AN ANALYSIS ON STRAIT OF MALACCA SEEN FROM THE PERSPECTIVES OF INTERNATIONAL LAW, REGIONAL REGULATIONS, AND REPUBLIC OF INDONESIA[*]

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Abstract

Global piracy has been a constant threat for a long period of time. The Strait of Malacca is a vital global trade channel, with some of the heaviest traffic worldwide, yet it has been experiencing high levels of piracy attacks. Despite the fact that the establishment of Malacca Strait Patrols by Indonesia, Malaysia, and Singapore has indeed helped reduce the number of pirates attacking ships passing by the Strait of Malacca, many States are still facing constant challenges in protecting the Strait of Malacca from piracy attacks. This paper discusses the challenges and how to combat them. The author uses normative textual analyzing approach in this paper.

Intisari

Fenomena pembajakan secara global sudah sejak lama menjadi ancaman di dunia pelayaran. Selat Malaka adalah saluran perdagangan dunia yang penting, dengan lalu lintas terpadat serta ancaman terhadap pembajakan yang tinggi. Walaupun media pengamanan berupa patroli yang disediakan oleh Indonesia, Malaysia, dan Singapura secara signifikan mampu menekan angka pembajakan terhadap kapal-kapal yang melalui Selat Malaka, tantangan dalam melindungi Selat Malaka dari pembajakan belumlah tuntas. Selanjutnya artikel ini akan mengangkat tantangan-tantangan yang dihadapi dalam memberantas pembajakan kapal serta bentuk penanggulangannya dengan menggunakan analisa pendekatan normatif tekstual.

Keywords: Piracy, Malacca Straits, UNCLOS.
Kata kunci: Pembajakan, Selat Malaka, UNCLOS.

A. Introduction

The seas under the international law is regulated by the 1982 United Nations Law of the Sea Convention [hereinafter UNCLOS] which has received majority consent of world states. Yet, it does not provide the legal definition of the sea. The Oxford Dictionary tries to define sea as the expanse of salt water that covers most of the earth's surface and surrounds its land masses. A sea in general is an area bordering States, so that the crimes committed in the sea often create conflicts of jurisdiction between the coastal State and the flag State, or between two or more coastal States. These jurisdictional conflicts arise in connection with the extra-territorial jurisdiction which is owned by the flag State and by the coastal State. Therefore, a coastal State's authority to apply criminal jurisdiction in its waters under the jurisdiction of the crimes, especially those committed by foreign vessels, must pay attention to the provisions of international law. Violation of the provisions of international law would give rise to the possibility that a coastal state may be brought to the International Court of Justice.

B. Global piracy and the piracy in Strait of Malacca

Piracy in the Strait of Malacca, unlike off the coast of Somalia and against the global trend, has effectively been eradicated. Increased cooperation and coordination in anti-piracy operations among littoral states is an important factor. However, of equal, if not greater significance to the regional decline of piracy is the massive impact of the 2004 Tsunami. Strait of Malacca is a waterway between the Malaysian peninsula and the Indonesian island of Sumatra. The Strait is a vital shipping route transited every year by ships carrying goods of the world's trade. This includes a majority of the oil tankers that supply the economies of East Asia. Given the volume of shipping, the Strait has been plagued by piracy for centuries.

Following the Asian financial crisis of the late 1990s, piracy became particularly prevalent. In 2004 there were 38 actual or attempted pirate attacks in the Strait which at the time was the second-highest in the world. (FOX NEWS, 2013) These attacks took many forms including robbery, kidnapping and hijacking. By 2008 the number of pirate incidents in the Strait had fallen to 2, as globally piracy reached a record high, and by 2009 only one incident was recorded as the global number rose to 102 attacks. (Schuman, 2009) The global trend of piracy has been a significant year on year increase but contrary to this, the Strait of Malacca has gone from a piracy hotspot to a piracy free zone.

For archipelagic States, such as Indonesia, the violence in the form of piracy is a part of life in the ocean dynamics that demands serious treatment. Strait of Malacca, situated between Indonesia, Malaysia, and Singapore, was long considered the world's most dangerous waters for pirate attacks (US State's Bureau of Consular Affairs, 2013). Even though the number of pirate attacks had already dropped in 2005 due to the increase of military patrols and vessels security, data released by the International Maritime Bureau in Kuala Lumpur in 1999 mentioned that there were 113 cases that occurred in Indonesian waters and the number increased to 117 cases in 2000. The particular data were in contrast with data collected by the Indonesian Navy in 2000 that showed the occurrence of 81 cases, of which 79 cases were piracy and 2 other cases were categorized as ship hijacking.

