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Enhancing Maritime Security In The Malacca Strait: Cooperation Against Piracy And Maritime Terrorism

Rheny Wahyuni Pulungan*

The Malacca Strait, together with the Singapore Strait, are two of the most important straits in the world and consequently there is significant traffic through them, reported to be approximately 60,000 vessels a year. The rising number of violent and well-coordinated attacks on transiting ships in these straits has become a very serious problem, such as threats of unauthorized boarding; theft of personal property, cargo and the ships themselves; and violence against, and the kidnapping or murder of, seafarers. One effort which is likely to enhance security in the Malacca Strait is the establishment of 'joint patrol areas', where more than one of the three littoral states will have the right to patrol and arrest persons and vessels where there is an incident of piracy. Extra regional assistance is also necessary to suppress and prevent piracy and maritime terrorism in the Malacca Strait, however the proposal by the United States to deploy its troops to help with patrolling these straits may violate the national sovereignty of the three littoral states. Therefore, the foreign assistance given by the major user states should be given in other forms such as providing more advanced technology for combating piracy and terrorism, training for personnel who patrol the Malacca and Singapore straits and sharing intelligence information to prevent piracy and maritime terrorist attacks.

Keywords: Maritime Security, International Strait, Regional Assistance

1. Introduction

The Malacca Strait, together with the Singapore Strait ("the Straits"), are two of the most important straits in the world. The Malacca Strait is located mostly within the territorial waters of Singapore, Malaysia and Indonesia. The straits of Malacca and Singapore connect the Indian Ocean with the South China Sea and, therefore, provide the shortest route for tankers trading between the Middle East and Far East Asian countries.¹

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Consequently, there is significant traffic through the Straits, which is reported to be approximately 60,000 vessels a year.² Furthermore, there is a large number of local vessels trading across the Straits and various fishing vessels can be encountered in most areas.³ The Malacca Strait is also very vital particularly to international energy trade.⁴ About thirty to forty percent (30%-40%) of the total traffic in the straits of Malacca and Singapore are oil tankers. About eighty percent (80%) of that oil is imported by Japan, South Korea and China from the Persian Gulf via the Malacca Strait.⁵ It is predicted, partly because of the increasing amount of oil imported by China from the Middle East, that the straits of Malacca and Singapore will become more important in the future.⁷

Any significant disruption to the maritime traffic through the Straits will have a serious impact on global trade.⁸ It is predicted that if the straits of Malacca and Singapore were closed for a period of time, for example, due to a terrorist bombing against a tanker, almost half of the ships in the world's fleet would have to alter their routes.⁹ It would be disastrous for the economies of many countries, especially Japan, China, South Korea and Singapore, which rely heavily on energy trading for their economic growth.¹⁰

Prior to 1989, the Malacca Strait was relatively safe with, on average, only seven cases of piracy and armed robbery reported every year. In 1989, the number of cases increased to 28 and rose significantly to 50 cases in 1991. In 2004 about one third of the 325 cases of armed robbery and piracy against shipping worldwide were in Southeast Asia.¹¹ This number decreased in 2005 and 2006 to 12 and 11 pirate attacks, respectively,¹² but in 2006 the number of

² Ibid.

³ Ibid.

⁴ Gal Luft and Anne Korin, 'Terrorism Goes to Sea' (2004) 83 *Foreign Affairs* 61, 67.

⁵ Donald B Freeman, *The Straits of Malacca: Gateway or Gauntlet?* (2004) 69.

⁶ Michael Richardson, 'Terrorism: The Maritime Dimension' (2004) 3 *Trends In Southeast Asia Series* [7] <http://www.iscas.edu.sg/32004.pdf> at 9 November 2009

⁷ Roach, above n.1, 101.

⁸ Nihan Unlu, 'Current Legal Development Straits of Malacca' (2006) 21(4) *The International Journal of Marine and Coastal Law* 539, 539. See also Energy Information Administration Official Energy Statistics from the U.S. Government, 'World Oil Transit Chokepoints: Malacca' <http://www.eia.doe.gov/cabs/World_Oil_Transit_Chokepoints/Malacca.html> at 9 November 2009.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Michael Richardson 'Aiming a shot across the bow', *Straits Times*, 25 May 2005, <<http://www.iscas.edu.sg/viewpoint/mr25may05.pdf>> at 7 July 2007.

ew killed increased to 15, compared with 2005 in which no one was killed.¹³ The number continued to decrease in 2007 and 2008 to 12 and 2, respectively.¹⁴

The rising number of violent and well-coordinated attacks on ships transiting the Straits has become a very serious problem.¹⁵ Often the pirates have satellite phones and can eavesdrop on communications from the targeted vessels.¹⁶ Moreover, automatic assault rifles, rocket-propelled grenades and hand grenades are increasingly carried and used by the pirates.¹⁷ As it is evident from the number of crew members killed in 2006, assaults are becoming more violent.¹⁸ Ships and their crews transiting the straits of Malacca and Singapore are facing regular threats of unauthorized boarding; theft of personal property, cargo and the ships themselves; and violence against, and kidnapping or murder of, seafarers.¹⁹

There are indications that there are likely to be more serious terror attacks on shipping in the Straits.²⁰ Some terrorism experts have suggested in their analyses that there is no link between these attacks and terrorist elements and, therefore, there is no evidence that the pirates and terrorists are working together in the Straits to launch terror attacks against shipping. Nonetheless, the Straits are vulnerable to such acts²¹ and, particularly in light of the heightened concern with terrorist activities post-9/11, the possibility of such attacks has now become a major international concern.²²

¹² IMB Reports 2006 <<http://www.icc-ccs.org/main/publication.php>> at 4 November 2009.

¹³ *Ibid.*

¹⁴ International Maritime Organization, 'Reports on Act of Piracy and Armed Robbery Against Ships' (2007) <http://www.imo.org/includes/blastDataOnly.asp/data_id%3D22585/15.pdf> at 4 November 2009 and International Maritime Organization, 'Reports on Act of Piracy and Armed Robbery Against Ships' (2008) <http://www.imo.org/includes/blastDataOnly.asp/data_id%3D25550/133.pdf> at 4 November 2009

¹⁵ Richardson, above n.11, 3.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ IMB Reports 2006 above n.12, 11.

¹⁹ Roach, above n.1, 2.

²⁰ Tammy M. Sittnick, 'State Responsibility and Maritime Terrorism in the Strait of Malacca: Persuading Indonesia and Malaysia to take additional steps to secure the strait' (2005) 14 (3) *Pacific Rim Law & Policy Journal* 743, 744.

²¹ Catherine Zara Raymond, 'The Malacca Straits and the Threat of Maritime Terrorism', *Power and Interest News Report*, 24 August 2005 as cited in Roach above n.1, 1. See also John H. Noer, 'Southeast Asian Chokepoints: Keeping Sea Lines of Communication Open', *Institute for National Strategic Studies Strategic Forum No. 98* (1996), <http://www.ndu.edu/inss/strforum/3F_98/forum98.html> at 7 November 2009.

Terrorism has been a very crucial problem for many Southeast Asian countries. Militant Islamic groups such as Jemaah Islamiyah (JI), Moro Islamic Liberation Front (MILF), and Abu Sayyaf (ASG) have launched terrorist attacks against their own governments as part of Islamic separatist activities. Many countries have strengthened their security at political, diplomatic, and military facilities, and so terrorists have shifted their focus to 'soft' economic targets. One of the most likely economic targets is maritime transport, including shipping channels, such as the Malacca Strait.²³ Therefore, not only it is a very good target for piracy, the Malacca Strait is very likely to become the target of maritime terrorist attacks.²⁴

One of the major difficulties in enhancing security in the Malacca Strait is the current inadequacy of international law in dealing with the act of piracy and maritime terrorism. Some waters are so notorious that the international community recognizes them as pirate havens, however the laws regarding piracy have difficulty in balancing the need to combat piracy and the need to respect state sovereignty.²⁵ Furthermore, there is no coherent and coordinated approach to piracy taken by the affected states and the international community to suppress and eliminate piracy and maritime terrorism.²⁶

Another difficulty in protecting shipping from these threats is related to the fact that perpetrators and law enforcement officials are not bound by the same rules.²⁷ Perpetrators do not respect maritime borders or national sovereignty, while law enforcement and military officials respect both these limits.²⁸ Furthermore, in relation to regional responsibility, there is a real need to level the playing field by facilitating international cooperation and enhancing regional capacity to suppress illegal activities at sea.²⁹

²² Dato' Sri Mohd Najib Tun Haji Abdul Razak, 'Enhancing Maritime Security Cooperation', *Military Technology* (2005) 29 (12) 56, 58.

²³ Simon Montlake, 'Pirates Ahead', *Christian Science Monitor*, 18 March 2004 <<http://www.csmonitor.com/2004/0318/p13s02-woap.html>> at 12 November 2009.

²⁴ Sittnick, above n.20, 750.

