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Palembang, South Sumatra 30139, Indonesia.
Phone: +62711-580063 Fax: +62711-581179
E-mail: sriwijalayalawreview@unsri.ac.id| sriwijalayalawreview@gmail.com
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The Challenges of Prosecuting Maritime Pirates

Wan Siti Adibah Wan Dahalan^a, Anati Binti Kisah^a, Subasny Sevanathan^a and Muhammad Nasir^b

^a Faculty of Law, National University of Malaysia, Malaysia. E-mail: wsa@ukm.edu.my

^b Faculty of Law, Malikussaleh University, Indonesia. E-mail: muhammadnasir@unimal.ac.id

Article	Abstract
<p>Keywords: <i>Criminal Law; Maritime Insecurity; Maritime Piracy; The UNCLOS 1982.</i></p> <p>Article History Received: May 8, 2020; Reviewed: Jun 24, 2020; Accepted: Jul 25, 2020; Published: Jul 31, 2020.</p> <p>DOI: 10.28946/slrev.Vol4.Iss2.615.pp221-237</p>	<p>Maritime piracy has always posed a constant threat to the peace and security of maritime navigation. The rise of acts of piracy is found to have been caused by several crucial factors such as geographical factor, weak law enforcement, maritime insecurity, economic dislocation and cultural acceptability. Nevertheless, due to the lack of consistency and uniformity on the definition of piracy under international law as well as on the imposition of punishment, together with the lack of domestic laws on maritime piracy and the reluctance of States to prosecute maritime pirates, these have contributed to the increase of such acts. Additionally, as a result, challenges are faced in prosecuting the captured maritime pirates, for instance, the drafting of the charges against the perpetrators, jurisdictional issues, political concerns and technical issues which may lead a State to drop the charges and releasing the perpetrators. Notwithstanding this, some states that do not have specific legislation on piracy, such as Malaysia, had successfully tried and punished maritime pirates under their domestic criminal laws. Accordingly, in order to face these challenges and gradually eradicate the acts of piracy, it is suggested, amongst others, for the uniformity on the definition of piracy as mentioned in Article 100 the United Nations Convention on the Law of the Sea 1982, the legal guidelines on the prosecution and imposition of punishment against maritime pirates and for States to increase their cooperation in combating acts of piracy via bilateral, and multilateral treaties.</p>

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INTRODUCTION

Maritime piracy is essentially a crime or an offence which violates international law. It is a crime that confers any State the power to exercise its national jurisdiction and universal jurisdiction.¹ Universal jurisdiction in this context means that every state has the right to prosecute and punish pirates for the crimes of piracy regardless of the location in which the crimes take place. As a result of this

¹ Amarilla Kiss, *Problems of The Investigation and Prosecution in Case of Piracy at Sea*, 2015.

universal jurisdiction, every state has a right to prosecute pirates under its national laws regardless of the pirate's original nationality, the ship registration, or the destination of the cargo.²

Although maritime piracy is a persistent and continuing international problem as it jeopardises the economy of the States involved, it disrupts the security of the ships and the crew members of ships concerned. It interferes with the flow and movement of the shipping lanes, the catch and release practice, where pirates are often released shortly after states, always adopts their capture due to among others, the lack of national laws governing the crimes of maritime piracy and punishment for such crimes, or due to a state's reluctance in prosecuting the pirates for various political reasons.³

This research will be covering the international legal framework governing maritime piracy, the factors accounting for the emergence of piracy, the dangers or impacts of piracy, the legal response to piracy, the principles of international law on piracy, the Malaysian laws on piracy and the challenges faced in prosecuting maritime pirates for the crimes of maritime piracy.

ANALYSIS AND DISCUSSION

International Legal Framework on Maritime Piracy

The United Nations Convention on the Law of the Sea (UNCLOS) provides for the provisions on piracy as enunciated in Articles 100 to 107. Article 101 of UNCLOS defines piracy to consist of any of the 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: (i) on the high seas, against another ship or aircraft, or persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; Any act of voluntary participation in the operation of a ship or 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).”

