Maritime Terrorism, the Straits of Malacca, and the Issue of State Responsibility

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Apart from traditional piracy, maritime terrorist attacks may also occur in the Straits of Malacca. There have been accusations that the littoral states are not doing enough to prevent possible maritime terrorist attacks by not accepting the offer of extraregional forces, and hence, may be held responsible under international law for damage resulting from maritime terrorist attacks. The present Article examines the concept of "attributability" under the law of state responsibility and establishes that in the absence of any other ground of attributability, the responsibility of a state under international law to suppress maritime terrorism is not absolute. A state is required only to exercise good faith due diligence. This Article argues that the littoral states have not breached their due diligence obligation, because they have stepped up coordinated measures, in accordance with the Jakarta Statement, to combat maritime terrorism in the Straits of Malacca. The Article concludes that maritime terrorism can be handled by balancing the interests of the littoral states and user states, while respecting the sovereignty of the littoral states and accepting the idea of burden sharing.

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I. INTRODUCTION

"Piracy has posed a threat to all states' maritime interests for nearly as long as people have sailed the oceans."[1] Pirates are regarded as *hostes humani generis* (enemies of mankind) and international law "treats piracy as a universal crime whose perpetrators are subject to punishment by any state that apprehends them."[2] However, since September 11, 2001, there have been increased concerns about terrorist attacks against ships, which are soft targets and vulnerable.[3] Maritime terrorism is one of the most discussed international law topics. Despite certain

1. Erik Barrios, Note, *Casting a Wider Net: Addressing the Maritime Piracy Problem in Southeast Asia*, 28 B.C. INT'L & COMP. L. REV. 149, 149 (2005).
2. *Id.*
3. *Id.* at 151.

similarities, piracy and maritime terrorism differ in their objectives or desired ends. Traditionally, a pirate was viewed as a private individual whose criminal act was aimed at achieving some personal economic benefit.[4] However, in the case of a maritime terrorist, the heinous act is not meant for an economic benefit, but for a political, or some other, objective.[5]

Whenever the topic of maritime terrorism is discussed, fingers are pointed at Southeast Asia in general, and the Straits of Malacca[6] in particular, as the most vulnerable location for maritime terrorist attacks.[7] Maritime terrorist attacks might occur in the Straits of Malacca due to a number of factors. The three littoral states, Indonesia, Malaysia, and Singapore (littoral states), are working very hard to prevent terrorist attacks and to enhance maritime security in the Straits of Malacca. Nevertheless, there are accusations that the littoral states (in particular Malaysia and Indonesia) are not doing enough to prevent possible maritime terrorist attacks because they do not accept offers of extraregional forces. Hence, it is suggested they may be held responsible under international law for damage resulting from maritime terrorist attacks.[8]

This Article first examines the concept of "attributability" under the law of state responsibility and establishes that in the absence of any other ground of attributability, the responsibility of a state under international law to suppress maritime terrorism is by no means absolute. A state is required only to exercise due diligence, which is an obligation of good faith. This Article then argues that there has been no breach of the due diligence obligation on the part of the littoral states because they have stepped up coordinated measures, in accordance with the *Jakarta Statement on Enhancement of Safety, Security and Environmental*

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4. *Id.*

5. *Id.*

6. The term "Straits of Malacca" refers to the Straits of Malacca and the Strait of Singapore. This is the most widely accepted term as evidenced by vast literature on the Straits. *See, e.g.*, MICHAEL LEIFER, INTERNATIONAL STRAITS OF THE WORLD: MALACCA, SINGAPORE, AND INDONESIA 54 (1978); *cf.* Tammy M. Sittnick, Comment, *State Responsibility and Maritime Terrorism in the Strait of Malacca: Persuading Indonesia and Malaysia To Take Additional Steps To Secure the Strait*, 14 PAC. RIM L. POL'Y J. 743 (2005). When we talk about maritime terrorism, we cannot exclude the Strait of Singapore because the Straits of Malacca and Singapore join as one; the Strait of Singapore is the narrowest part of the waterway, which represents the real choke point. *Id.* at 744.

7. Sittnick, *supra* note 6, at 744.

8. *Id.* at 755-56.

Protection in the Straits of Malacca and Singapore (*Jakarta Statement*),[9] to combat maritime terrorism in the Straits of Malacca. This Article concludes that maritime terrorism can be handled by balancing the interests of coastal states and user states while respecting the sovereignty of the coastal states and by accepting the idea of burden sharing, in the form of capacity building, training, technological transfer, and other assistance by user states.

II. THE STRAITS OF MALACCA AND THE SOVEREIGNTY OF THE LITTORAL STATES

The Straits of Malacca are primarily located within the territorial seas of Indonesia, Malaysia, and Singapore.[10] Part of the Straits is above the continental shelf and within the exclusive economic zones of Indonesia and Malaysia.[11] The Straits are used for international navigation, as defined in the United Nations Convention on the Law of the Sea (UNCLOS). [12] The Straits are under the sovereignty of the littoral states, subject only to UNCLOS and the rules of international law.[13]

A. Brief Overview of the Modern Concept of Sovereignty

For a clear understanding of the meaning and scope of the principle of sovereignty—a fundamental principle of international law—it may be useful to recall some general remarks on sovereignty made by Max Huber in his arbitral award in the *Island of Palmas* case:

> Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. . . .
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> . . . .
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> Territorial sovereignty . . . involves the exclusive right to display the activities of a State.[14]

The concept of sovereignty has been much criticized. Some would like to do away with sovereignty entirely.[15] Unfortunately, the limited scope of this Article does not allow for an in-depth analysis of the debate

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9. *Jakarta Statement on Enhancement of Safety, Security and Environmental Protection in the Straits of Malacca and Singapore*, Annex II, U.N. Doc. A/60/529 [hereinafter *Jakarta Statement*].

10. *Id.* at 6.

11. *Id.*

12. *See* United Nations Convention on the Law of the Sea, art. 37, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

13. *Id.* art. 2.