²⁵ Press Release IMB as cited in Ethan C. Stiles, 'Reforming Current International Law to Combat Modern Sea Piracy' (2003-2004) (27) *Suffolk Transnational Law Review* 299, 299.

²⁶ H.E. Jose Luis Jesus, 'Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects' (2003) 18 *The International Journal of Marine and Coastal Law* 363, 367.

²⁷ Sittnick, above n.20, 750.

²⁸ *Ibid.*

²⁹ *Ibid.*

There have been strong proposals from the U.S. and Japan to permit joint patrol areas and to allow extra-regional forces to patrol the Straits, especially in relation to maritime terrorism. However, Indonesia and Malaysia have consistently rejected this proposal claiming such steps will infringe upon their sovereignty.

This paper will examine the steps that have been taken, and that are envisioned, to enhance maritime security in the straits of Malacca and Singapore. Then, this paper will also investigate the shortcomings of the international law of the sea in combating piracy and maritime terrorism, particularly in the Malacca Strait. There will also be a discussion about the joint patrol areas and the extra-regional patrols proposal and how this proposal is unlikely to be accepted, especially by Indonesia and Malaysia, unless both states can be assured that it will not infringe their sovereignty.

2. The Malacca Strait

2.1. The Profile of the Straits of Malacca and Singapore (Geographic Location and Characteristics)

A strait may be defined in various ways, however, the primary characteristic, as recognized in existing international law, is a narrow space or passage connecting one part of the high seas or an economic zone to either another part of the high seas or another economic zone, or with the territorial sea of a state.³⁰

The 1982 United Nations Convention on the Law of the Sea³¹ has defined straits used for international navigation as the straits between one part of the high seas or an exclusive economic zone (EEZ) and another part of the high seas or an EEZ.³²

The straits of Malacca and Singapore extend for approximately 520 nautical miles (nm) and together comprise the longest straits used for international navigation.³³ The Strait of Malacca is located between the east coast of the Indonesian island of Sumatra and the west coast of the Malaysian peninsula.³⁴

³⁰ Phiphat Tangsubkul, ASEAN and the Law of the Sea (1982) 24.

³¹ Hereinafter UNCLOS 1982.

³² Article 37 UNCLOS 1982 <http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm> at 12 November 2009.

³³ Roach, above n.1, 98.

³⁴ Ibid.

The Strait of Singapore is located south of both the island of Singapore and the south eastern tip of the Malaysian peninsula, and north of the Indonesian Riau Islands.³⁵ The straits of Malacca and Singapore provide the shortest sea route between the Indian Ocean (via the Andaman Sea) and the Pacific Ocean (via the South China Sea).³⁶

The narrowest point of this shipping lane is 1.2 nm, located near Batu Berhanti, in the Strait of Singapore. It creates a natural bottleneck with the potential for collisions and/or groundings that could result in pollution of the marine environment.³⁷

At the broad, western entrance to the Malacca Strait, the coasts of Indonesia and Malaysia are separated by about 200 nm.³⁸ However the strait begins to funnel in a south easterly direction.³⁹ The 12 nm territorial seas of Indonesia and Malaysia overlap at 3°N and south of One Fathom Bank.⁴⁰ The narrowest part of the Strait of Malacca is 8.4 nm, which is at the south western tip of the Malaysian peninsula and, given the shallow depth, is much narrower for deep-draught vessels.⁴¹

The depth of the Malacca Strait is less than 75 feet, with a tidal range between 4.6 feet at the eastern outlet of the Singapore Strait and 12.5 feet at the western entrance to the Malacca Strait.⁴² The draughts of many large ships using the straits closely approach the controlling depths; therefore, tidal heights are very important for the safety of the ships.

2.2. The Significance of the Malacca Strait

The legal status of the Malacca Strait has been an important issue to the three littoral states, namely Indonesia, Malaysia, and Singapore. The Malacca Strait, which is a gateway between the Indian Ocean and the South China Sea,

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid. See also John H. Noer, "Southeast Asian Chokepoints: Keeping Sea Lines of Communication Open," Institute for National Strategic Studies Strategic Forum 98 (December 1996), <http://www.ndu.edu/inss/strforum/SF_98/forum98.html> at 7 November 2009

³⁸ Roach, above n.1, 98.

³⁹ Ibid.

⁴⁰ U.S. Department of State, "Indonesia-Malaysia Territorial Sea Boundary" Limits in the Seas No. 50 (1973) as cited in Roach, above n.1, 98.

⁴¹ Roach, above n.1, 98.

⁴² Michael Leifer, *Malacca, Singapore and Indonesian Straits* (1978) as cited in Roach, above n.,1, 98.

offers the shortest sea route from Europe and the Middle East to Southeast Asian Countries, Japan, China and other Far Eastern States. Stretching approximately 500 nm from north to south, the Strait is used by as many as 5,000 vessels a month, including small local craft and large tankers and cargo carriers.⁴³ More than 200 vessels, fifty percent (50%) of which are tankers, ply the Straits of Malacca and Singapore everyday.⁴⁴ It has been reported that an average of one ship enters the Straits of Singapore every six minutes.⁴⁵ The excellent port facilities and trade centres of Singapore and Penang, which are located in the Straits, have made them a very important place for world commerce.⁴⁶

If, for some reason, these two straits were closed almost half the world's fleet would have to sail more than 500 nm further, extending voyage times and generating a significant increase in the requirement for vessel capacity.⁴⁷ Indeed, some sources have claimed that all excess capacity might be absorbed, which would impact significantly on crude-oil shipments and dry-bulk cargoes such as coal. The closure of the Straits would definitely cause freight costs to rise worldwide.⁴⁸

The straits of Malacca and Singapore have received significant attention since the early 1970s.⁴⁹ In November 1971, both Indonesia and Malaysia agreed that they were not international straits but fully recognized their use for international shipping on the basis of the principle of innocent passage. Furthermore, the three littoral states agreed that: (1) the safety of navigation in the Straits was their joint responsibility; (2) tripartite cooperation was necessary in this regard; and (3) a body should be established to coordinate efforts for the safety of navigation and composed only of the three littoral states.⁵⁰

⁴³ Tangsubkul, above n.30, 50.

⁴⁴ *BT Shipping Times*, 26 February 1993, 22 as cited in Robert C. Beckman, Carl Grundy-Warr and Vivian L. Forbes, 'Acts of Piracy in the Malacca and Singapore Straits' (1994) 1 (4) *Maritime Briefing*, 7.

⁴⁵ *Straits Times*, 21 July 1989 as cited in Robert C. Beckman, Carl Grundy-Warr and Vivian L. Forbes, 'Acts of Piracy in the Malacca and Singapore Straits' (1994) 1 (4) *Maritime Briefing*, 7.

⁴⁶ Tangsubkul, above n.27, 50

⁴⁷ Roach, above n.1, 97.

⁴⁸ *Ibid.*

⁴⁹ George G. Thomson, 'The Malacca Straits: Who has the Last Word?' as cited in Peter Polomka, *Ocean Politics in Southeast Asia* (1978) 41.

⁵⁰ Joint Statement, 16 November 1971 as cited in Peter Polomka, *Ocean Politics in Southeast Asia* (1978) 41.

The legal status of the major access route of sea power between the world's seas has long been a crucial issue between maritime powers and weaker coastal states. Superpowers like the U.S. and the Soviet Union argued that it was very important to maintain unrestricted access through major straits, such as those of Malacca and Singapore, not only for the maintenance of the global 'balance of deterrence' but also for the deployment of sea power for other objectives, such as the protection of national ships.⁵¹

The weaker coastal states such as Indonesia and Malaysia argued that there was a clear distinction between the 'right of passage' of shipping engaged in international trade and communication and that of warships and submarines.⁵² They accepted the right of 'innocent passage' of the former but objected to the right of passage of the latter without prior notification.⁵³ The position that had been taken by Indonesia and Malaysia was related to their concern for national sovereignty as the Straits of Malacca is never more than 24 miles wide.

However, under the 1982 UNCLOS, it is clearly established that the Strait of Malacca is one of the straits used for international navigation, furthermore, analysis of Article 36 demonstrates this, since there is no other route which is similarly convenient with respect to its navigational and hydrographical characteristics.

There is one alternative route from Japan to the Persian Gulf, which is the Strait of Makassar between Kalimantan and Sulawesi, the Sunda Strait and the Lombok Strait, but this route is much longer, at 950 nm, and therefore needs a voyage of three extra days for vessels moving at 15 knots.⁵⁴ Although the amount of piracy in the straits of Malacca and Singapore has remained high, until now there has been no other route that can provide such similar convenience. Therefore, the straits of Malacca and Singapore are still considered very important in world commerce.

⁵¹ UNCLOS III, Official Records, Vol. II, pp. 126-127, Soviet Union Position on Straits Passage, see also UNCLOS III, Official Records, Vol. II, pp. 128-129 and p. 135, the US Position as cited in Peter Polomka, *Ocean Politics in Southeast Asia* (1978) 41.

