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Piracy and Sovereign Rights: Addressing Piracy in the Straits of Malacca Without Degrading the Sovereign Rights of Indonesia and Malaysia.

Carrie R. Woolley*

I. Introduction

In 1958, the international community convened to address legal issues concerning the high seas, including piracy, at the Geneva Convention on the High Seas.\(^1\) The Geneva Convention provided the foundation for the definition of piracy

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* Carrie R. Woolley is a graduate of Santa Clara University School of Law. She would like to thank her family and friends for their support in her educational efforts and for patiently listening to her constantly talking about pirates while writing this article. She would also like to thank Dr. Chaloka Beyani for his coverage of pirates in Law of the Sea, which inspired this article.

found in the 1982 United Nations Convention on the Law of the Sea (UNCLOS).\(^2\) UNCLOS codified customary international maritime law and took effect in 1994.\(^3\)

UNCLOS defines piracy as: (1) illegal acts committed on the high seas (2) for private ends and (3) by the crew or passengers of one ship against the crew, passengers, or property of another ship.\(^4\) The status of pirates as *hostes humani generis* (enemies of the human race) allows any state to pursue pirates and prosecute acts of piracy regardless of where the piracy occurs.\(^5\) Indonesia, Malaysia, and Singapore have all signed and ratified UNCLOS, thereby officially accepting its definition of piracy and the accompanying legal obligations.\(^6\)

The high number of maritime attacks in the Straits of Malacca (the Straits) in recent years has attracted the attention and concern of the international maritime community.\(^7\) In 2005, the insurer Lloyd’s of London listed the Straits as the world’s number one “hot spot” for pirate attacks and placed a premium on any ships using this passageway.\(^8\) Approximately forty percent of the world’s seaborne trade travels through the Straits each year.\(^9\) The percentage includes shipments of oil from the Middle East to countries in East Asia, particularly Japan and China.\(^10\) Any threat to the trade traversing the Straits, therefore, would have worldwide

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2. *See id.*
3. *Id.*
9. *Id.*
10. *Id.*
economic implications, whether it resulted in an interruption of trade or an increase in cost.

The importance of the Straits to world trade creates tension between the coastal states, specifically Indonesia and Malaysia, and the states using the Straits (user states). The tension comes from the conflicting interests of the user states in keeping this vital trade route open and secure with Indonesia and Malaysia’s interest in avoiding further erosion of their sovereign rights over the region.

Because Indonesia and Malaysia have ratified UNCLOS, they are bound to its terms.\textsuperscript{11} They are likewise entitled to expect adherence to the terms of UNCLOS by other ratifying states.\textsuperscript{12} The attempts by user states to institute international patrols or assert influence in the area\textsuperscript{13} erode the sovereignty of Indonesia and Malaysia and increase the tension over the security of the Straits.

Suggestions to amend UNCLOS to allow the pursuit of pirates into the territorial waters of a coastal state or allow international bounty hunters to investigate acts of piracy, pursue pirates, and apprehend them throughout the world, would likewise further erode the sovereignty of these two coastal states and increase the tension in the region. These suggestions would result in effectively forcing Indonesia and Malaysia to accept international patrols and foreign influence over a region they consider as subject to their sovereignty. Not only are these suggestions unworkable in application, attempts to accomplish them would probably be met with hostility from both Indonesia and Malaysia and worsen an already tense situation.

\section{II. The Geography of the Straits of Malacca Prevents the Application of the UNCLOS Definition of Piracy.}

The Straits of Malacca are located in Southeast Asia and are bordered by Indonesia, Malaysia, and Singapore.\textsuperscript{14} The Straits extend nearly 600 miles and

\textsuperscript{11} See UNCLOS, \textit{supra} note 4, prmbl.
\textsuperscript{12} \textit{Id.}
span from 350 kilometers to less than 3 kilometers. UNCLOS first requires that acts of piracy occur on the "high seas." UNCLOS defines the high seas to include any area outside of a coastal state’s territorial waters. A coastal state’s territorial waters may extend up to twelve nautical miles from that state’s baseline. The Straits’ geography makes the first requirement largely inapplicable since large portions of the Straits exist within the territorial waters of the coastal states bordering the Straits.

A coastal state has the same sovereign rights over its territorial waters as it has over its land territory, subject to the rights of innocent and transit passage. A coastal state may also claim up to two hundred nautical miles from its coastline as its Exclusive Economic Zone (EEZ). Although coastal states have sovereign rights within their EEZs to exploit marine resources, UNCLOS includes the EEZ in its definition of the high seas, allowing the applicability of the UNCLOS piracy provisions to a state’s EEZ.

The Straits' physical configuration makes this area historically one of the most prone to pirate attacks in Southeast Asia. Malaysia and Indonesia, along with the Philippines, are part of the world's largest archipelago. The archipelago contains over 20,000 islands, many of which are uninhabited, densely vegetated, and characterized by secluded bays and navigable rivers. At narrow points, the Straits also pass close to the coastlines of the littoral states, providing a further incentive for pirates by providing them with the ideal bases to launch attacks against travelers. The large number and geography of the islands within this archipelago,

16. UNCLOS, supra note 4, art. 110.
17. Id. art. 3.
18. Id.
20. UNCLOS, supra note 4, arts. 2, 17.
21. Id. arts. 3, 33, 55, 57.
22. Id. arts. 56, 58.
24. Id. at 5.
25. Id.
26. Generally, "littoral states" is a maritime term that refers to coastal states. In this paper, the term "littoral states" refers to the coastal states of Malaysia, Indonesia, and Singapore.
27. EKLOF, supra note 23, at 5.
coupled with the narrowness of portions of the Straits, make the area an ideal place for pirates to hide from authorities and plan their next attack.\textsuperscript{28}

The geography of the Straits also hampers efforts to pursue suspected pirates. The doctrine of "hot pursuit" under UNCLOS allows a state to pursue an offending ship until that ship reaches its own or a third parties' territorial waters.\textsuperscript{29} The existence of the majority of the Straits within the territorial waters of one of the littoral states means that any pursuit of suspected pirates will inevitably result in the offenders reaching the territorial waters of another state prior to capture.

