known as ‘Eyes in the Sky (EiS).’ They have since been codenamed the Malacca Straits Patrol (MSP) together with the Intelligence Exchange Group (IEG).²⁵¹

²⁴⁸ P Chalk. ‘Contemporary maritime piracy in Southeast Asia.’ (1998) *Studies in Conflict & Terrorism*, 21,1 87-112; AJ Young and MJ Valencia. ‘Conflation of piracy and terrorism in Southeast Asia: Rectitude and Utility.’ (2003) *Contemporary Southeast Asia* 269-283; RC Beckman ‘Combatting Piracy and Armed Robbery against Ships in Southeast Asia: the Way Forward’ (2002) 33 *Ocean Development & International Law* 317-341.

²⁴⁹ Cross-refer to Chapter 3 (para 3.3.4) on the discussion of maritime terrorism.

²⁵⁰ In 2002, the navies of Malaysia and Philippines conducted a six-day joint military exercise; later, Indonesia joined both states in a trilateral security pact. Later, in 2003, Indonesia and the Philippines conducted anti-piracy drills with Japan similar to those held between Malaysia and Philippines. See Shie (2006) 178.

²⁵¹ The MSP has certainly contributed to reducing the number of reported piracy incidents in the Straits of Malacca from a high of 38 in 2004 to 12 in 2005, 11 in 2006, 7 in 2007 and 4 in 2008. (see 2009 ICC-IMB-PRC Annual Report); Ian Storey ‘Maritime Security in Southeast Asia: Two Cheers for Regional Cooperation’ in Daljit Singh (ed) *Southeast Asian Affairs 2009* (ISEAS Singapore 2009) 41,

5.1.3.1 THE MALACCA STRAITS PATROL (MSP)

I. MALSINDO (MALAYSIA-SINGAPORE-INDONESIA)²⁵²

MALSINDO, which was launched on July 20 2004, is the expansion of the naval patrols of MALINDO, initially implemented between Malaysia and Indonesia in June 2001.²⁵³ There are about seventeen warships from the three states operating as the MALSINDO patrol with the goal to better utilise their resources to combat piracy on a year-round basis.²⁵⁴ Thus, control points have been set up in Belawan and Batam (Indonesia), Lumut (Malaysia) and Changi (Singapore).²⁵⁵ Since they agreed on coordinated patrols rather than joint patrols, they have reminded each other not to go beyond their territorial areas.²⁵⁶ In other words, it should be noted that, in such coordinated patrols, the warships of the participating countries are prohibited from carrying out patrolling activities in another participating country's territorial waters.²⁵⁷ Furthermore, the Indonesian Navy Chief of Staff, Admiral Bernard Kent Sondakh, has emphasized that MALSINDO will limit the 'hot pursuit' rights to the sovereign waters of participating states.²⁵⁸ Here, it is seems that the littoral states still view one another cautiously, as matters of sovereignty are paramount. For Christoffersen, MALSINDO

²⁵² It is also known as the Malacca Straits Surface patrol (MSSP): Storey (2009) 41.

²⁵³ The littoral states initiated the patrol in the Straits in 1992 but it was limited to four a year: See JN Mak 'Unilateralism and Regionalism' in GG Ong-Webb *Piracy, Maritime Terrorism and Securing the Malacca Straits* (ISEAS Singapore 2006); Ian Storey 'Securing Southeast Asia's Sea Lanes: A Work in Progress' [2008] *Asia Policy*, 95-127, 116.

²⁵⁴ Storey 117; AS Erickson 'Maritime Security Cooperation in the South China Sea Region' in Shicun Wu and Keyuan Zou (eds) *Maritime Security in the South China Sea: Regional Implications and International Cooperation* (Surrey, Ashgate Publishing Ltd 2009) 51-80,61.

²⁵⁵ Another control point was set up in Phuket after Thailand agreed to joint EiS; Yann-huei SONG 'RMSI and Enhancing Security in the Straits of Malacca' in Shicun Wu and Keyuan Zou (eds) *Maritime Security in the South China Sea: Regional Implications and International Cooperation* (Ashgate Publishing Ltd, Surrey 2009) 109-134, 124.

²⁵⁶ AS Erickson (2009) 62.

²⁵⁷ KC Vijavan '3-nation Patrols of Straits Launched: Year-round Patrols of Malacca Straits by Navies of Singapore, Indonesia and Malaysia aimed at Deterring Piracy and Terrorism.' *The Straits Times Interactive*, July 21, 2004; See also Yann-huei SONG (2009) 124.

²⁵⁸ AS Erickson (2009) 62.

has been created as a means of preventing intervention by outside powers.²⁵⁹ However, the littoral states encourage other states to contribute in terms of technology and intelligence-sharing but not by their physical military presence.²⁶⁰

II. EYES IN THE SKY (EIS)

In order to enhance security in the Straits, Najib Razak, Deputy Prime Minister of Malaysia and its Defence Minister at that time, proposed additional joint aerial surveillance known as 'Eyes in the Sky' (EiS) during the Shangri-la Dialogue held in June 2005. This joint patrol was launched at the Royal Malaysia Air Force base in Kuala Lumpur. Operationally, each littoral state of the Straits will provide two maritime patrol aircraft to patrol the waterway of the Straits every week and they will not be allowed to cross over to the land. Furthermore, they are allowed to fly no closer than three nautical miles from participating states' land. As compared to MALSINDO, which is only a 'coordinated patrol', the EiS program has been confirmed as a 'joint patrol' in which each patrol aircraft will have a Combined Maritime Patrol Team (CMPT) on board, consisting of a military officer from each of the participating countries.²⁶¹ Each participating state will establish EiS Operations Centres (EOCs) and their role will be to coordinate the flight schedules of the patrolling aircraft taking off from their respective airbases. If any piracy or sea robbery is suspected, the CMPT

²⁵⁹ Gaye Christoffersen, 'Chinese and ASEAN responses to the US Regional Maritime Security Initiative' in Guoguang Wu and Helen Landsdowne, *China Turns to Multilateralism Foreign Policy and Regional Security* (Routledge New York, 2008) 127-145, 135; 'India's offer to participate in the maritime patrols conducted in the Malacca Strait as part of the MALSINDO and MSP Network initiatives has been rejected.' See: Carolin Liss, *Oceans of Crime: Maritime Piracy and transnational Security in Southeast Asia and Bangladesh* (ISEAS Singapore 2011) 300

²⁶⁰ Ann Marie Murphy, 'United States Relations with Southeast Asia: The Legacy of Policy Changes' in AM Murphy and Bridget Welsh (eds.) *Legacy of Engagement in Southeast Asia* (ISAS, Singapore 2008) 248-280. 272

²⁶¹ *ibid.* at 125; Interaction among world powers can be source of strength: Minister Teo' *Channel News Asia*, August 4, 2005.

will broadcast the information to ground-based agencies known as Monitoring and Action Agencies (MAAs). The follow-up responses will be undertaken by each state upon receiving the report.²⁶² According to Najib, at the initial stage, the program will mainly involve the littoral states and Thailand, but it may be extended to include other extra-regional states including the US provided that the sovereignty principles of the littoral states are respected.²⁶³

5.1.3.2 THE MSP: OUTSIDER RESPONSES AND COMMENTS

The littoral states later fortified the cooperative measures and subsumed both MALSINDO and EiS into one overarching framework known as ‘The Malacca Straits Patrol’ (MSP). The admission of Thailand in September 2008 to the MSP has boosted the cooperative initiative to secure the Straits, especially when most of the ships approaching the northern entrance to the Straits will navigate through an area close to Thailand’s territorial sea.²⁶⁴ The terms of reference and standard operating procedures were signed by the littoral states in April 2006.²⁶⁵ To comprehend the patrol program, the Intelligence Exchange Group (IEG) is also included in the MSP with the purpose of improving coordination and situational awareness at sea among the littoral states; this is called MSP-IS and it is a data-sharing system that allows users to share information about any suspicious incidents on ships.²⁶⁶

²⁶² GG Ong-Webb and J Ho, ‘Maritime Air Patrols: The New Weapon Against Piracy in the Malacca Straits’ IDSS Commentary, 13 October 2005 (70/2005)

²⁶³ ‘Eyes in the Sky Ops Over Melaka Strait begins, Says Najib’ *Bernama* September 13, 2005, available at <<http://maritime.bernama.com/news.php?id=155246&lang=en>> accessed on 19 March 2011; *ibid.* 125; Graham Gerard Ong and Joshua Ho ‘Maritime Air Patrols: the New Weapons against Piracy in the Malacca Straits’ IDSS Commentary 70/2005, October 13, 2005, available at <<http://www.idss.edu.sg/publications/Perspective/IDSS702005.pdf>> (accessed on 20 March 2011)

²⁶⁴ Ian Storey (2009) 42.

²⁶⁵ *ibid.* 41.

²⁶⁶ *ibid.*

At the early stage, the implementation of MSP attracted extensive feedback from the media and commentators. The operation of the trilateral agreement of MALSINDO, for example, has been criticised for failing to curb the piracy problem in the Straits. In fact, a senior Indonesian navy officer also acknowledged that the coordinated patrols are ‘a serious policy shortcoming’, and ‘a potential cause for confusion, inefficiency and misallocation of resources.’²⁶⁷ The IMB also described the coordinated patrols as ‘ridiculous’ and commented on the possible futility of the operation since it has limited the ability of the law enforcement agencies to cross one another’s territorial sea boundaries while pursuing the pirates.²⁶⁸ In commenting on this, Mak believes that the disparity in the capabilities of each participating state in maritime enforcement will hamper the main aim of MALSINDO to tackle the piracy problem. This is particularly evident when he explains that, despite the fact that Malaysia and Singapore are doing a good job in securing the Straits, Indonesia, an archipelagic state and the most pirate-infested area in Southeast Asia, still lacks capacity in maritime enforcement; thus, the coordinated patrols will be useless.²⁶⁹ He further suggested that the littoral States should compromise more on sovereignty issues, thus allowing the better-equipped enforcement agencies of other participating states to help patrol the states that have low capacity, in order to address the issue efficiently.²⁷⁰ Apparently, the coordinated patrols of the Straits has also raised doubts about whether the littoral

²⁶⁷ Ioannis Gatsiounis, “Strait: Target for Terror” Asia Times Online, July 2004; Mak (2006) 155.

²⁶⁸ ‘Malaysia, Indonesia Rule Out Joint Patrols in Malacca Straits’ Channel New Asia 1 July 2004; Mak (2006) 155.

²⁶⁹ Mak (2006) 155.

²⁷⁰ According to Mak, ‘Jakarta’s maritime enforcement capability was severely overstretched with the Indonesian Navy ‘desperately’ needing more money and equipment. Therefore if the littoral states were really serious about using maritime patrols to curb piracy and terrorism, it would address this key jurisdictional problem, thus allowing Malaysian and Singaporean vessels to help patrol Indonesian waters.’ : Mak (2006) 155-156.

States sincere in their wish to combat piracy or merely want to show the world their capacity to oversee the Straits as a vital shipping lane for the international community, thus avoiding foreign intrusions.²⁷¹

Like the MALSINDO coordinated patrol, the Eis has also received criticism. Ong-Webb, for example, believes that EiS suffers from several inherent limitations in its operational effectiveness. Two maritime aircraft per week is insufficient to cover a large area of the Straits,²⁷² especially as different states contribute aircraft of varying capacities. He further elaborated that Malaysia's Hercules C130 has a top search speed of 380 knots and a flight endurance of up to fourteen hours as compared to the Singapore Armed Forces Fokker 50 MPA which has a search speed of 200 knots and a flight endurance of eight hours. The tendency for piracy or armed robbery incidents to take place after midnight when the darkness severely hampers the aerial surveillance has also been raised by Ong-Webb. This is particularly true when the pirates in the Straits use the surrounding small islands to launch attacks and hide from the authorities. Indonesia, an archipelagic state with thousands of islands, is said to be the pirates' heaven. Thus, rather than mainly focusing on the EiS operations, when aircraft are not permitted to fly within three nautical miles of the land area of the littoral States, the coastal surveillance of each county's own territory should be seen as more important since the pirates must come ashore somewhere to dispose of their gains.²⁷³ Abhyankar believes that a reduction in the number of piracy and armed robbery attacks in Indonesian waters would contribute to a dramatic change in the

²⁷¹ Mak (2006) 155-156; GG Ong-Webb (2006) xxxiv.

²⁷² At the longest, the Straits is about 960 kilometres which is equivalent to the period taken to fly from Singapore to Bangkok, i.e. two-and-a-half hours at best.

²⁷³ Jayant Abhyankar, 'Piracy, Armed Robbery and Terrorism at Sea' in GG Ong-Webb *Piracy, Maritime Terrorism and Securing the Malacca Straits* (ISEAS Singapore 2006) 20.

situation in the Straits and Southeast Asia.²⁷⁴ Mak also shares this view when he recommends tackling the piracy and armed robbery problem at source, that is, in Indonesia.²⁷⁵

Nevertheless, despite all the criticisms it appears that the initiatives taken by the littoral states in the trilateral agreement of MSP is still on-going and is finally showing a fruitful and exciting result for them and the international community. The IMB-PRC and Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) has reported an overall downward trend in their statistics for piracy and armed robbery incidents in the Straits. In fact, as a result of the littoral States' proactive and fortified action in securing the Straits, the JWC removed the Straits from Lloyd's list of 'war risk zones' classification in 2006.²⁷⁶ Since then, the Straits has been reported to have experienced a dramatic reduction and has recently has achieved a 'close-to-zero incident level.'²⁷⁷

5.1.4 EXTRA-REGIONAL SECURITY ARRANGEMENTS IN THE STRAITS

Much of the past research on Southeast Asian piracy has more enthusiastically recognized the anti-piracy efforts of extra-regional stakeholders over intra-regional unilateral, bilateral or multilateral actions.²⁷⁸ Although the intra-regional efforts are

²⁷⁴ *ibid.* 7.

²⁷⁵ Mak (2006) 158.

²⁷⁶ Cross-refer to Chapter 4 (para 4.3.2.1).

²⁷⁷ 'Drastic drop in Straits piracy' the Star online, Thursday April 21, 2011 at <http://thestar.com.my/services/printerfriendly.asp?file=/2011/4/21/> accessed on 20 March 2012.

²⁷⁸ See Shie (2006) 164; Robert C Beckman, Carl Grundy-War and Vivian L Forbes, 'Acts of Piracy in the Malacca and Singapore Straits', IBRU Maritime Briefing 1, no.4 (1994); Adam J Young and Mark J Valencia, 'Conflation of Piracy and Terrorism in Southeast Asia: Rectitude and Utility' *Contemporary Southeast Asia* 25, no.2 (2003): 269-83; John J Bradford, 'Japanese Anti-Piracy Initiatives in Southeast Asia: Policy Formulation and the Coastal State responses' *Contemporary Southeast Asia* 26, no.3 (2004): 480-505; Peter Chalk, 'Contemporary Maritime

mentioned, they are regarded as ineffective or inadequate in solving the problems.²⁷⁹ As the case of the Straits, Mak believes that the overarching problem in reaching security agreements in the Straits is the clash of interests between the key littoral States of Malaysia and Indonesia on the one hand, and the international users, in particular the maritime nations, on the other hand.²⁸⁰ Thus, it is difficult for the littoral States to agree on any proposal from the extra-regional powers to secure the Straits. They have a sceptical view that the outside powers' interference in the problems of the Straits will either directly or indirectly erode their sovereignty. Their responses were clearly shown following the proposal by the US to establish a Regional Maritime Security Initiative (RMSI) and the Japanese initiative on the establishment of ReCAAP.

5.1.4.1 THE UNITED STATES' SECURITY INITIATIVES

The September 11 attacks have boosted the United States' security strategy not only within the United States but also at the international level where the United States interest is at stake. Various security initiatives and regulatory frameworks have been originally sponsored by the United States. These include the Regional Maritime Security Initiative (RMSI), the implementation of the ISPS Code, the 1988 Suppression of Unlawful Acts against Piracy and Armed Robbery at Sea, the Container Security Initiative (CSI) and the Proliferation Security Initiative (PSI). Most of the United States' initiatives are preventive in nature and some have argued that

Piracy in Southeast Asia', *Studies in Conflict and Terrorism* 21 (1998): 87-112; Keyuan Zou, 'Enforcing the Law of Piracy in the South China Sea' EAI Background Brief no.19 (24 August 1998);

²⁷⁹ Shie (2006) 164; Ong-Webb(2006) 242; Valencia (2006) 84.

²⁸⁰ Mak (2006) 135.

they are too concerned with mere potential risk.²⁸¹ Boutilier described this situation as a ‘curious paradox’ that used the theory of the link between the real threat of piracy and the potential risk of terrorism at sea.²⁸² It is the threat of piracy and armed robbery with growing levels of violence that constitutes the real challenge to the shipping industry and the coastal states. However, this threat has been associated with the potential risk of maritime terrorism. In fact, the United States has emphasised this idea and has cajoled the international community through their initiatives on the basis of the war against terrorism.

The Regional Maritime Security Initiative (RMSI)

RMSI was one of the US’s ideas in response to the potential terrorist threat in the Straits. It is noteworthy that, due to the Straits’ significance as a strategic sea lane of communication and their long-established use for international navigation, it has become the US’s primary concern in terms of anti-piracy and anti-terrorism initiatives. RMSI was first proposed by Admiral Thomas B Fargo, the former Chief of the US Pacific Command on 31 March 2004 during his testimony before the House of Representatives Armed Services Committee.²⁸³ This idea is based on the concept of ‘a coalition of the willing.’²⁸⁴ It is meant to promote the cooperation among the naval forces in the Asian region, in particular the Straits of Malacca, to suppress the

²⁸¹ James Boutilier ‘The Best of Times, the Worst of Times: the Global Maritime Outlook 2004’ in Joshua Ho and CZ Raymond *The Best of Times, the Worst of Times: Maritime Security in the Asia-Pacific* (Singapore IDSS 2005) 13-31, 25.

²⁸² *ibid.*

²⁸³ CZ Raymond and Arthur Morrien ‘Security in the Maritime Domain and its Evolution since 9/11’ in Rupert Herbert-Burns, Sam Bateman and Peter Lehr, *Lloyd’s MIU Handbook of Maritime Security* (CRC Press, London 2009), 3-12, 9; David Rosenbergh, ‘Dire Straits: Competing Security Priorities in the South China Sea’ April 13, 2005 at <http://www.japanfocus.org/-David-Rosenberg/1773>, accessed on 24 July 2009; Banlaoi (2005) 68.

²⁸⁴ Banlaoi (2005) 68.

escalating illegal activities and transnational threats that have been increasingly disrupting the peace and security of surrounding states, the seafarers and the stakeholders. Fargo was reported to have said that RMSI would involve not only intelligence-sharing with Southeast Asian States but also the deployment of US Marines and Special Forces to assist the littoral states particularly, to deal with the maritime threats.²⁸⁵ RMSI has gained Singapore's full support. Singapore believes that the idea of suppressing piracy and helping with the war against terrorism is crucial, since this state perceives itself as a terrorist target.²⁸⁶ Thus, Singapore is more open than its counterparts to welcoming the extra-regional players to help bolster maritime security in the Straits.

However, Malaysia and Indonesia have had doubts since the idea of RMSI was first reported by the mass media in April 2004. The Malaysian Deputy Prime Minister cum Minister of Defence, who is currently the Prime Minister, said that "control of the Strait(s) is the sovereign prerogative of Malaysia and Indonesia, and US military involvement is not welcome."²⁸⁷ Meanwhile, Indonesia's Foreign Ministry spokesman, Marty Natalegawa, also opposed the US plan by emphasising that the waters of the Straits are part of the territorial waters of the littoral states which are definitely under their own sovereignty and responsibility.²⁸⁸ He added that any

²⁸⁵ Hong Nong 'Maritime Trade Development in Asia: A need for Regional Maritime Security Cooperation in South China Sea' in Shicun Wu and Keyuan Zou (eds.) *Maritime Security in the South China Sea: regional Implications and International Cooperation* (Ashgate Surrey 2009) 43.

²⁸⁶ Ian Storey 'Securing Southeast Asia's Sea Lane: A Work in Progress' 6 *Asia Policy* July 2008 95-127, 109.

²⁸⁷ Ji Guoxing, 'US RMSI contravenes UN Convention on the Law of the Sea,' *PacNet*, 29, 8 July 2004 at <<http://csis.org/files/media/isis/pubs/pac0429.pdf>> accessed on 2 February 2010.

²⁸⁸ *ibid.* Marty Natalegawa also said that 'it is the sovereign responsibility and right of the coastal states of Indonesia and Malaysia to maintain safety and security of navigation in the Malacca Straits. See 'Indonesia joins Malaysia in shunning U.S help in Malacca Straits', *Associated Press Newswires*, April 13 2005; Banlaoi (2005) 68.

cooperative measures to combat transnational crime in the Straits would need the littoral States' permission.²⁸⁹ Indonesia's navy chief, Admiral Bernard Kent Sondakh, also alleged that the foreign powers including US were interested in the Straits because of their strategic importance, rather than because of terrorism fears.²⁹⁰

According to Storey, there are four reasons for the negative reaction by Malaysia and Indonesia to the United States' RMSI.²⁹¹ First, they believe that the RMSI plan is an intervention that intrudes upon their sovereignty. Second, they are concerned that the physical presence of United States Military forces might unleash real terrorism by anti-American groups. The same concern is also highlighted by Hong Nong when he says that this would rather provoke terrorist incidents in the Straits.²⁹² Third, the RMSI might imply that they (the littoral States) are incapable of protecting the Straits. Finally, RMSI is an affront to the littoral states' declaration to be jointly responsible for securing the Straits and their stand of not recognising foreign interference. It is not surprising that the littoral States' sceptical view is largely based on the perceived encroachment onto their sovereignty and national security.²⁹³ Both states believe that they possess the capacity to ensure security in the Straits without any deployment of extra-regional forces. The intention of intercepting transnational maritime threats in

²⁸⁹ Banlaoi (2005) 69.

²⁹⁰ Anti-Piracy drive in Malacca Straits *BBC News* July, 20 2004 at <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/...> Accessed on 20 April 2011.

²⁹¹ Ian Storey 'Securing Southeast Asia's Sea Lanes: A work in Progress' (2008) 6 *Asia Policy* July, 95-127, 113-114.

²⁹² See also Hong Nong (2009) 43.

²⁹³ In his speech, he stated that 'we are looking at things like high-speed vessels, putting Special Operations Forces on high-speed vessels to conduct effective interdiction...' See Storey (2008) 113; David Rosenbergh, 'Dire Straits: Competing Security Priorities in the South China Sea' April 13, 2005 at <http://www.japanfocus.org/-David-Rosenberg/1773>, accessed on 24 July 2009; Boutillier (2005) 27; TR Shie 'Ports in a Storm? The Nexus Between Counterterrorism, Counter Proliferation and Maritime Security in Southeast Asia' 2004 *Pacific Forum CSIS*, 23 at <http://csis.org/files/media/csis/pubs/issuesinsightsv04n04.pdf> ; Banlaoi (2005).

RMSI was also viewed by China as a violation of the right of transit passage prescribed under Articles 34 and 38 of the 1982 Convention.²⁹⁴ As a state experiencing rapid economic development which is closely linked with the Straits waterway, China doubts the US initiative in RMSI. Instead it prefers the collaborative mechanism with the littoral Straits within the framework of the International Law of the Sea.²⁹⁵

The reaction of Indonesia and Malaysia has prompted the United States to clarify its plan on RMSI which, according to them, has been misrepresented.²⁹⁶ They attempted to clarify their true intention regarding RMSI during the Shangri-La Dialogue in Singapore in early June 2005.²⁹⁷ Following this explanation, Malaysia and Indonesia were inclined to show support for extra-regional assistance, including the US, in terms of the acquisition and sharing of intelligence and technology rather than physical deployment of foreign forces.²⁹⁸ Malaysia, for example, has entered into an agreement to conduct military exercises in the Five Power Defense Arrangements (FPDA). The FPDA consists of five states, namely Australia, Malaysia, New Zealand, Singapore and the United Kingdom.

²⁹⁴ Also Art 34 of the 1982 Convention: “the regime of passage through Straits used for international navigation shall not in other respects affect the legal status of the waters forming such Straits or the exercise by the States bordering the Straits of their sovereignty or jurisdiction over such waters and their space, seabed and subsoil.” See also: Valencia (2006) 94; Ji Guoxing, ‘US RMSI contravenes UN Convention on the Law of the Sea,’ PacNet, 29, 8 July 2004 at <<http://csis.org/files/media/isis/pubs/pac0429.pdf>> accessed on 2 February 2010.

²⁹⁵ Ji Guoxing, ‘US RMSI contravenes UN Convention on the Law of the Sea,’ PacNet, 29, 8 July 2004 at <<http://csis.org/files/media/isis/pubs/pac0429.pdf>> accessed on 2 February 2010.

²⁹⁶ CZ Raymond and Arthur Morrien ‘Security in the Maritime Domain and its Evolution since 9/11’ in Rupert Herbert-Burns, Sam Bateman and Peter Lehr, *Lloyd’s MIU Handbook of Maritime Security* CRC Press, London 2009, 3-12, 10.

²⁹⁷ The third International Institute of Strategic Studies (IISS) Asia Security Conference. See: Hong Nong (2009) 44.

²⁹⁸ Hong Nong (2009) 44.

In short, it appears that the proposed RMSI cannot be implemented effectively without the cooperation of both Malaysia and Indonesia. It is obvious that the sentiment of protective national security and sovereignty consistently highlighted by Malaysia and Indonesia forms the basis of this impasse. The former Malaysian Prime Minister, Mahathir Mohamad (1981-2003) highlighted that;

‘Asia is a very big continent and different parts of it experienced very different problems through the ages. During the period of Great Games of the Europeans, there were constant threats of conquest and colonization. In fact many parts of Asia, East, Central, South and West, were colonized or hegemonised by powerful European nations.’²⁹⁹

It appears that past foreign military intervention in the Straits has had a deep impact on both states. Furthermore, piracy was the excuse used by the colonial power to physically deploy military force in the Straits and interfere in the internal affairs of states surrounding this area.³⁰⁰ This was stated by Malaysian Vice Admiral Ramlan Mohamed Ali:

“Malaysia has been colonised four times, three times by Europeans, and in all cases they arrived under the pretext of fighting piracy. So you can understand why we are particularly sensitive to these issues.”³⁰¹

Thus, Malaysia and Indonesia strongly believe that the cooperation between the littoral states as well as the stakeholders’ compliance and the support of the existing regulatory regime will be sufficient to ensure maritime security in the Straits. The MSP is one of the littoral states’ efforts to fortify security cooperation in the Straits; they believe it is an ideal initiative to secure the Straits from piracy and maritime terrorism.

²⁹⁹ Mahathir Muhamad ‘Security Problems in Asia and their Possible Impact on World Stability’ Keynote address at the 1st International Conference by Centre for Defense Information Studies (CDIS) in Havana Cuba on 21 April 2008.

³⁰⁰ Cross-refer to Chapter 2.

³⁰¹ JF Bradford ‘Japanese Anti-Piracy Initiatives in Southeast Asia: Policy Formulation and the Coastal State Response’ 26 [2004] Contemporary Southeast Asia, 480-505,501.