⁵² Peter Polomka, *Ocean Politics in Southeast Asia* (1978) 42.

⁵³ *Ibid.*

⁵⁴ M.J. Valencia, *Malaysia and the Law of the Sea: Foreign Policy Issues and Options and their Implications* (1991) as cited in Robert C. Beckman, Carl Grundy-Warr and Vivian L. Forbes, 'Acts of Piracy in the Malacca and Singapore Straits' (1994) 1 (4) *Maritime Briefing*, 7.

2.3. Security Problems in the Malacca Strait

The Malacca Strait is a natural 'choke point', which has attracted pirates for centuries.⁵⁵ Its shallow reefs, numerous small islands, and the fact that the sheer volume of traffic often requires ships to transit at greatly reduced speed, make the spot particularly vulnerable, and thus make perfect conditions for those who would wish to board ships illegally, or once in control of ships, to block the passage of others.⁵⁶

Given the high frequency of acts of piracy and crew abductions in South-east Asia, it has been suggested that this could signal an opportunity for terrorists to train themselves in operating and navigating large commercial vessels, imitating the actions of the 9/11 terrorists in New York.⁵⁷

3. Piracy

3.1. Definition and Types of Piracy and the Susceptibility of Vessels Sailing Busy Waterways

Maritime Piracy continues to occur as a phenomenon in itself and as one that both directly and indirectly manifests a number of related social, historical, geo-political, security and economic issues.⁵⁸ Piracy has been an ongoing issue in the world's maritime sphere throughout history. In modern times, the waters of Southeast Asia have become a region of major concern, both in terms of the frequency of the occurrence of acts of piracy and the challenges the region faces.⁵⁹

Piracy has occurred in Southeast Asian waters since long before the Europeans arrived in the Indian Ocean Basin.⁶⁰ The exact relationship between Malay trade and piracy has remained unclear.⁶¹ Many scholars have argued that, at some stage in the past, piracy in the straits of Malacca and Singapore

⁵⁵ IMO to Take Straits Initiative (2004) 27 (48) Oil Spill Intelligence Report, 1.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Graham Gerard Ong-Webb, 'Southeast Asian Piracy: Research and Developments' in Graham Gerard Ong-Webb (ed), *Piracy, Maritime Terrorism and Securing the Malacca Straits* (2006) xi, xi.

⁵⁹ Ibid.

⁶⁰ Robert C. Beckman, Carl Grundy-Warr and Vivian L. Forbes, 'Acts of Piracy in the Malacca and Singapore Straits' (1994) 1 (4) *Maritime Briefing*, 1.

⁶¹ C.A. Trocki, *Prince of Pirates: The Temenggongs and the Development of Johor and Singapore, 1784-1855* (1979), 86 as cited in Beckman et al above n.60, 2.

had a connection with Colonial rulers since the Europeans tried to control the traffic and trade in the Straits.⁶² The control had changed the traditional linkages between the sea lords and their followers and undermined the traditional livelihood of the sea people.⁶³ Nowadays, however, the context and character of piracy is completely different to that which existed during the colonial period.⁶⁴

3.2. Piracy in Customary International Law

There was no authoritative definition of piracy under customary international law even though piracy is the oldest crime and universal jurisdiction was generally recognized over it.⁶⁵ Traditional conceptions of piracy comprised at least three primary elements for an act to be deemed as piracy.⁶⁶ Firstly, it is an unauthorized act of violence.⁶⁷ Secondly, the act must not occur within the territorial waters of any state.⁶⁸ Thirdly, the act must be committed from one vessel against another vessel.⁶⁹ This narrow definition has become a source of controversy in defining the act of piracy. The two-vessel requirement will exclude members of crew seizures or passenger takeover of ships from the notion of piracy because there is only one vessel in such cases.⁷⁰ However, there are situations which are not included in the traditional definition, but in practice are treated as acts of piracy.⁷¹ One such situation is the mutiny of some members of the crew who convert the ship and the goods on board for their own personal use.

⁶² Beckman, above n.60, 3.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ Malvina Halberstam, 'Terrorism on The High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety' (1988) (82) *The American Journal of International Law* 269, 273.

⁶⁶ Lawrence J. Kahn, 'Pirates, Rovers, and Thieves: New Problems with an Old Enemy' (1996) 20 *Tulane Maritime Law Journal* 293

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ Halberstam, above n. 65, 274.

⁷² *Ibid.*

⁷³ L. Oppenheim, *International Law a Treatise* (8 ed, 1967) 609.

Another element that is often linked with piracy is *animo furandi* or intent to plunder. According to a traditional definition of piracy the motive for such an act is also important to determine whether the act is piratical or not. However, there are some exceptions, for instance an unauthorized act of violence which includes murder of crew members or passengers and/or destruction of goods on board which occurs on the high seas but without intent to plunder. In practice, such an act will be considered as an act of piracy.⁷² There is no agreement among writers about the definition of piracy and some of them have objected to the traditional definition of piracy. If all acts which are treated as piratical in practice were intended to be included in the definition of piracy, it would have to be defined as every unauthorized act of violence against people or goods on board a ship on the open seas, either by one private ship against another ship or by rebellious crew or passengers against their own vessel.⁷³

One of the more controversial issues under customary law is related to the status of insurgents who have not been acknowledged as recognized belligerents.⁷⁴ There have been different treatments for insurgents who have not obtained any recognition from their own government or any other nation. Some writers argue that such insurgents would be treated as pirates but others said that it was incorrect to treat insurgents struggling for political independence as pirates.⁷⁵ It is generally accepted that a man-of-war or other public vessel under the orders of a recognized government, as long as she remains such, is not a pirate and if she commits an unauthorized act of violence, remedy has to be sought from her flag state, which has to try the captain and to pay damages where required.⁷⁶

3.3. Piracy under Current International Law

1. Piracy in the Geneva Convention and UN Conventions

In contrast with customary international law, the 1958 Geneva Convention on the High Seas (Geneva Convention) and the 1982 United Nations Convention on the Law of the Sea (UNCLOS) clearly define piracy. Article 101 of UNCLOS provides:

⁷⁴ Halberstam, above n. 275

⁷⁵ 3.F. Wharton, *International Law Digest* 471-72 (2ed.1887) (quoting W. Hall, *International Law* 233-34 (1st ed.1884).

⁷⁶ Oppenheim, above n.73, 610.

Piracy consists of any of the following acts:

- (a) any illegal acts of violence, 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:
 - (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) of this article.

Article 101 of UNCLOS was adopted from the wording of article 15 of the Geneva Convention, which was prepared by the Harvard Research in International Law.

The definition of piracy under the 1982 UNCLOS is very narrow. It is limited to illegal acts of violence or detention against a ship (or aircraft) 'on the high seas or in other areas beyond the jurisdiction of any state'.⁷⁷ The rules of international law give all states the right to arrest pirates on the high seas and to punish pirates for acts of piracy on the high seas. Under the 1982 UNCLOS, the rules on piracy also apply if the act of piracy is committed outside the territorial sovereignty of any state, such as the EEZ of a coastal state.⁷⁸ However, these rules on piracy do not apply when the act of piracy occurs within the jurisdiction of any state. It also limits the act of piracy as an act committed by a ship or aircraft against another ship or aircraft, therefore two ships are required to constitute an act of piracy. Furthermore, the definition states that the act of piracy is committed for private ends, and thus excludes maritime terrorism. It can be argued that the definition of piracy under the convention is too narrow to address the full extent of attacks on ships in the Malacca Strait, which mostly have occurred within the territorial seas of the three littoral states.

2. The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention).

⁷⁷ Article 101 UNCLOS.

⁷⁸ Beckman et al, above n.60, 5.

The SUA Convention was drafted in response to the *Achille Lauro* incident in an attempt to codify international maritime attacks that were not offences under UNCLOS. It was concluded in 1988 and entered into force in 1994.

An offence occurs under the convention if a person intentionally commits any unlawful act — whether for public or private ends. Such acts include:

1. Seizing control of a ship by force or threat of force;
2. An act of violence against a person on board a ship if the act is likely to endanger the safe navigation of the ship; or
3. Any damage to the ship that endangers the safe navigation of the ship

The 1988 SUA and its protocol remedy some of the UNCLOS's definitional short-comings. It does not differentiate between public and private motives, so in situations where terrorism and piracy overlap, the perpetrators can be prosecuted. It also does not contain the two-ship requirement. Moreover, the SUA Convention has far broader geographical provisions than UNCLOS, thus covers not only acts occurring on the high seas but also those occurring in ports, territorial seas, or in maritime zones outside the jurisdiction of coastal states. However, not all coastal states are parties to this convention, including Malaysia and Indonesia. Even if these two states became parties, the SUA Convention provides inadequate measures to suppress both piracy and maritime terrorism since the primary function of this convention is only to combat unlawful acts against the maritime navigational safety.

3. Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia (ReCAAP)

ReCAAP was adopted in 2004 by 16 states in the Southeast Asian region making it as the first government-to-government agreement that addresses the incidence of piracy and armed robbery in Asia. ReCAAP borrows the definition of piracy stated in UNCLOS. It also includes an additional offence of 'armed robbery against ships', which is defined using the same terms as the UNCLOS definition, but applies to acts occurring within each state's jurisdiction. Thus, it can be concluded that the ReCAAP uses the UNCLOS definition of piracy, without the high seas limitation. In addition, the ReCAAP includes exchanging information among contracting parties on incidents of piracy and armed robbery, facilitating operational cooperation among contracting parties, analysing the patterns and trends of piracy and armed robbery and supporting the capacity building efforts of contracting parties. However, again, neither

Malaysia nor Indonesia is a contracting party to this agreement. Therefore, it has limitations in its effort to combat piracy and maritime terrorism.

Most recent acts of piracy committed in or near the Straits of Malacca and Singapore have not occurred on the high seas or in the EEZ of a state.⁷⁹ These attacks on ships, rather, have occurred within the territorial sea of a coastal state, as under the 1982 UNCLOS a coastal state has the right to a 12 nm territorial sea. Some attacks even have taken place within the internal waters of a state, while the ship is in port or at anchor.⁸⁰ In archipelagic states, such as Indonesia, the attacks might also take place in waters which are defined as 'archipelagic waters'⁸¹. Consequently, according to the rules of the 1982 UNCLOS, attacks against vessels in any of these areas do not constitute piracy and the rules with respect to piracy on the high seas do not apply to these attacks.

There is another definition given by the International Maritime Bureau (IMB). Piracy as defined in the 2006 Special Report on Piracy is:

'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 the act'.

This definition is broader because it includes not only acts against vessels during passage but also acts against vessels in port or at anchor.⁸² Furthermore, the IMB definition is broad enough to comprise long-term seizures of vessels with the objective of theft or other crimes and with the threat or use of violence against the vessels' crew or passengers.⁸³

As mentioned earlier, almost all of the attacks in or near the straits of Malacca and Singapore occur within internal waters, territorial waters or archipelagic waters of one of the three littoral states. Accordingly, the definition given by the IMB is more appropriate to use in discussing the act of piracy in the straits of Malacca and Singapore.

Since the acts of piracy occur within the territorial sovereignty of Indone-

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ The waters enclosed by the archipelagic baselines. See Article 47 and 49 UNCLOS.

⁸² Beckman et al, above n.60, 5.

⁸³ *Ibid.*

sia, Malaysia and Singapore, jurisdiction over such piracy has to be given only to the three states. The main problem in regard to jurisdiction over acts of piracy within the territorial sovereignty of another state is that relating to the limits on the enforcement of jurisdiction.⁸⁴ Under international law, the law enforcement officials of one state may not act to enforce their laws in areas belonging to the territorial sovereignty of another state. In relation to the acts of piracy in the straits of Malacca and Singapore, the naval vessels or marine police from Singapore, for example, may not enter the archipelagic waters of Indonesia in order to conduct patrols or to arrest persons for acts of piracy, regardless of where such acts occur. Although under the 1982 UNCLOS, naval vessels or marine police have the right of innocent passage through territorial sea and archipelagic waters, the right of innocent passage does not include the right to exercise powers.⁸⁵

3.4. Types of Piracy and Vulnerability of Vessels Sailing Busy Waterways

Some experts have tried to make distinctions between different types of piracy and to identify certain areas more with one type than another. There are various types of piracy, including traditional piracy against modern shipping, politically motivated piracy, piratical acts of violence against refugees and yacht piracy.⁸⁶ The types of piracy that most frequently occur in the Malacca Strait are traditional piracy and acts of piracy against refugees and also local fishing vessels, which generally involve short-term attacks against vessels and acts of robbery, vandalism, threats of violence against vessels' crew and, in some cases, even acts of violence.⁸⁷

The report from the IMB showed that in the busy waterways of the straits of Malacca and Singapore, the pirates attack all types of commercial vessels, including conventional cargo carriers, container vessels, bulk carriers and tankers.⁸⁸ Although attacks have been reported at all times of the day, it is obvious that most attacks in 2006 occurred during night-time.⁸⁹

Most of the pirates use small, fast wooden boats and operate in groups.⁹⁰ The boats, which usually consists of three to ten people each, approach the

⁸⁴ Ibid, 6.

⁸⁵ Ibid.

⁸⁶ B., Aune, Piracy and Its Repression Under the 1982 Law of the Sea Convention, *Ocean Yearbook*, 8: 18-43 as cited in Beckman et al above n.60, 10.

⁸⁷ Beckman et al, above n.60, 11.

⁸⁸ IMB Reports 2006 above n.12.

⁸⁹ Ibid.

targeted vessels from the stern in the shadow of the radar beam so they cannot be detected.⁹¹ Then, they board the vessels using ropes and grappling hooks.⁹² After successfully boarding the vessels, they will go to the navigating bridge and cabins and then threaten the vessels' crew.⁹³ The most dangerous aspect of having the crew tied up by the pirates is the fact that the bridge is left completely unmanned, which is likely to cause a collision.⁹⁴

According to the annual piracy reports given by the IMB, the number of pirate attacks worldwide has increased dramatically over the last fifteen years.⁹⁵ In 1991, the number of pirate attacks globally was 107. This number rose significantly to 325 pirate attacks in 2004. However, the number of pirate attacks dropped by 15 percent in 2005, to 276 attacks. This number continued to decrease in 2006 to 236 pirate attacks. Although this is the lowest number of recorded attacks since 1998, the pirate attacks are still a crucial matter around the world.

Over the last half-decade, Southeast Asia has continued to experience around a quarter of the world's attacks, mostly in the Malacca Strait and Indonesian waters. According to International Maritime Bureau (IMB), in 2004, there were a total of 38 attacks in the Straits. Similar to the trend worldwide, this number also decreased in 2005 and 2006 to 12 and 11 pirates attacks, respectively. In 2004, 40 sailors were kidnapped. The number continued to drop in 2005 and 2006 to 10 and 3 kidnappings, respectively. But in 2006, the number of crew killed increased to 15 as compared with none in 2005. Furthermore, according to the International Maritime Organization (IMO), the number continued to decrease in 2007 and 2008 to 12 and 2, respectively. Although the number of attacks and acts of kidnapping continues to decrease, many would argue that the consequences of such numbers are simply too destructive to ignore.⁹⁶

⁹⁰ Beckman, above n.60, 11.

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ The Collision in the Malacca Strait on 20 December 1992 involving the Nagasaki Spirit, an oil tanker and the Ocean Blessing, a container vessel, was due to the act of piracy.

⁹⁵ IMB Report 2006, above n.12.

⁹⁶ Ong Webb, above n.58, xxvii.

4. Maritime Terrorism

As at the time this paper was written, there has been no 'maritime spectacular' as predicted by a range of maritime terrorism threat analysts. However, an attack was initiated by Al-Qaeda on the USS Cole whilst in port in Yemen in October 2000 and the Bali terrorist attacks which occurred in October 2002 indicated a shift towards maritime-related economic targets in Southeast Asia.⁹⁷ It was also reported that the perpetrators of the attack on the USS Cole had another plan to attack a U.S. ship visiting a Malaysian port in 2000.⁹⁸ Furthermore, the Malaysian Special Branch in 2001 interrupted a plan by Kumpulan Mujahidin Malaysia (KMM) to attack a visiting U.S. vessel.⁹⁹ Singaporean intelligence agencies also disrupted an Al-Qaeda plan to attack a U.S. vessel docked in its port in 2002. Moreover, a high-ranked Al-Qaeda operative, Omar al-Faruq, who is now under arrest by the U.S government, admitted that Al-Qaeda had a plan to attack an American ship in Surabaya, Indonesia's second largest port. Also in 2002, the Abu Sayyaf group (ASG) based in the Philippines claimed responsibility for an attack on a large ferry in the country, which killed 100 people.¹⁰⁰

Many argue that the current efforts to secure sea lanes and major ports, which have been conducted along the Straits, have probably prevented acts of maritime terrorism. This has been concluded from the fact that no such attack has been launched since the unsuccessful attacks mentioned earlier.¹⁰¹ Furthermore, there have been some other analyses attempting to explain the decline in maritime terrorist attacks. One analysis is that the war against terrorism across the world has led to the general destruction of the leadership, manpower, resources and the financial ability of Al-Qaeda to the point that it has now limited its attacks in the Middle East, particularly in U.S.-occupied Iraq.¹⁰² The Al-Qaeda attacks in Madrid, Spain in March 2004 and the London Bombings on 7 July 2005 may make this claim weak but they support the argument that land-based targets are preferable to maritime-based ones.¹⁰³

Another argument, which is in line with the view that there is no nexus between pirates and terrorists, is supported by research carried out in Riau

⁹⁷ *Ibid.*, xxviii.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

Island, Indonesia where pirates are often suspected to reside. In the case of Kampung Hitam, one small village in Batam District, Riau Island, the village does not even have a pesantren (*Quranic School*) like those established in Ngruki, Solo, which many believe become bases of terrorism in Indonesia. It can be said that there is no base of radical or extremist Islam whatsoever in the Kampung Hitam village.¹⁰⁴ It is clearly agreed that pirates and the success of their attacks can inspire terrorist to commit similar acts, however it is very difficult to justify the claim that pirates have an interest in helping terrorists.¹⁰⁵ Furthermore, the most obvious argument to support this view is that pirates attack vessels for economic reasons.¹⁰⁶ In terms of their level of education, pirates may be less educated than the members of Al-Qaeda or Jemaah Islamiyah, many of whom are known to be relatively well-educated.¹⁰⁷ Moreover, most pirates violate many Islamic laws such as drinking alcohol, gambling and prostitution.¹⁰⁸ Given these facts, it is very highly unlikely that any cooperation between terrorists and pirates exists.