\textbf{III. The Movement from \textit{Mare Liberum} to \textit{Mare Clausum} and the Delimitation of Maritime Boundaries.}

Pirates have been viewed ambivalently throughout history, despite their status as enemies of the human race.\textsuperscript{30} Prior to the this century and the ratification of UNCLOS, the ocean was seen as a free zone devoid of state control and open to the exploitation of individuals willing to risk their lives in the pursuit of treasure.\textsuperscript{31}

Piracy has a long history in the Straits, with historical references dating back to the fifth century and continuing into the present day.\textsuperscript{32} Piracy has been the work of small, local groups as well as a means of accumulating political power in the region.\textsuperscript{33} The stability of the governments in the Straits affects the number of attacks in the region, with sharp increases in attacks common during periods of government instability or frailty.\textsuperscript{34} The connection between government stability and piracy continues into modern times.\textsuperscript{35} The Straits saw a rise in pirate attacks during the Japanese occupation of the area during World War II\textsuperscript{36} and the currently high level of pirate attacks in Somalia shows that this correlation is not restricted to Southeast Asia.\textsuperscript{37}

\begin{itemize}
  \item[28.] \textit{Id.}
  \item[29.] UNCLOS, supra note 4, art. 111.
  \item[30.] \textit{EKLOF}, supra note 23, at 7.
  \item[31.] \textit{Id.}
  \item[32.] \textit{Id.} at 5.
  \item[33.] See \textit{id.}
  \item[34.] \textit{Id.} at 6.
  \item[35.] \textit{Id.} at 51.
  \item[36.] \textit{EKLOF}, supra note 23, at 51.
\end{itemize}
The sixteenth, seventeenth, and eighteenth centuries saw states without an established navy using piracy, in the form of privateering, to wage war. Following the end of the Napoleonic wars in 1815, international maritime trade increased, partly because of the availability of regular navies to protect merchant vessels.

The rise of colonialism in Southeast Asia caused piracy in the area to increase. By destroying the indigenous governments, the colonial powers destroyed the working relationships with the region’s pirates to protect traders and trade routes. Pirates emerged as a threat to the economic development of the colonial powers, inducing them to police the oceans.

The end of World War II and the decolonization of Southeast Asia changed the view of the oceans from *mare liberum* (freedom of the seas) to *mare clausum* (closed sea regime). The United States’ declaration of jurisdiction over its continental shelf in the 1945 Truman Declaration prompted this change. The development of technology capable of exploiting seabed resources encouraged coastal states to lobby to extend their territorial waters from the customary three nautical miles to twelve nautical miles. The newly independent states joined the push to extend their territorial waters, and their sovereignty, to twelve nautical miles.

Indonesia and Malaysia took advantage of this trend and extended their maritime boundaries. Indonesia claimed straight baselines between the outermost

39. *Id.*
40. *Id.* at 8.
41. *Id.* at 9.
42. *Id.* at 6, 9 (discussing the alliances between indigenous governments in Southeast Asia, including the Malacca Straits, and pirate groups in order to protect traders).
43. *Id.* at 9.
45. *Id.* at 140-41.
46. *Id.*
47. *Id.* (discussing the fact that, of the 101 states to join the United Nations, only 3 agreed to the customary three nautical mile territorial sea boundary while the remaining insisted on at least twelve nautical miles of territorial sea).
48. *Id.* at 141.
islands of its archipelago and extended its territorial waters to twelve nautical miles in 1960 with its Archipelago Act (Act No. 4 of February 1960). The Archipelago Act meant that all of the waters within the straight baselines would be internal waters of Indonesia. Because the waters are now internal waters, they are subject to Indonesian law, not international law. Indonesia’s claims increased its territory from 2 million square kilometers to approximately 5.2 million kilometers.

In December 1979, Malaysia published a map, called the Peta Baru, or New Map, delimitating the extent of its expanded maritime claims, including a twelve nautical mile territorial sea. The map used straight baselines, despite the fact that Malaysia, unlike Indonesia, was not qualified as an archipelagic state and allowed to use straight baselines. Malaysia and Indonesia’s maritime boundary extensions occurred before UNCLOS set limits on boundary extensions, meaning that the signatory states accepted these boundary extensions as the states’ existing boundaries at the time of ratification.

Indonesia and Malaysia, as two of the original five members of the Association of Southeast Asian Nations (ASEAN), embody that organization’s commitment to abstain from the internal affairs of other states and jealously protect their sovereignty from invasion. The extension of their maritime boundaries arose out of their concern over the security, navigational safety, and economic exploitation of their coastal waters. Indonesia and Malaysia also wanted to have a legal basis to prevent foreign powers from intruding into their sovereign waters and air space. These states, although having different views on what threatened their

49. Id.
50. Mak, supra note 44, at 141.
51. Id.
52. Id. (citing Dino Patti Djalal, Jakarta: Centre for Strategic and International Studies (CSIS), The Geopolitics of Indonesia’s Maritime Territorial Policy 40 (1996)).
53. Id.
54. Id.
55. Id. at 142.
56. Sheldon W. Simon, Strategic Studies Institute, ASEAN and its Security Offspring: Facing New Challenges 2, 5 (Aug. 2007) (noting that the other original members of ASEAN were Singapore, Thailand, and the Philippines).
57. Mak, supra note 44, at 142.
58. Id.
sovereignty, shared a common goal to retain and protect their sovereignty from external, as well as internal, forces.\textsuperscript{59}

Indonesia viewed internal factions as a primary threat to its sovereignty and used its Archipelagic doctrine to unite the nearly 14,000 islands within its borders and prevent the different revolutionary movements from destroying the newly recognized state.\textsuperscript{60} Indonesia saw the Straits as a security threat because it was the only strait that Indonesia shared with other coastal states.\textsuperscript{61} Indonesia’s lack of exclusive control over the Straits caused Indonesia to view the Straits as a potential strike point into Indonesia’s heart.\textsuperscript{62}