14. Island of Palmas (U.S. v. Neth.), 2 R.I.A.A. 829, 838-39 (Perm. Ct. Arb. 1928).

15. *See, e.g.*, LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 10 (1995).

on sovereignty. In any case, the modern concept of sovereignty, generally accepted by the international community today, can be summarized in the following terms:

(1) There is consensus among states that the old, outmoded, Westphalian model of sovereignty or the concept of absolute sovereignty is no longer in existence.[16]
(2) According to the modern concept of sovereignty, states are sovereign and they are equal in terms of sovereignty;[17] they, of their own free will, surrender a certain portion of their sovereignty in order to enter into relations with one another. The residual power given up by states is what we call international law.[18] State sovereignty, therefore, is the general rule while international law is the exception. Although states possess sovereignty, the exercise of that sovereignty is subject to the relevant rules of international law.
(3) Despite criticism of the concept of sovereignty, it is the very foundation of international relations in general and of international law in particular. Many critics of the concept of sovereignty acknowledge the contributions that it has made toward world order, stability, and peace.[19]

For example, Ambassador Richard Haass noted:

> Sovereignty has been a source of stability for more than two centuries. It has fostered world order by establishing legal protections against external intervention and by offering a diplomatic foundation for the negotiation of international treaties, the formation of international organizations, and the development of international law. It has also provided a stable framework within which representative government and market economies could emerge in many nations. At the beginning of the twenty-first century, sovereignty remains an essential foundation for peace, democracy, and prosperity.[20]

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16. 1 E.D. BROWN, THE INTERNATIONAL LAW OF THE SEA 38 (1994); *see also* S.S. Wimbledon (U.K., Fr., Italy, Japan, & Pol. v. Ger.), 1923 P.C.I.J. (ser. A) No. 1, at 25 (Aug. 17).

17. This is the principle of sovereign equality of states enshrined in article 2, paragraph 1, of the U.N. Charter. U.N. Charter art. 2, para. 1.

18. International law flows from the consent of states. This can be best explained by the two primary sources of international law: treaty and custom. Treaties are the outcome of what is expressly agreed by states. Customary international law is founded on state practice, accompanied by *opinio juris*, a form of implied consent.

19. John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT'L L. 782, 789 (2003).

20. Richard N. Haass, Dir., Policy Planning Staff, U.S. Dep't of State, *Sovereignty: Existing Rights, Evolving Responsibilities*, Remarks to the School of Foreign Service and the Montara Center for International Studies, Georgetown University 3 (Jan. 14, 2003) (transcript *available at* http://www.Georgetown.edu/sfs/documents/haass_sovereignty_20030114.pdf).

We can, therefore, conclude that "[a]lthough sovereignty is less absolute and more contingent than in the past, it remains, as it has been for the past three and a half centuries . . . the *central pillar* . . . of world order."[21] If we were to eliminate this sacred principle, it would be the end of the present nation-state system, and of a fair and just world order; it would be the beginning of a new era with the world under the rule of a single superpower or an anarchic world without law and order.

B. Sovereignty of the Littoral State over an International Strait Located Within Its Territorial Sea

The sovereignty that a coastal state enjoys over its land territory extends seaward to the territorial sea.[22] This basic principle of international law is reaffirmed in article 2 of UNCLOS in the following terms:

1. The sovereignty of a coastal State extends, beyond its land territory and internal waters . . . to an adjacent belt of sea, described as the territorial sea.
2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.[23]

The very first provision of UNCLOS regarding straits used for international navigation is the recognition of the legal status of the waters forming these straits and of the sovereignty of the bordering states:

> The regime of passage through straits used for international navigation . . . shall not in other respects affect the legal status of the waters forming such straits or the exercise by the States bordering the straits of their sovereignty or jurisdiction over such waters and their air space, bed and subsoil.[24]

Under UNCLOS,[25] there are two limitations on the sovereignty of the coastal states over an international strait that lies within their territorial sea, namely: to allow the right of transit passage and to warn of any danger to navigation within the strait.[26]

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21. *Id.* at 9 (emphasis omitted) (emphasis added).
22. UNCLOS, *supra* note 12, art. 2.
23. *Id.*
24. *Id.* art. 34.
25. The only binding treaty on the littoral states in this respect is UNCLOS because Indonesia and Malaysia are not parties to the Convention for the Suppression of Unlawful Acts Against Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 222.
26. UNCLOS, *supra* note 12, arts. 38, 42-44. UNCLOS article 43 is merely a reaffirmation of the customary international law rule laid down in *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Apr. 9).

C. The Right of Transit Passage and Duties of Strait Users

Ships and aircraft of all states enjoy the right of transit passage through a strait used for international navigation.[27] Transit passage means "the exercise in accordance with [UNCLOS] of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait."[28] Because, however, it is transit through an area subject to the sovereignty of a coastal state, the navigation is subject to a number of restrictions.[29] Thus,

> [s]hips and aircraft, while exercising the right of transit passage, shall:
> (a) proceed without delay through or over the strait;
> (b) refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations.[30]

Article 43 requires user states and straits states to cooperate in establishing and maintaining navigational and safety aids and in controlling pollution.[31] UNCLOS recognizes the need to share responsibility for providing these facilities.[32]

Although user states have a long list of duties and responsibilities[33] while using the straits, they only have two specific rights: first, the right of continuous and expeditious transit of the straits[34] and second, the right to cooperate with the straits states in establishing and maintaining navigational and safety aids.[35] The second right, however, is intertwined with a responsibility of burden sharing: the user states have to share the burden with straits states, whether in the form of financial or technological assistance.[36]

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27. UNCLOS, *supra* note 12, art. 38, para. 1.
28. *Id.* art. 30, para. 2.
29. *Id.* art. 39.
30. *Id.* art. 39, para. 1.
31. *Id.* art. 43.
32. *Id.*
33. *Id.* arts. 39-43.
34. *Id.* art. 38.
35. *Id.* art. 43.
36. *See Jakarta Statement*, *supra* note 9, at 9-10.