5.1.4.2 THE JAPANESE SECURITY INITIATIVES

The Straits are an important navigational route for Japan's trade and commerce, as they are for the US. As fifty per cent of its energy resources and some ninety per cent of its oil are conveyed through the Straits, Japan's concern over the safety and security of the Straits is undeniable.³⁰² Japan has been actively supporting the maintenance of safety and security of navigation in the Straits in terms of funding, capacity-building, and information- and intelligence-sharing. In fact the government of Japan, the Nippon Foundation, the Japan Maritime Foundation and the Japanese Association related to the maritime industries are the main contributors to the Straits of Malacca Council (MSC) whose function is to maintain safety of navigation and environmental protection of the Straits. Japan's efforts in this include donating buoy-tenders to coastal states and executing hydrographic surveys in the Straits.³⁰³ The MSC was established in 1969.³⁰⁴ Although the 1982 Convention, which came into force in 1994, has encouraged cooperation between user states and littoral states to contribute

³⁰² Andrin Raj 'Japan's Initiative in Security Cooperation in the Straits of Malacca on Maritime Security and in Southeast Asia: Piracy and Maritime Terrorism' (2009) The Japan Institute for International Affairs (JIIA) 13 at http://www2.jiia.or.jp/pdf/fellow_report/090331-Andrin_Raj.pdf accessed on 20 March 2011; However, according to Ashley, about 60 per cent of Japan's oil shipments flow through this sea area: J Ashley Roach 'Enhancing Maritime Security in the Straits of Malacca and Singapore' (2005) 59 *Journal of International Affairs* 97, 100.

³⁰³ Bradford (2004) 486.

³⁰⁴ The MSC was established for the purpose of the route maintenance in the Straits. Its principal activities include hydrographic surveys and production of navigational charts (1969-1975), installation and maintenance of aids to navigation (1969), clearance of navigable channels (1973-1981), donation of oil skimming vessels and buoy tenders (1975, 1976, 2002, 2003), tide and current observations (1976-1979) and donation of revolving funds for combating oil spills from ships (1981). The principal activities that are ongoing are maintenance of aids to navigation, research and studies on safe navigation and improvement of navigational conditions, technology transfer on the aids to navigation to the countries concerned as well as other activities to promote the international cooperation among the countries concerned.

to the cost of safety and security, as stipulated in Article 43, thus far Japan remains the major contributor to the MSC.³⁰⁵

Apart from the issue of safety of navigation in the Straits, Japan has also shown its concern over the security issues resulting from the piracy and armed robbery against ships in the Straits. Even though Japan acknowledges the legal definition of piracy in the 1982 Convention, Japan's National Institute for Defence Studies (NIDS) prefers to define piracy or 'modern piracy' broadly to include 'all acts of robbery, seizure of cargo, and seizure of vessels in ports and harbours, territorial waters, exclusive economic waters, and on the high seas' for the benefit of Japan's policy-makers.³⁰⁶ The flourishing of piracy attacks, particularly in Southeast Asia, on transiting ships in the early twenty-first century was considered a serious problem to Japan as one of the major maritime nations that have tremendous interest in the Straits. According to Valencia, between 1994 and 2005 about 140 Japanese ships were attacked in the Straits.³⁰⁷ Bradford also reveals that there were 125 piracy attacks on ships related to Japan between 1998 and 2003.³⁰⁸ Furthermore, according to the Nippon Foundation, Japan's estimated economic loss due to the piracy incidents is USD 10 to USD 15 million per year.

³⁰⁵ Art 43 is the basis for 'Cooperative Mechanism' between the users and coastal states on safety of navigation and environmental protection including for burden-sharing purposes.

³⁰⁶ Takai Susumu, 'Suppression of Modern Piracy and the Role of Navy' NIDS Security Reports, no.4, NIDS, Tokyo, March 2003, 38-58; John F Bradford, 'Japanese Anti-Piracy Initiatives in Southeast Asia: Policy Formulation and the Coastal State Response [2004] 26, no.3 Contemporary Southeast Asia ,480-505, 482;

³⁰⁷ MJ Valencia 'Piracy and Terrorism in Southeast Asia: Similarities, Differences and their Implications' in D Johnson and M Valencia *Piracy in Southeast Asia: Status, Issues and Responses* (ISEAS, Singapore 2005)106.

³⁰⁸ Bradford (2004) 483; the term 'ships related to Japan' includes those registered under Japanese Law, owned by Japanese Companies, or manned by Japanese crews.

Among the high-profile attacks on Japanese ships that drew the attention of the international community to the alarming incidents of piracy in the Straits were the attacks on the *Nagasaki Spirit* in 1992, the *Tenyu* in 1998, the *Global Mars* in 2000 and the *Arbey Jaya*³⁰⁹ in 2001, as well as the most well-known incident, the hijacking of the *Alondra Rainbow* in 1999. The pirate attack on the crude oil carrier *Nagasaki Spirit* caused a collision with the container vessel *Ocean Blessing*, which set alight 100,000 tons of Japan-bound petroleum at the northern entrance to the Straits. It was speculated that the collision was due to the inability of the *Nagasaki Spirit*'s master and crew to control the ship following the pirates' attack on their ship.³¹⁰ This caused an environmental disaster in the Straits. Meanwhile, the hijacking of the merchant vessel *Alondra Rainbow*, which was loaded with 7000 tonnes of aluminium ingots, after it had left the Indonesian port of Kuala Tanjung for the port of Miike, Japan, on 22 October 1999, has illustrated the importance of cooperation between the shipping industry and the coastal states' authorities.³¹¹ The crew members had been set adrift on a life raft in the Bay of Bengal and were found later by Thai fisherman. The hijacked ship was repainted as the *Mega Rama* and was first seen by *MV Al Shuhaada* after its hijacking was reported and broadcast. After two months, it was finally captured by an Indian naval vessel, the *INS Prahar*, in the Indian Ocean with fifteen

³⁰⁹ The incident occurred on April 25 during which three Japanese crew members went missing: T Susumu, 'Suppression of Modern Piracy and the Role of Navy' NIDS Security reports, No.4 (March 2003) 38-58 at page 42 http://www.nids.go.jp/english/publication/kiyo/pdf/bulletin_e2002_2.pdf accessed on 12 April 2012.

³¹⁰ Brian Fort 'Transnational Threats and the Maritime Domain' in GG Ong-Webb (ed.) *Piracy, Maritime Terrorism and Securing the Malacca Straits* (ISEAS Singapore 2006) 34; Bradford (2004) 486.

³¹¹ Lindsay Black 'Navigating the boundaries of the interstate society: Japan's response to piracy in Southeast Asia' in Glenn D.Hook (ed.) *Decoding Boundaries in Contemporary Japan: The Koizumi Administration and Beyond* (Routledge, Oxon 2011) 79.

Indonesian pirates on board.³¹² Since India has no specific Piracy Act, all the pirates were punished under the Indian Penal Code. The violence of piracy was also illustrated by the attack on the *Tenyu* in 1998, a year before the hijacking of the *Alondra Rainbow*. The *Tenyu* was a Japanese-owned and Korean-manned vessel. In this incident, the whole crew disappeared and it is suspected that they were all murdered.³¹³

Thus, for Japan, whose maritime trade is largely dependent on the Straits waterway, threats to the safety and security of the Straits cannot be tolerated.³¹⁴ Similar to the initiative in managing the safety of navigation through MSC, Japan also supports the need to ensure the maritime security of the Straits with regard to piracy and terrorism. In fact, Japan has convened several international and regional conferences on combating piracy and armed robbery against ships including the ‘International Conference for the Control of Piracy’ calling for regional cooperation to suppress piracy, ‘International Conference of All Maritime-Related Concerns, both Governmental and Private, on Combating Piracy and Armed Robbery Against Ships’ held from March 28 to 30, 2000, and ‘Asia Anti-Piracy Challenges 2000: Regional Conference on Combating Piracy and Armed Robbery Against Ships’ held from April 27 to 29, 2000. It was during the International Conference in March 2000 that the ‘Tokyo Appeal’ was issued; this emphasised Japan’s concern over the security

³¹² --*New Straits Times*, 29 November 1999; J Abhyankar ‘Piracy, Armed Robbery and Terrorism at Sea’ in Swati Parashar (ed.) *Maritime Counter-Terrorism: A Pan-Asian Perspective* (Pearson, Longman New Delhi 2008) 175; Lindsay Black ‘Navigating the boundaries of the interstate society: Japan’s response to piracy in Southeast Asia in Glenn D.Hook (ed.) *Decoding Boundaries in Contemporary Japan: The Koizumi Administration and Beyond* (Routledge, Oxon 2011) 79.

³¹³ J Abhyankar ‘Piracy, Armed Robbery and Terrorism at sea’ in GG Ong-Webb *Piracy, Maritime Terrorism and Securing the Malacca Straits* (ISEAS, Singapore 2006) 4-5.

³¹⁴ Japan imports approximately 99 per cent of its petroleum and 70 per cent of its food by sea. The Straits of Malacca alone carry 80 per cent of Japan’s petroleum imports: Bradford (2004) 485.

problem of piracy and armed robbery against ships which it believed could only be tackled by cooperative measures.³¹⁵ Japan's effort has not stopped there. Following these conferences, the Japan Coast Guard (JCG) and the Nippon Foundation organised a series of Expert Meetings to meet the goal of combating piracy and armed robbery against ships in Tokyo, Bangkok, Kuala Lumpur and Manila between 2000 and 2003.³¹⁶ In November 2001, during the ASEAN-plus Three Summit (APT) in Brunei, Japanese Prime Minister Junichiro Koizumi conveyed the idea of setting up the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP).

i. Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP)

This instrument is the first multilateral agreement of its kind and has three basic elements, namely Information-Sharing between the contracting states, Capacity-Building and Cooperative Arrangements. The Information-Sharing Centre (ISC) has been formed as a platform for exchange of information among the contracting parties of ReCAAP. Singapore has been chosen as the centre for this purpose.³¹⁷ According to its preamble, the ReCAAP aims to 'significantly contribute towards the prevention and suppression of piracy and armed robbery against ships in Asia.'³¹⁸ It embraces the

³¹⁵ See Appendix for the full text of the Tokyo Appeal.

³¹⁶ Valencia (2005) 106-107.

³¹⁷ Art 4 of ReCAAP creates an information Sharing Center (ISC) which is located in Singapore. Recently, Singapore has renewed its commitment to host the ReCAAP ISC for another five years: TN Shamsiah, 'Singapore to Host ReCAAP ISC for another Five Years' *Bernama.com* March 07, 2012 at <http://maritime.bernama.com/printable.php?id=650518> accessed on 4 April 2012.

³¹⁸ ReCAAP Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) <http://www.recaap.org/Portals/0/docs/About%20ReCAAP%20ISC/ReCAAP%20Agreement.pdf> accessed on 12 April 2012.

definition of piracy provided in the 1982 Convention and definition of armed robbery against ships as entailed in the IMO's Code of Practice for the Investigation of Armed Robbery against ships.³¹⁹ Article 3 clause 1 of the ReCAAP lays down the general obligations of the contracting parties as follows:

1. Each Contracting Party shall, in accordance with its national laws and regulations and applicable rules of international law, make every effort to take effective measures in respect of the following:
 - a) to prevent and suppress piracy and armed robbery against ships;
 - b) to arrest pirates or persons who have committed armed robbery against ships;
 - c) to seize ships or aircraft used for committing piracy or armed robbery against ships, to seize ships taken by and under the control of pirates or persons who have committed armed robbery against ships, and to seize the property on board such ships; and
 - d) to rescue victim ships and victims of piracy or armed robbery against ships.

Against this backdrop, the ReCAAP ISC lays out its functions, the basic framework of which focuses on information-sharing which provides alerts against imminent threats of piracy and armed robbery.³²⁰ It also provides statistics and reports based on the information gathered. The focal point that needs to be established by each state party will encourage smooth coordination between states' agencies, be they navy, coastguard agency or marine police.³²¹ Ho notes several roles of a focal point which include the following:³²²

1. managing the piracy and armed robbery incidents within its territorial waters;
2. acting as a point of information exchange with the ISC;

³¹⁹ Art 1 of the ReCAAP. (See Appendix for full text).

³²⁰ Art 7 of ReCAAP: the ISC serves as an information exchange platform, and collects and analyses information transmitted by the contracting states.

³²¹ Art 9 of the ReCAAP requires the contracting states to designate national focal points responsible for the communication with the ISC.

³²² Joshua Ho, 'Combating Piracy and Armed Robbery in Asia: Boosting ReCAAP's Role' 69 (2008) RSIS Commentaries 2.

3. facilitating its country's law enforcement for piracy and armed robbery with neighbouring focal points.

If any incidents are reported to any of the focal points and the ISC, the Information Network System will help an affected state to respond to the report and suppress piracy in a timely manner. ReCAAP also generates capacity-building that promotes the sharing of best practices among the contracting parties through training and workshops. It also encourages the mutual cooperation of government and non-government bodies, which has a direct or indirect impact on the menace of piracy and armed robbery against ships. Article 10 provides that the contracting parties may request other contracting parties to cooperate in detecting persons who have committed acts of piracy or armed robbery against ships and, finally, they may be extradited to the countries that have jurisdiction to prosecute them as stipulated in Article 12. It clearly shows respect for and non-interference with a state's jurisdiction.³²³ Nevertheless, it has to be emphasised that ReCAAP does not extend to providing enforcement mechanisms, nor does it envisage coordinated or joint patrols among contracting countries.³²⁴ Thus, it might be concluded that ReCAAP is a good instrument for formalising cooperation and coordination among the contracting states, but it still needs robust support from the states to enforce the law at their national levels in order to effectively combat piracy and armed robbery against ships.

³²³ Art 2(5) ReCAAP; See also Robin Geis and Anna Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (OUP, Oxford 2011) 46-47.

³²⁴ JF Bradford 'Japanese Anti-Piracy Initiatives in Southeast Asia: Policy Formulation and the Coastal State Response' 26 [2004] *Contemporary Southeast Asia*, 480-505,492.

ii. The Effect of Non-Ratification of Malaysia and Indonesia to ReCAAP

ReCAAP was agreed by sixteen countries in 2004, open for signature on 28 February 2005 and came into force on 4 September 2006.³²⁵ ReCAAP ISC was formally recognised as an International Organisation on 30 January 2007.³²⁶ Until recently, seventeen Asian countries had signed the agreement. Unfortunately, Malaysia and Indonesia remain signatories that have yet to ratify the ReCAAP.³²⁷ The hesitation of Malaysia and Indonesia to ratify the ReCAAP agreement has been seen as the main obstacle to the highest degree of information-sharing to suppress the problem of piracy.³²⁸ This is due to the fact that the increasing number of incidents of piracy and armed robbery against ships during that time had mostly taken place in the territorial waters of both states and the straits used for international navigation such as the Straits of Malacca, Lombok, Sunda and Makassar. Failure to share the information on piracy attacks in such areas would be detrimental to the main purpose of ReCAAP or would at least limit its effectiveness.³²⁹ According to Storey, the concerns over sovereignty have been a strong impediment to these two states joining the ReCAAP.³³⁰ On the other hand, Ho has pointed out that, although Malaysia and Indonesia have not yet ratified the ReCAAP agreement, the willingness of the maritime agencies of both

³²⁵ ReCAAP was officially launched in Singapore on 29 December 2006; Ramli Hj Nik and Sumathy Permal 'Security Threats in the Straits of Malacca' in HM Ibrahim and Hairil Anuar Husin *Profile of the Straits of Malacca* (MIMA, Kuala Lumpur, 2008)197; ReCAAP fact sheet. ReCAAP Press Release.

³²⁶ ReCAAP Press Release.

³²⁷ The seventeen Contracting Parties are: the People's Republic of Bangladesh, Brunei Darussalam, the Kingdom of Cambodia, the People's Republic of China, the Kingdom of Denmark, the Republic of India, Japan, the Republic of Korea, the Lao People's Democratic Republic, the Republic of the Union of Myanmar, the Kingdom of the Netherlands, the Kingdom of Norway, the Republic of the Philippines, the Republic of Singapore, the Democratic Socialist Republic of Sri Lanka, the Kingdom of Thailand and the Socialist Republic of Viet Nam.

³²⁸ Joshua Ho 'Combating Piracy and Armed Robbery in Asia' the ReCAAP Information-Sharing Centre, Marine Policy 33(2009)432-434

³²⁹ Yoichiro Sato 'Southeast Asian Receptiveness to Japanese Maritime Security Cooperation, Asia Pacific Center for Security Studies September 2007

³³⁰ Ian Storey 'Maritime Security in Southeast Asia: Two Cheers for Regional Cooperation' in Daljit Singh (ed.) *Southeast Asian Affairs 2009* (ISEAS, Singapore 2009) 42.

states, namely the Malaysian Maritime Enforcement Agency (MMEA) and the Indonesian Maritime Security Coordinating Board (BAKORKAMLA), to cooperate in sharing information with ISC will help to bridge the gap.³³¹ Indeed, both states, although they have not yet ratified the ReCAAP Agreement, have agreed to cooperate at the highest level.³³² A recent instance of their open-ended cooperation was the information-sharing and cooperative action between MMEA and ISC and other focal points that led to the recovery of a missing Singapore-flagged barge, *Callista*, and a tug, *Asta*, on 6 February 2010.³³³ During this incident, the shipping agent reported to the ReCAAP Focal Point in Singapore that they had been attacked and hijacked by armed pirates while underway north of Tioman Island, Malaysia. Upon receipt of the information about the incident, the ReCAAP ISC immediately alerted all its focal points, the MMEA, the Indonesia authorities and the shipping community. They were advised to exercise vigilance and report sightings of the missing vessels to the nearest coastal states, and law enforcement agencies were encouraged to step up surveillance and inform their relevant authorities to look out for the missing vessels should they arrive at their ports. On 17 February the barge was located and recovered off Tioman Island. Eleven crew members were found in a life raft and rescued by the Royal Malaysian Navy. Then, on 25 February 2010, the tug boat was located by the Philippines Coast guard with seven suspected pirates onboard.³³⁴ Such incidents have

³³¹ *ibid.*

³³² Batam Meeting of the foreign ministers of the three littoral states in August 2005; Joshua Ho. 'Combating Piracy and Armed Robbery in Asia: Boosting ReCAAP's Role' 69 (2008) RSIS Commentaries 2.

³³³ ReCAAP ISC Special report of the hijacking of Tug Boat *Asta* and Barge, *Callista* (March-June 2011) see: <http://www.recaap.org/Portals/0/docs/Reports/Special%20Report%2029%20Jun%2011.pdf> accessed on 12 April 2012.

³³⁴ ReCAAP ISC Special report on Hijacked/Missing Tug Boats and Barges in Asia (March-June 2011) 5-6; ICC-IMB Piracy and Armed Robbery Against Ships Report (1 January-30 June 2010) Second Quarter 2010, page 26.

illustrated the successful regional cooperation between the ReCAAP ISC and the non-contracting party, Malaysia. It is submitted that, although it is well agreed that Malaysia's and Indonesia's formal ratification of ReCAAP would definitely strengthen its objective to suppress piracy and armed robbery against ships in the region, it appears that what is more important is the cooperation and awareness of one particular state on any issue at hand.

5.3 CONCLUSION

Piracy, as a never-ending problem for the world's maritime trade at large, has attracted the attention not only of scholars, commentators and the media, who are always arguing about the adequacy of legal framework and international regulations as prescribed in the 1982 Convention and other international instruments, but also of the real players among the stakeholders, especially the maritime nations. For the latter, what is important is the proactive role in tackling the issue at hand. It does not matter whether an attack on a ship is legally defined as piracy under international law or simply armed robbery, which can occur in a port or territorial sea of a state, since criminals have never respected legal boundaries. Thus, this chapter has scrutinised the extent to which the states at regional level are overcoming the problem through their regional security initiatives and their responses to extra-regional initiatives. Considering the importance of the Straits to the world's maritime trade, the hands-on cooperative action by the littoral states together with the stakeholders, state users, and international and regional organisations is crucial. The debate about the role of regional institutions such as ASEAN and ARF in managing security in the region is also controversial since many of the regional conflicts are not dealt with through these

institutions. As Goh usefully assumed, the states in the region do not tend to treat these institutions as a medium for resolving security problems but instead rely on bilateral efforts.³³⁵ Notwithstanding the sceptical views on the efficacy of ASEAN and ARF forums in facilitating cooperation among the Southeast Asian states, this medium is believed to be ‘the most important governmental forum for multilateral security dialogue and cooperation in the Asian Pacific.’³³⁶ It may be true that, in spite of the ASEAN dialogue and workshops that have taken place since the early 1990s, not much has been achieved in terms of regional cooperation to combat cross-border crimes such as piracy; however, the regular meetings have turned out to be a medium for boosting awareness and a sense of responsibility in the participating states on the importance of maintaining safety and security in the region. In fact, their functions should not be analyzed in isolation, but simultaneously with the security efforts that have been pursued by the regional states.

As far as the Straits of Malacca is concerned, after examining the cause and effect of the threat of piracy in the Straits and the trend of the attacks in an earlier chapter, it may be suggested that, apart from the formal legal framework at international and domestic levels, the cooperative efforts between states in the region and stakeholders have proved to be one of the most effective ways of combating piracy and armed robbery in the Straits. This may be achieved when all stakeholders disregard contrasting perceptions of their internal issues for the betterment of the safety and security of the Straits.³³⁷ Furthermore, after a period of almost twenty years, reports show that the declining number of piracy attacks in recent years is the outcome of

³³⁵ Goh (2008) 117.

³³⁶ *ibid.*

³³⁷ *ibid.*

bilateral and trilateral cooperation and strategies among the coastal states of the Straits, particularly in the MSP.³³⁸ The success of the cooperative action undertaken by the littoral states has been highlighted by Mukundan, the director of IMB as follows:

“In addition to gathering statistics, the report also indicates the efficiency of law enforcement in combating piracy. Our findings indicate that actions taken by law enforcement agencies, notably in the Malacca Straits and India, have made a major contribution to keeping these figures down. Co-operation between Indonesia, Malaysia and Singapore is now better than ever before and has played a key role.”³³⁹

This in fact contradicts the argument that the regional states are too reliant on the extra-regional powers.³⁴⁰ Yet, it is undeniable that the help of extra-regional states such as the US and Japan has also contributed to this success. From the above discussion, it appears that Japan’s counter-piracy initiatives have received great support from the Asian states as compared to the US initiatives. According to Valencia, Japan’s initiatives in aiding indigenous efforts have had some successes. For example, the Indonesian government accepted Japanese technical and financial assistance to create its coastguard service.³⁴¹ It may be submitted that the littoral states are more ready to accept material and technical assistance from these states to help them improve their capacity-building rather than deploy foreign naval vessels or coastguards within or near their territorial areas. For them, especially Malaysia and

³³⁸ TR Shie, ‘Maritime Piracy in Southeast Asia: The Evolution and Progress of Intra-ASEAN Cooperation’ in GG Ong-Webb *Piracy, Maritime Terrorism and Securing the Malacca Straits* (Singapore, ISEAS 2006) 171.

³³⁹ See IMB-ICC, 02 May 2006 ‘IMB Releases Latest Piracy Statistics’ at www.icc-ccs.org/news/425-imb-releases-latest-piracy-statistics, accessed on November 12, 2011.

³⁴⁰ Shie (2006) 166.

³⁴¹ Valencia (2005) 107.

Indonesia, the sovereignty issue must be respected by other countries since they are still capable of maintaining safety and security in the Straits.

CHAPTER 6

THE MALAYSIAN LEGAL FRAMEWORK ON PIRACY AND ARMED ROBBERY AT SEA

The increasing challenges of transnational maritime crime in the globalised and interconnected nature of the world today demand comprehensive and effective security measures in the form of international and regional instruments. Ultimately, however, individual states will bear the burden and responsibility of coping effectively with this issue. While chapter five discussed regional, trilateral and bilateral maritime security arrangements and strategy in the Straits in detail, this chapter specifically examines the Malaysian legal framework in response to transnational maritime crime, particularly piracy and armed robbery against ships. The first part of this chapter provides an historical overview and background of the Malaysian legal system. In addition, since Malaysia is also a party to the 1982 Convention and other maritime-related treaties, this chapter will discuss the pertinent legal issues within the wider context of ocean governance in Malaysia. Following this, the implications of the establishment of a new enforcement agency, namely MMEA, to govern Malaysia's maritime sector is discussed. This study of the law governing acts of piracy and armed robbery in Malaysia will be completed using examples of the incident of attack in the Straits and finally the analysis of the *Bunga Laurel's* incident that become Malaysia first case on high seas piracy.

6.1 INTRODUCTION

Malaysia is arguably a maritime nation as ninety per cent of its trade is seaborne.¹ It has a vast area of maritime space with approximately 148,307 square kilometres of territorial sea area, 589,450 square kilometres of Exclusive Economic Zone (EEZ) and 4,490 kilometres of coastline.² Its geographical peculiarity which encompasses the South China Sea in between Peninsular Malaysia and Sabah and Sarawak as well as its strategic location along the Straits of Malacca has indirectly defined the importance of the sea, particularly to the Malaysian economy. In fact, most of Malaysia's major ports are situated in the Straits themselves. In 2008, Port Klang, one of Malaysia's best-known ports, was the fifteenth largest container port in the world.³

The Straits is undeniably important, not only for the shipping industry but also for other economic concerns such as the livelihoods provided by the fishery industry and the tourism industry. Realising the steady increase in the Straits' importance as strait used for international navigation and its contribution to the local industries, Malaysia is strongly committed to ensuring the safety and security of this strategic sea lane of communication (SLOC). It had spent more than RM200 million in a ten-year period

¹ Juita Ramli, A New Maritime Legal Regime for Malaysia within the Context of Ocean Governance, a paper presented at MIMA National Conference on Ocean Governance in Conjunction with the Year of Ocean, Maritime Institute of Malaysia, 16-17 June 1998, MIMA p.10; Zulkifli Abu Bakar 'Enhancing Maritime Security-Law Enforcement in Malaysia' paper presented during 24th Asia-Pacific Round Table, Kuala Lumpur, 7-9 June 2010; Cf. Singapore Ministry of Defence Pointer Journal 2007 v331: Eighty per cent of Malaysian trade passes through the Straits of Malacca. See www.mindef.gov.sg/ accessed on 11 July 2011.

² J.N Mak, Maritime Security and Ocean Governance: A Study in Comprehensive Security. A paper presented at National Conference on Ocean Governance in Conjunction with the year of the Ocean 1998 at MIMA, 1998, 2.

³ Joshua Ho 'Cooperative Mechanisms in the Malacca Straits' in Realising Safe and Secure Seas for All: International Maritime Security Conference 2009 (Select Publishing Singapore 2009) 167.

(1990-2000) for the purpose of installing and maintaining navigational and security-related facilities in the Straits. Any threat of disruption to the Straits' traffic and the surrounding area which might be caused by maritime trans-border crimes such as piracy and armed robbery, the potential organised crime of terrorism as well as the risk of environmental degradation caused by collisions between ships and oil spills, would have a devastating impact, particularly on Malaysia and the other littoral states. The risk is real and proximate to the littoral states.⁴ As a result, the task of protecting the Straits has been prioritised, and this has constantly challenged the effectiveness of Malaysian policy, regulations and legal framework.

6.2 MALAYSIAN MARITIME LEGAL REGIME: AN OVERVIEW

6.2.1 HISTORICAL BACKGROUND⁵

In the ninth century C.E, maritime trading between the Southeast Asian neighbour countries, including India, China, Japan and Arab countries was already in existence.⁶ Commodities such as ceramics, gold, iron pots, lead, and silken textiles were imported by these foreign traders in exchange for local items such as cotton, pearls, clothes and others. Since maritime travel and trade became the lifeline of people throughout the continent, it contributed towards the flourishing of Malacca and its empire which was situated along the Straits of Malacca. Most importantly, Malacca became one of the greatest emporiums of the early fifteen century. It was thought necessary to introduce specific laws governing maritime affairs between the traders due to the increasing

⁴ The incident of MT Nagasaki Spirit on 20 September 1992 (*BT Shipping Times*, October 2, 1992).

⁵ Cross-refer to Chapter Two.

⁶ Eusebio Z.Dizon 'Underwater/ maritime Archaeology in Southeast Asia' in *Southeast Asia: A historical encyclopedia, from Angkor Wat to East.. 1361-1364;* similarities were found among archaeological artifacts and features in Southeast Asian countries suggesting contact among peoples within the region.' 1361.

volumes of foreign ships from various places arriving at the port of Malacca to take advantage of its prosperity. Thus, a set of laws governing maritime affairs among the local and foreign traders were set up alongside laws on *adat* (local culture) and religious belief.