Malaysia’s concern, however, was with the navigational safety in the Straits since the increased maritime traffic through the region increased the likelihood of a collision or grounding.\textsuperscript{63} The two governments agreed, however, that extending their maritime boundaries would give them access to much needed offshore resources such as oil and gas.\textsuperscript{64} The revenues from these offshore resources were needed by both states to retain power and stabilize their hold on their sovereignty.\textsuperscript{65}

The pre-UNCLOS maritime expansion of Indonesia and Malaysia and their need to obtain and exploit valuable offshore resources are part of the reason why the two states are jealous and protective of their maritime sovereignty and react negatively to potential or perceived erosions.\textsuperscript{66} The states view their maritime sovereignty as vital to their continued existence.\textsuperscript{67} Indonesia views its maritime sovereignty as a means to retain control over a geographically and politically fractured country, while Malaysia views its sovereignty as a means to retain rights over its still contested maritime zones.\textsuperscript{68}

\begin{thebibliography}{99}
\bibitem{59} Id. at 141-43.
\bibitem{60} Id. at 141-42.
\bibitem{61} Id. at 142-43.
\bibitem{62} Id.
\bibitem{63} Mak, \textit{supra} note 44, at 143.
\bibitem{64} Id.
\bibitem{65} Id.
\bibitem{66} Id.
\bibitem{67} See id.
\bibitem{68} Id.
\end{thebibliography}
A. The Compromise over Transit Passage Rights and the Establishment of Incomplete Sovereignty.

UNCLOS developed the idea of "transit passage rights." Transit passage rights allow ships to travel straits used for international navigation without allowing the coastal states to impede their passage under any circumstances. Transit passage rights apply even when the straits pass through the territorial waters of coastal states.

In March 1970, Indonesia and Malaysia signed a treaty demarcating their maritime boundaries in the Straits and challenging the position of the Straits as both high seas and an international strait. The treaty would have granted "innocent passage rights" to user states under customary international law. Innocent passage rights allow coastal states to suspend passage rights if they feel that their security is threatened, and generally applies to areas where coastal states enjoy sovereign rights, such as in their territorial waters. In order to prevent the treaty from threatening the continued use of the Straits, the United States and the Soviet Union offered a compromise of transit passage rights in exchange for recognizing Malaysia and Indonesia's claims of a twelve nautical mile territorial sea.

By accepting the offered compromise of transit passage rights, UNCLOS returned the Straits to the status of an international strait thereby preventing the littoral states from suspending passage through the Straits for any reason. The agreement in UNCLOS to grant transit passage rights to user states means that the Straits contain two legal regimes. Even though Indonesia and Malaysia retain their rights to a twelve nautical mile territorial sea within the Straits, with traditional, and revocable, innocent passage rights, the transit passage rights in the Straits take precedence over the innocent passage rights and prevent the littoral

69. Mak, supra note 44, at 144.
70. Id.
71. Id.
72. Id.
73. Id.
74. Id.
75. Mak, supra note 44, at 145.
76. Id.
77. Id.
states from suspending passage rights through the Straits for any reason. Indonesia and Malaysia view the situation in the Straits as an incomplete establishment of maritime sovereignty, and view any attempt to intrude upon their sovereignty over the Straits as an attempt to remove their sovereign rights over the Straits entirely.

IV. Regional Solutions Have Proven Effective at Addressing the Piracy Problems in the Straits of Malacca.

A. The Piracy—Terrorism Nexus and the Push for an International or Multilateral Solution to Securing the Straits.

Singapore’s fear of a piracy-terrorism nexus threatening its port and shipping facilities led to its announcement in December 2003 that the Straits would be an ideal target for a terrorist attack and that such a threat of an attack was real and imminent. Maritime terrorism accounts for approximately 2% of the world’s terrorist attacks over the past thirty years. Despite the relatively low number of incidences worldwide, several groups in the region have used maritime terrorism to either fund their activities or further their agendas.

The Abu Sayaf Group has repeatedly used maritime violence in the form of kidnapping, attacks on foreign ships, and the bombing of ships to further its agenda. Indonesia believes that the separatist Free Aceh Movement (GAM) in Indonesia engaged in piracy and sea robbery as well as kidnapping for ransom prior to the 2005 Aceh Peace Agreement. Allegations were made in 2003 that

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78. Id.
79. See id. (discussing Indonesia and Malaysia’s jealous guarding of sovereignty rights in the Straits as a result of their incomplete maritime sovereignty in the region).
80. Id. at 151.
82. See id.
83. Id. (discussing the Abu Sayyaf Group’s 1991 attack on a Christian missionary ship in the southern Philippines, the kidnapping of tourists from an island resort in Malaysia in 2000, the kidnapping of tourists from a resort in the Philippines in 2001, and the bombing of a super-ferry in Manila Bay in 2004).
84. The term “Sea Robbery” applies to acts of piracy that occur on the water, but within the territorial waters or in the ports of coastal states, and therefore are outside of the UNCLOS definition.
85. Storey, supra note 81, at 99-100.
GAM conducted pirate attacks in the northern sections of the Straits to raise funds.  
86  GAM has consistently denied these allegations.  
87  Singapore arrested members of Jemaah Islamiyah (JI), an organization with close ties to Al Qaeda, in December 2001 claiming that the JI members were planning suicide attacks against visiting U.S. Naval ships in the Straits.  
88  Indonesia’s state intelligence agency claimed in August 2004 that JI operatives currently detained in Indonesia had admitted to contemplating attacks against shipping in the Straits.  
89  
These and other reports of planned terrorist attacks in the Straits led the Joint War Committee of Lloyd’s Market Association to declare the Straits a “war risk area” in 2005 alongside Iraq, Lebanon, and Nigeria.  
90  The littoral states immediately criticized Lloyd’s decision, arguing that there was no evidence of an imminent attack in the Straits and that the declaration damaged the Strait’s regional economies by imposing higher insurance premiums for ships traveling through the area.  
91  The current improvement in the Straits’ security convinced Lloyd’s to remove the Straits from their war risk list in August 2006.  
92  
Indonesia and Malaysia initially ignored Singapore’s claims that there was a piracy-terrorism nexus in the region.  
93  Part of the reason for ignoring Singapore’s claims was the perceived lack of threat to their national security from piracy.  
94  Indonesia saw the separatist movements in its Aceh region as a bigger threat to national security and ranked piracy as fairly low priority.  
95  Malaysia also considered piracy an insignificant threat to its national security until the attack by
the terrorist group Abu Sayaf in 2000, when the group kidnapped Malaysian nationals and tourists from the resort island of Sipadan.96