D. Respecting the Sovereignty and Territorial Integrity of the Littoral States Is Crucial to Whatever Measure Is Taken in Combating Maritime Terrorism in the Straits of Malacca

Although the Straits of Malacca are straits used for international navigation, they are, as stated earlier, located primarily within the territorial seas of Indonesia, Malaysia, and Singapore. The Straits of Malacca fall squarely under the sovereignty of the littoral states, subject only to the provisions of UNCLOS and other relevant rules of international law, relating to pollution, safety of navigation, security, and the like.[37]

It is true that maritime terrorist attacks might occur in the Straits of Malacca. It is equally true that damage resulting from the possible terrorist attacks might be severe. The littoral states are well aware of the danger and they are serious about preventing attacks.[38] As this Article will establish, they are dedicated to preventing and suppressing maritime terrorism in the Straits of Malacca and are determined to do whatever is necessary, short of allowing extraregional armed forces in the Straits, which would be tantamount to violating their territorial sovereignty.

The littoral states (especially Indonesia and Malaysia) consistently have made it clear that they will do whatever is necessary to prevent maritime terrorism in the straits, short of allowing their territorial sovereignty to be violated. They confirmed their stance in the *Batam Joint Ministerial Statement on the Straits of Malacca and Singapore* (*Batam Joint Ministerial Statement*), adopted on August 2, 2005, in the following terms: "The Ministers reaffirmed the sovereignty and sovereign rights of the [l]ittoral [s]tates over the Straits of Malacca and Singapore. As such, the primary responsibility over the safety of navigation, environmental protection and maritime security in the Straits of Malacca and Singapore lies with the littoral [s]tates."[39]

In the Jakarta Statement of September 8, 2005, thirty-four International Maritime Organization (IMO) Member States (including the three littoral states) and other participating international organizations reiterated that they fully respect "the sovereignty, sovereign rights, jurisdiction and territorial integrity of the littoral States, the principle of non-intervention, and the relevant provisions of international law, in particular the UNCLOS."[40]

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37. *See Batam Joint Ministerial Statement on the Straits of Malacca and Singapore*, Annex I, U.N. Doc. A/60/529 [hereinafter *Batam Joint Ministerial Statement*].

38. *See id.*

39. *Id.* para. 3.

40. *See Jakarta Statement*, *supra* note 9, at 9.

III. THE LAW OF STATE RESPONSIBILITY AND THE PRINCIPLE OF ATTRIBUTABILITY

The law of state responsibility traditionally consisted of rules of customary law, which evolved out of the practice of states and international decisions. The contemporary development of this important area of international law has been greatly influenced by the works of the International Law Commission, which resulted in the adoption of the *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* (*Draft Articles*).[41]

Responsibility arises from the breach by a state of an international obligation with respect to conduct that is attributable to the state.[42] Consequently, for a state to be responsible under international law, there must be "an action or omission" that is "attributable to the State under international law" and also "[c]onstitutes a breach of an international obligation of the State."[43]

A. The Principle of Attributability

Because a state is an abstract entity, it cannot act of itself. "States can act only by or through their agents and representatives,"[44] who are persons (individual human beings) or groups of persons (government departments or entities).[45] The question that arises is: "which persons should be considered as acting on behalf of the State?"[46] This introduces the important role of attributability. Conduct, which may consist of actions or omissions, will be attributable to the state if done by state organs,[47] or persons or entities "exercise[ing] elements of the governmental authority,"[48] or persons or group of persons "in fact acting

41. Int'l L. Comm'n, *Report of the International Law Commission: 53rd Session (23 April-1 June and 2 July-10 August 2001)*, para. 76, arts. 1-59, U.N. Doc. A/56/10 (Aug. 9, 2001) [hereinafter *Draft Articles*]. These articles involve both codification and progressive development of international law. The General Assembly adopted a resolution to take note of the *Draft Articles* for future adoption or other appropriate action. G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (Jan. 28, 2002).

42. *See* ABDUL GHAFUR HAMID @ KHIN MAUNG SEIN, PUBLIC INTERNATIONAL LAW: A PRACTICAL APPROACH 265 (2006).

43. *Draft Articles*, *supra* note 41, para. 76, art. 2.

44. JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 82 (2002) (quoting German Settlers in Poland, 1923 P.C.I.J. (ser. B) No. 6, at 22 (Sept. 10)).

45. *Id.* at 110.

46. *Id.* at 82.

47. *Draft Articles*, *supra* note 41, para. 76, art. 4. The term "state organ" includes the executive (government officials, police, armed forces, etc.), the judicial (national courts), and the legislative authorities. *Id.*

48. *Id.* para. 76, art. 5.

on the instructions of, or under the direction or control of, [the] State in carrying out the conduct,"[49] or if "the State acknowledges and adopts the conduct in question as its own."[50] In other words, the conduct of state organs, or of those who are agents of the state, is attributable to the state.

B. Involvement of a State in Terrorist Activities

Terrorist acts are normally committed by private persons. However, a state may be directly or indirectly involved in terrorist activities. To hold a state liable for terrorist activities by private persons, it is necessary for the injured party to show that the conduct of the private person is attributable to the state under international law.[51] Some writers suggest that "the terms 'state sponsorship' and 'state support' should be used to refer to two qualitatively different kinds of state involvement in terrorism."[52] Others are of the view that these terms are not satisfactory because they "lack precise legal content."[53] In any case, these terms may describe a state's involvement or "complicity, guilt, and participation in acts of terror" committed by private persons.[54]

The *Draft Articles* set forth the rules under which a state may be held responsible for the terrorist activity of private persons.[55] Article 8 states that "[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."[56] This article requires a state's prior knowledge of the terrorist act and effective control over the terrorists. If these conditions are met, terrorists are considered agents of the state, and their acts are attributable to the state. A state may also bear responsibility under article 11 when a state acknowledges or adopts the acts of terrorists as its own, thereby making them acts of the state.[57] In

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49. *Id.* para. 76, art. 8.
50. *Id.* para. 76, art. 11.
51. *Id.* para. 76, art. 2.
52. Scott M. Malzahn, Note, *State Sponsorship and Support of International Terrorism: Customary Norms of State Responsibility*, 26 HASTINGS INT'L & COMP. L. REV. 83, 96 (2002) ("[S]tate sponsorship of terrorism is limited to situations where the state planned, directed, and controlled terrorist operations and state support of terrorism includes all other lesser forms of state involvement.").
53. *Id.* (citation omitted).
54. *Id.* at 97.
55. *Draft Articles*, *supra* note 41, para. 76, arts. 8, 10.
56. *Id.* art. 8; *see also* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 62, 64-65 (June 27) (holding that a state must have "effective control" of the operations of the private persons so that it can be responsible for their conduct). Cf. Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment (July 15, 1999).
57. *Draft Articles*, *supra* note 41, para. 76, art. 11.

both cases, the articles clearly demonstrate a state's involvement in terrorist activity, which is attributable to the state and makes the state responsible.