Basically, under UNCLOS, there are four essential elements on the definition of piracy, i.e. (a) it is an illegal act of violence, detention, or depredation; (b) such illegal act is committed for private ends; (c) the illegal act is committed on the high seas; and (d) the said act involves at least two ships.⁴

Under Article 100 of UNCLOS, it provides that all states have an obligation to cooperate to the fullest possible extent in the repression of piracy. Article 105 of UNCLOS further explains that every state may seize a pirate ship or aircraft, or a ship or aircraft are taken by piracy and under the control of pirates, and arrest the persons and seize the property on board on the high seas, or in any other place outside the jurisdiction of any State. A pirate ship or aircraft is defined under Article 103 of UNCLOS as a ship or aircraft intended to be used to commit one of the acts referred to in Article 101 of UNCLOS by the persons in dominant control.

It is important to note that Article 105 of UNCLOS also further states that the courts of the state which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken concerning the ships, aircraft or property, subject to the rights of third parties acting in good faith.

² Diana Chang, 'Piracy Laws and the Effective Prosecution of Pirates', *Int'l & Comp. L. Rev.*, 2010.

³ Diana Chang.

⁴ Diana Chang.

On the other hand, the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention), which was prepared by the International Maritime Organisation (IMO) due to concerns of the increase in incidents of acts of piracy and of terrorist acts threatening the safety of navigation,⁵ expands the UNCLOS definition of piracy because it applies to any ship navigating into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States.⁶ Pursuant to the SUA Convention, each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences outlined in article 3 when the offence is committed against or onboard a ship flying the flag of the state at the time the offence is committed, in the territory of that state, including its territorial sea or by a national of that state.⁷ The SUA Convention also further provides that a State Party may also establish its jurisdiction over any such offence when it is committed by a stateless person whose habitual residence is in that state, during its commission a national of that state is seized, threatened, injured or killed, or it is committed in an attempt to compel that state to do or abstain from doing any act.⁸ It is also pertinent to note that the SUA Convention requires the State Parties to take steps and prosecute or extradite the suspected offenders as opposed to UNCLOS, where the prosecution of the suspected offenders is not obligatory.⁹

The International Maritime Organization (IMO) is the global standard-setting authority for the safety, security and environmental performance of international shipping. Its primary role is to create a regulatory framework for the shipping industry that is fair and effective, universally adopted and universally implemented.¹⁰ To improve security on the high seas and at port facilities, the IMO develops initiatives to combat two types of threats, i.e. piracy under UNCLOS, which can only occur on the high seas, and armed robbery at sea which can only occur within twelve nautical miles from the coastal state.¹¹

The IMO had passed a Resolution which is Resolution A.1025(26) on IMO's Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships. It is a document which serves to facilitate the Member States in the investigation of the crimes of piracy and armed robbery against ships.¹² Resolution A.1025(26) (Annex, paragraph 2.1), defines piracy as having the same meaning as provided in UNCLOS. The said Resolution (Annex, paragraph 2.2) further determines that armed robbery against ships consists of any of the following acts:

“Any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or persons or property on board such a ship, within a

⁵ R.R. Churchill & A.V. Lowe, *The Law of the Sea*, 3rd edn (Melland Schill Studies in International Law, 1999). P. 210, and 211.

⁶ Article 4 of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention).

⁷ Article 6(1) of the SUA Convention.

⁸ Article 6(2) of the SUA Convention.

⁹ Kiss.

¹⁰ International Maritime Organization, ‘Introduction to IMO’.

¹¹ Diana Chang.

¹² Annex, Paragraph 1 of *Resolution A.1025(26) on IMO's Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships*.

State's internal waters, archipelagic waters and territorial sea; Any act of inciting or of intentionally facilitating an act described above."¹³

Another international organisation which seeks to ensure the safety of maritime navigation is the International Maritime Bureau (IMB). The IMB is a specialised division of the International Chamber of Commerce (ICC) where it is a non-profit making organisation, established in 1981 to act as a focal point in the fight against all types of maritime crime and malpractice.¹⁴ One of the IMB's principal areas of expertise is in the suppression of piracy.¹⁵ The IMB created the IMB Piracy Reporting Centre in Kuala Lumpur, Malaysia, due to the growing phenomenon of maritime piracy. It maintains a round-the-clock watch on the world's shipping lanes, reporting pirate attacks to local law enforcement and issuing warnings about piracy hotspots to shipping.¹⁶

In comparison to IMO, IMB's definition of piracy is broader and covers almost all attacks against ships in all maritime jurisdictions of a State. The IMB elaborates piracy as to include three essential ingredients, i.e. (a) there should be an act committed by the crew or the passenger of the ship to board or attempt to board any ship; (b) the motive of this act is to commit theft or any other crime; and (c) there should be an attempt or capability to use force in furtherance of that act.¹⁷ Therefore these organisations are outstanding if they complement each other in executing pirates.