It is interesting to note that, as early as 1276, the Malacca Sultanate, which was the sovereign power in the Malay archipelagos, had already established a set of maritime laws known as '*Undang-Undang Laut Melaka*' or the Malacca Maritime Code.⁷ This Code formed one of the six parts of the '*Undang-Undang Melaka*' or the Laws of Malacca.⁸ Meanwhile, Borham stated that the laws of Malacca were divided into two parts: the *Undang-Undang Melaka* and *Undang-Undang Laut Melaka*. These laws had been drafted during the reign of Sultan Mahmud Syah.⁹ Later, they were amalgamated with other Malay rules and regulations to form '*Undang-Undang Melaka*'. Windstedt translates *Undang-Undang Laut Melaka* as 'the Maritime Laws of Malacca'. This set of laws provides and describes laws and regulations for the safety of a ship at sea. The existence of such laws clearly demonstrates the importance of having established and well-administered laws, especially in maritime affairs where people from different

⁷ This Code was found and translated by Sir Stamford Raffles in *The Maritime Institutions of the Malays, translated from the Malayu Language* which was published in 1820, pp. 130-158. See also Tunku Sofia Jewa *Public International Law: A Malaysian Perspective, Vol II* Pacifica Publications, 1996 Kuala Lumpur 885-913.

⁸ Also known as 'Malacca Code': Juita Ramli 'A New Maritime Legal Regime for Malaysia within the Context of Ocean Governance' paper presented at the MIMA National Conference on Ocean Governance in conjunction with The Year of the Ocean, MIMA, Kuala Lumpur, Malaysia, 16-17 June 1998; The term *Undang-Undang Melaka* has fourteen different names: Liaw Yock Fang, 'Naskah Undang-Undang Melaka: Suatu Tinjauan' SARI 25 (2007) 85-94.

⁹ Badriyah Hj Salleh, 'Undang-Undang Laut Melaka/ Malacca Maritime Code' in Ooi Keat Gin (2004) eds. *Southeast Asia: A historical encyclopaedia, from Angkor Wat to East Timor (1360-1361)* Santa Barbara: California. cf. Liaw Liaw Yock Fang 'Naskah Undang-Undang Melaka, SARI 25 (2007) 85-94, 86. The original text of The Laws of Malacca were the Royal rules during the reign of Sultan Muhammad Syah (1422-1444), later improved by Sultan Muzaffar Syah (1445-1458).

parts of the world are commuting and communicating with one another to create economic relationships.

Although, at that time, there were no specific laws dealing with the crime of piracy or armed robbery at sea, these laws covered a range of maritime affairs and security including laws on crime committed on board junks or *prahu*.¹⁰ As discussed in earlier chapters,¹¹ the openness concept of free trade that had been practised in the Straits of Malacca became the main factor contributing towards the triumph of the ports located along the Straits. However, the thriving of the Malay states was disrupted with the coming of the Portuguese who invaded the city of Malacca in 1511. Wood suggests that the reason behind the Portuguese occupation was the desire to control the Straits of Malacca, the location of which was very strategic as the centre for trade throughout the Southeast Asian region.¹² They built a gigantic fort to defend Malacca from any threat posed by their enemies, especially the attacks by the ex-ruler of Malacca who tried to repossess Malacca. This clearly demonstrated the courage of the Portuguese in their determination to stay and rule Malacca. The high taxes imposed on traders using the Straits of Malacca along with religious intolerance caused the foreign traders to flee to other ports such as Aceh. In 1641, the Dutch, in collaboration with the ex-ruler of Malacca in Johor, seized control of Malacca.¹³ Nonetheless, their occupation of Malacca and the Malay Peninsula was generally accepted. This was due to their tolerance of the traditional culture and the religion of the local people, which had been

¹⁰ Prahu is a Malay term referring to a vessel. TS Jewa, *Public International Law: A Malaysian Perspective, Vol II* (Pacifica Publications, 1996 Kuala Lumpur) 885-913.

¹¹ Cross-refer to Chapter 1 and 2.

¹² AJ Wood 'History and Movement of Peoples: Early Malay States and the First European Intervention' in Marshall Cavendish Corp. Eds. *World and Its Peoples: Malaysia, Philippines, Singapore and Brunei* (Marshall Cavendish Corporation, New York 2008) 1176-1177.

¹³ *ibid.*

ignored during the Portuguese rule. However, Dutch power gradually declined during the Napoleonic Wars in Europe (1793-1815).

Meanwhile in the late seventeenth century, the British, who had been expanding their trading company known as the East India Company (EIC) in Bencoolen, Sumatra, slowly increased their influence in the Malay Peninsula, initially occupying Penang. This area is an island situated off the north coast of the Peninsula and the Straits of Malacca. It was claimed that the island of Penang had been ceded in 1786 by the Sultan of Kedah as a result of the treaty between this local ruler and Captain Francis Light.¹⁴

In *Fatimah v Logan*¹⁵ Judge Hackett stated the following:

‘In 1786, Penang, being then a desert and uncultivated island, uninhabited except by a few itinerant fishermen, and without any fixed institution, was ceded by the Rajah of Quedah to Captain Light, an Officer of the E.I. Co., for and on behalf of the Company. On the occasion of taking possession of the Island, Captain Light published the following proclamation.

PROCLAMATION

These are to certify that, agreeable to my orders and instructions from the Hon’ble the Governor-General and Council of Bengal, I have this day taken possession of this Island called Pooloo Penang, now named the Prince of Wales’ Island, and hoisted the British Colours in the name of His Majesty George the Third, and for the use of the Hon’ble English East India Company this 11th day of August, 1786, being the eve of the Prince of Wales’ birthday.

In the presence of the underwritten,
FRANCIS LIGHT.’¹⁶

One of the issues discussed before the court in the case of *Fatimah v Logan* was very important for determining what laws should be applied in Penang. If it was the case

¹⁴ An Introduction to the Study of the Law Administered in the Colony of the Straits Settlements [1974] 16 MLR 4-51, 4.

¹⁵ Per Hackett, J. 258 in *Fatima v Logan* 1 KY. 255

¹⁶ *Fatimah v Logan* 1 KY 255, per Hackett J, 258.

that this island had been ceded to the British EIC while it was uninhabited and uncultivated, English law would be the law of the land. Furthermore, the British EIC settled the island until the population had increased.¹⁷ In fact, the introduction of the 1807 Charter of Justice in Penang apparently strengthens the claim that English law had been applied in the Island of Penang formally.

In 1795, the British occupation of the Malay Peninsula then spread to the state, famous during the fifteenth century, that had lent its name to these globally important straits, namely the state of Malacca. They occupied Malacca for several years before it was returned to the Dutch in 1801.¹⁸ Meanwhile, the British strengthened their position at the southern entrance to the Straits. Thus, to that end Sir Stamford Raffles reached an agreement in 1819 with the local ruler to make Singapore as Britain's trading station. The development of Singapore was very successful as it was transformed from a small fishing village into an affluent trading town and popular port.¹⁹ Complete British control over Singapore and Malacca and some other Malay states was achieved in 1824 through a treaty with the local ruler (Sultan of Johor) and the Anglo-Dutch Treaty of the same year. The latter 1824 Treaty divided the Malay Archipelago area into two parts. The British were given control over the Malay Peninsula while the Dutch were in control of the Indonesian archipelago.

It is thus important to understand the historical background and the influence of the colonial powers on the Malaysian legal system. Furthermore, the effect of

¹⁷ *ibid.* 258.

¹⁸ Wu Min Aun, *The Malaysian Legal System*, (2nd edn Longman, Kuala Lumpur 1990) 7.

¹⁹ An introduction to the study of the law administered in the colony of the Straits Settlements, [1974] 16 MLR 4-51, 12.

colonization that began from the sea along the Straits has influenced legal decisions and policies of the government of Malaysia to this day in all matters, especially the issue of security in the Straits.

6.2.2 EARLY RECEPTION OF THE ENGLISH LEGAL SYSTEM IN MALAYSIAN LAW

The Western exploration and exploitation followed by the colonization in Southeast Asia directly and indirectly affected and changed the Malay traditional law and administration. In fact, Malaysian historians believe that the Malaysian legal system has been shaped by the English legal system through the residency system which was introduced by British. The first statutory reception of English law in the Straits Settlement was the Royal Charter of Justice of 1807 which established 'The Court of Judicature of Prince of Wales' Island (which Penang was known as at that time). This 1807 Charter and the later 1826 Charter (in Malacca) and 1855 Charter introduced English law and the court system, wherever it was suitable for the local circumstances. When colonial law contradicted local custom, this custom would be referred to. However, Aun asserted that, although English law was formally applied in the Straits Settlement, in practice it was very difficult to implement, in view of the cultural and religious background of the local people. The English-trained administrators and magistrates had totally different approaches to administering justice over local cases.²⁰ In 1868 the Civil Law Ordinance replaced the previous Charter of Justice but still left the Malay customary law and Islamic law to be practised. In the case of *Ong Cheng Neo v Yap Kwan Seng*²¹, English law was only recognised in the Malay Courts 'in so

²⁰ Wu Min Aun, *The Malaysian Legal System*, (2nd edn Longman, Kuala Lumpur 1990) 7.

²¹ (1897) 1 *SSLR Suppl* p.3.

far as it has been adopted.’ The English law had to be applied only when there was a lacuna in the local law. Although the English administrators appeared to have been given ample scope to practise the local customary law alongside the English legal system, many English law models including those used by the British in the East India Company, such as the 1902 Criminal Procedure Code and the 1905 Penal Code, were applied directly without consideration of local law and custom. Lord Dunedin, in the Privy Council case of *Haji Abdul Rahman v Mohamed Hassan*²², opined that:

‘The learned judges...have been too much swayed by the doctrines of English equity, and not paid sufficient attention to the fact that they were dealing with a totally different land law...’²³

Despite such statement of Lord Dunedin, the English legal system continued to embrace and shape the legal system in the Malay States. A year before the Malay States were granted independence from the British administration,²⁴ the *Civil Law Ordinance 1956* was introduced in place of the earlier Ordinance. In 1963, the Federation of Malay States including Singapore changed its name to ‘Malaysia’ in order to symbolise the unity of multicultural races.²⁵ Nine years after this, the English law was still being recognised, with the *Civil Law Act 1956* (revised 1972) replacing the *1956 Ordinance*. Most of the laws, such as the *Rubber Shipping and Packing Control Ordinance 1949*, *Carriage of Goods by Sea Act 1950*, *Merchant Shipping Ordinance 1952*, *Federation Light Dues Act 1953*, *Penang Port Commission Act*

²² (1917) AC 216.

²³ 1917) AC 216; read the discussion put forward by Wu Min Aun (1999) 22-25.

²⁴ Cross refer to Chapter 1 and 2.

²⁵ Wu Min Aun (1999) 25.

1955, and the *Port Authorities Act 1963*, which were actually taken from the British legislation, are still in use to this day with a few amendments or none at all.²⁶

6.2.3 THE RECEPTION OF INTERNATIONAL LAW IN THE MALAYSIAN LEGAL SYSTEM

Generally most of the countries which were previously under the colonial rule of the British, follow the common law system. Normally, they apply a dualist theory for the application of international law in their national legal system.²⁷ As opposed to the monism, the theory of dualism, does not automatically transform international law to become part of the national legal system.²⁸ The dualist approach considers international law and national law as two separate legal systems. Thus, the international law will become part and parcel of the national law only after it is formally adopted into the national legislation.

According to Hamid, the reception of international law in Malaysia may be classified into two; namely the reception of international treaties and the reception of the customary international law.²⁹ He argued that the Malaysian Federal Constitution has explicitly vested in Parliament the power to implement treaties as stated in Article 74(1):³⁰

²⁶ Juita Ramli, 'A new Maritime Legal Regime for Malaysia within the Context of Ocean Governance' paper presented at the MIMA National Conference on Ocean Governance in conjunction with the Year of the Ocean, Maritime Institute of Malaysia, Kuala Lumpur 16-17 June 1998, 3-4.

²⁷ H Lauterpacht (ed.), *Oppenheim's International Law*, 8th edn, vol.1, Peace (Longman, London 1955) 37; Ian Brownlie, *Principles of Public International Law*, (6th edn OUP, Oxford 2003) 53.

²⁸ *ibid.*

²⁹ AG Hamid, *Public International Law*(3rd edn, Sweet & Maxwell Asia, Petaling Jaya 2011) 62.

³⁰ *ibid.*

Parliament may make laws with respect to any of the matters enumerated in the ‘Federal List’ or the ‘Concurrent List.’³¹ The ‘Federal List’ in the Ninth Schedule includes:

1. External Affairs, including-
 - (a) Treaties, agreements and conventions with other countries and all matters which bring the Federation into relations with other countries;
 - (b) Implementation of treaties, agreements and conventions with other countries;...³²

Also in the Article 76(1), which provides exceptional power of the Parliament to make law in certain circumstances, namely ‘...for the purpose of implementing any treaty, etc between the Federation and any foreign country.’³³ In the case of *Kelantan v Federation of Malaya and Tunku Abdul Rahman Putra Al Haj*,³⁴ the High Court affirmed that, it is the exclusive power of the executive in the federal government to make law in respect of external or foreign affairs. Therefore it may be concluded that the Parliament is responsible to implement international treaties by enacting or domesticating such treaties within the national legal framework. In other words the general rule is that ‘[a] treaty to be operative in Malaysia, therefore, needs legislation by Parliament.’³⁵ This is also called as the ‘doctrine of transformation’ which mainly used the dualist approach. However, it is noteworthy that it may be a situation where a treaty may be implemented locally without formal reception, such as the treaty for cultural exchange between neighbouring states.³⁶

³¹ Federal Constitution of Malaysia.

³² *ibid.*

³³ Art 76(1) of the Federal Constitution of Malaysia.

³⁴ [1963] *MLJ* 355 (Federation of Malaya High Court).

³⁵ Hamid (2011) 63.

³⁶ *ibid.* Heliliah Yusof, ‘Internal Application of International Law and Singapore’ (1969)1 *Singapore Law Review*, 62-71,65.

As regard to the reception of customary international law in Malaysia, Hamid views that, the practice were inconsistent. Although during pre-independence period, there was several practice of directly adopting customary international law as part of the law of the land without enacting the national statute as decided in the law cases,³⁷ the situation of the post-independence period incline towards the ‘doctrine of transformation.’³⁸ In the case of *PP v Narogne Sookpavit*,³⁹ the Thai fishermen were arrested within three miles⁴⁰ of the Malaysian coast and charged under section 11(1) of the Malaysian Fisheries Act 196. The defence counsel argued that the respondents have the right of innocent passage as stated in the Article 14 of the 1958 Geneva Convention on the Territorial Sea.⁴¹ Such Convention was customary international law and therefore part and parcel of the Malaysian law.⁴² However the judge in this case decided that:

Even if there was such a right of innocent passage and such right was in conformity with customary English law or customary international law as it is applied in England, the passage by the accused persons in the circumstances of this case could not be regarded as innocent passage since it contravened Malaysia domestic legislation.⁴³

³⁷ See *Sockalingam Chettiar v Chan Moi* [1974] MLJ, Malayan Union CA, per Evans J, (judge referred to the Hague Regulations); *Olofsen v Government of Malaysia* [1966] 2 MLJ 300, OJC Singapore (the court directly applied the rule of customary international law relating to the immunity of a sovereign state; *PP v Oie Hee Koi* [1968] 1MLJ, PC appeal from Malaysian Federal Court (the Privy Council applied customary international law on prisoners of war in the 1949 Geneva Convention).

³⁸ Hamid (2011) 63. For a comprehensive discussion on the reception of international law in Malaysia see Hamid (2011) at page 48-72.

³⁹ [1987] 2MLJ 100, HC, Johore Bahru.

⁴⁰ During that time Malaysia has not yet expanded its territorial sea to 12 nautical miles.

⁴¹ *PP v Narogne Sookpavit* [1987] 2MLJ 100, HC, Johore Bahru; Ian Brownlie, *Principles of Public International Law* (6th edn OUP, Oxford 2003) 305.

⁴² *ibid.*

⁴³ *ibid.*

It is appear from the case that despite an established rule of customary international law on the right of innocent passage in the territorial sea, the judge has not decided the case accordingly. It is put forward by Hamid that, in practice the maritime enforcement agencies in Malaysia recognise such right. In turn, the Malaysian ships also have the benefit of the same when they are passing through the territorial seas of other states.

In the case of *PP v Wah Ah Jee*⁴⁴ which followed the dictum in the English case of *Mortensen v Peters*, the court also held that:

‘In the court we have nothing to do with the question of whether the legislature has or has not done what foreign powers may consider a usurpation in a question with them. Neither are we a tribunal sitting to decide whether an Act of the Legislature is ultra vires as in contravention of generally acknowledged principles of International law. For us an Act of Parliament duly passed by Lords and Commons and assented to by the King, is supreme, and we are bound to give effect to its terms...’⁴⁵

It may be assumed that, the Malaysian court was reluctant to apply customary international law due to the latter inconsistency with the local law. For Malaysia, the general rule on the reception of international law is that, in the event of discrepancy between these two laws, the domestic law shall prevail.

⁴⁴ (1919) 2 FMSLR 193, 11.

⁴⁵ *ibid.*

Interestingly, on the other hand, Lord President Salleh Abas in his judgment on the extra-territorial jurisdiction of Malaysian Penal Code in the case of *PP v Rajappan*⁴⁶ had directly referred to the rule of customary international law and also the decision of the Permanent Court of International Justice in the *Lotus case*.⁴⁷ He ruled that:

International law also recognises that a State has the power to punish its nationals or its permanent residents for criminal acts committed by them outside its territory. But to translate this principle into municipal law a clear provision must be made to this effect in its municipal law.⁴⁸

It is important to highlight that, although the Lord President in this case had rightly given consideration to the established rule of customary international law, the underlined statement seems to show that, similar to the reception of international treaties, a ‘doctrine of transformation’ is still needed for the customary international law to be formally applied in the Malaysian legal system

However, it is suggested that it is prudent for Malaysia to accept and directly incorporate an established rule of customary international law. This is because, under the international law principles, the rule of customary international law is binding on all States. Unless Malaysia can prove that it is a persistent objector to such rule.⁴⁹ Otherwise, Malaysia may be liable for a breach of international law and consequently may be responsible for damages which include restitution and compensation.⁵⁰

⁴⁶ [1986] IMLJ 152, *Supreme Court, Kuala Lumpur*, 157.

⁴⁷ Hamid (2011) 68-69.

⁴⁸ *PP v Rajappan* [1986] IMLJ 152, *Supreme Court, Kuala Lumpur*, 157 (Emphasis added).

⁴⁹ Hamid (2011) 70.

⁵⁰ *ibid.*

6.2.4 MALAYSIA AND INTERNATIONAL LAW OF THE SEA

A year after its independence, Malaysia had the opportunity to join the discussion on the international law of the sea for the first time, during the 1958 Convention in Geneva, as an independent and sovereign state.⁵¹ Malaysia then acceded to the first United Nations 1958 Convention on 12 December 1960 and adopted its Continental Shelf Act on 28 July 1966.⁵² Malaysia responded to this development by enacting several national laws for its maritime zone including the *Proclamation of Emergency (Essential Powers) Ordinance 1969* for the extension of territorial waters from three nautical miles to 12 nautical miles. Ten years after that, Malaysia published its new map which is known as *Peta Baru menunjukkan Sempadan Perairan and Pelantar Benua Malaysia* (New Map showing the Territorial Waters and Continental Shelf boundaries of Malaysia) on 21 December 1979.⁵³ Later, the Exclusive Economic Zone (EEZ) of 200 nautical miles was officially proclaimed on 25 April 1980 and incorporated into the EEZ Act in 1984. The proclamation of the legislation pertaining to conservation, management and development of maritime and estuarine fishing and fisheries was made via the *Fisheries Act 1985*. After a lengthy debate on the importance and need for Malaysia to ratify the 1982 UNCLOS, the instrument of ratification of the 1982 Convention was signed on 2 October 1996, and deposited with the Secretary-General of the United Nations on 14 October 1996.

As a littoral state of the Straits and a state that is party to the United Nations and its law of the sea, Malaysia's commitment to dealing with maritime security has steadily intensified. The continuing incidents of piracy and armed robbery and other threats

⁵¹ Juita Ramli (1998) 7.

⁵² Cross-refer to Chapter 2.

⁵³ See Appendix.

taking place in the region have been given due attention by all the littoral states. This in turn has shown the dramatic decrease in the number of incidents in the Straits. This example clearly explains the role of the law and its enforcement. Indeed, in order to ensure security at sea, Malaysia has harmonised the international law and conventions with the national law and regulations, including the law pertaining to the safety and security of the Straits. These laws have clearly been enacted in order to ensure that the maritime area remains secure and safe for all users and to preserve the environment and sustain natural resources in the face of any threat that might affect Malaysia's economic wellbeing. At the same time, Malaysia has yet to become a party to a number of International Conventions such as the 1988 SUA Convention on coping effectively with the problem of piracy and any crime associated with it, including maritime terrorism.⁵⁴

6.2.4.1 TERRITORIAL WATERS OF MALAYSIA

As discussed in the second chapter, the most controversial subject that had prolonged negotiations on a settled international law of the sea previously was the question of determining the territorial sea of a state. Malaysia extended its territorial sea to 12 nautical miles in August 1969⁵⁵ pursuant to the 1958 Geneva Convention. The 1958 Convention, which stipulates 12 nautical miles as the maximum extension of

⁵⁴ Interview with Mohd Helmy Ahmad, Principal Assistant Secretary, Maritime Security and Sovereignty Division, Prime Minister's Department (Putrajaya, 11 November 2010).

⁵⁵ Malaysia's Emergency (Essential Powers) Ordinance No.7 of August 1969. The original version of the Ordinance (no.7) stated: 3(11) It is hereby declared that the breadth of the territorial waters of Malaysia shall be twelve nautical miles and such breadth shall be measured in accordance with Arts 3,4,5,6,7,8,9,10,11,12 and 13 of the Geneva Convention on the Territorial Sea and Contiguous Zone (1958).cf. amended version on Ordinance No.11 1969: The breadth of the territorial waters of Malaysia shall be 12nm and such breadth shall, except in the Straits of Malacca, the Sulu Sea and the Celebes Sea, be measured in accordance with Arts 3,4 and 6-13 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone.

territorial sea of a state, was then adopted in 1982 Convention. Article 3 of the 1982 Convention states that:

‘Every state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from the baselines determined in accordance with this convention.’⁵⁶

In the same year of the extension of territorial breadth, on 27 October 1969 Malaysia agreed on the delimitation of continental shelf with Indonesia which includes the agreement on their borders in the Straits of Malacca. Ten years after claiming 12 nm of territorial sea, Malaysia published its New Map or *Peta Baru* which defined the measurement of its territorial waters from the baseline of the low water mark without determining the exact coordination. The validity of this claim has, however, been challenged for its failure to comply with the rule of international law.⁵⁷ Valencia pointed out several reasons for its invalidation. Firstly, Malaysia, in establishing its 1979 New Map, has failed to provide due publicity on the inferred straight baseline. It is required under Articles 4 and 6 of the 1958 Convention that when a state is determining its maritime zone, due publicity on the baseline used should be given accordingly. The absence of due publicity on the baseline used to determine its new maritime map therefore contradicts the international law of the sea. Secondly, the inferred straight baseline used by Malaysia is unnecessary. Article 7 of the 1982 Convention states the following:

(a) In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its *immediate* vicinity, the method of straight baselines joining appropriate points

⁵⁶ Art 3, 1982 Convention.

⁵⁷ MJ Valencia, Validity of Malaysia’s Baselines and Territorial sea claim in the northern Malacca Strait, 27 (2003) *Marine Policy* 367-373. See also *Image* (Cayman Islands RC No.267531) and *Sun Cruises Limited, Sun Vista Limited and Sembawang Ship Management Pte Ltd. Suit No. 76 of 2002/w.*

may be employed in drawing the baselines from which the breadth of the territorial sea is measured.

(b)The drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently *closely linked* (emphasis added) to the land domain to be subject to the regime of internal waters.⁵⁸

Valencia argues that this article has been ‘misused’ due to the lack of a precise legal definition of the requirement to have ‘deeply indented and cut into’ or ‘fringe of islands along the coast in its *immediate* vicinity’ and ‘general direction of the coast’ or ‘closely linked’. The normal baseline should be used instead of a straight baseline since the islands of Malaysia, especially Pulau Jarak and Pulau Perak, are not located close to the coast. Furthermore, the fact that they are uninhabited islands may imply the non-existence of economic interest.⁵⁹ He also highlights the recent case between Qatar and Bahrain on territorial and maritime delimitation issues before the International Court of Justice (ICJ) which upheld the decisions of two other ICJ cases previously decided.⁶⁰ In these cases, the ‘disproportionate effect of small islands’ were eliminated.⁶¹ Thirdly, there was an inconsistency in Malaysia’s position. In Malaysia’s 1979 New Map there is no clear demarcation of where the territorial waters of Malaysia were drawn. Valencia concludes that the Malaysian practice is to treat water in the landward area all the way to the coast as its territorial waters rather than its internal waters. Consequently, this contravenes Article 5.1 of the 1958 Geneva

⁵⁸ Emphasis added.

⁵⁹ Art 7(5) :’...[E]conomic interest to the region concerned, the reality and the importance of which are clearly evidenced by long usage.’

⁶⁰ *The North Sea Continental Shelf Case ICJ Reports 1969*, p.36, para.57 and *Continental Shelf Libyan Arab Jamahiriya/Malta Judgment ICJ Reports 1985*, p.48, para.64; Valencia (2003) 370-371.

⁶¹ Valencia (2003) 371.

Convention which requires that ‘waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.’⁶²

However, for Malaysia, the absence of an objective test to determine the distance or location of an island of a state may not result in the invalidity of its claim.⁶³ Moreover, Malaysia has already signed an agreement with Indonesia, as a neighbour state, on both states’ maritime zone delimitation following the release of the 1979 New Map without arguing about the baseline used at that time.⁶⁴

Although Indonesia did not dispute Malaysia’s 1979 New Map for the purpose of delimitation of the continental shelf, in February 1980 Indonesia disputed Malaysia’s base point for the measurement of its territorial sea, especially in the maritime zone of the Straits of Malacca.⁶⁵ Due to the narrowness of the Straits, especially in the southern part of the Straits at less than 12 nautical miles, it is unsurprising that a solid agreement between the littoral States, whose territorial jurisdictions are overlapping in the northern part of the Straits, has not yet been reached. The determination of precise delimitation of territorial jurisdiction is important, especially for identifying whose law is to be applied when disputes arise. It is interesting to note that the obscurity regarding the boundaries of territorial waters in this area has made it a piracy-prone area.

⁶² Valencia (2003) 373.

⁶³ cf. ‘states should be guided by the general spirit of Art 7’; see Valencia (2003) 370.

⁶⁴ Although not disapproving of such a measurement, Indonesia rejected Malaysia’s attempt to use the 1979 agreement between them as an acknowledgement of Malaysia’s straight baseline. See Valencia (2003) 372.

⁶⁵ Valencia (2003) 372.

6.2.4.2 MALAYSIA'S EXCLUSIVE ECONOMIC ZONE (EEZ)

Two years before the adoption of the 1982 Convention, Malaysia had proclaimed its intention to benefit from an EEZ area, a development already practised by many states. Hussein Onn, the second Prime Minister of Malaysia, stated on 25 April 1980 the following.⁶⁶

AND WHEREAS a number of States have taken action in pursuance of the existing law and practice and have made declaration in regard to their exclusive economic zones:

NOW THEREFORE WE, Sultan Haji Ahmad Shah Al Musta'in Billah Ibni Al-Marhum Sultan Abu Bakar Yang di-Pertuan Agong of the States and territories of Malaysia, hereby declare and proclaim that the Federation of Malaysia shall have-

...