The aforementioned data indicate that the violence at sea, particularly acts of piracy, can be a serious threat to the

security and smooth sailing between regions and between countries. At the international level, Furthermore, at the regional and local levels, piracy poses a serious threat to the safety and security of seafarers and fishermen, whose means of livelihood directly depend on their ability to access specific maritime spaces and routes. Southeast Asian waters, and the many island and archipelagic states therein, are no exception. The safety of maritime circulation also bears heavily on the ability of some of these states to maintain political stability. Similarly, it may be affecting the credibility of the Government of Indonesia internationally, as well as containing the potential leading to bilateral or even international conflicts.

This paper will further discuss the protection towards international straits according to the applicable law, the challenges in protecting from piracy on specific cases in Strait Malaca, dan challenges faced by Indonesia in combating piracy in its jurisdictional seas.

C.　Protection Towards the International Straits

A strait in the geographical sense is defined as a contraction of the sea between two territories being of a certain limited width and connecting two seas otherwise separated at least in that particular place by the territories in question. (Bruel, 1947) This definition is in accordance with characteristic of straits provided by article 1 of UNCLOS, which does not specifically define the word straits.

According to UNCLOS, there are two available rights applicable in the straits used for international passage, namely the right of transit passage and the right of innocent passage. Transit passage means the exercise of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the

strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. However, the requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State.

The meaning of innocent passage itself is explained within article 19 of UNCLOS that a passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with UNCLOS and with other rules of international law.

D.　Straits of Malacca, Positioning and Regional Protection

While in this specific case, the Straits of Malacca geopolitically fall under a number of different territorial and maritime jurisdictions. Primarily, the Straits are defined as falling between Peninsular Malaysia (with a small portion of southern Thailand) and the island of Sumatra with east and west limits bordering Singaporean and Indian (the Andaman and Nicobar Island chain) territorial waters.

In terms of energy transport, more than two-thirds of the world‟s liquefied oil and natural gas passes through the Strait of Malacca. It is apparently renowned as the "energy lifeline" for economic power houses such as China, Japan, South Korea and Taiwan, as more than eighty percent of energy imports and exports pass through the Strait of Malacca and transit north through the South China Sea to reach their destinations in East Asia. (Tommy Koh, n.d.)

Despite the heavy international traffic from major trading nations, the safety and security of the Straits of Malacca is primarily the responsibility of the three states: Indonesia, Malaysia, and Singapore,

as the related main coastal States to the strait"s waters. In very specific situations, India and Thailand are accountable for maritime security, as their territorial waters share a smaller overlap compared to the aforementioned three countries. The three littoral states have the right to prescribe regulations for transit through the Straits, including any security and transit safety considerations, laws against marine pollution, traffic management, and other similar domains. Treaties, such as the International Regulations for Preventing Collisions at Sea and the United Nations Convention on the Law of the Sea, protect state sovereignty and at the same time permit the littoral States to control the territorial waters surrounding their State territory.

In terms of responsibility, user nations come second to the littoral states, consisting of foreign countries that depend highly on sea-based imports and exports. China, Germany, Japan, and the United States all figure prominently as observer and user nations. This is because the trade of heavy user states is contingent on the security of the Straits of Malacca, and therefore critical for their economies.

Considering the positioning of the strait above, the security of the Strait of Malacca cannot be tackled by any single country alone. The littoral states, user states and the international community need to co-operate and work together to ensure security and safety for all legitimate users. The Malacca Strait Patrols or MSP, which comprises the Malacca Strait Sea Patrol (MSSP), the "Eyes-in-the-Sky" (EiS) air patrols as well as the Intelligence Exchange Group (IEG), is a concrete set of practical co-operative measures undertaken by the littoral states to ensure the security of the Straits of Malacca and Singapore. (MINDEF Singapore, n.d.) The first multilateral measure to be introduced by the three

littoral states was the Trilateral Coordinated Patrol or MALSINDO, which was an abbreviation of Malaysia, Singapore, and Indonesia. It was aimed to enhance the security in that area or to peace keeping and patrolling coordinated in their respective territorial waters.

