

Malaysian Experience in Combatting Piracy and Armed Robbery in the Straits of Malacca: Some Recommendations

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Abstract

The crimes of piracy and armed robbery against ships have continued since the historical period. 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 their designation as a war risk zone by Lloyds List in July 2005 has prompted all littoral states and international instruments to strengthen the preventive measures to response to this. The littoral States especially the government of Malaysia have struggling for the improvements to the existing law and instruments for combating the crime. Based on the study of piracy and armed robbery against ships in the Straits of Malacca, the article suggest some recommendation and lesson to be learned from the cooperative action and legal framework of the littoral states from the Malaysian perspective.

Keywords: Piracy, Straits of Malacca, Regional Cooperation, littoral states and Law of the Se

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1. Introduction

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 Malacca² 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.³ As straits used for international navigation, the strategic and economic importance of the Straits for the stakeholders⁴ particularly coastal⁵ and flag states⁶ are crucial.

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² It should be noted that in this article 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.

³ In the context of the Straits of Malacca the term 'littoral states' refers to the states bordering the Straits, namely Malaysia, Indonesia and Singapore.

⁴ 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.

⁵ 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.

⁶ 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.'

The definition of piracy in the 1982 Convention which limits the application of the term 'piracy' merely for the unlawful or violent acts that occur on the high seas with the motive of private gain become a matter of concern among scholars. This definition excludes similar act of violent 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 one that occurring in 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 Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships.⁷ Meanwhile, the International Maritime Bureau (IMB)'s definition on piracy has not made any distinction on the location of the attacks.⁸

The littoral States have struggling for the improvements to the existing law and instruments for combating the crime. Piracy or, as it is legally referred to, armed robbery against ships in the context of the Straits can still be reduced and contained to prevent it spreading further, possibly leading to more disastrous impacts such as maritime terrorism.

1.1 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.

⁷ 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).

⁸ '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.

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.

1.2 Application of the Burden Sharing Principle 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 them in early 2000. It appears that the heavy traffic may cause not only environment 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.'⁹ It does not specifically mention cooperation for securing ships against maritime crime although the terms 'safety' and 'security' arguably carry similar meanings.

In term 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 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 the Prime Minister of Malaysia, Najib Tun Razak, the country has spent more than RM200 million for the purpose of maintaining and upgrading various navigational aids in the Straits over the years.¹⁰ 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 Straits.¹¹

⁹ Art 43 of the 1982 Convention.

¹⁰ The Eng Hock, 'Malaysia seeks to limit maritime traffic in Straits of Malacca' *The Star* (Kuala Lumpur, October 22, 2008).

¹¹ 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 .

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.'¹² 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.¹³ This would definitely not be accepted by Malaysia and Indonesia as they would perceive the extra-regional interference as a threat to their sovereignty.¹⁴

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.¹⁵ Other contributors include the Japanese government and an association of related industries including the Japanese Shipowners' Association and the Petroleum Association of Japan.¹⁶ 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.¹⁷

¹² 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.

¹³ OPRF 'OPRF Blueprint for a New Cooperative Framework on the Straits of Malacca and Singapore' (OPRF, Tokyo 2006) 7.

¹⁴ HashimDjalal '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.

¹⁵ This is based on information up to the year 2005. See <http://www.nmc.com.sg/MSC.pdf>; HashimDjalal (2004) 286.

¹⁶ Ibid.

¹⁷ 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.

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.¹⁸ 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.

1.3 The Awareness of the User States on Enhancing their Ships's 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. 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 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?'¹⁹ 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.

¹⁸ Djalal (2004) 288.

¹⁹ 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.

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.²⁰ It is in fact their responsibility to ensure that preventive measures have been taken, especially since they are navigating 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'²¹, 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.

1.4 A Lesson to be Learned

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.

²⁰ See IMO MSC.1/Circ.1334.

²¹ See IMO MSC.1/Circ.1334. Annex p.4

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' in the suppression of piracy. Thus, other coastal states in other parts of the world must always be ready to give cooperation 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.

1.5 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. Despite its remarkable achievement, it still arguably lacks enforcement power in certain areas, particularly in combating piracy. It leaves 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.²²

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 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.

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.

²² IMO Resolution A 26/Res.1025.

2 Conclusion

In conclusion, it is suggested 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. Despite several criticisms, Malaysia and its counterparts, have 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. In the Malaysian context, with the adoption of the 1982 Convention and other treaties, together with its national law and agencies, it 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. The cooperative action and the strengthening of the legal framework is the key success of reducing the number of attacks of piracy or armed robbery against ships in the Straits of Malacca.