(b) jurisdiction with regard to-

...

(iii) the preservation of the marine environment in the exclusive economic zone which is hereby established and that such exclusive economic zone extends to 200 nautical miles from the baseline which the breadth of the territorial sea is measured. (*emphasis added*)

This was the basis of the Malaysian EEZ Act 1984 which was enacted two years after the adoption of the 1982 Convention and came into force on 1 May 1985. Under the 1982 Convention, the EEZ legal framework is established under Part V which covers Articles 55 to 75. This part is considered to have been successful in reaching a compromise between the interests of exploring and conserving the marine resources by the coastal states on one hand, and the interest of other states in navigational freedom on the other.⁶⁷ It is an area beyond and adjacent to the territorial sea which

⁶⁶ Tunku Sofiah Jewa 673-674.

⁶⁷ Mazen Adi, 'The Application of the Law of the Sea and the Convention on the Mediterranean Sea' (2009) Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs, The United Nations, New York, 21. http://www.un.org/Depts/los/nippon/unff_programme_home/fellows_pages/fellows_papers/adi_0809_syria.pdf accessed on 16 May 2010.

covers 200 nautical miles from the baselines from which the extent of the territorial sea is measured.⁶⁸ Adi emphasized that the EEZ does not give exclusive sovereignty to the coastal states but only sovereign rights (to explore and exploit the adjacent marine resources for economic purposes), jurisdiction and duties.⁶⁹ While the coastal states have been granted power to enforce their law and regulations to ensure compliance with the EEZ, the rights of navigation and overflight of other states is definitely preserved. Section 10 of the EEZ Act 1984, for example, conferred on Malaysia the sovereign right to enforce its law in response to acts that might threaten the coastal environment such as the discharge of oil or pollutants from a vessel. Non-compliance with such coastal state laws might make a person, owner, occupier or master of a vessel liable to a fine of not exceeding one million ringgit.⁷⁰

The Fisheries Research Institute of Malaysia disclosed that the combined EEZ between Peninsular Malaysia and the West Malaysian states of Sabah, Sarawak and Federal Labuan, which are separated by the South China Sea, is approximately 548,800 kilometres.⁷¹ However, it is interesting to note that, like the issue of Malaysian territorial waters, the problem of Malaysia's EEZ is the same basic

⁶⁸ Art 57 of the 1982 Convention. Hamzah Ahmad, *Malaysia's Exclusive Economic Zone, A Study in Legal Aspects* (Pelanduk Publication, Petaling Jaya 1988) 10.

⁶⁹ Adi (2009) 21. Art 56-60 of 1982 Convention. Art 58 addresses the right and jurisdiction of the coastal states and other states in the EEZ; Art 59 establishes principles for the resolution of conflicts in cases where the provisions of the Convention do not specifically attribute rights or jurisdiction to either the coastal state or to another state; Art 60 gives the coastal states a certain competence which goes beyond their sovereign rights over resources which include jurisdiction with regard to the establishment and use of artificial islands, installations and structures, marine scientific research and the protection and preservation of the marine environment. See Adi (2009) 22; The Law of the Sea, National Legislation on the Exclusive Economic Zone, the Economic Zone and the Exclusive Fishery Zone. Office of the Special Representative of the Secretary General for the Law of the Sea, United Nations (1986) iv.

⁷⁰ s10 of the EEZ Act 1984; Ghafur (2009) 16.

⁷¹ 'Deep-Sea Resources Research and Survey in Malaysia Water Area' paper presented by Fisheries Research Institute Malaysia in Regional Workshop on Standard Operation Procedure and Development/Improvement of Sampling Gears for the Deep Sea Resources Exploration 25-23 May 2009, Samut Prakan Thailand.

question of how Malaysian territorial breadth is calculated. Apart from the argument put forward by Valencia, Herriman and Mohamed also assert that the large-scale map in the *Peta Baru* is ambiguous in terms of describing the calculation of the breadth.⁷² They finally inferred that the term ‘territorial waters’ used in this map as well as in other legislation including the 1984 EEZ Act is intended to refer to the ‘territorial sea’ as intended by the 1982 Convention. This is based on municipal law such as Section 3(2) of the Emergency (Essential Powers) Ordinance No.7, 1969, which states that the expression ‘territorial sea’ shall be construed as referring to ‘territorial waters.’⁷³ Again, in regard to a narrow area such as the southern Straits of Malacca where territorial jurisdictions overlap, the question of territorial breadth is extremely important in determining which law and jurisdiction should be applied.⁷⁴ Although Malaysia continues to reaffirm that Malaysian territorial waters are parallel to the ‘internationally recognised territorial sea’, the publication of *Peta Baru*⁷⁵ seems to contradict this. The absence of geographical coordinates for its territorial sea baselines might call into question its territorial jurisdiction and sovereign rights in the maritime zone. On the basis of *Peta Baru*, it is argued that Malaysia intended its territorial sea to be calculated based on a straight baseline. This, however, might still be considered invalid since Malaysia has never made a formal declaration on this as required by

⁷² Max Herriman and Raja Petra Mohamed, ‘A Malacca Straits EEZ Boundary: Factor for Consideration’ in M.Shariff, FM Yusoff, N Gopinanth, HM Ibrahim and RA Nik Mustapha (eds.) *Towards Sustainable Management of the Straits of Malacca: Proceeding of International Conference on the Straits of Malacca, 19-22 April 1999, Malacca Malaysia* (MASDEC UPM Serdang, 2000) 755-764.

⁷³ *ibid.* 758. MIMA Report on the Status of Maritime-Related National Laws and Maritime Conventions in Malaysia. Kuala Lumpur: MIMA January 1997. P44.

⁷⁴ See for example the case of *Image (Cayman Islands RC No.267531) v Sun Cruises Limited, Sun Vista Limited and Sembawang Ship Management Pte Ltd.* Suit No. 76 of 2002/w.

⁷⁵ Printed by Directorate of National Mapping, Malaysia 1979, 1-PPNM SYIT (SHEET) 1. See Appendix.

international law.⁷⁶ Moreover, some countries such Indonesia and United States have not recognised Malaysia's straight baseline.⁷⁷ Although Malaysia and Indonesia reached an agreement in November 1969 on the delimitation of continental shelf boundary in the south-eastern part of the Straits of Malacca based on the principle of equidistance recommended in international law,⁷⁸ there has still unfortunately been no precise coordination of maritime boundaries for EEZ areas.⁷⁹

Although the EEZ Act 1984 mainly conferred jurisdiction over acts that affect the marine environment, piracy or armed robbery might also be held liable under this Act if their present in the EEZ area would threaten the safety of navigation and traffic or living resources and environment of the sea. It is submitted that pirates, in their attempt to attack a ship that leaves the said ship unattended and without navigation,

⁷⁶ Max Herriman and Raja Petra Mohamed, 'A Malacca Straits EEZ Boundary: Factor for Consideration' in M.Shariff, FM Yusoff, N Gopinanth, HM Ibrahim and RA Nik Mustapha (eds.) *Towards Sustainable Management of the Straits of Malacca: Proceeding of International Conference on the Straits of Malacca, 19-22 April 1999, Malacca Malaysia* (MASDEC UPM Serdang, 2000) 755-764.

⁷⁷ *Ibid.*

⁷⁸ Both states have achieved an equitable and peaceful agreement. This principle of equidistance had been practised by states even before the 1982 Convention was concluded. Art 74 of 1982 Convention states that:

- (1) the delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Art 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.
- (2) If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.
- (3) Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.
- (4) Where there is an agreement in force between the States concerned, questions relating to the delimitation of the exclusive economic zone shall be determined in accordance with the provisions of that agreement.

See also Brownlie (2003) 219-220.

Art 111 of 1982 Convention;

⁷⁹ Sutarji Kasmin, *Efficiency Measurement of Malaysia's Maritime Enforcement Agencies* (UKM, Bangi 2009) 19.

consequently causing collisions with other ships and damaging the environment, might also be held liable under this Act.

6.3 THE CHALLENGES OF THE THREAT OF PIRACY AND ARMED ROBBERY AGAINST SHIPS FOR MALAYSIA'S ENFORCEMENT AGENCY

The Straits' strategic location as an oil and gas chokepoint for external powers such as the United States, Japan and China have consistently triggered their concern over the security issue in the Straits, especially during the closing years of the twentieth century into the beginning of the new millennium.⁸⁰ The threat perception has been heightened due the increase in piracy and armed robbery attacks against ships in the Straits and territorial seas of the littoral states. The external powers' concern over this issue has either directly or indirectly imposed pressure on Malaysia as one of the littoral States principally responsible for maintaining the safety and security of this vital SLOC. The complexity of international law on maritime space has proved to be a key challenge to the enforcement of the law, especially when maritime trans-border crimes such as piracy and armed robbery against ships are involved. As discussed in an earlier chapter, legally speaking, piracy as defined in the 1982 Convention must occur on the high seas.⁸¹ However, most of the attacks in this region have occurred in the territorial seas of the littoral states; hence, under the international law they would not qualify as piracy. In narrow straits such as the Straits of Malacca, there is no area of high seas towards the southern part where the territorial waters of the littoral States, namely Malaysia and Indonesia, overlap. Thus, Malaysia and Indonesia have claimed that the IMB's reports on the increasing number of piracy incidents in the Straits were

⁸⁰ See IMB Piracy Annual Report 2006.

⁸¹ Art 101 of the 1982 Convention. On the issue of whether piracy may also occur in the EEZ (Art 58(2) of the 1982 Convention), see discussion in Chapter 3 (para 3.3.1).

misrepresentations.⁸² Both states prefer to classify such attacks as ‘armed robbery against ships’ in accordance with the IMO’s definition rather than piracy, since the latter implication is rather detrimental to the security environment in the Straits. This was proved when the Straits were declared a war risk zone in Lloyd’s list of the Lloyds Market Association in 2005 due to the rising number of piracy incidents during that period.⁸³

Whilst it is reported that the threat of piracy and armed robbery in the Straits has declined due to aggressive coordinated patrols among the littoral states,⁸⁴ there are still many challenges compelling Malaysia to consistently improve its maritime legal regime and security forces. According to Zulkifli, First Admiral Maritime Malaysia, the security of the Straits is very important to the international community. It is the international perception that the security of the Straits is the responsibility of the littoral states and, because the name ‘Malacca’, which is one of the 13 states in the country, is synonymous with Malaysia, the pressure was greater on Malaysia to address this issue.⁸⁵ Malaysia believes that piracy, a non-traditional security threat, requires continuous attention and effective law enforcement. The cooperative action jointly implemented by Malaysia and its counterparts, Indonesia and Singapore, such

⁸² Zulkifli Abu Bakar ‘Enhancing Maritime Security-Law Enforcement in Malaysia’ paper presented during 24th Asia-Pacific Round Table, Kuala Lumpur, 7-9 June 2010; Interview with Mohd Helmy Ahmad, Principal Assistant Secretary, Maritime Security and Sovereignty Division, Prime Minister’s Department (Putrajaya, 20 February 2009, 11 November 2010, 10 January 2011).

⁸³ For further discussion cross-refer to Chapter 4 (para 4.3.2.1).

⁸⁴ The Star Online ‘Drastic Drop in Straits Piracy’ Thursday April 21, 2011: ‘...the 2010 IMB Piracy Report showed that the threats in the Straits was now close to the zero incident level.’ <http://thestar.com.my/services/printerfriendly.asp?file=/2011/4/21> accessed on 21 March 2012; ‘As world piracy hits a new high, more ships are escaping Somali pirates, says IMB report’ Oct 18, 2011 at ICC Commercial Crime Services at <http://www.icc-ccs.org/news/969-as-world-piracy-hits-a-new-high-more-ships-are-escaping-somali-pirates> accessed on 6 January 2012.

⁸⁵ Zulkifli Abu Bakar ‘Enhancing Maritime Security-Law Enforcement in Malaysia’ paper presented during 24th Asia-Pacific Round Table, Kuala Lumpur, 7-9 June 2010.

as the MALSINDO and Eyes in the Sky,⁸⁶ may not be achieved without each individual state being proactive internally and paying serious attention to tackling the issue before them.⁸⁷ Thus, it may be said that efforts to tackle transnational crime should begin with the creation of an effective national criminal enforcement capability which may be able to address the issue wisely.

6.3.1 THE NEW MALAYSIAN MARITIME ENFORCEMENT AGENCY (MMEA) IN RESPONSE TO PIRACY AND ARMED ROBBERY IN THE STRAITS

According to Kasmin, ‘the maritime law enforcement is construed as the taking of any reasonable measures to ensure compliance or prevent any form of violations of any Acts or applicable written law.’⁸⁸ In other words, in order to ensure compliance and to control criminal act and violence, it is important for a state to have an effective and adequate law and enforcement capability. Such capability is not only by patrolling maritime area, for preventing the crime, but also ability to stop, board and search a suspicious ship,⁸⁹ then arrest, put the perpetrators under a fair trial and finally punish them if found guilty under the local law.

⁸⁶ The Star Online ‘Drastic Drop in Straits Piracy’ Thursday April 21, 2011: ‘...the 2010 IMB Piracy Report showed that the threats in the Straits was now close to the zero incident level.’ <http://thestar.com.my/services/printerfriendly.asp?file=/2011/4/21> accessed on 21 March 2012; ‘As world piracy hits a new high, more ships are escaping Somali pirates, says IMB report’ Oct 18, 2011 at ICC Commercial Crime Services at <http://www.icc-ccs.org/news/969-as-world-piracy-hits-a-new-high-more-ships-are-escaping-somali-pirates> accessed on 6 January 2012.

⁸⁷ CR Woolley ‘Piracy and Sovereign Rights: Addressing Piracy in the Straits of Malacca without degrading the Sovereign Rights of Indonesia and Malaysia’ 8 [2010] Santa Clara J. Int’l L, 447-472, 470.

⁸⁸ *ibid.* 39.

⁸⁹ Art 24 of the 1984 EEZ Act: ‘...[W]here he has reason to believe that an offence has been committed...’

With the increasing complexity of maritime security over the past few years, the need for a more vigorous agency or body to facilitate the enforcement mechanism in dealing with piracy and armed robbery in the Straits is considered urgent. This is especially true considering the high operating costs of maintaining too many maritime-related agencies with a decentralised system which causes difficulties, raising the issues of overlapping duties and jurisdiction and inefficient enforcement.

In Malaysia, the plethora of laws and scattered departments that manage maritime affairs were identified as one the biggest challenges facing the Malaysian Government in maritime law enforcement. Previously, there are fourteen ministries, four maritime councils, two maritime committees and 24 other government agencies had been responsible for enforcing various rules and regulations related to maritime affairs.⁹⁰

Among these agencies are the following:

1. Royal Malaysian Navy (RMN)
2. Royal Malaysian Police (RMP) (Marine Operation Force, previously known as Marine Police)
3. Royal Customs and Excise Department (RC & E Dept)
4. Royal Malaysian Air Force
5. Department of Immigration
6. Department of Fisheries
7. Department of Environment
8. The Marine Department under the Ministry of Transport
9. The National Security Division, Prime Minister's Department

⁹⁰ Sutarji Kasmin, *Efficiency Measurement of Malaysia's Maritime Enforcement Agencies* (UKM, Bangi 2009) 32.

Basically, these agencies have worked largely independently of one another. However, the regular patrols of Malaysian waters were undertaken by enforcement agencies such as the Marine Police, the Royal Malaysian Customs and the Fisheries Department which were coordinated by the Maritime Enforcement Coordination Centre (MECC).⁹¹ As for the purpose of the trilateral MALSINDO Patrol arrangement, the Royal Malaysian Navy (RMN) has played a primary role as the representative of Malaysia's enforcement body together with the Royal Malaysian Air Force and the Police Air-Wing for air surveillance of the Straits.⁹² The RMN is mainly responsible of protecting the territorial and national sovereignty and security of Malaysia. Despite the existence of MECC, the fact that a range of agencies have been dealing with maritime affairs has led to different management of assets as well as interpretation of the law and regulations; this has imposed limitations on the effective enforcement of laws at domestic level.⁹³

Mak Joon Num once described the dilemma faced by the Royal Malaysian Navy in balancing its jurisdiction as a military authority or war-fighting body and a civilian law enforcement instrument that conducted specific tasks including maritime surveillance, sea patrols against maritime crime and search and rescue (SAR).⁹⁴ Apart from piracy, trans-border smuggling of firearms, narcotics and illegal immigrants by sea were also handled by different enforcement authorities. For example, narcotics

⁹¹ Mat Taib Yasin 'Sharing the Burden of Maintenance of Navigational Safety and Security in the Straits of Malacca' in Nazery Khalid (ed.) Proceedings of LIMA International Maritime Conference, Awana Porto Malai, Langkawi Malaysia, 4-5 December 2005 (MIMA Kuala Lumpur 2007) 24-37, 26.

⁹² Mat Taib (2005) 26.

⁹³ AG Hamid 'Malaysia's Commitments under International Conventions and the need for a harmonised Legal Regime Regulating Marine Pollution' [2007] 6 MLJ cxxiv, 10.

⁹⁴ Mak Joon Num, 'Malaysia's Naval and Strategic Priorities: Charting a New Course' in Ross Babbage and Sam Bateman *Maritime Change-Issues for Asia* (Allen & Unwin, North Sydney 1993) 117-125.

smuggling falls mainly under the jurisdiction of the Customs Department, whereas crimes involving firearms come under the police's jurisdiction.⁹⁵ In such cases, the conflict of jurisdiction may be identified as the main cause of the inefficacy of law and enforcement action. Taib highlights that, of the 37 sea robberies against ships in 2004 in the Straits, 73 per cent of the incidents involved the use of firearms.⁹⁶ He is of the view that 'the low probability of being caught has mitigated the deterrence value of the death penalty for illegal possession of firearms.'⁹⁷ To this extent, his proposition is acceptable since most of the acts of piracy and armed robbery against ships in the Straits are committed by opportunist pirates, and the inefficiency of enforcement may be one of the reasons for their fearlessness and courage in repeating this crime.⁹⁸ Kasmin also shares this view when he highlights that 'inefficient Decision Making Unit (DMU) [or agency] are unable to eradicate illegal activities in their maritime Area of Responsibility (AOR) primarily due to their [in]ability to carry out sufficient sea patrol.'⁹⁹

Certainly, the main challenge for a state at national level is to develop and sustain law enforcement capability. To this end, Young suggests that state policy should have two main driving forces: 'developing policing and operational maritime security capacities, and structural development, i.e. economic and political development.' The state needs to increase its operational capacities such as having a sufficient quantity and quality of vessels to be able to patrol the sea and to quickly respond to the security

⁹⁵ Mat Taib Yasin, *Threats to Malaysia From the Western Maritime Frontier: Issues and Option* (MIMA, Kuala Lumpur 2006) 15.

⁹⁶ *ibid.*

⁹⁷ Mat Taib Yasin, 'Security of Sea Lanes of Communication (SLOCs) through the Straits of Malacca: The need to Secure the Northern Approaches' in *The Security of Sea Lanes of Communication in the Indian Ocean Region* (MIMA, Kuala Lumpur 2007) 225-241, 234.

⁹⁸ Cross-refer to Chapter 4 (para 4.3.4)

⁹⁹ Kasmin (2009) 216. (Emphasis added).

threat of piracy and sea robbery. Thus, it appears that, in the Malaysian context, having various agencies dealing with the same issue has caused an uneconomical distribution of the resources and an inadequate number of experienced personnel, which has led to inefficiency of the management and in the implementation of the law. Kasmin suggests ‘two important aspects that form foundation of efficient command, control and coordination of the maritime enforcement system.’¹⁰⁰ First is an ‘integrated system’ to avoid ‘duplication of tasks, efforts, logistic support and base facilities.’ Second is ‘the role of the National Maritime Enforcement and Coordination Centre (NMECC) to be upgraded.’ Consequently, in order to resolve the overlapping of maritime jurisdictions and operations and to effectively police Malaysian waters, the Malaysian Maritime Enforcement Agency (MMEA) was finally established on February 15, 2005, about a year after the MMEA Act came into force. The establishment of MMEA as the Malaysian coast guard is expected to integrate the enforcement works of various agencies to ensure greater protection of safety, security and sovereignty of the Malaysian Maritime Zone (MMZ) as well as to improve coordination between the existing agencies. The reason for this is mentioned in the *Hansard* as the change from a ‘sectoral’ approach to maritime enforcement to a ‘singular dedicated agency’ for the enforcement of all Federal laws relevant to the sea.¹⁰¹

¹⁰⁰ Kasmin (2009) 223.

¹⁰¹ Records of the Malaysian Parliament’s Lower House of Representatives: Official Statement of ‘Dewan Rakyat’ 11th Parliament, 1st term of 1st meeting No.17, Monday June 14 2004 : See Irwin UJ Ooi, ‘The Malaysian Maritime Enforcement Agency Act 2004: Malaysia’s Legal Response to the threat of maritime terrorism’ (2007) 21 A&NZ Mar LJ, 70-91.

6.3.2 CONTROVERSY OVER THE CREATION OF MMEA

6.3.2.1 ADDITION TO THE EXISTING MARITIME AGENCIES

Although the main reason for the formation of the MMEA is to solve the problem of overlapping duties and jurisdictions by creating a single responsible agency, there is an argument that MMEA is an organisation that has been established as an addition to the existing maritime agencies and not as a replacement for them.¹⁰² This argument is made by referring to section 7(3) which states the following:

‘...an officer of the Agency shall have, for the purpose of this Act, all the powers which any relevant agency may exercise under any federal law which is applicable in the Malaysian Maritime Zone.’¹⁰³

Moreover, MMEA appears to have wide-ranging powers under section 7(2) of the Act such as ‘to receive and consider any report of the commission of an offence,’¹⁰⁴ and ‘to stop, enter, board, inspect and search any place, structure, vessel or aircraft’¹⁰⁵; these are similar to the powers conferred on the Marine Police in order to fight maritime crime.¹⁰⁶ It might be assumed that the duties and powers granted in section 7 are not granted solely to the MMEA officers, and those other existing authorities such as RMN, Marine Police, and Royal Malaysians Customs also share the same responsibilities.¹⁰⁷

¹⁰² Irwin UJ Ooi, ‘The Malaysian Maritime Enforcement Agency Act 2004: Malaysia’s Legal Response to the threat of maritime terrorism’ (2007) 21 A&NZ Mar LJ, 70-91, 86.

¹⁰³ Emphasize added.

¹⁰⁴ s7(2) (a).

¹⁰⁵ s7(2) (b).

¹⁰⁶ Irwin UJ Ooi, ‘The Malaysian Maritime Enforcement Agency Act 2004: Malaysia’s Legal Response to the threat of maritime terrorism’ (2007) 21 A&NZ Mar LJ, 70-91, 86.

¹⁰⁷ MMEA a appears to have wide-ranging powers under section 7 of the Act such as ‘to receive and consider any report of the commission’ and ‘to stop, enter, board, inspect and search any place, structure, vessel or aircraft’; these are similar to the powers conferred on the Marine Police in order to fight maritime crime.

6.3.2.2 LACK OF EXPERIENCE AND FAILURE TO BE COST-EFFECTIVE

The fact that most of the officials in the MMEA are recruited from the experienced personnel in the RMN and that their assets mostly belong to the RMN¹⁰⁸ has also caused unease in other government bodies, particularly the Marine Police, which was established in 1947 and is governed under the Police Act. This is probably because, previously, although Malaysia has various agencies dealing with maritime affairs, most of the successful arrests of maritime criminals such as sea robbers and illegal fishermen mainly resulted from the efforts and enforcement strategies of the Marine Police.¹⁰⁹ Ah See told *The Star* that he was sceptical about the need to establish the MMEA since its legal framework and main duties are similar to those of the Marine Police.¹¹⁰ He added that the newly-formed agency (MMEA) requires extra expenditure as compared to the existing Marine Police who operate on a very low budget since their officers and logistics are inter-transferable within the force and are supported by all the departments in the police force.¹¹¹ Moreover, they carry out the same kinds of duties as the land-based police, such as gathering intelligence, investigation, arrest of criminals and prosecution.

¹⁰⁸ 'Maritime agency to take over as sole enforcement unit soon.' (*Bernama*, June 9, 2011) at <http://competition-regulation-malaysia.blogspot.com/2011/06/maritime-agency-to-take-over-as-sole.html> accessed on 12 April 2012.

¹⁰⁹ Khoo Ah See 'Maintain Status Quo of Marine Police' (*The Star Online* June 19, 2011) at <http://thestar.com.my/news/story.asp?file=/2011/6/19/focus/892495> accessed on 20 April 2012.

¹¹⁰ *ibid.*

¹¹¹ *ibid.*

6.3.2.3 PROBLEMS OF RECRUITMENT AND COOPERATION OF THE EXISTING MARITIME BODIES

The Marine Operations Force Commander, Isa Munir, told *The Sun* newspaper that “although the marine police have agreed to give MMEA 60 (20-metre length or more) patrol boats, it is unlawful for the personnel to be absorbed automatically without their consent.”¹¹² This statement was a response to the news in *Bernama* a day earlier when it was reported that ‘a total of 1,420 staff and officers of the Royal Malaysian Customs and Marine Operation Force will be absorbed into the MMEA beginning August.’¹¹³ The Marine Police’s views on their role and duty are also illustrated by Hamzah, Sabah Commissioner of Police, who said that not all the patrol boats of the Marine Police should be handed over to MMEA since they are still required by the police to maintain security, especially in cases involving crimes such as fights, murder or theft that often occur on islands off the coast of the country such as in Sabah and Labuan.¹¹⁴

¹¹² ‘Marine Police to be given option to join MMEA’ (*The Sun*, Petaling Jaya April 22, 2011) at <http://www.thesundaily.my/news/local/marine-police-be-given-option-join-mmea> accessed on 20 April 2012.

¹¹³ *ibid.*

¹¹⁴ Jainudin Djimin ‘Not all patrol boats to be handed over to MMEA-SCP Hamza’ *New Sabah Times*, at <http://www.newsabahtimes.com.my/nstweb/print/50395> accessed on 12 April 2012.

6.3.3 THE CHALLENGE OF MMEA AS MALAYSIA'S SOLE MARITIME ENFORCEMENT AGENCY

6.3.3.1 OVERCOMING THE OVERLAPPING OF DUTIES ISSUE.

The establishment of MMEA as the Malaysian Coast Guard, which was announced in 2002 by the Malaysian Federal Government, was the result of the government's intention to have a single, efficient body that can integrate enforcement work and improve coordination between the existing agencies to ensure that good ocean governance in the Malaysian Maritime Zone (MMZ) is achieved. Ismail Omar, Deputy Inspector-General of Police, told a local newspaper that "it was determined that MMEA is the sole body for enforcement, compliance, checks and revention i Malaysian waters under the country's maritime laws. MMEA's operational domain starts from the coastline up to 200 nautical miles. However, the agency will not responsible for security at harbours and jetties."¹¹⁵ He added that the role of police in maintaining national security and public order and the revention of crime..¹¹⁶ However, MMZ, as defined under the 2004 MMEA Act, includes 'the internal waters, territorial sea, continental shelf, Exclusive Economic Zone and the Malaysian fisheries' waters, and includes the air space over the Zone.'¹¹⁷ It is clear from the 2004 Act that there is no intention to segregate or distribute powers between the existing agencies and the MMEA; rather it has been formed as the sole enforcement agency in Malaysia. This was confirmed by the Senior Assistant Commissioner and current Commander of the Marine Police, Isa Munir, in an interview with *The Malay Mail*.¹¹⁸ However, the clear division between enforcement and duty areas, as argued by Isa, is

¹¹⁵ Marhalim Abas, 'Q&A: Moving to Different Waters'(*The Malay Mail*, Friday 9 Sep 2011)

¹¹⁶ Ibid.

¹¹⁷ Section 2 Interpretation of the 2004 MMEA Act.