5. Designated Cooperation

Security in Southeast Asia is generally regarded to be firstly domestic, secondly bilateral/trilateral and only thirdly multilateral.¹⁰⁹ Furthermore, security problems are commonly perceived to be created by major powers violating the sovereignty of the littoral states. Therefore, some Southeast Asian countries make absolute principles governing their security cooperation. Firstly, no security cooperation should limit national sovereignty.¹¹⁰ Secondly, they try to ban any external interference in domestic affairs.¹¹¹ These principles are generally accepted and implemented in many newly independent countries, however, in Southeast Asia they are applied more strongly than in most other places.¹¹² Therefore, unlike in Europe where there is frequently a trade-off between sovereignty and cooperation in order to enhance common security, this approach

¹⁰⁴ Erick Frøen, 'Piracy and Armed Robbery at Sea along the Malacca Straits: Initial Impressions from Fieldwork in the Riau Islands' in Graham Gerard Ong-Webb (ed), *Piracy, Maritime Terrorism and Securing the Malacca Straits* (2006) 68, 81.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ Anders C Sjaastad, 'Southeast Asian SLOCs and Security Options' in Kwa Chong Guan and John K. Skogan (eds), *Maritime Security in Southeast Asia* (2007) 3, 6.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.*

would seriously limit many potentially feasible multilateral security options and would even impinge upon the use of bilateral arrangements in Southeast Asia.¹¹³

5.1. National Security Options

The capacity to pursue a successful national security policy varies considerably among the Southeast Asian countries.¹¹⁴ Recently, Malaysia has allocated significant resources to build up a national capacity to police and patrol the Malacca Strait.¹¹⁵ This policy includes providing a significant amount of money to develop a monitoring system covering the Malacca Strait and the establishment of a new maritime agency to enhance security in Malaysia's territorial waters, enforce maritime laws and conduct search and rescue operations.¹¹⁶ Malaysia is also ready to accept financial contributions from 'user' countries to help both financial investments and operational costs of monitoring activities and surveillance of the straits. Recently, Japan was the first state to offer a financial contribution to the Malacca Strait surveillance, both through its ship-owners' association and through other channels.¹¹⁷

On the other hand, Indonesia is still struggling to pay for any monitoring installations and therefore needs outside economic assistance. It is a statistical fact that more acts of piracy occur on the Indonesian side of the Malacca Strait than on the Malaysian side. As a very large country separated into many groups of Islands, Indonesia has faced difficulty to maintain its security, particularly against the act of piracy in the Malacca Straits. Since the financial crisis in 1997, poverty has been widespread and the tsunami in 2004 worsened the situation for many people who were already living close to subsistence level.¹¹⁸ Only recently, Indonesia separated its police force from the military in an attempt to improve law enforcement, including law enforcement in the Malacca Strait. Similar to Malaysia's case, Japan has financed a number of patrol boats to enhance Indonesia's capacity to fight piracy in its territorial waters.¹¹⁹ Japan has also made a commitment to help Indonesia to obtain some surveillance capability.¹²⁰ Furthermore, In November 2005, the US government provided

¹¹³ Ibid.

¹¹⁴ Ibid, 7.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Ibid, 6.

¹¹⁹ Ibid, 7.

¹²⁰ Ibid.

defence equipment to Indonesia, mainly to support its maritime security.¹²¹

5.2. Bilateral Security Cooperation

Bilateral Security cooperation between Indonesia and Singapore was established in 1992. In that year, Indonesia and Singapore agreed to increase cooperation between them in relation to the problem of pirate attacks in the waters in or near the Strait of Singapore. This agreement established a direct communication link between the navies of the two countries.¹²² Furthermore, they agreed to provide coordinated patrols between the two navies in the Singapore Strait and Phillip Channel to give protection to the shipping lanes from the act of piracy.¹²³

A Joint Border Committee has also been established between the governments of Indonesia and Malaysia to set up a mechanism for maritime cooperation between the two countries.¹²⁴ Under this agreement, the two countries conduct joint naval and police exercises and operations in the Malacca Strait.¹²⁵ They also agreed to exchange information and give tactical updates through regular *rendezvouses*.¹²⁶

There has been loose trilateral cooperation in regards to maritime security in the Malacca Strait. Malaysia and Indonesia have the closest relationship while Singapore, both in relation to geographical aspects and shared interests, is a more distant partner.¹²⁷

However, the cooperation between Indonesia and Malaysia has a limit when it comes to the sensitive topic of 'hot pursuit'. By agreeing to the principle of hot pursuit, one country's law enforcement unit could follow a suspect of piracy across another state's border and into its territorial water and, if necessary, apply force.¹²⁸ As discussed earlier, the principle of national sovereignty has led most countries in Southeast Asia to reject the idea of the hot pursuit principle. Therefore, when it comes to the border of a state in the Malacca Strait, the law enforcement unit pursuing a suspect of piracy has to

¹²¹ Ibid.

¹²² The Straits Times, 25 June 1992:1 as cited in Beckman et al, above n.60, 15.

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ Anders, above n.109, 8.

¹²⁸ Ibid.

¹²⁹ Ibid.

stop and 'hand over' the pursuit to the next country's law enforcement unit, whether it is there or not.¹²⁹ Furthermore, there has been no intensive mission coordination or shared real-time intelligence between the littoral states.¹³⁰ Consequently, the counter-piracy ability in the Malacca Strait is less efficient.

Apart from financial aid, foreign assistance in monitoring and patrolling the Malacca Strait has also been rejected by the littoral states. Japan proposed to assist the patrolling of the Malacca Strait by sending its coast guard after a Japanese-registered tugboat was hijacked by pirates in early 2005.¹³¹ In 1997, a major Japanese think-tank had toyed with the notion of 'ocean peacekeeping' as a mission for Japan.¹³² Recently, Japan has affirmed that it had a plan to renew its commitment to patrol the Malacca Strait.¹³³ Every time there is a proposal from Japan involving the Japanese Coast Guard or the Japanese Navy extending its 'defence parameter', it is generally perceived by its Asian neighbours as part of a grand plan to internationalize the Straits.¹³⁴ Similarly, the US proposal to deploy American assets in monitoring the Malacca Strait is suspected of nurturing a hidden agenda.

5.3. Multilateral Security Cooperation

When discussing the potential of multilateral security cooperation for Asia, particularly Southeast Asia, the most prominent absence is the lack of available multinational security organizations.¹³⁵ Unlike in Europe, which has the North Atlantic Treaty Organization (NATO) and the Organization for Security and Cooperation in Europe (OSCE), Asian countries have neither a collective defence alliance nor any collective security organization.¹³⁶ However, there have been three multilateral organizations of some security relevance, namely the Asia Pacific Economic Cooperation (APEC), the ASEAN Regional Forum (ARF) and ASEAN itself.¹³⁷ Among these three organizations, APEC can be considered as the least important organization in terms of security cooperation, since its meetings focus on economic and trade issues. Similarly, the ARF is unlikely to become a powerful security actor in the Asia-Pacific region, even

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Ibid, 9.

¹³⁶ Ibid.

¹³⁷ Ibid, 10.

though it has tried to deal with security issues. ASEAN, the largest organization in the Southeast Asia region, established mutual cooperation among member states, including security cooperation. However, ASEAN's strict adherence to the principle of non-interference has made security cooperation in the region less effective.