As the littoral states of the Straits of Malacca are active participants in the war on terrorism, "state sponsorship" or "state support" of terrorism is not an issue. We need only to proceed with the question of how a state can be responsible for the terrorist acts of private persons who have no linkage of attributability with the state.

C. Conduct of Private Persons Is Not as a General Rule Attributable to the State

"[T]he general rule is that the only conduct attributed to the State [under international law] is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e., as agents of the State."[58] This means that when private persons take action, their acts are not acts of the State.[59]

In principle, a state is not responsible for the acts of private persons.[60] "Nonresponsibility" is the general rule. There is a presumption against responsibility of a state for the acts of private persons who are not state organs or agents of the state.[61] The acts of private persons, nevertheless, may be accompanied by some omission on the part of the state, for which the state is responsible.[62] The state is responsible only if its own omission, inaction or failure (through its organs: police, security forces, courts, etc.) to act in conformity with international legal standards can be proved. Hence, a state is responsible under international law if it fails to exercise due diligence to prevent private persons from attacking foreign nationals or destroying foreign property.[63]

This principle was established in the *Tellini* case.[64] Several representatives of an international commission working to delimit the Greek-Albanian border were assassinated on Greek territory.[65] The

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58. CRAWFORD, *supra* note 44, at 91; *see, e.g.*, IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY pt. I, at 132-66 (1983); F. Przetacznik, *The International Responsibility of States for the Unauthorized Acts of Their Organs*, 1 SRI LANKA J. INT'L L. 151 (1989).

59. CRAWFORD, *supra* note 44, at 91.

60. *Id.*

61. *See id.*

62. *Id.* at 82.

63. *See* Horst Blomeyer-Bartestein, *Due Diligence*, *in* 1 ENCYCLOPEDIA PUB. INT'L L. 1110-15 (Peter Macalister-Smith ed., 1992).

64. CRAWFORD, *supra* note 44, at 91.

65. *Id.*

Council of the League of Nations referred the dispute between Italy and Greece to a special committee of jurists.[66] The committee stated:

> The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal.[67]

Thus, violence against foreigners or destruction of foreign property by private persons, such as insurgents, secessionists, rioters, militants, etc., is not generally attributable to the state. Terrorists, the main target of our discussion, can, for the purposes of attributability, be likened to private persons involved in insurgency, rioting, or militancy.

IV. A STATE'S DUTY TO EXERCISE DUE DILIGENCE TO PREVENT OR SUPPRESS TERRORISM

As explained above, a state is not responsible for terrorist acts committed by private persons unless it can be shown that the conduct is attributable to the state under international law. In the absence of any linkage of attributability, the only way a state can be held responsible for terrorist acts is by failing to exercise due diligence in preventing or suppressing terrorism.

A. A State Is Responsible Only When It Breaches Its Duty To Exercise Due Diligence

There is extensive and consistent state practice supporting the duty of a state to exercise due diligence in protecting foreign nationals and property.[68] For example, in *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, a British company brought an action against Sri Lanka, claiming compensation for the destruction of its Sri Lankan farm.[69] The farm was in an area that was largely under the control of Tamil Tiger rebels, and the farm management had offered to dismiss farm staff thought by the government to be in league with the rebels. Neglecting this offer, the Sri Lankan government forces launched a vast counterinsurgency operation in the area that resulted in the deaths of company workers and the destruction of company property. The tribunal first established that the State's duty to protect foreign nationals and their

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66. *Id.*
67. *Id.* (citing 5 LEAGUE OF NATIONS, OFFICIAL JOURNAL 524 (Apr. 1924)).
68. BROWNLIE, *supra* note 58, at 162.
69. Asian Agric. Prod. Ltd. v. Republic of Sri Lanka, 4 I.C.S.I.D. (W. Bank) 246, 251 (1990).

property in customary international law is to exercise due diligence, not absolute and strict liability.[70] It finally decided that Sri Lanka violated its due diligence obligation because the farm management had offered to dismiss staff suspected by the government, but the government did not follow up and minimize the risk of killings of foreigners being killed or having their property destroyed.[71]

A state is also responsible under international law if it fails to punish responsible individuals or to provide the injured foreign national with the opportunity to obtain compensation from the wrongdoers in the local courts.[72] This is an example of what is called "denial of justice."[73]

In the *Janes Claim*, the widow of a mine worker brought suit against Mexico.[74] Byron Everett Janes, an American citizen, was shot and killed at a mine in Mexico. The shooter was "well known in the community where the killing took place."[75] Within five minutes of the shooting, a Mexican magistrate was informed of the shooting. Several eyewitnesses to the crime identified the murderer to Mexican authorities. However, after eight years had elapsed, the murderer had not been apprehended or punished. The commission found that Mexico was responsible for the denial of justice and awarded damages accordingly.[76]

B. The Elements of the Due Diligence Obligation

As shown above, a state's responsibility for the acts of private individuals is neither absolute nor strict, because it must usually be shown that the State failed to exercise due diligence in preventing the injury or punishing the offender. What are the elements of this due diligence obligation?

The *United States Diplomatic and Consular Staff in Tehran* case can be taken as a precedent for the due diligence obligation of a state for the conduct of private persons, whether they be militants or terrorists.[77] In 1979, several hundred student demonstrators occupied the United States Embassy in Tehran by force and held the embassy staff as hostages. The International Court of Justice (ICJ) divided the events into two phases.