¹¹⁸ Marhalim Abas, 'Q&A: Moving to Different Waters'(*The Malay Mail*, Friday 9 Sep 2011) 6.

still needed, since their service in securing national and public order and the prevention of crime remains relevant.¹¹⁹ Although the MMEA powers, as defined in the 2004 MMEA Act, include jurisdiction over internal waters, the current Marine Police powers as stated by Isa are identified as ranging from jurisdiction over the internal waters, such as rivers, lakes, dams, islands, harbours and jetties, to the territorial waters of Malaysia.¹²⁰ Although the duties of the Marine Police and MMEA still seem to be overlapping, Isa emphasises that they ‘will not be involved in any enforcement duties’, especially in the area where MMEA has been positioned. Moreover, they will always cooperate with MMEA when necessary.¹²¹ Thus, it may be assumed that, despite the dissatisfaction expressed by some officials from several more established enforcement bodies as compared to this newly-formed MMEA, the initial intention of the Cabinet in establishing MMEA as an integrated enforcement agency or coast guard under the Prime Minister’s Department may be considered a success. This runs parallel to Bateman’s opinion that, nowadays, state coast guards have a wider function.¹²² They have been used as an instrument of foreign policy which may operate beyond the national boundaries, particularly in regional cooperative action such as MSP.

¹¹⁹ *ibid.*

¹²⁰ *ibid.*

¹²¹ *ibid.*

¹²² Bateman, ‘Multiples Uses, Maritime Law Enforcement and the Role of Ports and Coast Guards’ in *The Security of Sea Lanes of Communication in the Indian Ocean Region* (MIMA, Kuala Lumpur 2007) 274-275.

6.3.3.2 FUNCTIONS OF MMEA AND ITS COMPATIBILITY WITH THE EXISTING INTERNATIONAL LAW OF THE SEA

The functions and powers of the MMEA are listed in Section 6 of the 2004 MMEA

Act as follows:

- (1) The functions of the Agency shall be-
 - (a) To enforce law and order under any federal law;
 - (b) To perform maritime search and rescue;
 - (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 as 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.

- (2) Subject to the provisions of this Act, the functions of the Agency shall be performed within the Malaysia Maritime Zone.

- (3) Notwithstanding subsection (2), the Agency shall be responsible-
 - (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, on the high seas.¹²³

Although subsection 2 of section 6 limits the functions of the MMEA to the MMZ, subsection 3 extends the jurisdiction of MMEA to the high seas provided that any actions are taken only for the purposes of conducting maritime search and rescue, controlling and preventing maritime pollution, and suppressing piracy and illicit trafficking of narcotic drugs. It is noteworthy that international law considered the high seas as areas in which every state has the right to enjoy the freedom of navigation and overflight and no state could claim or purport to subject any part of the high seas

¹²³ Emphasis added.

to its sovereignty.¹²⁴ It is argued by Ooi that this provision seems to give MMEA extra-territorial jurisdiction over the high seas.¹²⁵ However, this is not the case, since Malaysia still has the right to exercise its jurisdiction over the ships flying its flag, as provided in Article 94 of the 1982 Convention. Subsection 2(b) states that:

- ‘(2) In particular every State shall:
- (b) Assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.’

This includes the jurisdiction to inquire into ‘every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to ships or installations of another State or to the marine environment...’ The 1982 Convention also conferred the power to institute proceedings subsequent to certain acts, such as causing collision of ships, only against the authorities of flag states or the state of which such a person is a national.¹²⁶ Other states have no such right because these incidents occur on the high seas beyond any state’s jurisdiction.¹²⁷ Article 98 of the 1982 Convention also imposes a duty on all states, especially the coastal states, to render assistance to any persons found in danger on the high seas and to have a body capable of carrying out maritime search and rescue (SAR). It might be said that Section 7(3)(a) of the 2004 MMEA Act has fulfilled this requirement and thus does not contravene the freedom of the high seas as guaranteed in the 1982 Convention.¹²⁸ A similar right is also conferred by Malaysia’s Extra-Territorial Offences Act 1976 (ETOA 1976) which

¹²⁴ Art 87 and Art 89 of the 1982 Convention.

¹²⁵ Irwin UJ OOi (2007) 85.

¹²⁶ Refer to Art 97(1) and (2) of the 1982 Convention.

¹²⁷ Art 97(3) of the 1982 Convention.

¹²⁸ Art 87-Art 89 of the 1982 Convention.

gives extra-territorial power to Malaysia to enforce its law, not only on ships registered in Malaysia but also in regard to any offence committed by one of its citizens or permanent residents on board any ship or aircraft on or over the high seas or in any place beyond the limits of Malaysia.¹²⁹ As for section 6(3) (c) on the responsibility of MMEA to prevent and suppress piracy on the high seas, there is clearly no such issue of claiming jurisdiction over the high seas. This is because piracy, as has been discussed in the earlier chapters, is a crime against humankind over which universal jurisdiction has been conferred.¹³⁰ Thus, Malaysia, in response to frequent incidents of piracy worldwide, is moving positively by providing an effective domestic law enforcement agency, namely the MMEA, which is in keeping with the spirit of international law to ensure safety and security at sea.

The MMEA also gained the right to exercise hot pursuit as prescribed in Article 111 of the 1982 Convention under Section 7 of the 2004 Act. If an MMEA officer discovers or believes that an offence has been committed at sea, he/she has the right to arrest the offender.¹³¹ An example of the exercising of this right is the MMEA's and RMN's successful rescue of the MT *Nautica Johor Bahru* on 28 October 2011.¹³² This vessel had been hijacked sixty nautical miles east of Tanjung Gelang Kuantan at about 9.20 a.m. and was found by an MMEA helicopter at about 3.20 p.m., 85 nautical miles east of Pekan, Kuantan, with the new name of MT *Icajo*. It was approaching the EEZ

¹²⁹ s2 (1) of Extra-Territorial Offences Act 1976.

¹³⁰ For a detailed discussion, cross-refer to Chapters 3 and 4; also Art 100 of the 1982 Convention which imposed a duty on every state to cooperate to the fullest extent possible in the repression of piracy on the high seas or in any other place outside the jurisdiction of any state.

¹³¹ s7 (2)(h) of the 2004 MMEA.

¹³² Kuantan, 29 October 2011 'Kejayaan APMM dan TLDM menyelamatkan MT NAUTICA JOHOR BAHRU' at http://www.mmea.gov.my/galerimm/images/stories/HQ/siaran_media/Rampasan%20kapal%20011.pdf accessed on 20 April 2012.

of Indonesia, moving towards the Anambas islands, and refused to stop even though it had been requested to do several times by the RMN vessel, *KD Lekiu*. The MMEA called BAKORKAMLA to report the incident and asked permission for the right of hot pursuit in Indonesian waters. Permission was granted within a short time. The hijacked ship was finally recovered but the pirates or hijackers were able to flee to the Anambas Islands in a small boat.¹³³ It is undeniable that the successful exercising of hot pursuit in this incident was due to the cooperation of both states in order to suppress piracy and criminal acts in the Straits and South China Sea and their mutual respect for the right provided under the 1982 Convention. Ooi believes that the 2004 MMEA Act is not exhaustive as it needs to be read together with other domestic statutes such as Emergency (Essential Powers) Ordinance, No.7, 1969, the Continental Shelf Act 1966, the Fisheries Act 1985, the Exclusive Economic Zone Act 1984, the Police Act 1967, the Customs Act 1967, the Criminal Procedure Code and the Mutual Assistance in Criminal Matters Act 2002.¹³⁴ Thus, when construing the wording of the Act, reference should also be made to these statutes according to their relevancy.

The express power given to MMEA ‘to investigate any offence which it has reason to believe is being committed, or is about to be committed or has been committed’¹³⁵ and ‘to arrest any person whom it has reason to believe has committed an offence’¹³⁶ confers an advantage on MMEA officers in conducting their enforcement functions without having to determine which federal law is applicable to the maritime zone of Malaysia. However, similar to the view expressed by Ooi, since the Act also made

¹³³ *ibid.*

¹³⁴ Irwin UJ Ooi, ‘The Malaysian Maritime Enforcement Agency Act 2004: Malaysia’s Legal Response to the threat of maritime terrorism’ (2007) 21 A&NZ Mar LJ, 70-91.

¹³⁵ s7(2)(d).

¹³⁶ s7(2)(h).

reference to the Criminal Procedure Code (CPC) in appointing the officers of the MMEA, it is assumed that all the MMEA powers of investigation and arrest must be exercised in accordance with the rules provided in the CPC.

As far as operational assets are concerned, MMEA initially operated with at least six helicopters and fixed-wing aircraft and about eighty small and medium-sized vessels which were drawn from various agencies such as the Navy, Marine Police and the Fisheries and Customs Departments.¹³⁷ It was also reported that Japan had donated a training vessel to the MMEA and the Japanese Coast Guard had at the same time organised a joint training exercise with six states in Southeast Asia including Malaysia.¹³⁸ At present, MMEA has one hundred and thirty vessels and eight helicopters which, according to Mohd Amdan Kurish, the MMEA Director-General, are still insufficient considering the need to police 614,000 sq km of Malaysian waters and the run-down condition of some of these assets.¹³⁹ The domestic enforcement authority's lack of assets has been argued to be one of the obstacles to suppressing piracy in the Straits. However, for a newly-established coastal guard such as the MMEA, the shortcomings can be overcome gradually and the successful cooperation between MMEA and other national authorities of the littoral states has proved their capability to curb the upsurge of piracy and armed robbery incidents in the Straits.

¹³⁷ Bateman 'Multiple Uses, Maritime Law Enforcement and the Role of Ports and Coast Guards' in *The Security of Sea Lanes of Communication in the Indian Ocean Region* (MIMA, Kuala Lumpur 2007) 274-275.

¹³⁸ Andrew S. Erickson, 'Maritime Security Cooperation in the South China Sea Region' in Shicun Wu, Keyuan Zou (eds.) *Maritime Security Cooperation in the South China Sea Region: Regional Implications and International Cooperation* (Ashgate Publishing Ltd, Surrey 2009) 51-80, 63.

¹³⁹ --'Maritime agency to take over as sole enforcement unit soon.' (*Bernama*, June 9, 2011) At <http://competition-regulation-malaysia.blogspot.com/2011/06/maritime-agency-to-take-over-as-sole.html> accessed on 12 April 2012.

While, in terms of prevention, this cooperative mechanism might be regarded as a successful effort to suppress piracy and armed robbery against ships in the Straits, in terms of deterrence it might lead to questions about the adequacy and efficacy of the law in regard to enforcement and prosecution. This is identified as one of the weaknesses of the existing international law on piracy as laid down in the 1982 Convention and the international customary law on universal jurisdiction over piracy.¹⁴⁰ It is equally important to harmonise and update national laws according to the spirit and intention of the International Convention. Yasin contends that, unless a state has competent substantive and procedural laws ‘that enable the enforcement authorities to put up a strong legal case, and the judiciary to try and pass the appropriate sentences’¹⁴¹, all the successful cooperative action in fighting and arresting the criminals or pirates at sea will be meaningless. The absence of a law providing for punishable offences means that the arrested criminal may be set free and emboldened to repeat the same crime again and again.¹⁴² Therefore, it is submitted that there is an urgent need to strengthen national law so that it is competent to try and punish the maritime criminals, especially those engaging in piracy.

¹⁴⁰ Cross-refer to Chapter 3 (para 3.3).

¹⁴¹ Yasin, MT, ‘Security of Sea lanes of Communication (SLOCS) through the Straits of Malacca: The need to secure the Northern approaches’ in D Rumley, S Chaturvedi and MT Yasin *The Security of Sea Lanes of Communication in the Indian Ocean region* (MIMA, Kuala Lumpur 2007) 225.

¹⁴² Juita (1998) 12-13.

6.4 PIRACY AND ARMED ROBBERY AGAINST SHIPS UNDER THE MALAYSIAN LAW

It is interesting to note that cases of piracy have existed in Malaya (Malaysia) since the colonial period.¹⁴³ In the 1840 case of *R v Tunku Mohamed Saad & Ors*,¹⁴⁴ the issue before the court was whether the capture of Kedah was an act of piracy or a justifiable act of national reprisal against a national enemy? This was because the accused was a prince of Kedah (currently one of the states of Malaysia); thus, his act was justified since he was an independent sovereign prince and the act was one of retaliation with the sole object of regaining the Kingdom of Quedah (Kedah) from the Siamese. The court found him not guilty and argued that ‘such captures could not by the Law of Nations be deemed piratical.’¹⁴⁵ It is noteworthy that such a case, should it occur nowadays, would not be considered piracy because the action would have been taken for political rather than for private reasons.¹⁴⁶ Even though Tunku Mohamad Saad’s case was heard in the Straits Settlement of Penang, which was part of Kedah, the case was heard before a British judge and jury and the law applicable in such a case was the British law and not the Malay or Malaysian law.¹⁴⁷

As far as the Straits are concerned, most of the incidents of attacks against ships have taken place either within the territorial sea or internal waters of the littoral states, including in ports and harbours. In such cases, the criminals are legally classified as robbers and will be charged according to Malaysian domestic law, particularly the

¹⁴³ Cross-refer to Chapter 4 (para 4.3.1.1).

¹⁴⁴ Straits Settlements, Penang (1840) 2Ky.Cr.18 in S JayaKumar, *Public International Law Cases from Malaysia and Singapore* (Singapore University Press, Singapore 1974) 248.

¹⁴⁵ Judge held in *R v Tunku Mohamed Saad & Ors*,

¹⁴⁶ Cross-refer to Chapter 3 on development of the international law of piracy.

¹⁴⁷ Cross-refer to sections 6.1.1 and 6.1.2 for discussion on Malaysian Legal History.

Penal Code and Firearms (Increased Penalty) Act 1960. Nevertheless, should Malaysia wish to prosecute pirates whose crimes were committed on the high seas, the similar law might still be applied depending on the nature of the criminal act, and without the need for a specific law on maritime piracy.¹⁴⁸ Generally, the laws that deal with the maritime safety and security of the Malaysian Maritime Zone include:

- The Malaysia Maritime Enforcement Agency Act 2004
- Police Act 1967
- Penal Code
- Criminal Procedure Act
- Merchant Shipping Act (Oil Pollution) 1994
- Merchant Shipping Ordinance Act 1952
- Fisheries Act 1985 (Amendment 1993)
- Exclusive Economic Zone Act 1984
- Petroleum Mining Act 1966
- Environment Quality Act 1986
- Continental Shelf Act 1966
- Customs Act 1967
- Immigration Act 1959 (Amendment 1963)
- Petroleum (Safety Measures) Act 1984
- Telecommunication Act
- Dangerous Act 1952
- Explosive Act 1957
- Protection Places Ordinance Act 1959
- Internal Security Act 1960 (it has currently been repealed and replaced by a new bill)
- Firearms Act 1960

As a state party to the 1982 Convention, Malaysia is always willing to cooperate in fighting piracy regardless of whether it takes place on the high seas or in its territorial waters. This corresponds to the international law provision that requires states to cooperate to the fullest possible extent in suppressing piracy.¹⁴⁹ Malaysia's devotion and commitment to combating such crimes can be seen in several steps and actions undertaken at all levels, be they national, regional or international. As a littoral state of

¹⁴⁸ See discussion on the incident of MT *Bunga Laurel* in Chapter 6 (para 6.4.4).

¹⁴⁹ Art 100 of the 1982 Convention.

one of the busiest straits in the world, Malaysia's responsibility to maintain and ensure safety and security of navigation in the Straits of Malacca as straits used for international navigation is apparent and crucial. Following is a further discussion on the domestic law applicable for prosecuting piracy and sea robbers in Malaysia.

6.4.1 THE COURT OF JUDICATURE ACT 1964 (CJA)

An act of robbery at sea is often called by local people an act of 'piracy,' before the law it is still regarded as 'robbery' or 'armed robbery' against ships. Thus, certainly the court in Malaysia has jurisdiction to try such perpetrators. The problem may arise, if similar acts occur beyond territorial sea, especially to states which lack domestic law that criminalise piracy. Nevertheless, in Malaysia, despite the non-existence of a specific law on piracy, the High Court has been granted criminal jurisdiction to try any person who has committed piracy on the high seas under the 1964 Court of Judicature Act. The CJA was enacted before the adoption of the 1982 Convention but six years after the 1958 Geneva Convention. Paragraph 1 of **Section 22** of the Court of Judicature Act 1964 provides that:¹⁵⁰

- (1) The High Court shall have jurisdiction to try--
 - (a) all offences committed--
 - i. within its local jurisdiction;
 - ii. on the high seas on board any ship or on any aircraft registered in Malaysia;
 - iii. by any citizen or any permanent resident on the high seas on board any ship or on any aircraft;
 - iv. by any person on the high seas where the offence is piracy by the law of nations; and (*emphasis added*)

¹⁵⁰ s22 of Court of Judicature Act 1964.

This provision provides a means of prosecuting the crime of piracy committed by any person on the high seas and prevents the criminal from escaping justice merely because of the lack of jurisdiction.

6.4.2 THE MALAYSIAN PENAL CODE

Legally speaking, most cases reported in Southeast Asian waters including the Straits of Malacca are not piracy under international law but merely armed robbery against ships.¹⁵¹ Piracy under international law requires such an offence to have occurred on the high seas or any other place outside jurisdiction of any state. In cases of piracy where the perpetrator is caught by the Malaysian authorities, the punishment would be similar to other land-based crimes of armed robbery, gang robbery or theft as prescribed in the Malaysian Penal Code. Section 2 of the Penal Code envisaged generally that any crimes committed in any part of Malaysia's jurisdictional area, whether on land or water, might be made liable under relevant provisions in the Code.¹⁵² The words 'within Malaysia' can have a wider meaning which might include similar offences at sea.¹⁵³ Thus, apart from the legal conflict of meaning between piracy under international law and armed robbery against ships, the two offences bear a very great resemblance in terms of the nature of the acts. Boarding another vessel illegally, taking possession of the goods of persons and ships, and threatening or causing hurt to the crews are among the elements shared by piracy and armed robbery.

¹⁵¹ Interview with Captain Maritime Mamu Said Alee, Director of Maritime Policy and International Relation, MMEA (Kuala Lumpur 23rd February 2009).

¹⁵² Section 2 of the Malaysian Penal Code reads as follows: 'Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within Malaysia.'

¹⁵³ Norfadhillah Mohamad Ali and Hendun Abd Rahman Shah, 'Piratical Activities in the Malacca Strait: The UNCLOS, Malaysian Legal Framework and Islamic Point of View' [2006] 5 MLJA 140,142.

Thus, they will incur similar punishments under the Malaysian Penal Code which would be determined according to the facts of each individual case. Section 390 of the Penal Code states that:

- (1) In all robbery there is either theft or extortion.
- (2) Theft is 'robbery' if, in order to commit theft or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death, or hurt, or wrongful restraint, or fear of instant death, or of instant hurt or of instant wrongful restraint.
- (3) Extortion is 'robbery' if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, of instant hurt or of instant wrongful restraint to that person or to put in fear then and there to deliver up the thing extorted.

The offence of robbery would normally involve the act of theft or extortion or both. It is noteworthy that, from 2005 to 2009, the number of attacks and attempted attacks in the Straits and all the littoral states reported by IMB has seen a sharp decrease from 101 reported cases in 2005 to 76 in 2006, 62 in 2007, 46 in 2008 and just 42 in 2009.¹⁵⁴ In 2009 alone, all of the actual attacks reported were committed when the ship was berthed, at anchor or steaming.¹⁵⁵ Interestingly, on many occasions the offences committed in port or while ships were berthed or at anchor would involve the theft of moveable things from persons or ships. Such an offence is covered under Sections 378 and 379 of the Penal Code.¹⁵⁶ Section 378 defines theft as taking another's moveable property intentionally without consent, while section 379 provides the punishment term of the offence which may carry up to three years imprisonment

¹⁵⁴ IMB Annual Piracy Report 2009, 5.

¹⁵⁵ *ibid.* 6.

¹⁵⁶ s378. Whoever, intending to take dishonestly any moveable property out of possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft.

s379. Whoever commits theft shall be punished with imprisonment for a term which may be extended to three years or with a fine, or with both, and for a second or subsequent offence, shall be liable to imprisonment or to a fine or whipping or any two of such punishments.

or a fine or both. The Legal Officer in the Royal Malaysian Navy, Azhar, said that it is unfair to blame the littoral states for failing to control the increasing number of reported incidents of piracy if the report used by IMB Piracy Reporting Centre includes the crime of petty theft onboard a ship in port.¹⁵⁷ Piracy, as understood by the layman, resembles a cruel act of violence or depredation on the high seas, and is recognised by international law as an offence against mankind. To include petty theft as an act of piracy would seriously impact the state's reputation and increase insurance premiums. In other words, using the term 'piracy' in all cases would have a severe effect on the good name of the state and the shipping industry. Attacks or robbery against ships at sea carried out with weapons normally involve the carrying of dangerous items such as guns, rifles, machine-guns, knives, or even automatic weapons which might make the offender liable under Sections 390 to 402 of the Penal Code. In Southeast Asia, the criminal tendency to violence is not as great as that found in the seas off Africa. Asian pirates normally use weapons to cause fear and to threaten the ships' crews. However, they sometimes become violent if resistance by the crews is apparent.

¹⁵⁷ Interview with Commander Azhar, Royal Malaysian Navy, 2006.

6.4.3 PROSECUTING ARMED ROBBERS AGAINST SHIPS UNDER MALAYSIAN LAW: CASE EXAMPLES

6.4.3.1 MT *NEPLINE DELIMA* INCIDENT:

A celebrated case that shows the success of Malaysian law, this time in prosecuting ten¹⁵⁸ Indonesian pirates who had committed armed robbery against a Malaysian tanker laden with 6,300 tonnes of diesel, was the incident of MT *Nepline Delima*. The incident occurred at 4 a.m., on 14 June 2005 in the Straits, approximately 30 nautical miles south of the Langkawi Islands, Malaysia. The ship was en route to Myanmar from Port Klang¹⁵⁹ when the pirates, armed with weapons¹⁶⁰, managed to board the tanker, taking control of the ship before disabling the tanker's distress signal.¹⁶¹ They forced the master of the ship to call all the crew members who were then bound and blindfolded before being locked in the cabin. They also caused a head injury to the master, and hit and slapped some crew members who resisted. Meanwhile, unbeknownst to the pirates, one of the crew members was able to escape the scene, jumping off the ship and taking the pirates' speed boat to call for help. When they realised that one crewman had escaped with their boat, they tried to manoeuvre the ship towards international waters. However, the size of the tanker prevented it from

¹⁵⁸ IMB-PRC Annual Report 2005; Cf Lourdes Charles, 'Twelve pirates and two crewmen suspected of being accomplices of the mastermind behind the hijacking of MT *Nepline Delima* were arrested' The Star Online (Kuala Lumpur, 22 June 2005) at <http://thestar.com.my/news/story.asp?file=/2005/6/22/nation/11285916&sec=nation> accessed on 12 April 2011.

¹⁵⁹ *ibid.*

¹⁶⁰ It was not specified in the IMB report what types of weapon were used. It was mentioned that the pirates were wielding *parangs*, i.e. a kind of long, large knife. See Peter Gwin 'The Straits of Malacca Dark Passage' in *National Geographic* October 2007, 127-149,138.

¹⁶¹ Peter Gwin 'The Straits of Malacca Dark Passage' in *National Geographic* October 2007, 127-149,138.

fleeing quickly even at top speed.¹⁶² Fortunately, the crew managed to contact the Malaysian Marine Police on Langkawi Island who then rescued the ship with five police patrol boats including a PZ15 gunboat.¹⁶³ All ten pirates were then arrested together with two crew members of the tanker who were accused of complicity with the piracy syndicates.¹⁶⁴ Gwin, a journalist with the *National Geographic* magazine who had interviewed one of the pirates from the MT *Nepline Delima*, Ariffin (also known as ‘John Palembang’), also confirmed the involvement of the co-conspirators among the crewmen who had been sending text messages from the ship revealing the ship’s position, course and speed.¹⁶⁵ It appears that such assistance from the crew of the tanker itself had made the plan to rob the tanker easier. The pirates or, legally speaking, the armed robbers against the ship were charged under Sections 395¹⁶⁶ and 397¹⁶⁷ of the Malaysian Penal Code; they may be liable for terms of imprisonment for up to twenty years and whipping. Maznah Abdul Aziz, the judge of the Session Court in Kedah, sentenced this group of pirates, or robbers, to seven years’ imprisonment.¹⁶⁸

¹⁶² ibid.

¹⁶³ Charles, Lourdes ‘MT *Nepline Delima* were arrested’ *The Star Online* (Kuala Lumpur, 22 June 2000) <http://thestar.com.my/news/story.asp?file=/2005/6/22/nation/11285916&sec=nation> accessed on 12 April 2011.

¹⁶⁴ Fairplay Publications Limited, 11.

¹⁶⁵ Peter Gwin ‘The Straits of Malacca Dark Passage’ in *National Geographic* October 2007, 127-149.

¹⁶⁶ s395 of the Malaysian Penal Code is punishment for gang robbery

¹⁶⁷ s397 of the Malaysian Penal Code provides punishment for robbery when armed or with attempts to cause death or grievous hurt.

¹⁶⁸ -- ‘Seven years Jail for Nine Pirates’ *Bernama* (Kuala Lumpur, MMEA, 19 February 2006) at <<http://www.accessmylibrary.com/article-1G1-142667534/seven-years-jail-nine.html>> accessed on 12 April 2011.

6.4.3.2 MT *SKY JUPITER*

On 19 September 2011, at about 12.49 a.m., a merchant ship, MT *Sky Jupiter*, was attacked by a group of Indonesian pirates who were attempted to rob that ship in the southern part of the Straits. However, the Malaysian authorities were able to arrest those pirates and they have been charged with gang robbery under s395 of the Penal Code of Malaysia. All of them pleaded guilty. The court in Johor sentenced them to ten years' imprisonment and four strokes of the cane after being satisfied by the prosecutor's argument on the seriousness of the crime.¹⁶⁹ The criminals, however, appealed to mitigate the sentence. Taking into account that they 'had threatened the country's sovereignty by encroaching into the country's waters to rob'¹⁷⁰ and the large amount of weapons seized during the incident, Justice Abdul Halim Aman, a session court judge, then increased their sentences from ten to fifteen years' imprisonment and five strokes.

6.4.3.2 MT *FRONT QUEEN*

This incident took place in the southern part of the Straits near Kota Tinggi, Johor, on 9 March 2011. All the Indonesian pirates were arrested by the Malaysian Maritime Enforcement Agency (MMEA) shortly after they robbed the ship MT *Front Queen*, a Majuro Island-registered ship.¹⁷¹ The MMEA personnel who were patrolling that area during the incident had acted promptly to rescue the ship after they heard the ship's

¹⁶⁹ --'Malaysia Court jails six Indonesian Pirates' *Agence France-Presse* (1 October 2011) <http://globalnation.inquirer.net/14301/malaysian-court-jails-six-indonesian-pirates>> accessed on 12 March 2012.

¹⁷⁰ --'Six Indonesian Pirates get longer jail term' *The Star Online* (3 February 2012) :<<http://thestar.com.my/news/story.asp?file=/2012/2/3/courts/10667185&sec=courts>> accessed on 22 March 2012.