Factors Accounting For the Emergence of Piracy

Various factors are causing the emergence of piracy such as geographical factor, weak law enforcement, maritime insecurity, economic dislocation and cultural acceptability.

With regards to geographical factor, areas which have proximity to waterways are more susceptible to be the targets of piracy. Proximity in this context refers to major transportation lanes, and principal harbours which provide piracy for more profitable opportunity thus increases the probability of piracy. Geography would also refer to the presence of hideaways for the maritime pirates which are used by them for the operation of acts of piracy, and vessel anchoring in cases of ransom piracy.¹⁸

Effective law enforcement is essential to ensure the safety of maritime navigation. Thus, weak law enforcement would increase the likelihood of piracy.¹⁹ Various levels of law enforcement such as the from the navy and coast guard play a significant role in safeguarding the safety and security of the navigation at sea. Weak law enforcement will, in turn, contribute to the next factor, which is maritime insecurity. Seas which are insecure as a result of weak law enforcement tends to be the hub for illegal activities such as smuggling, trafficking and illegal fishing.²⁰

¹³ *Resolution A.1025(26) on IMO's Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships.*

¹⁴ ICC Commercial Crime Services, *International Maritime Bureau.*

¹⁵ ICC Commercial Crime Services.

¹⁶ Annex, Paragraph 1 of *Resolution A.1025(26) on IMO's Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships.*

¹⁷ Ahmad Almaududy Amri, 'The International Legal Definition of Piracy and Its Motives', *Jati*, 19 (2014).

¹⁸ Christian Bueger, 'Learning from Piracy: Future Challenges of Maritime Security Governance.', 2015.

¹⁹ Nn, *Maritime Crime: A Manual for Criminal Justice Practitioners*, ed. by Alan Cole, 2nd edn (Vienna: United Nations Office at Vienna, 2019).

²⁰ Bueger.

Economic dislocation is also one of the factors leading to the existence of acts of piracy. Poverty, particularly in the context of unemployment, often lead economically disregarded communities to join in the acts of piracy. On the cultural acceptability factor, it can be said that some communities which accept such activity would have provided shelter, food and other supplies to ensure the sustainability of the piracy operations, and these communities may be ones which are being economically marginalised as mentioned before.²¹

The Dangers of Piracy

The apparent impact on the dangers of piracy is the imminent threat to the lives of the crew members onboard the ships which are being attacked by the pirates. On another scale lower than the threat to lives, the crew members are also exposed to the risk of being injured not just physically but also mentally when such piracy attacks occur on their ships.²²

From the economic point of view, piracy has an impact on creating situations such as delayed trips, fraud and stolen cargos which lead to the disruption of a State's trading ability. In terms of politics, piracy can play a crucial role in encouraging corruption among elected officials and administrators, which in turn would ultimately undermine and weaken governing legitimacy. Piracy also can instigate a significant environmental disaster, particularly when an attacked vessel or ship is left to drift on the shipping lane, which could result in the collision of vessels. Such collision could be a major one, for instance, if it involves a heavily laden oil tanker that may lead to the occurrence of oil spills in the ocean, resulting in maritime pollution and the destruction of marine lives.²³

Legal Response to Piracy

Both UNCLOS and the SUA Convention are silent on the aspect of prosecuting pirates which have been captured. However, the SUA Convention requires the State Parties to take steps and prosecute or extradite the suspected offenders as opposed to UNCLOS, where the prosecution of the suspected offenders is not obligatory. Due to this reason, each state is left to decide on how to conduct prosecution against the captured pirates according to its domestic legal system. Thus, it is difficult for some states to prosecute the captured pirates because of procedural obstacles, and lack of resources to spend on a full trial and possible imprisonment of the suspected offenders.²⁴

As for Malaysia, Malaysia does not have a specific law on anti-piracy. The Penal Code of Malaysia has thus become the principal law to prosecute pirates for the crimes of maritime piracy. Major offences such as robbery, murder, causing hurt, death or threat of causing hurt or death, hostage-taking, and extortion are defined and criminalised by the Penal Code of Malaysia. Hence, there is a wide selection of laws to apprehend, prosecute and punish the pirates for the crimes of piracy in Malaysia. Among the statutes that can be used for this purpose would include the Penal Code [Act 574], Court of Judicature Act 1964 [Act 91], Criminal Procedure Code [Act 593], Malaysian Maritime Enforcement Agency Act 2004 [Act 633], Arms Act 1960 [Act 206], Firearms (Increased Penalty) Act 1971 [Act 37], Police Act 1967 [Act 344], Dangerous Drug Act 1952 [Act

²¹ Bueger.