In June 2005, Malaysia's Deputy Prime Minister Najib Razak made the effort to break the existing impasse in cooperation against piracy by addressing some key points to enhance regional maritime security.¹³⁸ Firstly, maritime security was an area of enforcement in which cooperation was needed.¹³⁹ Given the narrow nature of the Straits which made it easy for criminals to escape, he suggested including the Royal Thai Navy in the existing coordinated patrols run by Malaysia, Indonesia, and Singapore since July 2004. Secondly, it was very important to use more advanced technology such as surveillance through maritime patrol aircraft, coastal radar linked to satellites and radio tracking technology.¹⁴⁰ Thirdly, while the littoral states held the main responsibility for maintaining security in the Straits, greater cooperation among states using the Straits was very important.¹⁴¹ The cooperation could include financial support, intelligence support, intelligence sharing, training and provision or loaning of equipment such as ships and craft. Fourthly, stronger enforcement, regional cooperation and the use of advanced technology was best implemented to enhance the effort to detain pirates at source rather than on the high seas.¹⁴² This could be done by attacking bases from which pirates operated and interrupting the resources and manpower they depended on. This required that the littoral states develop their law enforcement capacities and enact harsher laws in dealing with pirates. Fifthly, any form of preventive measures and operational arrangements to enhance the security in the Straits was not to infringe the territorial integrity and sovereignty of the littoral states.¹⁴³ As a consequence, the region was to reject the idea of foreign vessels being escorted by their naval or coast guard ships plying the Straits. Sixthly, there were many critiques with respect to the fanatical obsession of the littoral states over their individual territorial sovereignty and Datuk Seri Najib clearly made a proposal to solve this

¹³⁸ Ong-Webb above n.58, xxix.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

problem.¹⁴⁴ While it was very important to take current measures at a comfortable level, an 'open mind' was needed so that coordinated naval patrols could evolve into a regional 'joint' patrol.¹⁴⁵

Therefore, in 2004, Indonesia, Malaysia and Singapore established coordinated naval patrols in the Malacca Strait. Through these coordinated patrols, all three countries contribute up to seven ships to patrol the Straits but each ship is still under its own nation's command.¹⁴⁶ In 2005, the three countries asked Thailand, as a close neighbour, to be part of the joint maritime patrols in the Malacca Strait.¹⁴⁷ In September 2005, the four ASEAN countries mentioned above, launched joint air patrols of the Malacca Strait under the 'Eyes in the Sky' (EiS) program, in which planes from Indonesia, Malaysia, Singapore and Thailand are allowed to fly through each other's air space.¹⁴⁸ Furthermore, through this program, the four countries take turns conducting two patrols a week.¹⁴⁹

5.4. Regional Piracy Centre

One of the important ways to fight against piracy is by establishing a regional centre for monitoring the problem for industry.¹⁵⁰ A plan was made on 27 February 1992 at a conference in Kuala Lumpur, engaging 360 delegates from 15 countries. The delegates came from the shipping and related industries, international organizations and law enforcement agencies.¹⁵¹ At the meeting it was found that the frequency of attacks could be minimized if preventive and responsive action was taken. One of the major issues was the lack of coordination and reporting of incidents to the relevant law enforcement agencies by the shipping industry.¹⁵² Given these facts, at the meeting it was agreed that the International Chamber of Commerce (ICC) International Maritime Bureau (IMB) would establish a regional centre, without prejudice to the existing reporting systems of law and enforcement agencies, in order to give assis-

¹⁴⁴ *Ibid.*, xxx.

¹⁴⁵ *Ibid.*

¹⁴⁶ Anders, above n.109, 11.

¹⁴⁷ *Ibid.*, 12.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ Beckman et al above n.60, 18.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

tance in the identification and reporting of incidents and collation of information.¹⁵³ Accordingly, on the 1st of October 1992, a centre was established on piracy in Kuala Lumpur, Malaysia.¹⁵⁴ This centre acts as an information and broadcasting centre. Moreover, it does not have enforcement capabilities of its own but cooperates with the law enforcement agencies in the region.¹⁵⁵

6. Enhancing Cooperation

6.1. Joint Patrol Areas

In a situation where the number of pirate attacks has increased significantly, as has occurred in the straits of Malacca and Singapore, there is another cooperative effort which might be considered by the littoral states. The idea is to establish 'joint patrol areas' where more than one of the three states will have the right to patrol and arrest persons and vessels if there is an incident of piracy.

On June 2004, Malaysia and Indonesia agreed to enhance security in the Malacca Strait by increasing naval patrols. However, both countries established pre-conditions for such patrols.¹⁵⁶ Firstly, Malaysia and Indonesia clearly stated that these patrols would be confined only to the forces of the littoral states; Secondly, such patrols are not joint patrols but coordinated patrols, therefore the vessels of each country would remain in their own territorial waters.¹⁵⁷ This agreement means that there will be no sharing of vessels and no *hot pursuit*.¹⁵⁸

Malaysia, Indonesia and Singapore have been conducting coordinated patrols in the Malacca Strait since 1992, limited to four patrols annually.¹⁵⁹ The new arrangement of such patrols was launched on 20 July 2004, which includes year-round patrols with seventeen ships from the littoral states dedicated to this task force.¹⁶⁰ Each country will contribute up to seven ships with

¹⁵³ IMB Fact sheet as cited in Beckman et al, above n.60, 18.

¹⁵⁴ Beckman et al above n.60, 18.

¹⁵⁵ Ibid.

¹⁵⁶ J.N. Mak, 'Unilateralism and Regionalism: Working Together and Alone in the Malacca Straits' in Graham Gerard Ong-Webb, *Piracy, Maritime Terrorism and Securing the Malacca Straits* (2006) 134, 155.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

approximately 100 crew.¹⁶¹

The coordinated patrols conducted by the littoral states are obviously a great change in relation to suppressing the act of piracy and maritime terrorism in the Strait of Malacca. However, since these are not joint patrols, meaning vessels of each country would remain in their own territorial waters, it has limited implications, especially in relation to reducing the occurrence of acts of piracy.

The joint patrol areas should cover the areas where there are the most incidents of piracy against vessels plying the Straits, particularly if these areas are where the territorial boundaries are undecided.¹⁶² The joint patrol areas may also include waters within the territorial sovereignty of one or more states.¹⁶³ By such an arrangement, the three countries will effectively give each other express permission to enforce jurisdiction within the joint patrol areas, even when the incident occurs in the territorial waters of another state.

In relation to the joint patrol areas, the three states could also agree to pass domestic legislation stating that all acts of piracy conducted against vessels and persons in the joint patrol areas is a crime under their domestic law and would be punished with serious penalties.¹⁶⁴ The act of piracy would be a crime under the laws of the three states even if one of the states concerned did not meet the general principles of criminal jurisdiction, namely the territorial principle and the nationality of the flag state principle. The new prescriptive jurisdiction could be justified on the basis of other principles of criminal jurisdiction, for example the protective principle or the effects principle.¹⁶⁵ With this arrangement, no state would protest if both Singapore and Indonesia made acts of piracy in joint patrol areas in the Singapore Strait a crime under their domestic laws, even if the crimes were conducted in areas beyond the territorial sovereignty of the arresting state.¹⁶⁶

The assertion of jurisdiction by the three states might be expected to be recognized by the international community, since acts of piracy in the Straits are against the fundamental interest of each state and the safety of international

¹⁶¹ *Ibid.*

¹⁶² Beckman et al above n.60, 18.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*, 19.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

shipping. The enactment of such legislation would also prevent any alleged pirates claiming that the state arresting them did not have jurisdiction under international law because the act of piracy was committed beyond the territorial sea.¹⁶⁷

The three littoral states may also make an agreement that persons arrested for conducting pirate attacks in the joint patrol areas should not be tried based on the territorial principle but based on the nationality principle, if they were citizens of any of the three states.¹⁶⁸ Under such an arrangement, if the Singapore officers arrested Indonesian nationals in the joint patrol areas for committing acts of piracy, they would be sent back to the Indonesian authorities for prosecution and trial. This agreement would prevent the problem of a state claiming that a neighbouring state did not have right to prosecute its nationals for acts which were committed in areas beyond that neighbouring country's sovereignty.¹⁶⁹ Furthermore, such an arrangement could also include a provision which stated clearly that, in the situation where no extradition agreement existed between two states, the arrested pirates still should be turned over to the state of which they were nationals.¹⁷⁰

The joint patrol areas would be likely to reduce the occurrence of acts of piracy in the straits of Malacca and Singapore. However, the implementation of such an arrangement still becomes a problem, especially in relation to the security interests of the three states. There is a number of possible solutions to this problem. One of the solutions would be to apply a requirement for each state patrolling in the joint patrol areas to keep the other states well informed about the frequency of patrols and the number of incidents investigated.¹⁷¹ The patrolling vessel could also be asked to keep in radio contact with the law enforcement officers from the neighbouring states as well as their own. The arrangement should also include a provision regarding the right of arrest and seizure in the joint patrol areas, which would not apply to warships or authorities' ships operated for non-commercial purposes.¹⁷²

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid, 20.

Another fundamental issue which is still a concern among the littoral states is the fear that such an agreement in the joint patrol areas could jeopardize their claim to sovereignty over the sea.¹⁷³ Behind this fear is the doubt as to who has the territorial sovereignty over the areas and where the territorial boundary should be located.¹⁷⁴

To deal with this concern, it could be provided in the agreement that no acts relating to their cooperation in the joint patrol areas to fight against piracy could be interpreted as a repudiation of their sovereignty in those areas.¹⁷⁵ Therefore, all states will agree that the cooperation in the joint patrol areas will not diminish the position of any of them in dealing with maritime boundary negotiations.