¹⁷¹ --'Marine agency arrests seven Indonesians for sea robbery,' (9 March 2011) <http://www.freemalaysiatoday.com/category/nation/2011/03/09/marine-agency-arrests-7-indonesians-for-sea-robbery>

emergency alarm at about 3.15 a.m. Zulkifli Abu Bakar, MMEA Southern Region Chief, told the reporter that when they came close to the ship, the seven Indonesian pirates aged between 28 and 33 years had tried to escape with the stolen items in their wooden boat. MMEA also found some weapons such as knives, axes and spanners, as well as masks.¹⁷²

6.4.4 CASE-STUDY: MALAYSIAN EXPERIENCE IN PROSECUTING PIRACY: *MT BUNGA LAUREL*

The pirate attack on the high seas off the Gulf of Aden against *MT Bunga Laurel* was a historic incident which resulted in Malaysia's first prosecution involving high seas piracy.¹⁷³ This is because most of the attacks that had been successfully prosecuted previously involved armed robbery at sea where the existing local law could be implemented easily. However, this case involved various parties, thus rendering the identification of the jurisdiction of the Malaysian court to try the case quite a complex matter. The vessel was in Japanese ownership and registered as a Panama-flagged ship but was chartered by the Malaysia International Shipping Corporation (MISC).¹⁷⁴ In addition, it was operated by 29 Malaysian crew members and 10 Filipinos. The ship, laden with chemical tanks, was attacked en route to Singapore.¹⁷⁵

¹⁷² ibid. Also see: 'Malaysia arrests Indonesian pirates after attacking tanker' *BNO News*, Kuala Lumpur March 10, 2011: <http://www.thaindian.com/newsportal/world/malaysia-arrests-indonesian-pirates-after-attacking-tanker_100512501.html> accessed on March, 22 2012.

¹⁷³ The case is also considered the first ever Asian court trial of Somali pirates who are currently contributing the largest number of piracy incidents reported to the IMB Piracy Reporting Centre; See: IMB PRC Annual Report 2011; MM Malek, 'Malaysia needs to overcome major legal hurdles to fight high-seas piracy' *The Star* (Kuala Lumpur, 7 Feb 2011); --'Malaysia holds seven Somali pirates after saving ship *The Jakarta Post* (Jakarta, 22 January 2011).

¹⁷⁴ IMB report; MT Laurel's Incident: The RMN Experience <<http://navy.mil.my/wpns2012/.../MT%20LAUREL%20INCIDENT.pdf>> accessed on 25 September 2012.

¹⁷⁵ ibid. cf there were 23 Filipino crew members on board the vessel: --'Court has jurisdiction to hear case of seven Somali pirates' *The New Straits Times* (Kuala Lumpur, 24 September 2012).



Picture 2: The Incident of MT Bunga Laurel¹⁷⁶

During the incident on 20 January 2011, the Royal Malaysian Navy (Paskal), which was escorting MISC vessels for their protection in this highly prone piracy-infested area, successfully prevented the attempt by seven Somali pirates to hijack the ship and kidnap the crew for ransom. Since Somalia is known as a weak state, the issue of who should take on the burden of apprehending the perpetrators and prosecuting acts of piracy arose.¹⁷⁷ As a weak state with no functioning central government, for almost

¹⁷⁶ K. Ashraf Kammed, Sharidan M. Ali, Shaun Ho Zuhri Azam Ahmad, *The Star* (22 January 2011).

¹⁷⁷ Cross-refer to Chapter 4; Somalia is regarded as a 'failed state' which since the 1990s has been under the management of a Transitional Federal Government (TFG): see DR Rothwell and T Stephens *The International Law of the Sea* (Hart Publishing, Oxford 2010) 432.

20 years Somalia has had no legal and judicial capability to suppress piracy; thus, the Malaysia Navy could not deliver the pirates to the Somali government for further action. Moreover, unlike the European Union and United States, which have adopted Memorandums of Understanding (MoU) with Kenya to receive and prosecute suspected pirates captured by the Kenyan authorities,¹⁷⁸ Malaysia decided to bring the pirates to trial in a Malaysian court. Malaysia believes that subsequent legal action must be undertaken so that the perpetrators are not simply released without punishment.

Does Malaysia have jurisdiction to try Somali pirates for acts committed outside Malaysian territorial sea?¹⁷⁹

Originally, the seven suspected Somali pirates were charged under Section 3 of the 1971 Firearms (Increased Penalty) Act and Section 34 of the Penal Code in February, 2011, before the Kuala Lumpur Magistrate's Court.¹⁸⁰ They were accused of discharging firearms at the Malaysian Navy during an attempted robbery of a Malaysian-operated vessel on the high seas in the Gulf of Aden (250 nautical miles off Oman). No pleas were recorded when the charge was read to them in this court. However, since such a charge carries a mandatory death penalty upon conviction, the case was transferred to the Kuala Lumpur High Court's criminal division on 14 April 2011. Moreover, as the case involved potential capital punishment, the Court ensured

¹⁷⁸ Kenya signed the MoU with the United States on January 16, 2009, with the European Union on March 6, 2009 and the United Kingdom on December 11, 2008: See James Thuo Gathii, 'Jurisdiction to Prosecute Non-National Pirates Captured by Third States under Kenyan and International Law' (2010) *Loy.L.A. Int'l & Comp. L. Rev.* (2010) *Loyola of Los Angeles International and Comparative Law Review*, 101-140, 127.

¹⁷⁹ Unreported Case, 24 Sept 2012, Kuala Lumpur, High Court, Criminal Division, Case Number: 44-126-07/2012; an informal interview with one of the prosecuting officers of Attorney General Chambers, Lailawati held on 24 September 2012.

¹⁸⁰ Case Number: 450-23-2011.

that the pirates were represented by local counsel in order to preserve their rights in due process of law.

Consequently, on 5 July 2012, *Messrs Chooi & Co.* filed notice of a motion on behalf of a 16-year-old Somali juvenile, Kasayah Dhalin Hussein,¹⁸¹ to quash the charge on the basis that the High Court of Malaysia had no jurisdiction to hear the case.¹⁸² The notice was supported by an affidavit affirmed in June, 2012, stating that the alleged offence occurred outside the territory of Malaysia. Moreover, the ship is not a Malaysian-flagged vessel. Following the application, the High Court heard the case on 24 September 2012.

The central argument revolved around the issue of whether the Malaysian High Court had jurisdiction to hear the case since it involved non-nationals attacking a non-Malaysian-flagged ship beyond the Malaysian maritime zone. It was the argument of the defence counsel, Edmund Bon, that the prosecutor's sanction to prosecute the foreign appellant was unfounded and blemished.¹⁸³ Had the attack taken place in the Straits of Malacca, then only the Malaysian court would have had jurisdiction. However, in the present case, the location of the attack, which was thousands of miles

¹⁸¹ Unreported Case, 24 Sept 2012, Kuala Lumpur, High Court, Criminal Division, Case Number: 44-126-07/2012.

¹⁸² The Malaysian Insider: 12 July 2012 'Accused Somali Pirate contests local court's jurisdiction.', see: <http://www.themalaysianinsider.com/litee/malaysia/article/accused-somali-pirate-contests-local-courts-jurisdiction/> accessed on September 2012.

¹⁸³ 'Applicant's counsel Edmund Bon said the A-G's sanction to prosecute dated 11 Feb 2011, under Section 127(A)(1)(d) of the Criminal Prosecution Code should be set aside as it was baseless and flawed. "The incident is not proven to be a threat against Malaysian security as there was no sign that the ship was headed to Malaysia or planning to attack the country.' Tariq, Qishin, 'Seven Somalians accused of piracy offered lesser alternative charge.' *The Star*, (24 September 2012); Jennifer Gomez, 'Court has Jurisdiction to Hear Case of Seven Somali Pirates' *The News Straits Times* (Kuala Lumpur, 24 September 2012) accessed on 24 September 2012.

from Malaysia, had hampered the jurisdiction of the Malaysian court. Moreover, at such a distance it is impossible to claim that Malaysian national security was affected.

On the other hand, the deputy public prosecutor's team led by Mohd Abazafree contended that Malaysia has jurisdiction to try the case under Malaysian national law, namely section 22 of the 1964 Court of Judicature Act and section 127(A)(1)(d) of the Criminal Procedure Code [Act 593]. The fact that the accused pirates had shot at the Malaysian navy, who were there to escort and protect a ship chartered by a Malaysian Company, was considered by the prosecutor to have affected the national security of Malaysia. Thus, the prosecutor has rightly issued sanctions for the purpose of prosecuting them before a Malaysian court. Section 127 (A)(1)(d) of the Criminal Procedure Code [Act 593]¹⁸⁴ reads as follow:

127A. (1) Any offence under Chapter VI and VI_A of the Penal Code, any offence under any of the written laws specified in the Schedule to the Extra-territorial Offences Act 1976 [Act 163], or any offence under any other written law the commission of which is certified by the Attorney General to affect the security of Malaysia committed, as the case may be-

- (a) on the high seas on board any ship or any aircraft registered in Malaysia;
- (b) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft;
- (c) by any citizen or any permanent resident in any place without and beyond the limits of Malaysia;
- (d) by any person against a citizen of Malaysia;

...

May be dealt with as if it had been committed at any place within Malaysia:

(emphasised added)

It is clearly stated in the provision that, although the perpetrator is not a Malaysian citizen, an offence has been committed against a citizen of Malaysia. In the present

¹⁸⁴ See CPC (Amendment) Act 2006 [Act A1274].

case, the offence referred to is the act of firing on the Malaysian navy by Somali pirates; thus, the power vested in the Attorney General to certify such an offence as affecting the security of Malaysia cannot be disputed. Consequently, it may therefore be dealt with as if it had been committed in Malaysia. The judge, after giving due consideration to the arguments of both the prosecuting officer and the applicant's counsel, decided in favour of the prosecuting officer. The application was therefore dismissed. Thus, the Court was able to proceed with the trial of the Somali pirates under section 3 of the 1971 Firearms (Increased Penalties) Act as conferred by section 22 of the 1964 CJA.¹⁸⁵

However, it is pertinent to note that the prosecuting officers' arguments in establishing the jurisdiction of the Malaysian High Court and the validity of its sanction over such an extraterritorial offence in the present case have not raised any international law principles on piracy.¹⁸⁶ Since the high court has affirmed its jurisdiction to try Somali pirates in this case, it seems to suggest that existing Malaysian legal framework is adequate to serve as a medium to prosecute and punish both piracy armed robbery at sea. In addition, Malaysian local law has embraced international law principles to facilitate efforts to suppress piracy wherever it occurs. It is suggested that the prosecuting officers' basis of prosecution would be more credible and persuasive were the public international principles on the law of piracy also to be raised. The universal jurisdiction over the crime of piracy as conferred by the customary international law has demonstrated the seriousness of the crime. Moreover, the Security Council of the UN has issued a Special Resolution on Piracy in Somalia to the extent that foreign

¹⁸⁵ Cross-refer to Chapter 6 at page ??

¹⁸⁶ Based on an interview with DPP Lailawati on 24th September 2012 in the courtroom following the hearing of application made to quash the charge by defendant's counsel.

armed forces are allowed to pursue the pirates within Somali waters.¹⁸⁷ Thus, it would be against the spirit of the international law were the Attorney General's sanction to prosecute the Somali pirates in the Malaysian High Court to be quashed. The *Bunga Laurel* incident and subsequent trial is important to highlight the legal point used by the Malaysian court in establishing the basis of jurisdiction to prosecute piracy under Malaysian law.

6.5 CONCLUSION

The safety and security of the Straits has always been Malaysia's priority. As a state that is largely dependent on seaborne trade, Malaysia has responded positively to most recommendations and assistance given by IMO, other states and stakeholders. In fact, Malaysia's adoption and ratification of the 1982 Convention indicates the country's willingness to compromise its interests with other users over the Straits. As international law is mainly based on treaties between participating parties, a state is expected to comply with and adhere to such law. As a littoral state of one of the important straits in the world, Malaysia's role of guaranteeing freedom of navigation and ensuring the safety and security of ships is crucial. In this context, Malaysia is undertaking this task prudently by steadily strengthening its policy and legal framework in terms of enforcement capability and adequacy of the law. Historically, laws regulating the sea in this state have existed for centuries. It is clear that the over-dramatised concern expressed about the flourishing of incidents of piracy in the Straits

¹⁸⁷ Cross-refer to Chapter 3; On 16 December, 2008, the UN Security Council decided that: '...States and regional organizations cooperating in the fight against piracy and armed robbery at sea off Somalia's coast - for which prior notification had been provided by Somalia's Transitional Federal government to the Secretary General - could undertake all necessary measures 'appropriate in Somalia'...'

in the early twenty-first century was not the sole reason for Malaysia to intensify its efforts to combat piracy in the Straits. In fact, the sea patrols within the Malaysian maritime zone were being enforced long before the incidents of piracy were reported. The Malaysian authorities have, over the years, caught and prosecuted armed robbers of ships; however, for Malaysia, these incidents are not 'piracy' as it is termed under international law because the attacks mainly occur in the territorial sea. Despite some criticism, it is believed that the recent establishment of the Malaysian Maritime Enforcement Agency (MMEA) as a coastguard service may enable Malaysia to fully utilise its assets and manpower and at the same time effectively scrutinise the best cooperative mechanisms with other littoral states. It must be given a chance to play its role effectively in parallel with the objective of its formation.

The above highlighting of various incidents of piracy and armed robbery in the Straits has shown Malaysia's capability of combating such crime either individually or, in some cases, with the help of other littoral states. It is important to emphasise that, since there are no formal law reports on such cases, most of the facts pertaining to the cases are taken from newspapers. Although it has no specific law on piracy, Malaysia has adequate legal provision to prosecute and punish both piracy and armed robbery against ships under the Penal Code, Firearms (Increased Penalty) Act and some other relevant laws. Certainly, it has no difficulty in prosecuting armed robbers since their crimes occur within state sovereign jurisdiction; however, when it comes to piracy there is a need to address some aspects provided under international law. Although pirates are considered enemies of mankind and universal jurisdiction is conferred to deal with them, in practice states will avoid invoking such jurisdiction. Malaysia is

one of the countries that never invokes such jurisdiction, not because there are no attacks on ships in its maritime area of the Straits but because no such crime of piracy has ever occurred in the Straits. The attack on the *Bunga Laurel* by Somali pirates in February 2011 is considered the first piracy case ever to be prosecuted in Malaysia. Although the incident occurred on the high seas in the Gulf of Aden and not within the Straits of Malacca, the case has been highlighted in this chapter with the purpose of explaining the issue of the adequacy of Malaysian law to prosecute piracy. It is acknowledged that the plummeting number of cases of piracy and armed robbery attacks in the Straits is mainly due to the cooperation among the littoral states with the help of certain other maritime states. Thus, it is submitted that, in order to ensure the safety and security of the Straits, each party involved has to play its role, especially the littoral states. Without their full support for the system of law that was designed in collaboration with other states and their courage in consistently improving their internal security approach and legal framework, the problem of piracy will never end nor even decrease.

CHAPTER 7

CONCLUSIONS AND RECOMMENDATIONS

History has shown the existence of piracy since time immemorial. Although contemporary piracy is radically different from former types of piracy,¹⁸⁸ the same threat to shipping industries continues to exist. The efforts to curb the problem of piracy have long been an important agenda at international, regional and national levels. In fact, one of the points highlighted during the early period of codification of the international law concerns the issue of piracy. It is undeniable that piracy exists in almost every part of the world. However, various extra-legal factors underlie the emergence of piracy and they differ from one region to another.

General principles governing a State's rights and duties in different maritime zones are well established under the 1982 Convention. For straits used for international navigation, such as the Straits of Malacca which are recognised as one of the important straits in the world, the duties of the littoral States to ensure safety and security of ships transiting the Straits are crucial. This is especially true when the Straits, which is located mostly in the territorial sea of these States has long been a piracy- and armed robbery-infested area and was once declared a war-risk zone. Although the 1982 Convention lays down several provisions on piracy and the customary international law has conferred universal jurisdiction over such crime, as its perpetrators are considered enemies of all humankind, in practice these measures have

¹⁸⁸ Cross-refer to Chapter 2 on the evolution of piracy in international law.

not entirely solved the problem. Consequently, the debate surrounding the issue of piracy is receiving wide coverage from various bodies around the world, especially the mass media and the stakeholders. It was the aim of this research to assess the different approaches to solving the problem of piracy and armed robbery in the Straits with an emphasis and focus on the Malaysian perspective and experience on this issue. To achieve the aim, the central question considered here is whether the existing international law and its instruments, regional and extra-regional cooperation, as well as the Malaysian legal framework and policies are adequate and capable of addressing this issue.

This study has examined several related questions on the legal status of the Straits, the law on piracy in international law and specifically, the 1982 Convention, as well as responses to contemporary issues of piracy and armed robbery against ships at international, regional and national levels. The initial part of the thesis highlighted the significance of the Straits, before the study turns to the general principles of the international law of the sea and law of piracy that provide a backdrop for determining whether Malaysia is in compliance with the existing rules of international law. Following this, the second part looked at the regional and extra-regional responses as well as Malaysia's capability and adequacy at regional and national levels in dealing with the issue at hand.

7.1 HAS THE AIM OF THIS STUDY BEEN ACHIEVED?

It is pertinent to mention that the study of the legal analysis of piracy and armed robbery in the Straits of Malacca is motivated by the author's curiosity to discover **why** the Straits became a piracy-infested area that was once declared as a zone at risk of 'war, strike, terrorism and related perils' by Lloyd's Joint War Committee (JWC), and to **what** extent Malaysia, as one of the littoral states in the Straits, has resolved the issue. The following highlighted points are important to answer the concerns surrounding the issue of contemporary piracy and armed robbery against ships. The study is crucial and is expected to contribute to the on-going research on security of maritime space and navigational ships, particularly for Malaysia. Due to the scarcity of literature exploring Malaysia's view on this issue, it is hoped that the thesis can provide a holistic and thoughtful view from which others can learn and which can be used for future research.

7.2 RESEARCH FINDINGS

7.2.1 PROBLEM OF DEFINITION OF PIRACY

It is found that, as the Straits is used for international navigation, being strategically located at the connection point between the Indian and Pacific Oceans, the issue of piracy has been a subject of concern for numerous parties, particularly the stakeholders. The well-known attempt to measure the fluctuation and magnitude of piracy incidents all around the world, that is, the annual and quarterly reports issued by the Piracy Reporting Centre of IMB in Kuala Lumpur, has suggested that the main area contributing to the high percentage of piracy incidents in the world from the year 2000 until the mid-2000s was the Straits and territorial waters of Indonesia. However,

legally speaking it is not really 'piracy' that has become endemic in the Straits since piracy, as defined under Article 101 of the 1982 Convention, requires certain conditions to be fulfilled including the requirement for such crime to have occurred on the high seas and beyond the jurisdiction of any states. Both Malaysia and Indonesia have argued that, since the extension of the territorial seas of both states from three to twelve nautical miles, which is in parallel with the 1958 and 1982 Conventions, there is no longer a high seas corridor in the Straits. This means that, technically, there will be no piracy incidents in the territorial sea except 'armed robbery against ships.' It is noteworthy that this issue has arisen due to the different definition of piracy held by the IMB, the body responsible for issuing the statistics on piracy through the PRC. For the IMB, no distinctions exist between attacks on the high seas and in territorial waters. In addition, motive is irrelevant; be it for private ends or for political reasons, it may be considered as piracy by the IMB. Meanwhile, for Malaysia and its counterparts, the implication of the word 'piracy' is devastating and may cause erosion and detriment to their sovereignty. This is due to the fact that, under international customary law, piracy is subject to universal jurisdiction in which all states have the power to catch and prosecute the perpetrators, as it is regarded as a crime against humankind. Therefore, although the overwhelming reliance on the statistics produced by IMB has, to some extent, triggered international concern over the position of the Straits' security, in the event of inconsistencies the legal definition of piracy in the 1982 UNCLOS should prevail.

7.2.2 APPLICABILITY AND RELEVANCE OF UNIVERSAL JURISDICTION FOR CONTEMPORARY PIRACY

It may be argued that the well-established principle of universal jurisdiction may or may not be suitable for contemporary piracy and armed robbery incidents. The historical foundation for this principle in piracy lies in the heinousness of the crime which occurs on the high seas and beyond the jurisdiction of any state. For this reason it is called '*pirata est hostis generis humani*' which means 'piracy is the enemy of humankind'. In the context of the littoral States of the Straits, such a basis of jurisdiction has rarely been invoked by the states. They normally prefer to use diplomacy or invoke other means of establishing jurisdiction in order to avoid controversial prosecutions, particularly since the 1982 Convention is silent on the method of prosecution and imposition of punishment and has not specified any penalties for the pirates. This issue demonstrates the weakness of the 1982 Convention in its failure to adequately define the term 'piracy' and provide a basis for the prosecution and punishment of the perpetrators of piracy. It leaves the matters of enforcement action, which relate to substantive and procedural process, to the individual states. This means that such a universal crime will not be subject to special courts or universal punishment; rather it will be punished according to the municipal law of an individual state.¹⁸⁹ However, enforcement might be difficult or impossible to implement if a state does not have any local law regulating piracy or crimes resembling it. Thus, states need to further incorporate relevant law pertaining to the crime of piracy into their domestic legislation and to establish the jurisdiction of the local courts to try such crimes. Having said that, it is not expected that each state will

¹⁸⁹ Dubner (1979) 488

need to have similar, precise and identical rules of enforcement; rather, it will be sufficient for states to have consistent practical laws that meet the ultimate goal of the 1982 Convention to combat and suppress piracy. As far as Malaysia is concerned, although it is empowered under Section 22 (1)(a)(iv) of the Court of Judicature Act 1964 to exercise universal jurisdiction over the crime of piracy, its national courts have never asserted such jurisdiction. One of the reasons is that most of the attacks were not piracy but armed robbery against ships, for which the Malaysian Penal Code is applicable. Furthermore, Malaysia always adopts a cautious approach and thus prefers to apply other bases to establish criminal jurisdiction such as territorial principle, nationality principle and protective principle. It is also the practice of Malaysia to enact a domestic law to give effect to a treaty obligation rather than giving a straightforward effect to customary international law obligation. Thus, in the event of a request for the extradition of a pirate, which is based on the universal jurisdiction, it is still necessary to first satisfy section 6 of the 1992 Extradition Act that requires the offence to be punishable by both countries and for the extra-territorial criminal jurisdiction to be established.

7.2.3 THE NEXUS BETWEEN PIRACY AND TERRORISM AND THE 1988 SUA CONVENTION

The rampant piracy attacks in the Straits have also led to the anecdotal view that there is a nexus between piracy and terrorism. Halberstam is an example of a well-known commentator whose idea on this nexus has often been quoted by others. In addition, Ong suggests that there are similarities between piracy and maritime terrorism in four areas. First is the implication of this crime for global security, second is the modus

operandi employed, third is the weapons used and fourth is the use of violence. Burgess goes further in suggesting that, similar to the crime of piracy, universal jurisdiction might also be applicable to terrorism. However, the opponents of this view hold to the legal meaning of piracy in Article 101 of the 1982 Convention which clearly departs from political motives. Although there is no authoritative meaning of maritime terrorism, it is a well-established principle that the act of terrorism is carried out for political or ideological purposes and is always coupled with the threat of mass devastation. Thus, it is timely to acknowledge the opinion of Rubin and Good who hold that, while universal jurisdiction is no longer suitable for contemporary piracy, the idea of connecting these two crimes in order to invoke universal jurisdiction is also inappropriate.

The declaration of the Straits as a 'war-risk zone' based on the perception that the peril of piracy in the Straits might equivalently lead to maritime terrorism has no valid or legal basis and is improper. According to Khalid, the risk of reported attacks in the Straits was less than 0.001 per cent of its total traffic volume.¹⁹⁰ Raymond also agrees with this view, highlighting the finding that, of the total number of alleged terrorist attacks worldwide, maritime terrorist attacks have contributed only two per cent and none of the terrorist acts have taken place in the Straits.¹⁹¹ Thus, it is submitted that it is reasonable for Indonesia and Malaysia to give priority to national security issues which need immediate attention over the issue of potential terrorism. This does not

¹⁹⁰ **ibid.** This is based on 38 attacks in the Straits against 63,636 ships traversing the Straits in 2004 as reported in 2004 IMB-PRC Annual Report; cf. S Bateman, CZ Raymond and J Ho 'Safety and Security in the Malacca and Singapore Straits: An Agenda for Action' (May 2006) Institute of Defence and Strategic Studies Policy Paper, 20: 'the proportion of ships attacked ...ranges from 0.06 percent to 0.19 percent of the total number of ships using the Straits annually, but these are predominantly on vessels on local voyages.'

¹⁹¹ Apart from a small number of hostage-taking incidents: CZ Raymond 'The Threat of Maritime Terrorism in the Malacca Straits' (February 9, 2006) Vol.4 Terrorism Monitor issue 3.

mean that no action towards preventing this potential crime will be taken; rather, the real dangers that are rampant in the internal and territorial waters, including armed robbery against ships in port and at anchor, illegal immigration, smuggling and human trafficking, must be emphasised first.

It is worth mentioning that the 1988 SUA Convention was adopted in Rome on 10 March 1988 with a view to rectifying the definitional problem of piracy in the 1982 Convention and to address the issue of maritime terrorism. The *Achille Lauro* incident, which involved a political motive, prompted the adoption and enforcement of the SUA Convention within a short period of time. Surprisingly, although it was adopted in 1988, six years after the adoption of the 1982 Convention, it came into force two years earlier than the 1982 Convention. In fact, the 1988 SUA Convention came under review in 2005 to further strengthen maritime security in order to respond to the terrorist attack on New York's Twin Towers on September 11, 2001. The fear of a potential terrorist attack that might use floating ships to destroy important waterways, particularly the Straits, has raised the concerns of the international community on security conditions in the Straits. Due to the difficulty in distinguishing between the acts of piracy and terrorism when taking place at sea, the 1988 SUA Convention gave a wider definition to what would constitute an 'unlawful act.' This term will certainly include both crimes in its scope. It provides a basis of jurisdiction for the participating states to try or extradite the perpetrators. It is likely that the 1988 SUA Convention is more advanced than the 1982 Convention in that it provides provisions which will help solve the problem of 'catching and releasing' the pirates and armed robbers, which is claimed to be rampant in the Straits. Although its attempt

to improve the provision for prosecution of pirates has been relatively successful, it is not able to solve the problem in the Straits effectively. This is primarily due to the fact that the main littoral States of the Straits, namely Malaysia and Indonesia, have thus far not been parties to the Convention. Consequently, they are not bound by the provisions of the 1988 SUA Convention. According to a Malaysian Government officer on the National Security Council, Prime Minister's Department, Malaysia has yet to ratify the 1988 SUA Convention pending amendment of related domestic law. It is suggested that, although not a party to the 1988 SUA Convention, Malaysia has complied with the rule of international law under the 1982 Convention in giving full cooperation to combat piracy.

However, it appears that the lack of a legal definition of piracy is not the sole reason why piracy cannot be curtailed. It is not surprising that piracy still exists today, as the crimes of robbery on land, murder and so forth have not been eliminated totally either. Although both have certain weaknesses, it is suggested that the 1982 Convention and 1988 SUA Convention can still generally be considered useful tools for combating piracy and armed robbery against ships. Hence, this is not the time to be overly concerned with the technical problem of the definition; rather, it is timely to find the best solution to rectify and improve the weaknesses in the existing international laws. Thus, states, as important entities in international law, are responsible for carrying out this duty. Without the cooperation of states, the objective of having a set of laws or treaties at international level will not be achieved.

7.2.4 ARE THE LITTORAL STATES AT FAULT FOR PIRACY IN THE STRAITS?

It is argued by Sittnick that Malaysia and Indonesia have not sufficiently carried out their duty to suppress piracy and generally are not capable of ensuring the safety and security of the Straits from maritime crime.¹⁹² Consequently, he suggests that both States may be held responsible for a breach of international obligations. His assertion has been strongly opposed by Hamid who argues that these States have from time to time fortified their efforts to secure the Straits from any risk of maritime crime.¹⁹³ Thus, they have exercised due diligence and cannot be made responsible for the growing threat of piracy and armed robbery in the Straits. It is also argued that Sittnick's suggestion was made in 2005, the year in which the cooperative efforts between the littoral States had just begun. In fact the littoral States have in many instances responded to the upsurge of piracy in the Straits, intensifying their efforts regionally and domestically in combating piracy and armed robbery. Although the IMB's definition of piracy is broader than that of the 1982 Convention in terms of location of the attack, the IMB has, since 2005, received only trivial reports on piracy and armed robbery in the Straits. This dramatic reduction has prompted the media to recognise the success of the Straits States which have achieved 'a close-to-zero incident level.' This has undoubtedly resulted from the cooperative mechanisms between the littoral States. Mukundan, the director of IMB, also acknowledged that the reduction in piracy incidents in the Straits is due to the efforts of the littoral States;

¹⁹² TM Sittnick 'State Responsibility and Maritime Terrorism In the Straits of Malacca: Persuading Indonesia and Malaysia to take additional Steps to Secure the Straits' (2005) 1*Law & Policy Journal* 761-767.