²² Peter Chalk, *Maritime Piracy: Reasons, Dangers and Solutions*, 2009.

²³ Chalk.

²⁴ Diana Chang.

234], Explosives Act 1957 [Act 207], Corrosive and Explosive Substances and Offensive Weapons Act 1958 [Act 357], Kidnapping Act 1961 [Act 365], Prevention of Crime Act 1959 [Act 297], Security Offences (Special Measures) Act 2012 [Act 747], Prevention of Terrorism Act 2015 [Act 769], Special Measures Against Terrorism in Foreign Countries Act 2015 [Act 770], National Security Council Act 2016 [Act 776], Customs Act 1967 [Act 235], Immigration Act 1959 [Act 155], Fisheries Act 1985 [Act 317], Exclusive Economic Zone Act 1984 [Act 317], Continental Shelf Act 1966 [Act 83] and Environmental Quality Act 1974 [Act 127].²⁵

The landmark case in Malaysia is the case of MT Bunga Laurel²⁶ which is the first-ever Malaysian case against international piracy where the offenders were apprehended, tried, sentenced and punished by the Malaysian authorities and the Malaysian courts. Briefly, what happened in the said case was that on 20 January 2011, the vessel called MT Bunga Laurel (the Panama-owned, Japanese-registered and Malaysian operated chemical tanker which was carrying lubricating oil and ethylene dichloride worth an estimated RM30 million (\$9.8 million)), which was initially guarded by the Royal Malaysian Navy (RMN) vessel Bunga Mas 5 (BM5) before it took its route, was attacked and hijacked by a group of Somali pirates 300 nautical miles (600 km; 300 mi) southeast of the port of Muscat, Oman.²⁷ In the instant case, although MT Bunga Laurel flew the Panama flag and was sailed by different nationals, the vessel was chartered by one MISC Berhad, a Malaysian company. As such, it is agreed that MISC has become the owner of MT Bunga Laurel at that particular time, and no States objected to the action taken by Malaysia in apprehending and prosecuting the Somali pirates.²⁸ The Somali pirates, Ahmed Othman Jamal and six others were prosecuted in the Malaysian Courts. They were charged under section 3 of the Firearms (Increased Penalty) Act 1971 [Act 37] for firing at the armed forces with the intent to avoid lawful detention, onboard the MT Bunga Laurel, which carries the death penalty.²⁹ During the course of the trial, the Somali pirates accepted the alternative charge offered by the Prosecution under Section 32(1)(a) of the Firearms Act [Act 260] which was punishable by life in prison, or a maximum 14 years prison, while the original charge carries the mandatory death penalty. They pleaded guilty to the alternative charge and were subsequently sentenced with imprisonment instead of the death penalty.³⁰

An example of a State which has a law on piracy is the United States of America (USA). In the USA, the criminal prosecution of piracy is authorised in Article I Section 8 clause 10 of the Constitution of the United States which states that the Congress has the power “to define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations”. Title 18 U.S.C. § 1651, the United States Statute Relating to Piracy further states that “Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life”.

²⁵ Muhammad Hameedullah & Md Khalil Ruslan, ‘Prosecuting Piracy at the High Seas: The Experience of Malaysia’, *IJUMIJ*, 26.2 (2018).

²⁶ Ruslan. P. 322; In the High Court of Kuala Lumpur, Criminal Case No. 45D-23-2011, PP v Ahmed Othman Jamal & 6 Ors. (Unreported); Magistrate Court Kuala Lumpur arrest warrant no. 7-81-39-2011.

²⁷ Alex Richardson, ‘Refile-Malaysian Navy Foils Hijack Attempt off Oman’, *Reuters*, 2011. Ruslan.

²⁸ Ruslan.

²⁹ Qishin Tariq, ‘Seven Somalis Jailed over Hijack Bid in the Gulf of Aden’, *The Star Online*, 2013.