The Malaysian government suffered international embarrassment over the attack, since it appeared that they were incapable of preventing foreign intrusions into their sovereign territory.97 Instead of responding with an increased concern over the threat of terrorist activities, however, the Malaysian government issued a statement that any further kidnappings of Malaysians from within their borders would be considered a violation of Malaysia’s sovereignty.98 Malaysia’s response showed that its concern was for the threat to its sovereignty by intrusions of non-state actors, not the bare threat of piracy or terrorism in the Straits.99

The three littoral states view the security threats to the Straits very differently.100 Singapore, as the smallest of the three, considers international trade necessary to the health of its economy and sees any threat to the flow of trade through the region as a direct threat to its well-being as a state.101 Singapore is also concerned that its continued support of Western nations, particularly the United States, has made it a target for groups like or linked to Al Qaeda.102 These fears have led top Singapore officials to draw a connection between terrorism and piracy, even going so far as to refer to the acts of piracy in the region as “terrorism camouflaged as piracy.”103

Malaysia, however, sees piracy as a lesser threat to its security than other maritime crimes within their territorial waters and the Strait.104 Malaysia considers the trafficking in people, small arms, narcotics, and the illegal immigration of people from Indonesia as more of a threat to its security than piracy or sea

96. Id.
97. Id. at 151-52.
98. Id. at 152 (citing Troops on Isles: Najib: Soldiers to Be Deployed on All Islands Along Sabah’s East Coast, STAR, Sept. 15, 2000).
99. Mak, supra note 44, at 152.
100. Storey, supra note 81, at 109.
101. Id.
103. Id. at 110 (citing Piracy Equals Terrorism on Troubled Waters: Minister, AGENCE FRANCE-PRESSE, Dec. 21, 2003).
104. Id. (citing author interviews and discussions with senior policy practitioners from the Malaysian Armed Forces and Royal Malaysian Police, Asia-Pacific Center for Security Studies (APCSS), Honolulu, Hawaii, Mar. 2004-Mar. 2007).
robbery. Malaysia, though, has a lower number of reported attacks within its territorial waters than either Indonesia or Singapore. The smaller number of attacks is probably due to Malaysia’s more stable government and better socio-economic conditions, as well as a more professional and capable security force.

The Malaysian government has downplayed any connection between terrorism and piracy, insisting that there is no credible evidence supporting a link between piracy and terrorism in the region. Malaysia has not dismissed the possibility of a terrorist attack within the Straits, however. Although Malaysia acknowledges the possibility of a terrorist attack in the Straits, it does not appear to view the possibility with the same level of concern as Singapore.

Indonesia, like Malaysia, does not view piracy as the primary challenge to its maritime security. Indonesia is unable to patrol its vast archipelagic waters, and concentrates its security efforts on attempting to contain the illegal fishing, smuggling, and, prior to the 2005 Aceh Peace Agreement, the activities of the GAM. Indonesia has less incentive to view the potential economic losses from piracy in the Strait as alarming as either Malaysia or Singapore since Indonesia receives less economic benefit from the Straits, having only one port within the Straits.

Overall, Indonesia has not made maritime security a priority. Indonesia has been more concerned with the high levels of poverty, unemployment, infectious diseases, and violence caused by political, separatist, and communal factions in the country since the fall of the Suharto government. Indonesia has also had natural

105. Id.
106. Storey, supra note 81, at 109.
107. Id.
108. Id. (citing Malaysia Says It Has Not Found Link between Terrorists and Regional Piracy, ASSOCIATED PRESS, June 5, 2005).
109. Id. at 110-111 (citing Terror in Malacca Strait Would Have Global Economic Shockwaves: KL Police Chief, ASSOCIATED PRESS, June 12, 2007).
110. Id. (citing Terror in Malacca Strait Would Have Global Economic Shockwaves: KL Police Chief, ASSOCIATED PRESS, June 12, 2007).
111. Id. at 111 (citing author interviews and discussions with senior policy practitioners from the Indonesian armed forces, APCSS, Mar. 2004-Mar. 2007).
112. Storey, supra note 81, at 111. (citing author interviews and discussions with senior policy practitioners from the Indonesian armed forces, APCSS, Mar. 2004-Mar. 2007).
113. Id.
114. Id.
115. Id.
and man-made disasters in recent years, leaving very little resources left to address a problem that affects only one of its sea ports.\textsuperscript{116} Additionally, despite allegations that the GAM financed its terrorist activities through piracy, the Indonesian government does not accept the terrorism-piracy nexus promoted by Singapore.\textsuperscript{117}

The events of September 11, 2001 and later terrorist attacks in Western countries resulted in increased international concern over the safety of the Straits.\textsuperscript{118} Maritime violence in the Straits is of concern to the international community because the Straits are the shortest route for ships traveling between the Pacific and Indian Oceans.\textsuperscript{119} Estimates place the volume of global trade passing through the Straits at one-third to forty percent.\textsuperscript{120} The Straits are of particular importance to Japan and China, since ninety percent of Japan's and seventy to eighty percent of China's energy imports pass through the Straits each year.\textsuperscript{121}