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70. *Id.* at 252, 270, 284-85.
71. *Id.* at 285.
72. Janes v. United Mexican States (U.S. v. Mex.), 4 R.I.A.A. 82, 86-87 (Claims Comm'n 1926).
73. *Id.* at 88.
74. *Id.* at 83.
75. *Id.* at 86.
76. *Id.* at 86, 89-90.
77. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24).

In the first stage, the attack was carried out by militants who in no way could be regarded as agents or organs of the Iranian State. Therefore, according to the court, the militants' conduct in mounting the attack, storming the embassy, and seizing the employees as hostages could not be imputed to the state on that basis.[78] Nevertheless, Iran was held responsible because the obligation of due diligence was breached by its failure to take "steps either to prevent the militants from invading the Embassy or to persuade or to compel them to withdraw."[79] The court reaffirmed the two-element test of due diligence established in customary international law. In order for a state to be held responsible for the conduct of private persons, the following two requirements must be met: (1) knowledge of harm to foreigners or foreign property and (2) failure to use the means at its disposal to prevent the harm.[80]

Furthermore, as the ICJ demonstrated in *Corfu Channel*, a state does not necessarily bear absolute responsibility for an injury suffered by a foreign state merely because the injury occurred on the territory of the former State.[81] The court stated:

> It is clear that knowledge of the minelaying cannot be imputed to the Albanian Government by reason merely of the fact that a minefield discovered in Albanian territorial waters caused the explosions of which the British warships were the victims. . . . This fact, by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof.[82]

In *Corfu Channel*, the court found that Albania knew or should have known about the mines, and because Albania had knowledge of the mines, it had a duty to warn ships passing through the straits of the danger to navigation.[83] Albania was held responsible for the damage because its failure to warn the British ships about the danger was a breach of its duty to exercise due diligence.[84] It is clear that the ICJ employed the same two-element test of due diligence in this case. Although the court stated that proof of a state's knowledge of a threat cannot be presumed and must "leave *no room* for reasonable doubt,"[85] it concluded that the mines could not have been laid "without the

78. *Id.* at 12, 29-30.
79. *Id.* at 32.
80. *See id.* at 32-33.
81. Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 18 (Apr. 9).
82. *Id.*
83. *Id.* at 22.
84. *See id.* at 22-23.
85. *Id.* at 18.

knowledge [or connivance] of the Albanian Government."[86] In framing the breach as a failure to warn, rather than a failure to remove the mines, the court chose to focus on the conduct that was most easily exercised by the Albanian government.[87]

C. The Duty To Use Means "At Its Disposal" To Prevent Harm

As shown above, the two-element test must be satisfied in order to prove a breach of the due diligence obligation. When we apply the test to the situations of the Straits of Malacca, we find that the first element is simple and not problematic. Although the littoral states cannot have advance knowledge of each and every terrorist attack, they generally have knowledge that terrorists might attack, as do the strait users.

Therefore, the determining factor is the second element: that a state fails its obligation to prevent harm. This requirement needs further clarification. Customary international law imposes neither absolute nor strict duty on states regarding the conduct of private persons.[88] It merely imposes an obligation of good faith.[89] If a state has taken some reasonable steps in good faith, it has exercised due diligence. It is enough that a state uses means at its disposal to prevent harm in order to escape responsibility.[90] A rational interpretation of this phrase can deduce only one meaning: "at its disposal" means "for a state to use whatever resources it may have, or to use whatever means within its power" to prevent harm. Therefore, extraregional forces are not means at the disposal of the littoral states because they are the armed forces of extraregional sovereign states. As a result, failure to allow extraregional forces to station troops or carry out operations in the Straits of Malacca, cannot be considered a failure to exercise due diligence to prevent maritime terrorism in the Straits.

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86. *Id.* at 22.

87. *Id.*

88. *See supra* Part III.

89. *See* Home Missionary Soc'y Claim (U.S. v. Gr. Brit.), 6 R.I.A.A. 42, 44 (1920) (holding, in the context of the wrongful acts committed by insurgents, that "[i]t is a well-established principle of international law that no government can be held responsible for the act of rebellious bodies of men . . . where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection").

90. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 32-33 (May 24).

V. SECURITY COUNCIL RESOLUTION 1373 AND THE DUTY TO TAKE NECESSARY STEPS TO PREVENT TERRORIST ACTS

On September 28, 2001, the United Nations Security Council, reacting to the events of September 11, 2001, and acting on a draft proposed by the United States, adopted Resolution 1373.[91] The resolution dealt with threats to international peace and security caused by terrorist acts and explicitly referred to chapter VII of the U.N. Charter.[92]

A. The Security Council Assumed the Status of World Legislature: A Function Never Intended by the Drafters of the U.N. Charter

Many critics argue that by adopting Resolution 1373, which has far-reaching legislative effects, the Security Council turned itself into a world legislature.[93] The representative of Costa Rica, referring to Resolution 1373, said, "In short, for the first time in history, the Security Council enacted legislation for the rest of the international community."[94] One author even claimed that "the Security Council has in fact replaced the conventional law-making process on the international level."[95]

International organizations cannot legislate international law.[96] The appeals chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) held in the *Tadic* case that there was "no legislature, in the technical sense of the term, in the United Nations system . . . . That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects."[97] Binding international law can be created only by states, whether through the adoption and ratification of treaties, the creation of customary law by means of general practice supported by *opinio juris*, or the recognition of general principles of law. As a general rule, international organizations can only adopt recommendations to their members, although they can

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91. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

92. *Id.*

93. *See, e.g.*, Nico Krisch, *The Rise and Fall of Collective Security: Terrorism, US Hegemony, and the Plight of the Security Council*, *in* TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VERSUS LIBERTY? 879, 883 (Christian Walter et al. eds., 2003); Jose E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873, 874 (2003).

94. U.N. GAOR, 56th Sess., 25th plen. mtg. at 3, U.N. Doc. A/56/PV.25 (Oct. 15, 2001).

95. Krisch, *supra* note 93, at 884.

96. *See* OPPENHEIM'S INTERNATIONAL LAW 114 (Roberts Jennings & Sir Arthur Watts eds., 9th ed. 1996).