However, unfortunately on December 2004, five month after MALSINDO was launched, an earthquake occurred in Aceh, the western most area of Indonesia, and it affected most coastlines bordering the Indian Ocean, including Malaysia, Singapore, and Thailand as the nearest coastal States to the epicenter of the earthquake. Apparently, good news managed to emerge out of the pitiful disaster. According to the 2004 International Maritime Board report on 2003 activities including pirate-related ones, (International Maritime Board, 2004) the weeks after-Tsunami shows that piracy attacks in Strait of Malacca has ceased. The impact of Tsunami was apparently significant: there was a decline on the number of piracy attacks from 38 to 12, showing more than 60 percent reduction.

In September 2005, Malaysia, Singapore, and Indonesia agreed to a joint air patrol over the Strait of Malacca to enhance the quality of protection in order to reduce the number of piracy attacks in the particular area. The three States each donated two planes for the patrols, known as the "Eyes in the Sky" (EiS) plan, which permits aircraft to fly up to three nautical miles into the territorial waters of the littoral states. This marked a significant change in flexibility for the three countries, as they were willing to put sovereignty issues aside in order to improve maritime security. (The Fund for Peace, 2013)

Based on this plan, aircrafts can fly up to three nautical miles into the twelve-nautical mile territorial waters of the participating states, which are Malaysia,

Singapore, and Indonesia. EiS was expected to provide beneficial supplement to the trilateral coordinated sea patrols, which were limited to their own territorial waters.

In the term of politics, EiS was significant because it was the first time the littoral states had been really or seriously concerns over the sovereignty of their territorial waters and allows foreign forces across the border. Each patrolling aircraft would have on board a representative from each of the three littoral states. In April 2006 both MALSINDO and EiS were brought together under the umbrella of the Malacca Strait Patrols. Nevertheless, despite the fact that it was politically successful, EiS has been criticized as "superficial and a mere reflection of the desire the littoral states to be seen to be doing something in the face of international pressure. It is estimated that seventy sorties per week need to be carried out by the aerial patrols in order to monitor the strait effectively, 24/7. However, currently only eight are flown. There is also a lack of patrol vessels to carry out investigation and interdiction, if necessary, following the sighting of a suspect vessel by the aerial patrols. It would seem that EiS"s apparent success in helping to prevent any resurgence in attacks may be a function more of its deterrent effect than of its actual, practical application. (Raymond, 2009)

The project of Malacca Strait Patrols consists of two parts which are sea patrol and the data network. The data network is the MSP Intelligence Exchange Group, aimed to share the information in Malacca Strait, furthermore surveillance network to monitor the Strait, which is used to exchange data over the Internet data center in Singapore, Thailand, Malaysia and Indonesia. It supports the sea and air patrols through the Malacca Strait Patrols Information System (MSP-IS) which is used by air and sea assets deployed on scene to pass information of an unfolding incident to all Monitoring and Action Agencies (MAA) on a real-time basis. (One Earth Future Foundation, 2008)

For many years the countries of Southeast Asia treated piracy as a negligible phenomenon. By comparison, other national and transnational security threats, in particular terrorism and maritime issues like illegal fishing and smuggling of people, weapons and goods appeared more pressing. This changed in 2004 when each States used the region's sea routes. One of the decisive factors was United States' policy to initiate a Regional Maritime Security Initiative (RMSI) that provoked great controversy (partly due to ambiguous wording). Although the plan itself, which envisaged close cooperation between Washington and Southeast Asian countries to contain transnational security risks, was never implemented, the discussion led all three States bordering of Straits of Malacca to make fighting piracy a security priority.

E.   Fighting Global Piracy

Article 101 UNCLOS provides the legal definition of piracy that consist of these following acts: any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed; on the high seas, against another ship or aircraft, or against persons or property onboard such ship or aircraft; against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; 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; any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

Piracy on the high seas is an international crime and is regarded as a

common state enemy, and can be tried anywhere the pirates are arrested regardless of their nationality. Piracy on the high seas is seen to be a "crime of universal interest", so that each country can respond to acts of piracy that occurs outside its territory or the territory of another country that is on the high seas, and has the right to enforce the jurisdiction and legal provisions. (Louis Henkin, 1980) UNCLOS Article 99 provided the standard obligations for States to cooperate in the repression of piracy, given that all States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.