In 2004, the United States proposed sending Marines to patrol the Straits through the Regional Maritime Security Initiative (RMSI).\textsuperscript{122} Of the three coastal states bordering the Straits, only Singapore is a participant in this initiative.\textsuperscript{123} When Agence France-Presse quoted the then United States Pacific Command Chief in 2004, Admiral Thomas Fargo, as saying that U.S. Marines and Special Forces would help patrol the Straits, Malaysia and Indonesia reacted predictably.\textsuperscript{124} Malaysia and Indonesia saw Admiral Fargo's claim as part of a larger plot to internationalize the Straits and remove the responsibility of the Straits' security, including within the territorial waters of the two states, from the control of the littoral states.\textsuperscript{125} The public speech by Singapore's Defense Minister calling for an

\begin{itemize}
\item \textsuperscript{116} Id.
\item \textsuperscript{117} Id. (citing Malacca Strait Pirates 'Unlikely to Aid Terrorist,' Straits Times, Sept. 8, 2005 (discussing how the Indonesian Foreign Minister Hassan Wirayuda rejected the notion that there is a nexus between pirates and terrorists on the grounds that the two actors had different goals: "While terrorists want to halt world trade, the sea robbers would be out of business without world trade.").
\item \textsuperscript{118} See Kuppuswamy, supra note 13.
\item \textsuperscript{119} Storey, supra note 81, at 101.
\item \textsuperscript{120} Id. at 102 (one-third of global trade passes through the Straits); Barrios, supra note 7, at 150.
\item \textsuperscript{121} Id. at 103.
\item \textsuperscript{122} See Kuppuswamy, supra note 13.
\item \textsuperscript{123} Id.
\item \textsuperscript{124} Mak, supra note 44, at 152.
\item \textsuperscript{125} Id.
\end{itemize}
international solution to secure the Straits confirmed Malaysia and Indonesia's suspicions and prompted them to declare that they would not allow any outside powers to become involved in any attempt to secure the Straits.\textsuperscript{126} The two states made it very clear that the responsibility and right of securing the Straits belonged to the littoral states alone.\textsuperscript{127}

Indonesia and Malaysia resent Singapore's support for a stronger foreign presence in the region and view its support as an attempt to use the threat of terrorism to justify an increased foreign presence.\textsuperscript{128} Indonesia and Malaysia view the presence of foreign forces in the Straits as an affront to their national sovereignty.\textsuperscript{129} Malaysia pointedly stated that security concerns should not be used as an excuse to compromise its sovereignty.\textsuperscript{130} Indonesia made it clear that any foreign military patrols in its waters would be inconsistent with international law and would harm the country's national interests.\textsuperscript{131} Malaysia and Indonesia also worry that the presence of U.S. forces could fuel Islamic radicalism in the region.\textsuperscript{132}

The two countries continue to resist the further erosion of their sovereignty over the Straits and insist that any use of the Straits for military purposes be approved by the littoral states.\textsuperscript{133} Malaysia and Indonesia showed a willingness to cooperate with the security concerns of foreign states when they allowed Indian warships to escort select American ships through the region.\textsuperscript{134} The states did not object to the presence of Indian warships in the Straits because the United States and India had consulted the littoral states prior to announcing the arrangement.\textsuperscript{135}

\section*{B. The Establishment of Regional Solutions to Secure the Straits.}

The fear that the security concerns of foreign nations will erode the sovereign rights of the littoral states over the Straits caused Indonesia and Malaysia to agree

\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} Kuppuswamy, \textit{supra} note 13.
\textsuperscript{129} Id.; Storey, \textit{supra} note 81, at 115.
\textsuperscript{130} Mak, \textit{supra} note 44, at 152.
\textsuperscript{131} Id. at 153.
\textsuperscript{132} Storey, \textit{supra} note 81, at 113-114 (citing \textit{S'pore Can't Invite U.S. to Patrol Straits: KL, STRAITs TIMES, May 12, 2004}).
\textsuperscript{133} Id.
\textsuperscript{134} Id.
\textsuperscript{135} Id.
to increase security in the region and coordinate trilateral patrols with Singapore.\(^{136}\) Indonesia and Malaysia adhere to the ASEAN norm of non-interference with the internal affairs of foreign states that comes from the Westphalian concept of sovereignty.\(^{137}\) The Westphalian concept recognizes the legal right of a state to exist without outside influence in its domestic affairs.\(^{138}\)

U.S. initiatives and the legal and political debates following the end of the Cold War appear to question the Westphalian concept of sovereignty by advocating the right of external powers to interfere with the internal affairs of states that are unable to maintain domestic law and order.\(^{139}\) Indonesia and Malaysia view attempts by the U.S. to protect its interests in the region from attacks by non-state actors as an attack on their concept of sovereignty.\(^{140}\) Indonesia and Malaysia saw an agreement to coordinate patrols in the Straits and increase their security efforts in the region as a means to avoid foreign interference in what they saw as their domestic affairs, specifically, activities occurring in their territorial waters.\(^{141}\)

The three coastal states came to an agreement and launched the Malaysia-Singapore-Indonesia (MALSINDO) coordinated patrols on July 20, 2004.\(^{142}\) Seventeen warships from the three countries patrol the region year round.\(^{143}\) In September 2005, maritime air patrols, the Eyes in the Sky (EiS) initiative, was launched.\(^{144}\) The three states individually conduct two air patrols a week along the Malacca and Singapore Straits under the EiS program.\(^{145}\) The patrols carry military personnel from each participating state and report suspicious activities to the ground centers in the appropriate state for follow-up by maritime law enforcement.\(^{146}\) In April 2006, the EiS and the Malacca Straits Sea Patrols joined

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137. Mak, supra note 44, at 154.
138. Id.
139. Id.
140. Id.
141. Id.
142. Storey, supra note 81, at 116.
143. Id.
144. Id.
145. Id.
146. Id.
forces to become the Malacca Straits Patrols (MSP).\textsuperscript{147} A joint coordinating committee of officials from the three states run the MSP and meet twice a year.\textsuperscript{148}