97. Prosecutor v. Tadic, Appeal on Jurisdiction, No. IT-94-1-AR72, para. 43 (Oct. 2, 1995).

make definitive decisions concerning the organization itself that might create some binding obligations.[98]

It is, however, to be admitted that under U.N. Charter article 25, the Security Council can adopt decisions that are binding on U.N. members.[99] These decisions must be taken in exercise of the Security Council's "primary responsibility for the maintenance of international peace and security" under article 24, paragraph 1,[100] and in particular under chapter VII of the U.N. Charter on the basis of a determination by the Security Council that there exists a "threat to the peace, breach of the peace, or act of aggression."[101]

In fact, the Security Council is the executive organ of the United Nations, entrusted with the primary responsibility for the maintenance of international peace and security.[102] It is organized in such a way as to be able to cope with emergency situations that threaten international peace and security. Nevertheless, the Security Council is not a legislative organ and was never intended by the drafters of the U.N. Charter to be one. It is an organ consisting of diplomats and statesmen from only fifteen countries and is not representative of the international community as a whole.

Considering that consent is the foundation of international law, no individual state or group of states can legislate for the rest of the international community. Although the Security Council has far-reaching powers to make binding decisions, provided that they are made in accordance with international law and the basic principles of the U.N. Charter, it is doubtful that it can assume the status of world legislature, ignoring and neglecting the existing international law-making process by means of multilateral treaties and customary international law.

B. The Duty "To Take Necessary Steps" Is by No Means More Stringent than the Due Diligence Obligation Under Customary International Law

In Resolution 1373, the Security Council decided that all Member States should "prevent and suppress the financing of terrorist acts," criminalize the funding of terrorists, freeze the funds and assets of persons involved in terrorism, prohibit their nationals from giving

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98. Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT'L L. 901, 901 (2002) (referring to U.N. Charter art. 17 as an example).

99. U.N. Charter art. 25.

100. *Id.* art. 24, para. 1.

101. *Id.* art. 39.

102. *Id.* art. 24.

economic assistance to people involved in terrorism, and "[t]ake the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information."[103]

Leaving aside the problem of whether the Security Council has a law-making power, the important issue to be addressed here is the scope of the obligation imposed by Resolution 1373 regarding the prevention of terrorist acts. The resolution requires that all states shall "[t]ake the necessary steps to prevent the commission of terrorist acts."[104] Which steps are necessary is entirely a question of fact to be determined by the circumstances of each case. However, the duty to take necessary steps does not impose anything more stringent than the requirement of due diligence under customary international law.

VI. THERE HAS BEEN NO BREACH OF THE DUE DILIGENCE OBLIGATION ON THE PART OF THE LITTORAL STATES

The following is a serious accusation directed squarely at Malaysia and Indonesia:

> Despite recent efforts by the coastal states to improve security in the Strait, sustained piracy rates indicate such efforts have had a limited effect. Although Singapore has expressed a willingness to consider additional steps, Malaysia and Indonesia have refused to take further steps to improve security, such as implementing joint patrols or allowing for the presence of extra-regional forces, arguing such steps infringe upon their sovereignty.
>
> . . . .
>
> . . . Malaysia's and Indonesia's refusal to consider available options for improving security in the Strait [of Malacca] constitutes a breach of their international responsibilities to prevent terrorism. As such, Malaysia and Indonesia could be responsible for damages resulting from a maritime terrorism attack in the Strait.[105]

The two major weaknesses in the reasoning of the above quotations are: (1) considering extraregional forces as an option and further step available to the littoral states and are means at their disposal, without considering the fact that they are the armed forces of a foreign sovereign power and not the armed forces of the littoral states, and (2) unfairly expressing too much concern for the extraregional forces to be stationed in the strategically important straits, but having little concern for the sovereignty and territorial integrity of the littoral states.

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103. S.C. Res. 1373, *supra* note 91, ¶¶ 1-2.
104. *Id.*
105. Sittnick, *supra* note 6, at 743, 762.

As has been stated above, the correct interpretation of the obligation of due diligence is that it is to be exercised *by the means at the disposal of the state concerned* (with whatever resources it has) and that a state is never required to submit to the introduction of foreign forces that would adversely affect its territorial sovereignty and political independence.

A. To Permit Extraregional Forces in the Straits Would Seriously Violate Territorial Sovereignty, Create Unnecessary Implications in the Region, and Make the Problem Worse Rather than Solved

The concept of the territorial sovereignty of states is a long-standing and well-established rule of customary international law. The U.N. Charter enshrines the principle of sovereign equality of states in article 2, paragraph 1, and proclaims in article 2, paragraph 4, that states "shall . . . refrain from the threat or use of force against the territorial integrity or political independence of any state."[106] The ICJ in *Nicaragua v. United States* quoted with approval the following statement by the International Law Commission: "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule having the character of *jus cogens*."[107]

The ICJ, in *Corfu Channel*, ruled that a British minesweeping operation done in the Corfu Channel—an international strait—within Albanian territorial waters without its approval was a violation of Albanian sovereignty.[108] Therefore, to allow extraregional forces in the Straits of Malacca would violate the sovereignty and territorial integrity of the littoral states. Furthermore, it could create unnecessary implications in the region and make the problem worse rather than solved. It could adversely affect the littoral states' war on terrorism. It could even increase terrorist attacks rather than decrease them. The recent situation in Iraq is a good lesson of a tragedy created by uninvited and unwanted extraregional forces in an unfriendly region.

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106. U.N. Charter art. 2, paras. 1, 4.

107. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 100 (June 27) (quoting *Draft Articles on the Law of Treaties: Article 50*, [1966] 2 Y.B. Int'l Comm'n 247, U.N. Doc. A/CN.4/SER.A/1966/Add.1).

108. Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 35 (Apr. 9); *see also* S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, 18 (Sept. 7) ("[T]he first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State.").