6.2. Extra-Regional Assistance

Instead of previous concerns about the non-interference and non-intervention principles and the focus on the sovereignty of state, newer norms are emerging which focus more on the commitment of the international society to intervene if there are states in danger.¹⁷⁶ The emergence of principles declaring the importance of human security, the right to protection and the importance of regional and international institutions has led to changes in managing straits and waterways used for international shipping.¹⁷⁷ Initially, it was mainly the responsibility of the littoral states. However, since such straits were seen as international highways with vessels engaged in transit which did not bear any responsibilities for reducing the risk of accidents, collisions, oil spills and trans-boundary crimes, the shipping community did not want to bear the cost of measures designed to improve the safety and security of navigation.¹⁷⁸ On the contrary, for the littoral states, there was no reason to spend their own resources to improve facilities for safety and security, which gave no revenues.¹⁷⁹ The littoral states have cooperated with international institutions, for example the IMO, which has tried to remind the user states of their responsibility to bear the cost of such improvements without providing a proportionate increase in the user state's role to govern the transit regime.¹⁸⁰

¹⁷⁶ Barry Desker, 'The Safety of Navigation in the Malacca Strait in Southeast Asian SLOCs and Security Options' in Kwa Chong Guan and John K. Skogan, *Maritime Security in Southeast Asia* (2007) 14, 16.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

The changed strategic environment in the straits of Malacca and Singapore provide an opportunity to review the relationship between the littoral and the user states.¹⁸¹ Instead of focusing on national interest and national sovereignty of the littoral states, more attention should be paid to the impact on the global economy if straits used for international navigation are closed because of errors of commission or omission.¹⁸² This new environment has become of particular interest to two communities of states. First, the littoral states, namely Indonesia, Malaysia and Singapore, due to the threat of pollution and the possible risk of attacks on onshore facilities.¹⁸³ Second, the user states, particularly China, Japan and South Korea, which rely heavily on the Malacca Strait for the faster and very efficient transit of cargo, especially energy supplies.¹⁸⁴ Other user states, which are the major maritime powers such as the United States, are very concerned about possible attacks on their vessels plying the Straits. Although the threat of maritime terrorism is low, concern about the risk has led to the reassessment of the costs and benefits of regional and international cooperation.¹⁸⁵

Concern about such risk reached its highest level after the terrorist attacks on September 11, 2001. The United States has perceived Muslim radical groups in Southeast Asia as a real danger for shipping activities through the Malacca Strait. The most terrible situation predicted by the U.S. is that a super tanker will be attacked and sunk in the narrowest portion of the Malacca Strait and, therefore will bring disruption to commercial traffic, particularly the oil imports to East Asia.¹⁸⁶ From the United States' point of view, this scenario would likely occur because of the lack of capability of most Southeast Asian countries in dealing with piracy and maritime terrorism. Therefore, the U.S., together with India, took preventive action by escorting commercial vessels, which are passing through and transiting the Malacca Straits, with their warships.

This action obviously has led to strong suspicion in the region in relation to the real aims of the Indian and U.S. warship's presence in the Malacca Strait.

¹⁸¹ Ibid.

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

¹⁸⁶ Mark J Valencia, 'The Politics of Anti-Piracy and Anti-Terrorism Responses' in Graham Gerrard Ong-Webb (ed), *Piracy, Maritime Terrorism and Securing the Malacca Straits* 84, 90.

Such action, which is always a serious concern for Indonesia and Malaysia, could be viewed as an attempt to internationalize the Malacca Strait. Furthermore, the presence of the Indian and U.S. warships in the Straits has been viewed as being not only to combat piracy and terrorism but as being the beginning of a larger military engagement between the US and India to gain more control in the region.¹⁸⁷

The suspicion regarding the presence of the US and Indian naval vessels is reasonable and can be justified since it will likely affect regional authority and what has been perceived as domestic affairs of that region, especially those of Indonesia and Malaysia. Furthermore, for both countries, the presence of the U.S. and Indian warships escorting their commercial vessels has been proof that the U.S. and India undermine the ability of the three littoral states to secure the Straits, particularly in combating piracy and maritime terrorism. The presence of these warships has also been questioned in relation to their effectiveness in guarding the Straits. The U.S. and Indian warships, in accordance with the jurisdiction principles, have no authority to arrest persons suspected of committing acts of piracy or maritime terrorism.¹⁸⁸ Under its status as a strait used for international navigation, the Malacca Strait is open to any commercial vessels and accordingly naval vessels which may escort those vessels under the transit passage regime.¹⁸⁹ However, their authority is limited to their own flag vessels.¹⁹⁰ Therefore, the presence of the U.S. and Indian naval escorts can give no more than a deterrence effect to pirates and terrorists by the sheer intimidation of their presence and can also be viewed as the eyes and ears of regional maritime security authorities.

Recently, the U.S. government proposed to restrain traffic in weapons of mass destruction (WMD), under the Proliferation Security Initiative (PSI).¹⁹¹ A group of countries have agreed to ban, selectively, ships and aircraft bound to or from 'rogue countries' bringing materials or technologies to produce or deliver WMD.¹⁹² Furthermore, in April 2004, the US proposed the Regional Maritime Security Initiative (RMSI) aiming to implement the PSI by facilitating intelligence sharing and law enforcement activities to monitor, identify and inter-

¹⁸⁷ Ibid, 91.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ Ibid, 92.

¹⁹² Ibid.

cept suspect vessels in national and international waters.¹⁹³ The early focus was to be the Malacca Strait.¹⁹⁴ Malaysia and Indonesia have strongly opposed this proposal stating that the responsibility to safeguard the Straits remains theirs alone.¹⁹⁵ On the other hand, Singapore accepted the proposal and has tried to find other countries who want to support this proposal.¹⁹⁶ Furthermore, Singapore's Deputy Prime Minister, Tony Tan invited countries outside the region, such as Japan to help patrol the Malacca Strait.¹⁹⁷ He also argued that it would be impossible to rely on the three littoral states to patrol the Straits.¹⁹⁸ Singapore was also keen to involve the United Nations in helping to patrol the Straits, whereas Indonesia and Malaysia strongly rejected this idea arguing that this is an attempt to internationalize the Straits.¹⁹⁹ At present, Singapore gives permission to U.S. military jets to stopover in its airbase and allows the U.S. Navy to use its port for repairs, refuelling and replenishment.²⁰⁰ Furthermore, Singapore and the U.S. are now developing a strategic framework agreement on security and defence which will comprise cooperation in counter-terrorism, the prevention of trade in WMD and joint military exercises.²⁰¹ Indonesia and Malaysia have serious concerns about this ongoing process, which according to both countries could lead to the establishment of a U.S. military base.²⁰²

Malaysia's response toward this process was clearly stated by its Foreign Minister, that is, Singapore cannot unilaterally invite the U.S. to patrol the Malacca Strait.²⁰³ Furthermore, Malaysia would only increase patrols in the Straits if there were precise and accurate intelligence reports on terrorist threats. Simi-

¹⁹³ U.S. Embassy Claims Senior Admiral 'mischaracterized', *New Straits Times*, 6 April 2004 as cited in Valencia, above n.186, 92.

¹⁹⁴ *Ibid.*

¹⁹⁵ John Burton and Shawn Donnan, 'US Plan to Guard Straits of Malacca not welcome', *Financial Times*, 6 April 2004 as cited in Valencia, above n.186, 92.

¹⁹⁶ Valencia, above n.186, 92.

¹⁹⁷ Siti Rahil, 'Singapore Seeks Joint Patrols of Malacca Straits, Involving Japan', *Kyodo News*, 20 May 2004 <home.kyodo.co.jp/alldisplay.jsp?an=20040520156> as cited in Valencia, above n.186, 92.

¹⁹⁸ *Ibid.*

¹⁹⁹ Valencia, above n.186, 93.

²⁰⁰ *Ibid.*

²⁰¹ Chua Mui Hoong, 'Singapore on Track in Foreign Security Accord' as cited in Valencia, above n.176, 93.

²⁰² Valencia, above n.186, 93.