Despite the agreed upon necessity of patrolling the region as a means to avoid international intrusion, the patrols have become an illustration of how vehemently Indonesia and Malaysia guard their sovereignty. The patrols themselves are coordinated, not joint.\textsuperscript{149} Each state is responsible for patrolling its own sector and the ships remain under their respective state’s command.\textsuperscript{150} The patrols are expected to remain coordinated rather than joint for the near future, mainly because of the sovereignty concerns of the participating states.\textsuperscript{151}

Prior to the April 2006 agreement, sovereignty concerns prevented the MALSINDO ships from having “hot pursuit” rights into the territorial waters of participating states.\textsuperscript{152} Hot pursuit rights allow security forces from one state to pursue suspected criminals into the territorial waters of another state without first obtaining that state’s permission and are vital in areas with adjacent territorial waters.\textsuperscript{153} The 2006 agreement finally granted hot pursuit rights to MALSINDO ships up to a maximum of five nautical miles into the sovereign waters of another participating state.\textsuperscript{154}

The trilateral patrols have been remarkably successful and have resulted in a dramatic reduction in the number of pirate attacks in the Straits.\textsuperscript{155} In 2003, the International Maritime Bureau (IMB) received reports of 28 attacks in the region; by 2007, that number had fallen to seven.\textsuperscript{156} The patrols also reduce the likelihood

\textsuperscript{147} Id. (citing author interviews with Ministry of Defense officials, Singapore, Sept. 22, 2006).
\textsuperscript{148} Storey, \textit{supra} note 81, at 116 (citing author interviews with Ministry of Defense officials, Singapore, Sept. 22, 2006).
\textsuperscript{149} Id. at 119.
\textsuperscript{150} Id.
\textsuperscript{151} \textit{Id.} (discussing Malaysia Deputy Prime Minister Najib Razak’s comments that joint patrols are possible only if the littoral states overcome certain “sensitivities;” citing \textit{Malaysia Deputy Prime Minister: Joint Patrols in Malacc Strait Possible}, ASSOCIATED PRESS, Apr. 17, 2007).
\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} Storey, \textit{supra} note 81, at 119 (citing TNI-AL Presentation (paper presented at the Military Operations (MILOPS) Conference, Kuala Lumpur, July 19, 2006)).
\textsuperscript{156} Storey, \textit{supra} note 81, at 118.
of the type of attacks recently seen off the coast of Somalia. The IMB’s Piracy Reporting Center released a statement to this effect and credits the commitment and resources of the coastal states for the improvement to the piracy situation in the Straits. The coastal states appear to have learned that cooperation within the area is necessary to prevent piracy from disrupting the security of the Malacca Straits and the erosion of their sovereign rights over the region.

The international community, however, has not been entirely removed from the effort to secure the Straits. The United States provides aid to Indonesia’s antipiracy efforts in the form of high-speed response boats and funding for a communications and radar system in the area. The U.S. government pledged 30 25-foot Defender-class patrol boats to the Indonesian marine police, and delivered the first 15 in January 2008. The U.S. has also financed improvements to the marine police training facility in Jakarta and the U.S. Navy provides training opportunities for coastal states in the region.

Japan pledged millions of dollars to both Indonesia and Malaysia to improve their maritime security. Indonesia initially rejected Japan’s offer of patrol boats, however, when Japan conditioned the offer of the boats on the boats being stationed in the Straits and being used exclusively to fight piracy and maritime terrorism in the region. The two states eventually reached an agreement, but the refusal highlighted Indonesia’s refusal to accept conditional aid.

157. See McDonald, supra note 8.
158. Id.
160. Id.
161. Id.
165. Id. (citing Indonesia Refuses to Accept Conditions for Use of Japanese Patrol Boats, JU Press, June 15, 2005).
166. Id.
China joined the international efforts and pledged aid to improve the maritime security of the Straits, including the sharing of information and intelligence with the littoral states.\textsuperscript{167} India has also shown an interest in assisting the littoral states, but its offers have yet to take concrete form.\textsuperscript{168} Although these offers of help are welcome, the littoral states have made it clear that they do not want the Straits to become an arena for geopolitical rivalries.\textsuperscript{169}

In addition to the trilateral patrols, Singapore, Malaysia, and Indonesia have enacted national security initiatives since 2004.\textsuperscript{170} Singapore tightened its maritime security by requiring all vessels in its territorial waters to carry identification transponders and deploying armed security teams from its navy to board select ships entering its territorial waters.\textsuperscript{171} Malaysia launched a national coast guard whose primary focus is on the Straits.\textsuperscript{172} The Malaysian government also randomly places armed police officers on vessels carrying high-risk cargo through Malaysian waters or entering Malaysian ports.\textsuperscript{173} Indonesia increased naval patrols and intelligence gathering in the area, spurred partly by a desire to prevent foreign intervention in the area and partly to reform their international image.\textsuperscript{174}

\begin{enumerate}
\item \textsuperscript{167} Id. at 124 (citing Joshua Ho, Commentary, The IMO-KL Meeting on the Straits of Malacca in Singapore, IDSS, (Oct. 5, 2006); Joint Communiqué Between the People’s Republic of China and Malaysia (Full Text), XINHUA NEWS AGENCY, Dec. 15, 2005).
\item \textsuperscript{168} Storey, supra note 81, at 124 (citing RI, India to Conduct Joint Patrol in Andaman Sea, ANTARA NEWS, Aug. 22, 2007; India to Help with Security in the Straits of Malacca, Bernama, June 27, 2007).
\item \textsuperscript{169} Id.
\item \textsuperscript{170} Id. at 117.
\item \textsuperscript{171} Id. (citing Armed Navy Escorts for Suspect Ships, STRAITS TIMES, Feb. 28, 2005).
\item \textsuperscript{172} Id.
\item \textsuperscript{173} Id. (citing Malaysia to Put Armed Police on Ships in Malacca Strait, CHANNEL NEWS ASIA, Apr. 1, 2005, available at http://www.newagebd.com/2005/apr/02/busni.html#23)
\item \textsuperscript{174} Storey, supra note 81, at 117. (citing Indonesian Leader Urges Increased Sea Patrols to Tackle Piracy, JAKARTA POST, Dec. 16, 2005).
\end{enumerate}
V. Solutions Suggested by other Scholars: Amendment to the UNCLOS Definition of Piracy and Employment of International Bounty Hunters.