F.   Challenges for Indonesia in Protecting Strait of Malacca from Piracy

New figures from the piracy watchdog show sea piracy has fallen to its lowest level worldwide since 2008, as policing by international naval forces has deterred pirates operating in the waters off Somalia. The International Maritime Bureau stated there were 233 actual and attempted attacks on vessels globally in the first nine months of 2012, compared with 352 in the corresponding period last year. In Asia, the waters off Indonesia were most prone to pirate attacks, with 51 incidents, up from 30 in 2011. (Katie Hunt, 2012)

Indonesia recorded 51 incidents in the first nine months of 2012, up from an annual 2011 total of 46. (ICC Commercial Crime Services, 2012) Vessels were boarded in 46 of the 51 reports. Elsewhere in South East Asia, ships have been hijacked this year in the Malacca Straits, South China Seas and around Malaysia. As the largest of the three littoral States, Indonesia apparently has been struggling with efforts of implementing successful anti-piracy initiatives. Despite the economic growth in recent years, Indonesia

still suffers from a lack of consistent governmental authority, particularly the ones highly qualified to control its waters. Because of its enormous breadth of its entire coastline which is twice the perimeter of the Earth, the State control system is facing difficulties in trying to reach all locations. Being hindered by active Islamic fundamentalist groups causing most piracy attacks in the areas around Aceh as one of the hotspot of Islamic and separatist movements, and also a continuous underground economy, this weak spot in Indonesia has put huge pressure on the government's unstable capacity to combat piracy at sea, let alone other threats. Indonesia may view pirate attacks as a nuisance for international ships only and thus place greater importance on land-based security concerns like those mentioned above. Predictably, Indonesian waters are reported to have suffered the most incidents of piracy in the 2000. (Sittnick, 2005)

Indeed, Indonesia may already have a lot to fix regarding its own internal security. Placing it into perspective, the International Maritime Bureau received only 103 incidents of piracy in 2002. On the other hand, 1,687 murders, 9,000 cases of violent theft, and approximately 11,000 cases of serious assaults occurred on land – meaning less than 0.05% of its total reported crimes were pirate attacks. (Rosenberg, 2009)

Another reason why Indonesia focused less on the Strait of Malacca is the fact that the Lombok and Sunda Straits handle most of its trade. As a growing regional power on its own, Indonesia is not amenable to its security problems being handled by other nations. The Indonesian government has specifically repudiated any foreign military presence in its waters, even if extra-regional powers offer to help secure the adjacent Straits of Malacca. The government in Jakarta has even been

distrustful of initiatives proposed by Malaysia and Singapore, as it views both nations as direct economic competitors perhaps more so thanstrategic partners.

In terms of state capacity, Indonesia does not possess adequate naval training, equipment, and funding to handle its serious maritime piracy problems. The navy, for instance, lacks many of the estimated 262 patrol ships needed to efficiently guard Indonesian territorial waters. In fact, it is believed that only one-fourth of the Indonesian Navy's 114 vessels are serviceable at any given time, impeding any progress from the security apparatus.

Additionally, only 20 patrol boats were "seaworthy" in 2004. (Fund for Peace, 2012) Moreover, seven ports failed to comply with the International Ship and Port Facility Security Code (ISPS Code), which is a security instrument of the International Maritime Organization. The ISPS Code delineates "a set of measures designed to enhance the security of ships and port facilities made mandatory under the International Convention for the Safety of Life at Sea", which Indonesia has agreed to observe. Indonesia has also had significant problems in securing funding for maritime security initiatives in the Straits of Malacca.

The internal problems of Indonesia are therefore seen as the foremost important yet affecting issues in combating piracy in its own jurisdiction. Even though good intentions are shown by the government through its joint participation in Malacca Strait Patrols, apparently Indonesia has not contributed much in the role of joint protection in Strait of Malacca. This becomes the greatest challenge of Indonesian government, and yet a big homework, on how to combat piracy in its own jurisdiction.

G.   Conclusion

Global piracy has been a constant threat since it first emerged as an old law until it becomes modernized. The Strait of Malacca as one of the busiest water channels worldwide has been experiencing high levels of piracy attacks. The establishment of Malacca Strait Patrols by Indonesia, Malaysia, and Singapore has indeed helped declining the number of pirates attacking ships passing by Strait of Malacca. However, Indonesia has been facing constant challenges from its own internal affairs, mainly from the lack of available sea patrols and the incapability of governmental authorities.

Besides leading huge internal fixation on governmental authorities and facilities in charge of sea patrols, Indonesia has to figure out a way to restore the international community"s trust in it, since Indonesia sits in peak position of piracy attacks number on 2012. As the globalization expands to greater fields, as a maritime State, Indonesia needs to regain its glory back in the old days, so that the massive area of waters owned by Indonesia wouldn"t be such a waste.

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