B. The Littoral States Have Stepped Up Measures To Prevent Possible Maritime Terrorist Attacks

Since July 2004, Indonesia, Malaysia, and Singapore have begun coordinated trilateral patrols of the Straits of Malacca.[109] The littoral states created a task force made up of naval vessels from each country operating under their national commands and established a twenty-four-hour communication system. Additionally, in August 2005, representatives from Indonesia, Malaysia, and Singapore met on the Indonesian island of Batam to discuss maritime safety and security issues affecting the Straits of Malacca and Singapore.[110]

In the *Batam Joint Ministerial Statement*, foreign ministers reaffirmed the sovereignty and sovereign rights of the littoral states and stated, "the primary responsibility over the safety of navigation . . . and maritime security . . . lies with the littoral [s]tates."[111] The ministers, nevertheless, welcomed the assistance of the user states, international agencies, and the shipping community "in the areas of capacity building, training and technology transfer, and other forms of assistance in accordance with UNCLOS."[112] The ministers agreed to create a Tripartite Technical Experts Group (TTEG) on Maritime Security "to complement the works of existing TTEG on Safety of Navigation and Revolving Fund Committee."[113] The ministers also took note of the establishment of the Regional Cooperation Agreement on Anti-Piracy (ReCAAP) Information Sharing Centre in Singapore and indicated their preparedness to cooperate with the centre.[114] The ministers also "expressed regret at the Lloyds Joint War Committee's categorization of the Straits of Malacca and Singapore as a 'war risk zone' without consulting and taking into account" the efforts made by the littoral states.[115] The ministers, therefore, "urged the [Lloyds Joint War Committee] to review its assessment accordingly."[116]

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109. *S'pore, Malaysia, Indonesia Start Coordinated Malacca Straits Patrols*, CHANNEL NEWSASIA, July 20, 2004, *available at* http://www.channelnewsasia.com/stories/southeastasia/view/96556/1/.html; *see also International Maritime Experts Cheer Joint Patrols in Malacca Straits*, CHANNEL NEWSASIA, June 29, 2004, *available at* http://www.channelnewsasia.com/stories/southeastasia/view/92790/1/.html.

110. Indonesian News, *Indonesia, Malaysia, Singapore Jointly Patrol the Malacca Straits* (Aug. 8, 2005), http://www.indonesia-oslo.no/news411.htm (last visited Sept. 20, 2006).

111. *See Batam Joint Ministerial Statement*, *supra* note 37, para. 3.

112. *Id.* para. 9.

113 *Id.* para. 8.

114. *See id.* para. 9.

115. *Id.* para. 10.

116. *Id.*

In September 2005, Indonesia hosted the Jakarta Meeting on the Straits of Malacca and Singapore: Enhancing Safety, Security and Environmental Protection.[117] The IMO sponsored and organized the meeting in cooperation with the governments of Malaysia and Singapore. The delegations of thirty-four IMO member countries plus observer delegations from governmental and nongovernmental organizations attended. The meeting adopted the *Jakarta Statement*.[118]

The *Jakarta Statement*, first of all, upheld the *Batam Joint Ministerial Statement* made by the littoral states. "Recognizing the positive results of co-ordinated maritime patrols among the security forces of the littoral states" and "[r]especting fully the sovereignty, sovereign rights, jurisdiction and territorial integrity of the littoral States, the principle of non-intervention, and the relevant provisions of international law, in particular the UNCLOS," the participants agreed in the Jakarta Statement:

> (b) that a mechanism be established by the three littoral States to meet on a regular basis with user States, the shipping industry and others with an interest in the safe navigation through the Straits . . . ;
> (c) that efforts should be made through the three littoral States . . . to enhance maritime domain awareness in the Straits and thus contribute to the enhancement of co-operative measures . . . ;
> (d) to promote, build upon and expand co-operative and operational arrangements of the three littoral States, including the . . . [TTEG] on Maritime Security, co-ordinated maritime patrols in the Straits . . . with a view to further strengthening capacity building in the littoral States to address security threats to shipping.[119]

In the meantime, Malaysia established the Malaysian Maritime Enforcement Agency (MMEA) by passing the Malaysian Maritime Enforcement Agency Act of 2004.[120] The MMEA is the principal government agency responsible for security, enforcement, and search and rescue within the Malaysian maritime zone.[121] The MMEA is analogous

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117. *See Jakarta Statement*, *supra* note 9, at 5.

118. *Id.* at 9-10.

119. *Id.*

120. Malaysian Maritime Enforcement Agency Act No. 633 of 2004 [hereinafter MMEA]. The Act was passed by the Malaysian parliament in May 2004. The Act received the Royal Assent on June 25, 2004 and came into force on February 15, 2005. Malaysian Maritime Enforcement Agency, About Us, http://www.mmea.gov.my/hocgmy/mmea.htm (last visited Sept. 20, 2006).

121. Malaysian Maritime Enforcement Agency, *supra* note 120. When launching the MMEA at Northport on March 21, 2006, the Malaysian Deputy Prime Minister said, "[B]efore we had 11 different agencies involved in maritime security and tasks, now we have one agency

to the United States Coast Guard.[122] The agency reports directly to the Prime Minister's Department.[123] The MMEA became operational on November 30, 2005, with the commencement of patrols by MMEA vessels.[124] The establishment of such a coast guard agency with coordinated and comprehensive powers demonstrates a dedicated effort on the part of Malaysia to enhance security, counter terrorism, and combat piracy more effectively in the Straits of Malacca.

Another highly commendable endeavor on the part of the littoral states to further enhance the security of the Straits of Malacca is the implementation of multilateral maritime air patrols or the "Eyes in the Sky" (EiS) initiative, first mooted by the Deputy Prime Minister and Defence Minister of Malaysia, Datuk Seri Najib Tun Razak, at the Shangri-La Dialogue in June 2005 in Singapore.[125] The initial stage of the EiS project is for the three littoral states (Malaysia, Indonesia, and Singapore) and Thailand to conduct combined air patrols over the Straits, as part of the Malacca Straits Security Initiative, designed to increase maritime awareness over the Straits of Malacca and Singapore.

According to the EiS project, the participating states would provide resources in the form of patrol aircraft and a Combined Maritime Patrol Team. Each participating state would conduct up to two patrols per week in the designated airspace over the Straits. A Monitoring and Action Agency would also be set up in each of the participating states to keep in touch with EiS flights and coordinate follow-up actions within their own territorial seas.[126]

The EiS project was launched on September 13, 2005, with a C-130 transport of the Royal Malaysian Air Force, a flight operated by individuals from Indonesia, Malaysia, and Singapore.[127] The Malaysian Deputy Prime Minister reportedly stated that other countries like the United States and Australia would also be welcome to participate in "phase two" of the project if they complied with the conditions made by

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[MMEA] with the authority and power to do so." *Najib: Drop War-Risk Tag on Straits*, NEW STRAITS TIMES, Mar. 22, 2006, at 2.