³⁰ Tariq.

The Consideration of Judicial Mechanism

Principles of Piracy under International Law

Prosecuting suspected pirates is seen as a significant potential deterrent. Piracy continues to be a threat to international shipping mainly due to the failure of the prosecuting the suspected maritime pirates for the offence of piracy. According to the UNCLOS, the prosecution of the perpetrators is not an obligation, but the SUA Convention requires to take steps and try these people.³¹ UNCLOS only defines the circumstances under which universal jurisdiction applies but does not come up with single tribunal to hear the crime of piracy. Similarly, the SUA Convention does not state trial procedures or establish penalties for its defined offences.

Under international law, UNCLOS provides for universal jurisdiction for any State to prosecute maritime pirates on the high seas.³² Nevertheless, UNCLOS or any other instruments under international law do not provide a legal framework for purposes of prosecution, nor does it provide types of punishment to be meted. It depends on the state itself to come up within its domestic legal framework to prosecute piracy and execute a suitable punishment for the crime. Nevertheless, it is indeed commendable that only a few states do so, and many states release the suspected pirates without trial.

The acts of piracy committed within the exclusive economic zone (EEZ), the territorial sea, the internal waters or the archipelagic waters of a state are subject to the full sovereignty, where domestic jurisdiction of the coastal state alone applies. The UNCLOS allows every state to seize a pirate ship or aircraft together with property on board and arrest the persons on the high seas or in a place outside the jurisdiction of any state.³³ It further allows the state to decide upon the penalties to be imposed and to determine the action to be taken concerning the ship, aircraft or property.³⁴

It is not only a legal obligation of the custodial state to prosecute and punish the perpetrators when the coastal state transfers the captured pirates for prosecution, but it is also a moral obligation. The custodial state can either prosecute and punish the offenders before a domestic court or extradite them to another State which has an interest in prosecution. The issues on jurisdiction often surround this particular crime where states claim jurisdiction concurrently over the same offenders.³⁵ In order to avoid such situation, there are five principles of state jurisdiction may invoke to claim jurisdiction over perpetrators of piracy, i.e. territorial principle, nationality principle, protective principle, universality principle and passive personality principle.³⁶

Firstly, the territorial principle should be applied to the state which the offence is committed by the offenders rather than any other State as the offence is committed within its territorial jurisdiction. The second priority should be given to the flag State whereby the offence is committed on the high seas or in a place outside the jurisdiction of any State as a ship is originally

³¹ Article 105 of *The United Nations Convention on the Law of the Sea 1982*. Article 3 of the SUA Convention.

³² Muhammad Nasir and others, 'Unilateral Claim in Dispute of Island Over the South China Sea', *Sriwijaya Law Review*, 4.1 (2020), 79–85.

³³ Abdul Ghafur Hamid @ Khin Maung Sein, *Public International Law: A Practical Approach*, 3rd edn (Sweet & Maxwell Asia).

³⁴ Article 105 of *The United Nations Convention on the Law of the Sea 1982*.

³⁵ Sein.

³⁶ Sein.

subjected to the exclusive jurisdiction of the flag State on the high seas. The third priority is to the nationality of the offenders; however, for a stateless person to apply the state of habitual residence to allow the state to establish jurisdiction over its nationals.

Next, the nationality of the victims is to be taken into consideration because it has a certain degree of interest to try the offenders since the state's nationals are being injured or killed. Lastly, any other State which has the interest to prosecute maritime pirates since the act of piracy is an international crime subjected to universal jurisdiction because piracy is a *delicta jure gentium* (international crime) and a *hostis humani generis* (enemy of all humankind). This principle does not require any nexus between the state claiming for jurisdiction, the offender or the victim. Based on the above principles, when a custodial State facing difficulties when receives more offenders for extradition, they should execute it on a priority basis to establish the jurisdiction.

Principles of Piracy under Malaysian Law

The conventions of international law do not become part of the domestic law unless the country takes action to implement those laws. The Federal Constitution of Malaysia has no provision that automatically adopts international law and conventions as the law of Malaysia. Also, Malaysia does not have legislation or provision catering specifically to the crime of piracy, and it has not defined in any of the domestic legislation. However, not having a single-piracy law is not necessarily a failure to prosecute the said crime. In fact, Malaysian authority has a wide selection of laws for suppression, prosecution and punishment of piracy at the high seas.³⁷ As such, the suspected pirates could be brought for the crime of piracy under the international principles of universal jurisdiction, yet when charged and tried for other crimes such as gang-robbery, armed robbery, criminal conspiracy or even terrorisms if elements are met.