A. Amending the UNCLOS Definition of Piracy Ignores the Requirement that the Signatory States Accept and Ratify Any Amendments.

Scholars have suggested various solutions for addressing the problem of piracy in the Straits and elsewhere in the world. A common suggestion is to amend the UNCLOS definition of piracy to include acts of piracy that are within the territorial waters of coastal states or to include maritime attacks that are politically motivated. This suggestion is popular among scholars discussing the Straits of Malacca because the majority of attacks occur within the territorial waters of the coastal states.

Scholars advocating an amendment to the UNCLOS definition of piracy appear to ignore, or fail to consider, the fact that any amendment to UNCLOS requires ratification by the signatory nations. Indonesia and Malaysia have maintained that the presence of foreign forces within their territorial waters would violate their sovereignty. This position is in spite of the fact that the proposed foreign forces would include the presence of Indonesian and Malaysian officials and would have some level of government oversight. Indonesia and Malaysia's refusal to allow any erosion of their sovereignty over the region, even when there is the involvement of their governments, argues against the likelihood that they would ratify such an amendment.

175. See Barrios, supra note 7, at 149 (advocating that the UNCLOS definition of piracy should be amended to reflect an historically accurate view of piracy); Brooke A. Bornick, Comment, Bounty Hunters and Pirates: Filling the Gaps in the 1982 U.N. Convention on the Law of the Sea, 17 FLA. J. INT'L L. 259 (Mar. 2005) (advocating the use of international bounty hunters).
176. Barrios, supra note 7, at 155-56.
177. UNCLOS, supra note 4, arts. 315 (stating that States must agree to any amendments to UNCLOS), 316 (explaining which States are bound by amendments).
178. Mak, supra note 44, at 153.
B. International Bounty Hunters Would Be An Affront to the Sovereign Rights of States by Allowing Private Individuals the Power and Ability to Remove Nationals from their Home States to Stand Trial in Foreign States.

Ms. Brooke A. Bornick, in her article in the Florida Journal of International Law in 2005, suggests an innovative solution to the piracy problem in the Malacca Straits. Ms. Bornick advocates employing private bounty hunters to patrol areas where pirate attacks are likely to occur, pursue suspected pirates, and deliver them to the victim states. Ship owners would pay the bounty hunters a reward for the capture of the pirates or, if the ship owners failed to compensate the bounty hunters, then the flag state would be obliged to pay the reward. Although this suggestion is an interesting one, it would be dangerous in application.

Ms. Bornick proposes that the bounty hunters be granted limited legal liability in order to allow the effective patrol of problem areas and the pursuit of suspected pirates. Ms. Bornick bases her proposal for limited legal liability on the legal immunity enjoyed by bounty hunters in the United States. In order for private individuals to have legal immunity throughout the world, however, the states in which they operate would need to grant them legal immunity within their borders. This would require some sort of international agreement or an amendment to an existing agreement, such as UNCLOS. The freedom from legal liability that Ms. Bornick proposes would allow these international bounty hunters to kidnap nationals of a foreign state on suspicion of being a pirate and transport them to another state to stand trial.

It is difficult to imagine that Indonesia and Malaysia, states that have vehemently objected to the erosion of their sovereignty over their territorial waters, would be willing to surrender sovereign rights within their land territory to allow private bounty hunters to enter and remove their citizens on suspicion of being pirates. Malaysia’s response to the 2000 kidnappings supports this conclusion. Malaysia’s declaration that any kidnappings of Malaysians within its borders

179. Bornick, supra note 176, at 259.
180. Id. at 266-269.
181. Id. at 269.
182. Id. at 268.
183. Id. (citing Major Christopher M. Supernor, International Bounty Hunters for War Criminals: Privatizing the Enforcement of Justice, 50 A.F.L. REV. 215, 238 (2001)).
184. Mak, supra note 44, at 152.
would be seen as a violation of its sovereignty is in direct conflict with any proposal that would grant private individuals legal immunity from kidnapping Malaysian citizens on suspicion of piracy.\textsuperscript{185} It would take willful blindness to suppose that Malaysia would agree to any such legal immunity for non-state actors in the form of international bounty hunters. There is no reason to think that Indonesia would respond differently. Indonesia and Malaysia's refusal to allow foreign states to assist in patrolling the Straits out of sovereignty concerns also argues against the likelihood that these states would allow private individuals, free from government participation, knowledge, control, or oversight, to operate on a carte blanche basis within their territory.

Ms. Bomick cites the success of bounty hunters in the United States as support for advocating international bounty hunters.\textsuperscript{186} International bounty hunters, however, would not be operating like their United States' counterparts. In the United States, bounty hunters have the right to pursue fugitives, in other words, they have the right to pursue persons who are fleeing from the justice system.\textsuperscript{187} Their quarry, therefore, have already received some measure of due process in a judicial system.\textsuperscript{188}

The limitations on whom bounty hunters may pursue are discussed in \textit{Taylor v. Taintor}, the United States Supreme Court case defining the rights of bounty hunters.\textsuperscript{189} None of the rights included in \textit{Taintor} authorize bounty hunters to investigate and determine the guilt of parties.\textsuperscript{190} Instead, the bounty hunters' rights are phrased in order to make it clear that they apply to the capture and return of fugitives, i.e., criminal defendants with outstanding warrants for their arrest.\textsuperscript{191} This understanding is reflected in the principal practice that bounty hunters engage in, that of the recovery of "bail jumpers".\textsuperscript{192}

By contrast, the proposal for the employment of international bounty hunters to combat piracy would necessarily include the ability of these bounty hunters to