¹⁹³ Maritime Terrorism, The Straits of Malacca and the Issue of State Responsibility' 15 *Tulane Journal of International and Comparative Law* (2006) 155-179.

these efforts should be praised and other States may learn from them. In fact it is not surprising that this trend has become one of the factors influencing the JWC to withdraw the Straits from Lloyd's list of war-risk zones in August 2006.

7.2.5 EXTRA-LEGAL FACTORS UNDERLYING PIRACY AND ARMED ROBBERY IN THE STRAITS

Piracy, a well-known crime that has been considered one of the oldest illegal professions, has affected the world community for centuries. Similar to the problem of defining piracy, the reason why the crime cannot be totally eliminated lies in the factors that led to its emergence, which differ from one state or region to another. Thus, apart from analysing the legal aspects of the issue of piracy and armed robbery against ships in the Straits, it is important to examine the extra-legal factors underlying such crime in the Straits. The idea of designating pirates as enemies of mankind, which originated in the European region, was to ensure the freedom of navigation or *Mare Liberum*. Originally, the theory of *Mare Liberum* was propounded by a Dutch jurist, Hugo Grotius, to challenge Portuguese and Spanish domination¹⁹⁴ of the sea routes to the East Indies, including the Straits.¹⁹⁵ These European powers had colonised the states surrounding the Straits of Malacca around the year 1511 and claimed that any interference with their ships at sea would be considered piracy. In opposition to this idea, the English jurist John Selden had proposed the idea of *Mare Clausum* which recognised state power over some parts of the sea. While, during that

¹⁹⁴ At that time Portugal had been united with Spain. See RP Anand, 'Maritime Practice in South-East Asia until 1600 AD and the Modern Law of the Sea' (1981) 30 ICLQ 442.

¹⁹⁵ DP O'Connell (IA Shearer (ed.)), *The International Law of the Sea* (vol 1, Clarendon Press Oxford 1982) 9; E Fletcher, 'John Selden (Author of *Mare Clausum*) and His Contribution to International Law' (1933) 19 Transactions of the Grotius Society, Problems of Peace and War 7; MB Vieira '*Mare liberum* vs. *Mare Clausum*: Grotius, Freitas, and Selden's Debate on Dominion over the seas', (2003) 64 Journal of the History of Ideas, 361; PB Potter, *The Freedom of the Seas in History, Law and Politics* (Longmans, Green and Co, London 1924) 57.

time, the local rulers who prevented the main waterway surrounding their state from being illegally occupied by outsiders were regarded as pirates, the modern international law of the sea has now established the rule that the motive for attack must be for private ends.

There appear to be various reasons that have led to the flourishing of contemporary piracy and armed robbery in the Straits, with money or private gain as the main motivation. According to the IMB, the attacks that are rampant in the Straits are low-level armed robberies mostly carried out by opportunist pirates. Murphy, Young and Banlaoi agree that weak governance (legal and jurisdictional weakness), economic crisis and favourable geography are major factors in piracy.¹⁹⁶ The lack of strong political will and unstable governance will embolden pirates to attack ships. The huge coastline coupled with weak port security and under-funded enforcement officers who practise corruption has made the situation even worse. Thus it is unsurprising that two of the largest archipelago states in the world - Indonesia and the Philippines - have been recognised as piracy hot spots. These states' small islands provide plentiful hideouts for pirates.¹⁹⁷ Based on the numbers of unreported cases of armed robbery against ships in the Straits, it is believed that most of the pirates or armed robbers of this kind are Indonesians operating from Indonesian islands such as Batam, Aceh and Riau.¹⁹⁸

¹⁹⁶ MN Murphy, *Contemporary Piracy and Maritime Terrorism: The Threat to International Security* (London, IISS 2007) 13; Young (2005).

¹⁹⁷ Stefan Eklof, *Pirates in Paradise: A Modern History of Southeast Asia Marauders* (Copenhagen: NIAS Press 2006) 5.

¹⁹⁸ Stefan Eklof (2006) 47-48 and 54.

It is submitted on behalf of Malaysia that, since piracy and armed robbery in the Straits is a trans-border crime whose perpetrators are mainly nationals of another state, namely Indonesia, cooperation among the enforcement officers of the littoral States is crucial. It is suggested that, were the root causes of piracy to be tackled, this problem might be totally eradicated or at least reduced and managed efficiently.

7.2.6 REGIONAL AND EXTRA-REGIONAL EFFORTS

It appears quite likely that piracy will remain a problem in the 21st century. The question of how to best suppress piracy and armed robbery at sea in its modern form cannot be answered merely by examining the adequacy of the existing legal framework on piracy. It is the hope of the stakeholders that the Straits will remain safe and secure in order to retain their important function as the shortest sea route connecting the India and Pacific Oceans. Thus, when the report by the IMB and other media reports showed a dramatic increase in piracy in Southeast Asian waters, particularly the Straits, this situation urged every stakeholder to solve the problem collectively. At the regional level, ASEAN has played its role by hosting seminars and establishing ARF to further discuss the issue of maritime security and implement its plan of action. As argued by Jones and Smith, the preoccupation with mutual respect for sovereignty and equality as well as non-interference in the internal affairs of another state has been considered an obstacle impeding the regional cooperative mechanism.¹⁹⁹ Many commentators are emphasizing that ASEAN regionalism, while frequently stating the need for mutual cooperation in tackling the security issues, has

¹⁹⁹ David Martin Jones and Michael LR Smith, 'Making Process, Not Progress: ASEAN and the Evolving East Asian Regional Order' 32 [2007] 1 *Journal of International Security*, 148-184,169; ADH Poole 'Cooperation in Contention: The Evolution of ASEAN Norms' YCISS working paper number 44 Jan 2007 p.1-2 in www.yorku.ca/yciss/whatsnew/documents/WP44-Poole.pdf accessed on 30 January 2011

not really implemented it in actual practice.²⁰⁰ It has also been argued that there has never been a mechanism for resolving conflicting territorial claims among its members. The reason for this is simply the fact that suppressing such crimes requires some deterioration of the principle of non-interference in internal affairs.²⁰¹ Thus, the idea of regional multilateral security cooperation is limited to bilateral agreements between members. Despite this sceptical view, Severino comments that, for decades, ASEAN took some considerable steps towards realising certain regional goals.²⁰² Thus, to deprecate ASEAN's efforts in tackling transnational issues such as piracy would be to overlook this organisation's capability and potential competency. Despite the challenges to intra-ASEAN multilateral security cooperation, the bilateral defence and security ties have undergone a speedy expansion.²⁰³ Redha believes that, despite ASEAN's shortcomings as a regional security organisation, it has been regarded as an umbrella under which member states may take up bilateral or multilateral security initiatives.²⁰⁴ More often than not, ASEAN states are able to display toleration and put aside their self-interests to show their commitment to security cooperation, especially when the threat exists within their area.

Piracy incidents in the Straits had also raised the concerns of the extra-regional maritime nations, particularly the main users of the Straits, namely Japan and the United States. They have relentlessly planned and offered assistance to suppress

²⁰⁰ Jones and Smith [2007] 164; Liss (2011) 305; Evelyn Goh 'Great Powers and Hierarchical Order in Southeast Asia: Analysing Regional Security Strategies' [2008] 32 *International Security* 113-157 at 117.

²⁰¹ Sheldon Simon (2008) 268.

²⁰² Rodolfo C Severino 'Southeast Asia's Security Outlook, ASEAN: New Charter, New Optimism' in Ian Storey, Lee Poh Onn (eds) *Regional Outlook: Southeast Asia 2009-2010* (ISEAS, Singapore 2009) 7.

²⁰³ Redha (2010) 3.

²⁰⁴ *ibid.* 1, 2.

piracy in the Straits, including proposing the RMSI and ReCAAP. As far as RMSI, which was proposed by the United States, was concerned, initially Malaysia and Indonesia hesitated to accept their assistance for fear that this might affect their sovereignty over their parts of the territorial sea in the Straits.²⁰⁵ Both states believed that they possessed the capacity to ensure security in the Straits without any deployment of extra-regional forces. However, they finally announced their willingness to accept help when the United States further explained that it was not their intention to deploy the US Army but merely to assist the littoral States in terms of funds, training and expertise in maintaining maritime security. As for the ReCAAP, which was propounded by Japan, the littoral States welcomed the idea of cooperation more than they had done with the RMSI. ReCAAP was agreed by sixteen countries in 2004, opened for signature on 28 February 2005 and came into force on 4 September 2006.²⁰⁶ ReCAAP ISC was formally recognised as an international organisation on 30 January 2007.²⁰⁷ This instrument is the first multilateral agreement of its kind and has three basic elements, namely Information Sharing between the contracting states, Capacity Building and Cooperative Arrangement. It embraces the definition of piracy provided in the 1982 Convention and the definition of armed robbery against ships as entailed by the IMO's Code of Practice for the Investigation of Armed Robbery against Ships. It clearly shows respect for and non-interference in a state's

²⁰⁵ In his speech, he stated: 'we are looking at things like high-speed vessels, putting Special Operations Forces on high-speed vessels to conduct effective interdiction...' See Storey (2008) 113; David Rosenbergh, 'Dire Straits: Competing Security Priorities in the South China Sea' April 13, 2005 at <http://www.japanfocus.org/-David-Rosenberg/1773>, accessed on 24 July 2009; Boutilier (2005) 27; TR Shie 'Ports in a Storm? The Nexus Between Counterterrorism, Counter Proliferation and Maritime Security in Southeast Asia' 2004 Pacific Forum CSIS, 23 at <http://csis.org/files/media/csis/pubs/issuesinsightsv04n04.pdf>.

²⁰⁶ ReCAAP was officially launched in Singapore on 29 December 2006; Ramli Hj Nik and Sumathy Permal 'Security Threats in the Straits of Malacca' in HM Ibrahim and Hairil Anuar Husin in *Profile of the Straits of Malacca* (MIMA, Kuala Lumpur, 2008)197; ReCAAP fact sheet.

²⁰⁷ ReCAAP Press Release. < <http://www.ReCAAP.org>>

jurisdiction.²⁰⁸ Nevertheless, it has to be emphasised that ReCAAP does not extend to providing enforcement mechanisms, nor does it envisage coordinated or joint patrols among contracting countries.²⁰⁹ Thus, it might be concluded that ReCAAP is a good instrument to formalise cooperation and coordination among the contracting states, but it still needs robust support from the states to enforce the law at their national levels in order to effectively combat piracy and armed robbery against ships.

Nevertheless, Malaysia and Indonesia remain signatories that have yet to ratify the ReCAAP,²¹⁰ which was considered to be to the detriment of the main purpose of ReCAAP.²¹¹ This is due to the fact that most of incidents of attacks against ships in the Straits during that time, took place within territorial seas of both states. According to Storey, the concern over sovereignty has been a strong impediment to these two states joining the ReCAAP.²¹² However, Ho pointed out that, although Malaysia and Indonesia have not yet ratified the ReCAAP agreement, the willingness of maritime agencies of both states, namely Malaysian Maritime Enforcement Agency (MMEA) and Indonesian Maritime Security Coordinating Board (BAKORKAMLA), to

²⁰⁸ Art 2(5) ReCAAP; See also Robin Geis and Anna Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (OUP, Oxford 2011) 46-47.

²⁰⁹ JF Bradford 'Japanese Anti-Piracy Initiatives in Southeast Asia: Policy Formulation and the Coastal State Response' [2004] 26 *Contemporary Southeast Asia*, 480-505,492.

²¹⁰ The seventeen Contracting Parties are: the People's Republic of Bangladesh, Brunei Darussalam, the Kingdom of Cambodia, the People's Republic of China, the Kingdom of Denmark, the Republic of India, Japan, the Republic of Korea, the Lao People's Democratic Republic, the Republic of the Union of Myanmar, the Kingdom of the Netherlands, the Kingdom of Norway, the Republic of the Philippines, the Republic of Singapore, the Democratic Socialist Republic of Sri Lanka, the Kingdom of Thailand and the Socialist Republic of Viet Nam.

²¹¹ Yoichiro sato 'Southeast Asian Receptiveness to Japanese Maritime Security Cooperation,' Asia Pacific Center for Security Studies September 2007

²¹² Ian Storey 'Maritime Security in Southeast Asia: Two Cheers for Regional Cooperation' in Daljit Singh (ed.) *Southeast Asian Affairs 2009* (ISEAS, Singapore 2009) 42.

cooperate in sharing information with ISC will help to bridge the gap.²¹³ Indeed, both states, despite not yet ratifying the ReCAAP Agreement, have agreed to cooperate at the highest level.²¹⁴

7.2.7 MALAYSIAN LEGAL FRAMEWORK

Malaysia's endeavour in ensuring maritime security in the Straits is reflected in its reaction and strategy to suppress piracy and other maritime threats by not only participating in cooperative mechanisms with its counterparts, but also by strengthening its law and policy to ensure compliance with the spirit of international law. There is no doubt that the state is an important entity and vehicle for implementing international law and treaties; without it, the latter seems to have no function. As a coastal state historically recognised as a great entrepôt in the region, Malaysia definitely regards the Straits as significant for its economic resources. Thus, protection of the Straits is not undertaken merely for the sake of gaining a good reputation in the eyes of the international community, as argued by some commentators; it is also in Malaysia's interests.

Philippe comments that, although international law empowered and mandated states to punish piracy through the acceptable rule of universal jurisdiction, the implementation of the international law over such crime is complicated as it would involve national legislation, political will, sufficient funds and assets, and efficient enforcement power

²¹³ *ibid.*

²¹⁴ Batam Meeting of the foreign ministers of the three littoral states in August 2005; Joshua Ho. 'Combating Piracy and Armed Robbery in Asia: Boosting ReCAAP's Role' 69 (2008) RSIS Commentaries 2.

by a particular state.²¹⁵ It is obvious that the states that possess sufficient funds and naval resources, actionable capacity-building and intelligence, as well as effective law enforcement and judicial finality, will have the ability to provide complete deterrence against such a threat.

Malaysia believes that piracy, as a non-traditional security threat, requires continuous attention and effective law enforcement. The cooperative action jointly implemented by Malaysia and its counterparts, Indonesia and Singapore, such as the MALSINDO and Eyes in the Sky,²¹⁶ might not have been achieved without each individual state's internal pro-action and serious attempts to tackle the issue before them.²¹⁷ Thus, it may be said that efforts to tackle transnational crime should begin with the establishing of good governance in each local state.

In pursuance of this aim, enforcement powers allowing the initial arrest of persons, the instigation of criminal proceedings and the effective prosecution of alleged perpetrators are equally important for ensuring long-term success in the suppression of piracy and armed robbery at sea. The Malaysian Maritime Enforcement Agency (MMEA) was established on February 15, 2005, about a year after the MMEA Act came into force, with the intention of providing a single but efficient body that could

²¹⁵ Phillippe, X, 'The Principles of Universal Jurisdiction and Complementarity: How Do The Two Principles Intermesh?' (2006) 88 Int'l Rev of the Red Cross 862, 375.

²¹⁶ The 2010 IMB Piracy Report showed that the threats in the Straits was now close to the zero incident level.' -- 'Drastic Drop in Straits Piracy' *The Star Online* (21 April 2011). at <<http://thestar.com.my/services/printerfriendly.asp?file=/2011/4/21>> accessed on 21 March 2012; 'As world piracy hits a new high, more ships are escaping Somali pirates, says IMB report' Oct 18, 2011 at ICC Commercial Crime Services at <http://www.icc-ccs.org/news/969-as-world-piracy-hits-a-new-high.more> ships are escaping Somali pirates accessed on 6 January 2012.

²¹⁷ CR Woolley 'Piracy and Sovereign Rights: Addressing Piracy in the Straits of Malacca without degrading the Sovereign Rights of Indonesia and Malaysia' 8 [2010] Santa Clara J. Int'l L, 447-472, 470.

integrate enforcement work and improve coordination between the existing agencies. The purpose of this is to ensure that good ocean governance in the Malaysian Maritime Zone (MMZ) is achieved. Although subsection 2 of section 6 limits the functions of the MMEA to the MMZ, subsection 3 extends the jurisdiction of MMEA on the high seas. This does not contravene the freedom of the high seas as guaranteed in the 1982 Convention.²¹⁸ A similar right is also conferred in Malaysia's Extra-Territorial Offences Act 1976 (ETOA 1976) which gives extra-territorial power to Malaysia to enforce its law, not only on ships registered in Malaysia but also for offences committed by its citizens or permanent residents on board any ship or aircraft on the high seas or in any place beyond the limits of Malaysia.²¹⁹ The extra-territorial jurisdiction of Malaysian court to try piracy cases that occurred outside Malaysia territorial water but against Malaysian national which considered as affecting national security is also provided under the new Amendment of Section 127(1)(A)(d) of the Criminal Procedure Code which has been upheld recently by the high court in the prosecution of seven Somali Pirates in *MT Bunga Laurel's* incident.²²⁰

Section 6(3) (c) makes it the responsibility of MMEA to prevent and suppress piracy on the high seas. Since piracy has generally been accepted as a crime against humankind and is subject to universal jurisdiction, this section is in line with the 1982 Convention.²²¹ MMEA also gained the right to exercise hot pursuit, as prescribed in Article 111 of the 1982 Convention, under section 7 of the 2004 Act. Thus Malaysia,

²¹⁸ Art 87 to Art 89 of the 1982 Convention.

²¹⁹ s2 (1) of Extra-Territorial Offences Act 1976.

²²⁰ Cross-refer to Chapter 6.4.

²²¹ For detailed discussion, cross-refer to Chapters 3 and 4; also Art 100 of the 1982 Convention which imposes a duty on every state to cooperate to the fullest possible in the repression of piracy on the high seas or in any other place outside the jurisdiction of any state.

in response to frequent incidents of piracy worldwide, is moving positively to provide an effective domestic law enforcement agency, namely the MMEA, to ensure safety and security of navigation.

As far as the Straits is concerned, most incidents of piracy or armed robbery against ships took place either within the territorial sea or internal waters of the littoral States, including in ports and harbours. In such cases, the criminals are legally classified as robbers and are normally charged according to Malaysian domestic law, particularly the Penal Code and Firearms (Increased Penalty) Act 1960. Nevertheless, even if Malaysia were to prosecute pirates whose crimes occurred on the high seas, the similar law might still be applied depending on the nature of the criminal act, and without the need for a specific law on maritime piracy.²²² The punishment would be similar to other land-based crimes of armed robbery, gang robbery or theft as prescribed in the Malaysian Penal Code. Thus, it is submitted that, for similar acts of piracy or armed robbery against ships occurring in the territorial sea including the Straits and on the high seas where the extra-territorial principle and protective principle can be applied, the Malaysian Penal Code and other related provisions may still be applied without the need for a specific law on piracy. Nevertheless, as a dualist state,²²³ it is undoubtedly the case that, were Malaysia to enact a law on piracy, this would provide a strong basis for prosecution of piracy; such prosecutions would not be restricted to incidents occurring in the Straits but would also extend to other regions such as the Gulf of Aden and Somali waters.

²²² See discussion on the Incident of *MT Bunga Laurel* in Chapter 6 (para 6.4.4).

²²³ See Chapter 6 (para 6.2.3).

7.3 RECOMMENDATIONS

The crimes of piracy and armed robbery against ships have continued since the historical period. This is a fact that must be accepted. But this does not mean that improvements to the existing law and instruments for combating the crime cannot be achieved. However, piracy or, as it is legally referred to, armed robbery against ships if occur within territorial sea can still be reduced and contained to prevent it spreading further, possibly leading to more disastrous impacts such as maritime terrorism. Thus the thesis recommends the following:

7.3.1 A LESSON TO BE LEARNED

At the time when this study began, in 2006, the Straits had been the main piracy-prone area in the world. Incidents of armed robbery against ships in the Straits and the territorial sea of the littoral States of Malaysia and Indonesia consequently attracted the attention of maritime nations, stakeholders and other interested parties. As they have regarded and used the Straits as a free passageway for their trade, security in the Straits is a grave concern for them. At this juncture, the littoral States had indirectly been compelled to tackle the issue by any means. Many efforts have been undertaken not only by the littoral States but also by other stakeholders at international and regional levels to safeguard the Straits against piracy and armed robbery. Some maritime States such as Japan and the United States are even willing to give material and technical assistance to Malaysia, Indonesia and Singapore in order to protect their economic interests in the Straits.

The enhanced cooperation in the Straits has finally resulted in diverting the upsurge in piracy attacks from the Southeast Asia region to the African region, particularly in the waters off Somalia. This is evident in the IMB Piracy Report (2000-2010). It may be submitted that it is the cooperative efforts between states in the region and the extra-regional support that have contributed significantly to the reduction of piracy and armed robbery in this region, particularly in the Straits of Malacca. This is in compliance with the spirit of the Article 100 of the 1982 Convention where all states are required to 'cooperate to the fullest possible extent' in the suppression of piracy. Thus, other coastal states in other parts of the world must always be ready to give cooperate to combat such crimes. However, one must bear in mind that, although the African region may learn a lesson from the success in reducing piracy incidents in the Straits, the tactics or strategy used in the Straits may not be suitable for the African region. This is because the nature of attacks and the root causes of piracy differ from one region to another. The Security Council has issued Resolution 1918 which is specially designed to tackle the problem of piracy off the coast of Somalia. The Resolution called on all states to prosecute piracy under their domestic laws and allow hot pursuit within Somali internal waters. The unprecedented right of hot pursuit in the territorial water is solely applicable to Somali territory, which is considered a failed state by the UN Security Council. Thus, this does not create any international customary right. Such a Resolution has never been invoked in the Straits because the littoral States which are directly responsible for the Straits are capable of dealing with the problem and have their own domestic laws for ensuring prosecution and imprisonment of perpetrators. Such a reaction of concluding a special Resolution in response to piracy incidents in Somalia shows that the law and its enforcement on

piracy are changing according to the needs of society. The weak governance and legal system of a state may make the existing law meaningless and prosecution of the perpetrators difficult.

Thus, it may be said that the 1982 Convention basically provides a legal foundation for the rule of law at sea against piracy. In fact the customary international law and other instruments, such as the 1988 SUA Conventions, IMO, IMB and ReCAAP, establish a basis for cooperation among states and provide mechanisms for the betterment of enforcement action with one aim: to ensure continuous safety and security of navigation, particularly in the Straits of Malacca. Nevertheless, to some extent the existing 1982 Convention and 1988 SUA Convention are inadequate and need modification according to the needs of society, as happened in the case of piracy in Somalia and the Gulf of Aden. This is important in order to secure a more effective legal framework. The UN Secretary-General's suggestion to build the capacity of regional states to prosecute Somali pirates or establish tribunals at state, regional or international levels may be implemented, but the root causes of piracy cannot be neglected.

7.3.2 THE COOPERATIVE ACTION IN THE STRAITS AMONG STATES AND STAKEHOLDERS MUST BE MAINTAINED.

The growing concerns of the international community in general over the threat of piracy in the important sea lanes of communication have provoked responses from states, especially those that rely on maritime trade. Since piracy does not respect the law and state borders, the inter-dependency between countries for secure seas is obvious, especially in dealing with trans-border criminals. It may be submitted that, in order to achieve effective cooperation between the littoral States and other stakeholders, the principles of maritime security cooperation that give primary responsibility for the security of the Straits to the littoral States while at the same time recognising their sovereignty must be enhanced. Besides multilateral efforts through regional instruments such as ASEAN, ARF and ReCAAP, bilateral defence cooperation, which has been claimed to be the most effective way of avoiding personal conflict, has served to strengthen mutual trust for a robust maritime security framework. In fact this cooperative action in the MSP has proved to be an effective way of reducing piracy and armed robbery against ships in the Straits. As far as the government of Malaysia is concerned, it is its policy to always welcome extra-regional support but it prefers help in the form of financial support or the loan of equipment, intelligence-sharing and personnel-training for capacity-building. Such assistance is the most acceptable way of repressing piracy in the long term. As the challenges of maritime security evolve, the States must always be ready to set aside their personal interests and fully support and collaborate with their counterparts to ensure effective implementation of their plan of action.

7.3.3 APPLICATION OF 'BURDEN-SHARING' IN THE MAINTENANCE OF BOTH SAFETY AND SECURITY OF NAVIGATION IN THE STRAITS

Although the safety and security of the Straits is acknowledged as primarily the responsibility of the littoral States, the help of the international community, particularly the Straits' users, is very welcome. The manifold increase in traffic yearly has exponentially increased the cost of maintaining the Straits for safe and secure navigation of ships. It is projected that the number of ships using the Straits will increase to triple the number of ships using it in early 2000. It appears that the heavy traffic may cause not only environmental degradation due to pollution from ships and ships grounding but also collisions between ships that have lost steering control due to piracy attacks on board. The likelihood of piracy or armed robbery attacks against ships increases when they have to slow down at certain points in the Straits due to the shallow waters. Thus piracy, as well as being regarded as a threat to the security of shipping, may also affect the environment in the Straits, consequently interfering with safety of navigation.

Although Article 43 of the 1982 Convention encourages cooperation by agreement between states bordering a strait and user states, it is limited to 'the establishment and maintenance of navigational safety or other improvements in aid of international navigation, and also for the prevention, reduction and control of pollution from ships.'²²⁴ It does not specifically mention cooperation for securing ships against maritime crime although the terms 'safety' and 'security' arguably carry similar meanings.²²⁵

²²⁴ Art 43 of the 1982 Convention.

²²⁵ Cross-refer to Chapter 4 (para 4.2).

In terms of ensuring safe and sustainable navigation through the Straits, the littoral States have devised several mechanisms including the establishment of the Tripartite Technical Experts Group (TTEG) since the 1970s and STRAITREP (the mandatory ship reporting system used in the Straits) under the auspices of the IMO. The effort to facilitate safe and unimpeded passage in this waterway has long been undertaken with the help of Japan. In fact, Japan is a user state that has contributed generously to the maintenance of navigational safety in the Straits over many years. This is because the cost of having such smooth facilities and systems requires the investment of millions of dollars for training manpower and infrastructure development for the benefit of all.

According to Najib Tun Razak, Malaysia has spent more than RM200 million²²⁶ for the purpose of maintaining and upgrading various navigational aids in the Straits over the years.²²⁷ This is a relatively huge amount for developing countries such as Malaysia and Indonesia to bear over a long period, while the Straits have been used by thousands of ships from all parts of the world. Although Malaysia acknowledges the status of the Straits as a strait used for international navigation in which transit passage applies, it also needs the cooperation of the user states to ensure the prolonged use of the Straits for the benefit of all. It is against this backdrop that Malaysia and Indonesia suggested expanding the scope of burden-sharing set out in Article 43 of the 1982 Convention to include expenses related to the management of security in the

²²⁶ USD64,198,000.00 (Current exchange rate 14 June 2013).

²²⁷ The Eng Hock, 'Malaysia seeks to limit maritime traffic in Straits of Malacca' *The Star* (Kuala Lumpur, October 22, 2008).