122. Malaysian Maritime Enforcement Agency, *supra* note 120.

123. *Id.* Currently, the Deputy Prime Minister and Minister of Defence, Hon. Dato' Seri Mond Najib Tun Haji Abdul Razak is responsible for the MMEA. *Id.*

124. *Id.*

125. Singapore Ministry of Defense (MINDEF), Launch of Eyes in the Sky (EiS) Initiative (Sept. 13, 2005), http://www.mindef.gov.sg/imindef/news_and_events/nr/2005/sep/13sep05_nr.html.

126. *Id.*

127. The Nation, *Four Asian States Launch Anti-Terror Air Patrols* (Sept. 14, 2005), http://www.nation.com.pk/daily/sep-2005/14/international1.php.

the four founding states.[128] He also noted that the EiS project underlined the resolve of the littoral states to maintain security in the Straits of Malacca.[129]

C. Piratical Attacks Have Declined Dramatically in the Straits of Malacca: Res Ipsa Loquitur

Although there have been accusations that the littoral states (in particular Indonesia and Malaysia) are not doing enough to prevent possible terrorist attacks in the Straits of Malacca, there is no doubt that the above analysis has effectively cleared the air. At the Lankawi International Maritime and Aerospace Exhibition's (LIMA) Conference, held on December 4-5, 2005, the Deputy Prime Minister of Malaysia gave a key note address and said:

> There have been perceptions by some stakeholders that the Straits of Malacca is infested with pirates and that the threat of maritime terrorism makes it unsafe for users. Not withstanding [sic] this statement, it needs to be stressed that there have been many steps and much effort taken at the domestic and regional level to mitigate the maritime security challenges. The "Eyes in the Sky" initiative proposed by Malaysia is now a reality and is producing results. The International Maritime Bureau or IMB has reported a drastic drop in reported cases over the last 5 months. This is indeed a note-worthy achievement to be acknowledged by all.[130]

The best way to evaluate the success of antipiracy/counterterrorism measures is to look at the actual results. There is no reliable source other than the IMO Piracy Report. Careful analysis of the 2005 IMO Piracy Report shows that the Straits of Malacca are no longer a pirate-prone area.[131]

The report revealed an increase of pirate activities in other areas—notably Somalia, Tanzania, and Vietnam. Somalia recorded thirty-five reported attacks in 2005 compared to just two in 2004. The increased attacks now rank Somalia number two, after Indonesia, in the table of world piracy prone areas. Despite accounting for nearly 30% of all reported attacks, figures for Indonesia show a drop from ninety-four attacks in 2004 to seventy-nine in 2005. Attacks in the Straits of

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128. *Id.*

129. *Id.*

130. Najib Razak, Malay. Deputy Prime Minister, Keynote Address of the LIMA International Maritime Conference (Dec. 4, 2005) (transcript *available at* http://www.lima maritime.com.my/conference/).

131. *See* ICC INT'L MAR. BUREAU, PIRACY AND ARMED ROBBERY AGAINST SHIPS: ANNUAL REPORT—1 JANUARY-31 DECEMBER 2005 (2006).

Malacca fell from thirty-eight attacks in 2004 to twelve in 2005. Out of the twelve attacks, five were unsuccessful attempts.[132]

One commentator stated that the IMO report shows that "positive action taken by agencies—notably in Indonesia and the Malacca Straits—has proven to be effective."[133] Indeed, the result speaks for itself. An expert on Asia-Pacific security made the following remarks: "What was a problem of some concern has now been not eradicated, but brought under control . . . . Some of the report[ing] on this issue over the years has given the impression that the strait is highly dangerous. The figures show that that's not the case."[134]

VII. CONCLUSION

As a general rule, a state is not responsible for the conduct of private persons, be they terrorists or militants. Nevertheless, it can be responsible for the terrorist acts of private persons if it fails to exercise due diligence to suppress terrorism. The due diligence obligation requires the state to use means at its disposal to prevent terrorist acts of which it has knowledge. Applying this rule of customary law to the situation in the Straits of Malacca, the phrase "to use means at its disposal" clearly excludes the stationing of extraregional forces conducting operations in the Straits, which are within the territorial sea and under the sovereignty of the littoral states.

Through coordinated naval patrols and joint air patrols under the EiS initiative, the littoral states have increased efforts to make the Straits of Malacca a safer sea-lane for user states. The result has been a drastic drop in pirate attacks. There is, therefore, no doubt at all that the littoral states have exercised due diligence to suppress maritime terrorism in the Straits of Malacca.

The recent *Jakarta Statement* emphasizes the need to balance the interests of the littoral states and user states while respecting the sovereignty of the littoral states, to establish a mechanism for facilitating cooperation between them to discuss issues relating to the safety and security of the straits, including exploring possible options for burden sharing. The burden to make the Straits of Malacca safe at all times is

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132. *See id.* at 5, 7, 77.

133. Int'l Chamber of Commerce Commercial Crimes Servs., *Iraq Declared New Piracy Hotspot* (Jan. 31, 2006), http://www.icc-ccs.org/main/news.php?newsid=63.

134. Associated Press, *Policing Has Made Straits of Malacca More Secure, but Southeast Asian Piracy Remains a Threat* (Mar. 19, 2006), http://www.iiss.org/whats-new/iiss-in-the-press-march-2006/policing-makes-malacca-strait-more-secure (quoting Tim Huxley, an expert on Asia Pacific security at the International Institute for Strategic Studies based in London).

indeed heavy and the littoral states alone cannot be expected to shoulder it. The littoral states welcome cooperation and assistance by user states and the international community in accordance with UNCLOS, in the areas of capacity building, training, and technology transfer. Putting aside the differences and cooperating in good faith, let us make the Straits of Malacca a safe place for all.