\textsuperscript{185} Id.
\textsuperscript{186} Bornick, \textit{supra} note 177, at 267.
\textsuperscript{187} Gerald D. Robin, \textit{Reining in Bounty Hunters}, 21 CRIM. JUST. 4, 6-7 (Fall 2006).
\textsuperscript{188} Id.
\textsuperscript{189} Id. (citing and discussing the rights outlined in Taylor v. Taintor, 83 U.S. 366 (1872)).
\textsuperscript{190} Id.
\textsuperscript{191} Id.
\textsuperscript{192} Id. at 4-5. ("Bail jumpers" refer to criminal defendants released on bail who fail to return for court appearances and for whom the court issues a warrant).
investigate and discover the guilty parties. The international bounty hunters would act as an informal international police force, one without even a veneer of official oversight or control. Unless the international community creates a new international agreement or amends an existing international agreement, these international bounty hunters would lack any legal basis with which to conduct their activities.

The proposal to use international bounty hunters to police problem areas and pursue suspected pirates also fails to address the likely source of these individuals. Private bounty hunters would probably come from the private military and security companies (PMC and PSC) that have become popular since the end of the Cold War. These companies provide services that range from advisory roles to providing private security forces to protect ships, retrieve cargo, and rescue kidnapped crew members and captured ships from the grasp of pirates. The recent trend toward using the services of these companies has highlighted the abuses that these companies are capable of and actually engage in. Some companies have even been accused of engaging in criminal activities.

The largest and most prominent PMCs are based in Western countries, particularly in the United States and the United Kingdom. The PMC’s satellite offices in states near the Straits are controlled by their Western home offices. These companies are seen by some observers to be an alternative method for Western governments to pursue their own policies without incurring accountability for the actions of these still private companies. Having Western owned PMCs operating with virtually no accountability in this area would seem to be an equally

193. Id. at 6-7.
194. Hereinafter PMCs since the proposal for international bounty hunters would go beyond the services that the typical PSC provides (i.e., advisory services and training of ship personnel).
196. Id. at 108.
197. Id. (such as prolonging conflicts, overbidding, and forcing mineral and other natural resources concessions from their clients).
198. Id.
199. Id. at 111-12.
200. Id.
201. Id. at 108.
offensive infringement on the sovereignty of nations like Indonesia and Malaysia that are so protective over their sovereign rights.

Another problem with Ms. Bornick’s proposal of using international bounty hunters to address piracy is that these bounty hunters would be operating to make a profit. This could lead to the bounty hunters only pursuing pirates who attack ships that are owned by wealthy companies or that sail under the flags of paying, wealthy, states, and ignore attacks on poorer ships. Besides the obvious unfairness of this approach, it could also lead to a disproportionate amount of attacks on the cargo and ships of weaker, less prosperous states.

VI. Invading the Sovereign Rights of Malaysia and Indonesia Would Be Setting a Dangerous Precedent.

Indonesia and Malaysia have insisted on maintaining their sovereign rights over the Malacca Straits.202 Their insistence has prevented other larger and more powerful nations from enforcing multilateral agreements to increase enforcement and patrolling efforts in the region.203 Their insistence has also resulted in a regional solution, trilateral patrols, that have proven effective in preventing the majority of pirate attacks in the Straits.204

The suggestion to amend the UNCLOS definition of piracy to include politically motivated attacks or attacks that occur within the territorial waters of states ignores the basic sovereignty concerns of Indonesia and Malaysia.205 The pirate attacks are occurring within their territorial waters, making the attacks a domestic problem. Allowing the international community to bully them into accepting international assistance in the form of a foreign military presence would be tantamount to forcing them to accept a foreign military presence within their land territory to address burglary.206

Another possible repercussion to forcing Indonesia and Malaysia to either agree to amend the UNCLOS definition of piracy or refuse to ratify such an amendment would be the message it could send to other coastal states in the

202. See Mak, supra note 44, at 152.
203. See Kuppuswamy, supra note 13.
205. See Barrios, supra note 7, at 155-56.
206. See Mak, supra note 44, at 153.
region. Those states could see the fate of Indonesia and Malaysia as a warning that insistence on maintaining their sovereign right could result in the removal of those rights.

Indonesia and Malaysia, even if they refuse to ratify such an amendment, could probably find their territorial waters invaded by foreign warships pursuing suspected pirates or terrorists. Since UNCLOS is considered a codification of customary international law, the amendment might enjoy the same protection, which would force Indonesia and Malaysia to vigorously protest these incursions or risk losing their sovereignty rights over their territorial waters.\textsuperscript{207}

Ultimately, solutions such as international bounty hunters or amending UNCLOS to protect the private property of private individuals will do more harm than good and runs counter to the stated purpose of UNCLOS to settle maritime issues "in a spirit of mutual understanding and cooperation."\textsuperscript{208} Stepping on the sovereign rights of smaller nations to ensure the security of the private property of private individuals from larger states would make a mockery of this stated purpose.

\textbf{VII. Conclusion}

The international community should allow Malaysia and Indonesia to continue to implement regional solutions to address the piracy problems in the Straits of Malacca. Private companies that travel the Straits on a regular basis are free to employ security forces to protect their cargoes. If travel through the Straits becomes too dangerous or unprofitable, then these companies will either adapt by employing security services to prevent attacks or find new routes, thereby providing an incentive for Malaysia and Indonesia to either accept international assistance or increase patrols of the area.

The international community should not use piracy as an invitation to invade the sovereignty of smaller, relatively weaker, states. The UNCLOS definition of piracy should remain as it is. The current definition prevents individuals and states from invading the sovereign rights of others states in pursuit of pirates.\textsuperscript{209} The suggestion that international bounty hunters should be employed to patrol for and
pursue pirates would result in an affront to the sovereignty of the states where suspected pirates operate or reside. This could increase international tension in the region and probably hinder efforts to continue to address this problem at the regional level and within the spirit of the stated purpose of UNCLOS.