²⁰³ Singapore Can't Invite US to patrol Straits: KL', *The Straits Times*, 12 May 2004; 'KL To Tighten Security in Straits of Malacca on Specific Intelligence Report', *Channel NewsAsia*, 20 May 2004 as cited in Valencia, above n.186, 93.

larly, Indonesia has rejected the idea of inviting foreign vessels to patrol the Straits. The Indonesian Navy Chief Admiral Bernard Kent Sondakh said: 'There is a grand strategy to paint a bad picture over our waters, as if the Indonesian navy is not strong and the crimes at sea are increasing... Indeed if we can't show the ability to guard the Straits of Malacca, the international forces may get in'.²⁰⁴ He also made an order to shoot dead armed pirates or terrorists in the Straits in order to show the world that the Indonesian Navy has the ability to safeguard the Malacca Straits.²⁰⁵

Other regional countries' reactions to the U.S. proposal were different. Australia stated that only the militaries from the three littoral states, namely Malaysia, Indonesia and Singapore, had the right to help safeguard the Straits.²⁰⁶ Thailand supported the U.S. proposal to improve technical and intelligence assistance but did not support the presence of the U.S. naval vessels in the Straits. China, as a very important user state of the Malacca Strait, has opposed the RMSI proposal. According to China, the presence of the U.S. warships in the Straits could be a violation of Article 38 UNCLOS, which mentions that '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 air space, seabed, and subsoil'.²⁰⁷ A senior Colonel from the People's Liberation Army of China proposed that China and ASEAN start cooperating in anti-terrorism intelligence exchange and deportation of suspects.²⁰⁸ Japan has consistently proposed multilateral joint patrols, but this proposal has not yet been accepted by most Southeast Asian countries, especially Indonesia and Malaysia. The reason is similar to the objection to the proposal by the U.S, which is a serious concern in relation to the national sovereignty issue.

However, there was a move toward a greater role of the user states at a

²⁰⁴ Achmad Sukarsono, 'Indonesia being tested over Malacca Strait', Indo News, 19 July 2004 < <http://www.kabar-irian.info/pipermail/kabar-indonesia/2004-July/007352.html> > at 3 August 2008.

²⁰⁵ Ibid.

²⁰⁶ Valencia, above n. 186, 94.

²⁰⁷ Ji Guoxing, 'US RMSI Contravenes UN Convention of the Law of the Sea', Pacnet, 8 July 2004 as cited in Valencia, above n. 176, 93.

²⁰⁸ Lee Kim Chew, 'China Could Play Part in Asean's Maritime Security', Straits Times, 20 June 2004 as cited in Valencia, above n. 176, 93.

meeting of foreign ministers of the three littoral states in Batam, Indonesia on 2 August 2005. It was agreed in the meeting that the three littoral states welcomed the assistance of the user states, relevant international agencies and the shipping community in enhancing the safety of the straits of Malacca and Singapore.²⁰⁹ Furthermore, the meeting also reaffirmed the need to engage the states bordering what were described as the 'funnels' leading into both straits, including states such as India and Thailand.²¹⁰ The change in attitudes can also be seen in the changes in the strategic and economic interests of the littoral states.²¹¹ Malaysia's interest increases parallel with Singapore's interest since Port Kelang and Tanjung Pelapas Port have become important ports and have drawn attention of trans-shipment cargo companies.²¹² Indonesia's interest has increased after the election of its new leaders who want to be seen as supportive of greater international cooperation in enhancing the security in the Straits, especially after some terrorist attacks in that country. India's interest can be seen after 9/11 when Indian naval vessels escorted US vessels visiting the Straits. Thailand's interest has risen along with the growing concern regarding the activity of the Muslim militancy in its southern parts. Japan's interest, since the very beginning, has been very clear, which is its main concern for the safety of the cargo bringing energy supplies to the country. China's and South Korea's concerns have shifted from a coastal states' perspective to that of user states along with their growing roles as global economic powers.²¹³

Another change was evident in the Statement on the Enhancement of Safety, Security, and Environmental Protection in the Straits of Malacca and Singapore agreed at the meeting held by the IMO and the Indonesian Government in Jakarta in September 2005.²¹⁴ The Jakarta meeting decided that it would be a mechanism of regular meetings between the littoral states, the user states, the shipping industry and others who have an interest in safe navigation through the Straits.²¹⁵

This change provides an opportunity to strengthen the role of international and regional institutions. This is in accordance with the 1982 UNCLOS which

²⁰⁹ Desker, above n.176, 16.

²¹⁰ *Ibid.*

²¹¹ *Ibid.*

²¹² *Ibid.*

²¹³ *Ibid.*

²¹⁴ *Ibid.*, 18.

²¹⁵ *Ibid.*

limits the right of the littoral states to regulate the passage of ships transiting the Straits but recognizes the jurisdiction of the littoral states over illegal activities occurring in their territorial waters. Article 43 of the UNCLOS regulates the burden-sharing agreement between the littoral states and user states in the establishment and maintenance in a strait of: a) necessary navigational safety aids and other improvements in aid of international navigation, and; b) for the prevention, reduction and control of pollution from ships.²¹⁶

It is not an easy task to change the attitude of the three states toward the possibility of extra regional assistance. Singapore, as perceived by Indonesia and Malaysia, has always taken unilateral initiatives to invite outside powers to protect the Malacca Strait against piracy and terrorism. On the other hand, Indonesia and Malaysia, when it comes to the issue of extra regional assistance, have always been very reluctant to give their consent. Both countries are always very careful in examining the proposals of foreign assistance as they have the possibility of infringing their sovereignty over territorial waters. The position of Indonesia and Malaysia toward this issue is clear: the security should not be used as an excuse to jeopardize a state's sovereignty. Furthermore, Indonesia and Malaysia have pointed out that acts of piracy in the Malacca Strait have been exaggerated and that it is part of a plan to justify the intervention of foreign power in that region. They have also tried to argue that there has been no evidence of the link between terrorism and piracy in the Malacca Strait.

This changing attitude toward a greater role of the user states should be responded to positively. The three littoral states, especially Indonesia and Malaysia should realize that, as the Straits are used for international navigation, the Malacca Strait has to be open for foreign assistance. To rely only on the three littoral states to safeguard the Straits from piracy and maritime terrorism is almost impossible because of the lack of resources in these states. Furthermore, the methods and technology used by pirates in the Malacca Strait have improved significantly and therefore require more advanced technology, such as ships and radar based on satellite tracking systems and more trained personnel in the Straits. Therefore, assistance from foreign countries particularly user states, such as the U.S., Japan and China is essential. However, the assistance does not necessarily mean foreign forces or troops deployed to help patrolling

²¹⁶ Article 43 of 1982 UNCLOS <http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm> at 4 November 2009.

the Straits. This is because the deployment of such troops is against the will of the three littoral states, particularly Indonesia and Malaysia. Both countries' rejection of such deployments is reasonable and understandable since it may lead to the violation of national sovereignty of the littoral states. The suspicion that such deployments would be part of a grand plan to internationalize the Straits, as perceived by Indonesia and Malaysia, lacks evidence. However, the 1982 UNCLOS clearly states that 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 air space, seabed, and subsoil.

Therefore, foreign assistance should be given in another form instead of deployment of troops. Under Article 43 of the 1982 UNCLOS, the three littoral states and the principal user states could enter into an agreement to cooperate in securing the Malacca Strait and especially for user states to provide the Straits states with the technology, equipment and training to do so. Therefore, assistance could come from providing more advanced technology for combating piracy and terrorism, training for personnel who patrol the Straits and intelligence sharing and coordination.

7. Conclusion

The rising number of acts of piracy in the straits of Malacca and Singapore has become a very serious problem. Although it has not yet been proven, there is a serious concern that terrorists may use pirates' methods or cooperate with them to launch terrorist attacks in the Straits. There are a number of efforts that have been made by the three littoral states to suppress and prevent piracy, including enhancing their national capacity, bilateral security cooperation, multi-lateral cooperation and through the regional piracy centre initiated by the International Maritime Bureau (IMB). However, these attempts have not been enough to reduce the number of pirate attacks. Furthermore, since the terrorist attacks on September 11, the concern regarding these risks has reached its highest level.

One effort which is likely to enhance security in the Malacca Strait, is establishing 'joint patrol areas' where more than one of the three states will have the right to patrol and arrest persons and vessels where there is an incident of

piracy. Singapore, Malaysia and Indonesia have agreed to enhance security in the Malacca Strait by increasing naval patrols. However, this agreement has limited implications because both countries established pre-conditions that such patrols are not joint patrols but coordinated patrols, therefore, the vessels of each country would remain in their own territorial waters. This agreement means that there will be no sharing of vessels and no *hot pursuit*. To deal with these limits, joint patrols are inevitable. Furthermore, the three states could agree to pass domestic legislation stating that all acts of piracy conducted against vessels and persons in the joint patrol areas is a crime under their domestic law and will be punished with serious penalties. The three littoral states may also make an agreement that persons arrested for conducting pirate attacks in the joint patrol areas should not be tried based on the territorial principle but based on nationality principle, as if they were citizens of any of the three states.

Extra regional assistance is also necessary to suppress and prevent piracy and maritime terrorism in the Malacca Strait. The proposal by the US to deploy its troops to help with patrolling the Straits may violate the national sovereignty of the three littoral states. Therefore, the foreign assistance given by the major user states should be given in other forms such as providing more advanced technology for combating piracy and terrorism, training for personnel who patrol the Straits and sharing intelligence information to prevent piracy and maritime terrorist attacks.

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