Straits.²²⁸ Were this to be done, the user states would need to contribute to the cost of maintaining security in the Straits as well. Japan also supports this cooperative idea as timely because the idea that the safety and security of ships' navigation through the Straits should be provided free of charge is already 'out of date and must be changed.'²²⁹ Malaysia and Indonesia have proposed that some sort of fee be levied on ships using the Straits to fund the management of security in the Straits. However, Beckman argues that this would raise the perception that the user states should have a say in the utilisation of the fund in return for their contributory fees.²³⁰ This would definitely not be accepted by Malaysia and Indonesia as they would perceive the extra-regional interference as a threat to their sovereignty.²³¹ In this matter, considering that agreement was reached leading to the establishment of the Malacca Straits Council (MSC) in 1969, it may be possible to set up a similarly functioning body for the purpose of managing a fund for the maintenance of security against maritime crime. The MSC was established for the purpose of maintenance of navigational aids and preservation of the marine environment; through the Nippon Foundation, Japan contributed two thirds of the total amount of the MSC fund.²³² Other contributors include the Japanese government and an association of related industries including the Japanese Shipowners' Association and the Petroleum

²²⁸ Yann-huei Song 'Security in the Straits of Malacca and the Regional Maritime Security Initiative: Responses to the US Proposal' in Michael D. Carsten *Global Legal Challenges: Command of the Commons, Strategic Communications and Natural Disasters* (82 U.S Naval War College International Law Studies) 97-156 at 7 and 141 .

²²⁹ Hiroshi Terashima, Executive Director, OPRF (Ocean Policy Research foundation) at the Seminar on Maritime Terrorism and the Straits of Malacca, on September 19 2005. Cited from OPRF 'OPRF Blueprint for a New Cooperative Framework on the Straits of Malacca and Singapore' (OPRF, Tokyo 2006) 6.

²³⁰ OPRF 'OPRF Blueprint for a New Cooperative Framework on the Straits of Malacca and Singapore' (OPRF, Tokyo 2006) 7.

²³¹ Hashim Djalal 'The Malacca-Singapore Straits Issue' in MN Basiron and A Dastan (eds.) *Building a Comprehensive Security Environment in the Straits of Malacca* (MIMA, Kuala Lumpur 2004) 270-289, 288.

²³² This is based on information up to the year 2005. See <http://www.nmc.com.sg/MSC.pdf>; Hashim Djalal (2004) 286.

Association of Japan.²³³ Japan's concern over the Straits is not limited to the issue of maintaining navigational safety. On many occasions, Japan has also voiced security concerns; for instance, it convened the discussion on combating piracy in the region in Tokyo in 2002, conducted a joint anti-piracy exercise with the Royal Brunei Marine Police and helped with the drafting of a Coast Guard Code for Indonesia.²³⁴ It is pertinent to highlight that, while Japan has given significant financial support to the management of the Straits over the last 30 years, other user states or actual users are also expected to contribute to the betterment of their interests and security in the Straits.²³⁵ There should be no issues of regionalism or internalisation of the Straits. Provided that IMO approval is received, the suggestion to establish a fund through the imposition of fees on actual users, either voluntarily or compulsorily, might still be implemented to cater for the growing importance of the Straits to global trade.

7.3.4 THE AWARENESS OF THE USER STATES ON ENHANCING THEIR SHIPS' SECURITY

While the rights and duties of the coastal states seem to be fairly balanced with those of the user states as stipulated in the 1982 Convention, in practice this is not the case. History has recorded that it takes longer for the 1982 Convention to reach a consensus on balancing the two groups' interests.²³⁶ The coastal states or, in the context of the Straits, the littoral States had attempted to limit the freedom of navigation through the Straits for fear of degradation of their sovereignty and, more importantly, the sustainable marine environment due to pollution from ships. Meanwhile, the user

²³³ *ibid.*

²³⁴ M J Valencia 'Security Issues in the Malacca Straits: Whose security and Why it Matters' in MN Basiron and A Dastan (eds.) *Building a Comprehensive Security Environment in the Straits of Malacca* (MIMA, Kuala Lumpur 2004) 91-110, 95.

²³⁵ Djalal (2004) 288.

²³⁶ Cross-refer to Chapter Two.

states, perhaps rightly referred to as the maritime nations, struggled for the freedom of navigation through the Straits so that their maritime trade would not be impeded.

It appears that the identification of what constitutes a user state is rather complicated. Oegroseno asks the following questions on this issue: ‘Are we to classify them based on frequency of traffic, amount of goods, value of goods, or strategic interests? Or are we to classify them based on some other standards, such as proximity?’²³⁷ These questions correctly point out that no specific definition of ‘user states’ is provided in the 1982 Convention. Thus, it is not surprising that, thus far, it has not been possible to implement the recommendation to impose fees or voluntary contributions on the user states under the principle of burden-sharing. However, it is important to emphasise that more transparent value must come from the responsible user states or stakeholders in responding to the issues of safety and security of the Straits. It is not appropriate to rely totally on the cooperative action and legal framework designed by the littoral States and then point the finger at the littoral States when piracy and armed robbery attacks occur in the Straits. It is argued that a lack of awareness by the ship’s owner or crew on ensuring the security of their ship while transiting this bottleneck might also contribute to this problem. Subsequent to this, IMO has issued guidelines to shipowners on precautionary steps they should take to prevent their ships from being attacked by pirates or armed robbers either at anchor, in ports or underway, as well as the implementation of the ISPS Code.²³⁸ It is in fact their responsibility to ensure that preventive measures have been taken, especially since they are navigating

²³⁷ AH Oegroseno ‘Straits of Malacca and the Challenges Ahead: Indonesian Point of View’ in MN Basiron and A Dastan (eds.) *Building a Comprehensive Security Environment in the Straits of Malacca* (MIMA, Kuala Lumpur 2004) 28-45, 33.

²³⁸ See IMO MSC.1/Circ.1334.

a seaway that is vulnerable to attacks of piracy and armed robbery. This includes ‘providing appropriate surveillance and detection equipment to aid their crews and protect their ships’²³⁹, particularly when they have small crews. The lesson learned from the number of attempted attacks of piracy and armed robbery against ships is that the prompt action of the crews can thwart the attacks. Therefore, it is suggested that, as potential victims, the user states or flag states whose ships ply the Straits must always be committed and ready to comply with the rules and regulations enforced by the littoral States and the guidelines of the IMO in order to deter and suppress piracy and armed robbery attacks in the Straits. Eventually, such assistance will help the local authorities to police the Straits and enforce their laws effectively.

7.3.5 STRENGTHENING DOMESTIC LEGAL FRAMEWORK AND GOVERNMENT POLICY AGAINST PIRACY AND ARMED ROBBERY AGAINST SHIPS.

International law governs the relationships between states and imposes certain rights and duties on them to ensure harmonisation among all states of the world. To attain that aim, it is ultimately the role of an individual state to observe the law which is regulated or customarily adopted by the international law. The 1982 Convention is an example of a comprehensive international law governing the sea to which most states are parties. It can also arguably be regarded as having evolved into customary international law, and non-parties to the Convention have also applied the provisions stipulated in it.²⁴⁰ Despite its remarkable achievement, it still arguably lacks enforcement power in certain areas, particularly in combating piracy. It leaves

²³⁹ See IMO MSC.1/Circ.1334. Annex p.4

²⁴⁰ Cross -refer to Chapter 3.

domestic laws to produce suitable mechanisms to bring the perpetrators to justice. Thus, a concrete legal framework that has a robust substantive and procedural law as well as good policy and enforcement propensity is needed for that purpose.

The growing concerns over the crime of piracy and armed robbery against ships in the Straits have impelled the state to strengthen its law. This is important in order to ensure that the perpetrators are punished accordingly as a means of deterrence. To release them without charge will encourage them to repeat the crime without fear. It has been pointed out that, while some states have adequate law enforcement capacities, others have resource problems which may impede their efforts to suppress piracy and other maritime trans-border crime. This includes the absence of effective legislation to deal with such crimes.²⁴¹

However, catching and charging the pirates or armed robbers in the Straits has become problematical due to the geographical area of the littoral States, especially Indonesia which contains thousands of islands. In such a situation, the pirates, who are mostly Indonesian, are able to quickly reach their hiding places after attacking the ships. This makes the enforcement of authority fairly difficult since the right of hot pursuit ceases at the territorial sea of a foreign state. Although the littoral States have made arrangements for coordinated patrols, these have been criticised since each state is responsible only for its own territory. According to an officer at the Malaysia Maritime Enforcement Agency (MMEA), this problem has recently been solved when the three littoral States reached a consensus on a less stringent approach to the right of

²⁴¹ IMO Resolution A 26/Res.1025.

inter-territorial hot pursuit. However, a contradictory view was obtained personally from an officer in the Maritime Policy at the Prime Minister's Department who said that, while joint air patrols are already being deployed through the 'eyes in the sky' (EiS), the boat patrol (MSSP) has yet to be implemented.

As mentioned in this thesis, it is important to note once again that almost all of the reported attacks in Southeast Asian waters, particularly the Straits, are not piracy but rather armed robbery against ships. Thus, when the perpetrators are arrested, they will be charged according to the local law applying in the area where the crime occurred. If it occurs within the Malaysian Maritime Zone (MMZ), the Malaysian Penal Code and other relevant laws such as the Armed Offence Increase Penalty Act will be applied. However, in cases of piracy such as the *MT Bunga Laurel*, where Somali pirates were arrested on the high seas off Somalia by the Malaysian Navy, the Malaysian law may still be applicable. Nevertheless it is recommended that the government of Malaysia enact more comprehensive legislation that deals exclusively with the issue of piracy globally such as Maritime Security Act. At the same time, Malaysia should be prepared to become party to 1988 SUA Convention to enhance the basis for prosecution of piracy and armed robbery against ships.

7.4 CONCLUDING REMARKS

In conclusion, to respond to the question posed at the beginning of this chapter, and in particular in relation to issues of suppressing piracy and armed robbery in the Straits of Malacca, the overall analysis conducted allows the author to conclude that, with the assistance of international instruments, regional states and other stakeholders, the littoral States have successfully reduced the number of incidences of piracy in the Straits. Zooming in on the smaller context, this means that, despite several criticisms, Malaysia, which has been given special attention in the thesis, has the capability and adequate law to protect and secure the Straits and subsequently to criminalise the perpetrators of crime, be it piracy or armed robbery against ships. With the adoption of the 1982 Convention and other treaties, together with its national law and agencies, Malaysia arguably has an adequate legal framework to investigate and prosecute perpetrators of piracy and armed robbery at sea. The requirement to give full cooperation in suppressing piracy, as required by Article 100 of the 1982 Convention and IMO Guidelines and Resolutions such as Resolution A.1025 (26) on the Code of Practice for the investigation of Crimes of Piracy and Armed Robbery against Ships, has been complied with. The supportive and cooperative attitude of the government of Malaysia in improving its enforcement capacities and legal framework is evident from the establishment of MMEA and the prosecution of armed robbers and pirates in the Malaysian judicial system over the years. Although Malaysia has been preoccupied with other obvious internal security threats, to some extent Malaysia has compromised its national interests in order to ensure the safety and security of ships passing through the Straits. This conclusion appears to be supported by the analysis of Malaysia's legal framework conducted in Chapter Six. Apart from the analysis of the legal regime in

international law²⁴² and the domestic laws focusing on Malaysia, the statistical data discussed in Chapter Four may constitute a standard for determining the efficacy or at least adequacy of laws, action and cooperation of the littoral States and other interested parties in maintaining a comprehensive security environment in the management of the Straits.²⁴³ This will ultimately enable the author to confirm the hypothesis that, the adequate domestic legal framework criminalising piracy and cooperative action among states at regional and international levels are the key factors in the successful and dramatic reduction of piracy and armed robbery in the Straits.

²⁴² Cross-refer to Chapters One and Two of the thesis.

²⁴³ This is parallel with the aspiration of Malaysia: see Keynote Address by Mohd Najib Abd Razak, at the launching of the Centre for Straits of Malacca on 21 October 2008, in MIMA Bulletin (2008) 15 (3), 31.

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Interviews

Interview with Lailawati Ali, Deputy Public Prosecutor of Attorney General's Chambers Malaysia (High Court Criminal Division, Kuala Lumpur 24th September 2012).

Interview Mohd Helmy Ahmad, Principal Assistant Secretary, Maritime Security and Sovereignty Division, Prime Minister's Department (Putrajaya, 20 February 2009, 11 November 2010, 10 January 2011)

Interview with Captain Maritime Mamu Said Alee, Director of Maritime Policy and International Relation, MMEA (Kuala Lumpur 23rd February 2009).

Interview with Commander Azhar, Royal Malaysian Navy (Kuala Lumpur, 22 May 2006)

APPENDICES

Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at 23 January 2013

Extracted from:

http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm

The United Nations Convention on the Law of the Sea of 10 December 1982		La Convention des Nations Unies sur le droit de la mer du 10 décembre 1982	
165.	Timor-Leste (8 January 2013)	165.	Timor-Leste (8 janvier 2013)
164.	Swaziland (24 September 2012)	164.	Swaziland (24 septembre 2012)
163.	Ecuador (24 September 2012)	163.	Équateur (24 septembre 2012)
162.	Thailand (15 May 2011)	162.	Thaïlande (15 mai 2011)
161.	Malawi (28 September 2010)	161.	Malawi (28 septembre 2010)
160.	Chad (14 August 2009)	160.	Tchad (14 août 2009)
159.	Dominican Republic (10 July 2009)	159.	République dominicaine (10 juillet 2009)
158.	Switzerland (1 May 2009)	158.	Suisse (1 mai 2009)
157.	Liberia (25 September 2008)	157.	Liberia (25 septembre 2008)
156.	Congo (9 July 2008)	156.	Congo (9 juillet 2008)
155.	Lesotho (31 May 2007)	155.	Lesotho (31 mai 2007)
154.	Morocco (31 May 2007)	154.	Maroc (31 mai 2007)
153.	Republic of Moldova (6 February 2007)	153.	République de Moldova (6 février 2007)
152.	Montenegro (23 October 2006)	152.	Monténégro (23 octobre 2006)
151.	Niue (11 October 2006)	151.	Nioué (11 octobre 2006)
150.	Belarus (30 August 2006)	150.	Bélarus (30 août 2006)
149.	Estonia (26 August 2005)	149.	Estonie (26 août 2005)
148.	Burkina Faso (25 January 2005)	148.	Burkina Faso (25 janvier 2005)
147.	Latvia (23 December 2004)	147.	Lettonie (23 décembre 2004)
146.	Denmark (16 November 2004)	146.	Danemark (16 novembre 2004)
145.	Lithuania (12 November 2003)	145.	Lituanie (12 novembre 2003)
144.	Canada (7 November 2003)	144.	Canada (7 novembre 2003)
143.	Albania (23 June 2003)	143.	Albanie (23 juin 2003)
142.	Kiribati (24 February 2003)	142.	Kiribati (24 février 2003)
141.	Tuvalu (9 December 2002)	141.	Tuvalu (9 décembre 2002)
140.	Qatar (9 December 2002)	140.	Qatar (9 décembre 2002)
139.	Armenia (9 December 2002)	139.	Arménie (9 décembre 2002)
138.	Hungary (5 February 2002)	138.	Hongrie (5 février 2002)
137.	Madagascar (22 August 2001)	137.	Madagascar (22 août 2001)
136.	Bangladesh (27 July 2001)	136.	Bangladesh (27 juillet 2001)
135.	Serbia (12 March 2001)	135.	Serbie (12 mars 2001)
134.	Luxembourg (5 October 2000)	134.	Luxembourg (5 octobre 2000)
133.	Maldives (7 September 2000)	133.	Maldives (7 septembre 2000)
132.	Nicaragua (3 May 2000)	132.	Nicaragua (3 mai 2000)
131.	Vanuatu (10 August 1999)	131.	Vanuatu (10 août 1999)
130.	Ukraine (26 July 1999)	130.	Ukraine (26 juillet 1999)
129.	Poland (13 November 1998)	129.	Pologne (13 novembre 1998)
128.	Belgium (13 November 1998)	128.	Belgique (13 novembre 1998)

127.	Nepal (2 November 1998)	127.	Népal (2 novembre 1998)
126.	Suriname (9 July 1998)	126.	Suriname (9 juillet 1998)
125.	Lao People's Democratic Republic (5 June 1998)	125.	République démocratique populaire lao (5 juin 1998)
124.	European Union (1 April 1998)	124.	Union européenne (1 avril 1998)
123.	Gabon (11 March 1998)	123.	Gabon (11 mars 1998)
122.	South Africa (23 December 1997)	122.	Afrique du Sud (23 décembre 1997)
121.	Portugal (3 November 1997)	121.	Portugal (3 novembre 1997)
120.	Benin (16 October 1997)	120.	Bénin (16 octobre 1997)
119.	Chile (25 August 1997)	119.	Chile (25 août 1997)
118.	United Kingdom of Great Britain and Northern Ireland (25 July 1997)	118.	Royaume-Uni (25 juillet 1997)
117.	Equatorial Guinea (21 July 1997)	117.	Guinée équatoriale (21 juillet 1997)
116.	Solomon Islands (23 June 1997)	116.	Iles Salomon (23 juin 1997)
115.	Mozambique (13 March 1997)	115.	Mozambique (13 mars 1997)
114.	Russian Federation (12 March 1997)	114.	Fédération de Russie (12 mars 1997)
113.	Pakistan (26 February 1997)	113.	Pakistan (26 février 1997)
112.	Guatemala (11 February 1997)	112.	Guatemala (11 février 1997)
111.	Spain (15 January 1997)	111.	Espagne (15 janvier 1997)
110.	Papua New Guinea (14 January 1997)	110.	Papouasie-Nouvelle-Guinée (14 janvier 1997)
109.	Romania (17 December 1996)	109.	Roumanie (17 décembre 1996)
108.	Brunei Darussalam (5 November 1996)	108.	Brunéi Darussalam (5 novembre 1996)
107.	Malaysia (14 October 1996)	107.	Malaisie (14 octobre 1996)
106.	Palau (30 September 1996)	106.	Palaos (30 septembre 1996)
105.	Mongolia (13 August 1996)	105.	Mongolie (13 août 1996)
104.	Haiti (31 July 1996)	104.	Haïti (31 juillet 1996)
103.	New Zealand (19 July 1996)	103.	Nouvelle-Zélande (19 juillet 1996)
102.	Mauritania (17 July 1996)	102.	Mauritanie (17 juillet 1996)
101.	Panama (1 July 1996)	101.	Panama (1 juillet 1996)
100.	Netherlands (28 June 1996)	100.	Pays-Bas (28 juin 1996)
99.	Sweden (25 June 1996)	99.	Suède (25 juin 1996)
98.	Norway (24 June 1996)	98.	Norvège (24 juin 1996)
97.	Ireland (21 June 1996)	97.	Irlande (21 juin 1996)
96.	Finland (21 June 1996)	96.	Finlande (21 juin 1996)
95.	Czech Republic (21 June 1996)	95.	République tchèque (21 juin 1996)
94.	Japan (20 June 1996)	94.	Japon (20 juin 1996)
93.	Algeria (11 June 1996)	93.	Algérie (11 juin 1996)
92.	China (7 June 1996)	92.	Chine (7 juin 1996)
91.	Myanmar (21 May 1996)	91.	Myanmar (21 mai 1996)
90.	Bulgaria (15 May 1996)	90.	Bulgarie (15 mai 1996)
89.	Slovakia (8 May 1996)	89.	Slovaquie (8 mai 1996)
88.	Saudi Arabia (24 April 1996)	88.	Arabie saoudite (24 avril 1996)
87.	France (11 April 1996)	87.	France (11 avril 1996)
86.	Georgia (21 March 1996)	86.	Géorgie (21 mars 1996)
85.	Monaco (20 March 1996)	85.	Monaco (20 mars 1996)
84.	Republic of Korea (29 January 1996)	84.	République de Corée (29 janvier 1996)
83.	Nauru (23 January 1996)	83.	Nauru (23 janvier 1996)
82.	Argentina (1 December 1995)	82.	Argentine (1 décembre 1995)
81.	Jordan (27 November 1995)	81.	Jordanie (27 novembre 1995)

80.	Samoa (14 August 1995)	80.	Samoa (14 août 1995)
79.	Tonga (2 August 1995)	79.	Tonga (2 août 1995)
78.	Greece (21 July 1995)	78.	Grèce (21 July 1995)
77.	Austria (14 July 1995)	77.	Autriche (14 July 1995)
76.	India (29 June 1995)	76.	Inde (29 juin 1995)
75.	Slovenia (16 June 1995)	75.	Slovénie (16 juin 1995)
74.	Bolivia (Plurinational State of) (28 April 1995)	74.	Bolivie (État plurinational de) (28 avril 1995)
73.	Croatia (5 April 1995)	73.	Croatie (5 avril 1995)
72.	Cook Islands (15 February 1995)	72.	Iles Cook (15 février 1995)
71.	Italy (13 January 1995)	71.	Italie (13 janvier 1995)
70.	Lebanon (5 January 1995)	70.	Liban (5 janvier 1995)
69.	Sierra Leone (12 December 1994)	69.	Sierra Leone (12 décembre 1994)
68.	Singapore (17 November 1994)	68.	Singapour (17 novembre 1994)
67.	Mauritius (4 November 1994)	67.	Maurice (4 novembre 1994)
66.	Germany (14 October 1994)	66.	Allemagne (14 octobre 1994)
65.	Australia (5 October 1994)	65.	Australie (5 octobre 1994)
64.	The former Yugoslav Republic of Macedonia (19 August 1994)	64.	Ex-République yougoslave de Macédoine (19 août 1994)
63.	Viet Nam (25 July 1994)	63.	Viet Nam (25 July 1994)
62.	Sri Lanka (19 July 1994)	62.	Sri Lanka (19 July 1994)
61.	Comoros (21 June 1994)	61.	Comores (21 juin 1994)
60.	Bosnia and Herzegovina (12 January 1994)	60.	Bosnie-Herzégovine (12 janvier 1994)
59.	Guyana (16 November 1993)	59.	Guyane (16 novembre 1993)
58.	Barbados (12 October 1993)	58.	Barbade (12 octobre 1993)
57.	Honduras (5 October 1993)	57.	Honduras (5 octobre 1993)
56.	Saint Vincent and the Grenadines (1 October 1993)	56.	Saint-Vincent-et-les-Grenadines (1 octobre 1993)
55.	Malta (20 May 1993)	55.	Malte (20 mai 1993)
54.	Zimbabwe (24 February 1993)	54.	Zimbabwe (24 février 1993)
53.	Saint Kitts and Nevis (7 January 1993)	53.	Saint-Kitts-et-Nevis (7 janvier 1993)
52.	Uruguay (10 December 1992)	52.	Uruguay (10 décembre 1992)
51.	Costa Rica (21 September 1992)	51.	Costa Rica (21 septembre 1992)
50.	Dominica (24 October 1991)	50.	Dominique (24 octobre 1991)
49.	Djibouti (8 October 1991)	49.	Djibouti (8 octobre 1991)
48.	Seychelles (16 September 1991)	48.	Seychelles (16 septembre 1991)
47.	Marshall Islands (9 August 1991)	47.	Iles Marshall (9 août 1991)
46.	Micronesia (Federated States of) (29 April 1991)	46.	Micronésie (États fédérés de) (29 avril 1991)
45.	Grenada (25 April 1991)	45.	Grenade (25 avril 1991)
44.	Angola (5 December 1990)	44.	Angola (5 décembre 1990)
43.	Uganda (9 November 1990)	43.	Ouganda (9 novembre 1990)
42.	Botswana (2 May 1990)	42.	Botswana (2 mai 1990)
41.	Oman (17 August 1989)	41.	Oman (17 août 1989)
40.	Somalia (24 July 1989)	40.	Somalie (24 juillet 1989)
39.	Kenya (2 March 1989)	39.	Kenya (2 mars 1989)
38.	Democratic Republic of the Congo (17 February 1989)	38.	République démocratique du Congo (17 février 1989)
37.	Antigua and Barbuda (2 February 1989)	37.	Antigua-et-Barbuda (2 février 1989)
36.	Brazil (22 December 1988)	36.	Brésil (22 décembre 1988)
35.	Cyprus (12 December 1988)	35.	Chypre (12 décembre 1988)

34.	Sao Tome and Principe (3 November 1987)	34.	Sao Tomé-et-Principe (3 novembre 1987)
33.	Cape Verde (10 August 1987)	33.	Cap-Vert (10 août 1987)
32.	Yemen (21 July 1987)	32.	Yémen (21 juillet 1987)
31.	Paraguay (26 September 1986)	31.	Paraguay (26 septembre 1986)
30.	Guinea-Bissau (25 August 1986)	30.	Guinée-Bissau (25 août 1986)
29.	Nigeria (14 August 1986)	29.	Nigeria (14 août 1986)
28.	Kuwait (2 May 1986)	28.	Koweït (2 mai 1986)
27.	Trinidad and Tobago (25 April 1986)	27.	Trinité-et-Tobago (25 avril 1986)
26.	Indonesia (3 February 1986)	26.	Indonésie (3 février 1986)
25.	Cameroon (19 November 1985)	25.	Cameroun (19 novembre 1985)
24.	United Republic of Tanzania (30 September 1985)	24.	République-Unie de Tanzanie (30 septembre 1985)
23.	Guinea (6 September 1985)	23.	Guinée (6 septembre 1985)
22.	Iraq (30 July 1985)	22.	Iraq (30 juillet 1985)
21.	Mali (16 July 1985)	21.	Mali (16 juillet 1985)
20.	Iceland (21 June 1985)	20.	Islande (21 juin 1985)
19.	Bahrain (30 May 1985)	19.	Bahreïn (30 mai 1985)
18.	Tunisia (24 April 1985)	18.	Tunisie (24 avril 1985)
17.	Togo (16 April 1985)	17.	Togo (16 Avril 1985)
16.	Saint Lucia (27 March 1985)	16.	Sainte-Lucie (27 mars 1985)
15.	Sudan (23 January 1985)	15.	Soudan (23 janvier 1985)
14.	Senegal (25 October 1984)	14.	Sénégal (25 octobre 1984)
13.	Cuba (15 August 1984)	13.	Cuba (15 août 1984)
12.	Gambia (22 May 1984)	12.	Gambie (22 mai 1984)
11.	Philippines (8 May 1984)	11.	Philippines (8 mai 1984)
10.	Côte d'Ivoire (26 March 1984)	10.	Côte d'Ivoire (26 mars 1984)
9.	Egypt (26 August 1983)	9.	Égypte (26 août 1983)
8.	Belize (13 August 1983)	8.	Bélize (13 août 1983)
7.	Bahamas (29 July 1983)	7.	Bahamas (29 juillet 1983)
6.	Ghana (7 June 1983)	6.	Ghana (7 juin 1983)
5.	Namibia (18 April 1983)	5.	Namibie (18 avril 1983)
4.	Jamaica (21 March 1983)	4.	Jamaïque (21 mars 1983)
3.	Mexico (18 March 1983)	3.	Mexique (18 mars 1983)
2.	Zambia (7 March 1983)	2.	Zambie (7 mars 1983)
1.	Fiji (10 December 1982)	1.	Fidji (10 décembre 1982)

The 1979 New Map of Malaysia





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Sheet 1 (Peninsula Malaysia) - Shows the Maritime Boundaries of Malaysia and Neighbouring States and the related treaty/agreement



Sheet 2 (West Malaysia) - Shows the Maritime Boundaries of Malaysia and Neighbouring States and the related treaty/agreement



The Malaysian Maritime Zone

Source: Website of the National Security Council, Prime Minister Department, Malaysia

Perairan Dalaman (<i>Internal waters</i>)	97,306.83 km ² 37, 571 bn ²
Laut Wilayah (Territorial waters/sea)	63,665.3 km ² 24,581.85 bn ²
Pelantar Benua (Continental Shelf)	476,761.87 km ² 184,082.22 bn ²
Zon Eksklusif Ekonomi (Exclusive economic Zone)	453,186.18 km ² 174,979.43 bn ²
Pesisir Pantai	4492 km - 1737 km (Sem. Malaysia) - 2755 km (Sabah/Sarawak)
Nisbah Darat dan Laut	1 : 2