The effort of Geneva Convention on the High Seas in 1958³⁸ includes criminalisation of piracy by introducing relevant rules and regulations to incorporate under the agreement made among the member states at the international level. Article 15 of Geneva 1958 on piracy has been reflected under UNCLOS into its Article 101 identically with the same idea. About eight years later, Malaysia has added a special provision on piracy into the domestic law, Courts of Judicature Act (CJA) and Criminal Procedure Code (CPC).

Ultimately, the Malaysian authority adopts the universal jurisdiction conferred by UNCLOS, which is added in section 22 (1) (a) of the CJA. If an act is illegal under the Laws of Malaysia, a Malaysian citizen or permanent resident who commits the act on the high seas or any person who commits that act on the high seas on a ship that is registered in Malaysia can be punished for that crime in Malaysian Court. That act also provides the High Court with criminal jurisdiction to try all offences committed "by any person on the high seas where the offence is piracy by the law of the nations". This provision indirectly criminalising the crime of piracy and embodies the concept of universal jurisdiction to eliminate threats of piracy within region and regions beyond.

Furthermore, section 22(1) (b) of CJA and section 127A (1) of CPC play an essential role in apprehending and prosecuting suspected offenders of piracy, robbery, or armed robbery at sea. By having these provisions, the High Court of Malaysia may try any offence of piracy committed at

³⁷ Ruslan.

³⁸ United Nations Treaty Collection, *Convention on the High Seas 1958*.

the high seas, provided that the court could satisfy the ground that the act committed is piracy under the international law or in any way affected the security of Malaysia and jeopardises Malaysian interest at sea.

Apart from CJA and CPC, the Penal Code of Malaysia has become the Principal Act to ascertain piracy. It has always been the statute relied on when there is a threat against peace and security of the state. Section 3 of Penal Code allows for the punishment of offences committed beyond, but which by law may be tried within Malaysia. The subsequent section 4 provided that any offence under chapter VI, VIA and VI regardless of it being committed on the high seas, is to be treated as if the offence is committed within territorial limits of Malaysia.

Article 101 of UNCLOS is meant to provide a comprehensive definition of piracy. It provides a large element of a crime, i.e. any illegal act of violence, detention or depredation. As such, violence may include all kind of criminal acts such as murder, robbery, extortion, kidnapping and other offences typically committed by pirates in their course of action.³⁹ These criminal acts are already covered by the Malaysian Penal Code and other statutes. As such, any violence committed in the course of committing piracy could be tried as a crime on its own.

There are several provisions addressed under the Penal Code, which are usually committed by pirates in their criminal conspiracy. In fact, causing fear of instant death, hurt or wrongful restraint is sufficient to establish the crime of robbery under section 390(2). For the purpose of gang-robbery, section 391, 396, 399 and 400 have addressed a higher degree of crime respectively. According to section 325, if pirates cause grievous hurt to crew members of the ship, he is liable to imprisonment up to seven years and shall also be liable to fine upon conviction. When dangerous weapons handled for that matter, section 326 applies that the term of imprisonment may be extended up to twenty years and may also be liable for fine and whipping. Murder, a coincidental event following resistance by the pirates is an offence under section 300 and punished under section 302 with death. In short, the Penal Code itself appears to have provided sufficient ground to prosecute piracy on the high seas. Most importantly, section 3 and 4 empower the law to be applied not only within the territorial limit of the state but also beyond that board.

Other than Penal Code, CJA and CPC, other statutes may be used by the authority to prosecute piracy such as Malaysian Maritime Agency Act, Arms Act, Kidnapping Act, Offensive Weapons Act, Immigration Act, Security Offences (Special Measures) Act and Prevention of Terrorism Act. Each of the Act may be applied with the fulfilment of individual elements, nature of the act, grounds of offences and pieces of evidence against the pirates. In short, since the acts of piracy involve the commission of some other crimes that are expressly defined under Penal Code, those offences can be tried in Malaysian Courts if they are committed in Malaysia maritime zone or if they are committed on the high seas or on a ship registered in Malaysia.

Although the domestic law consists tool to prosecute piracy, the issues on the jurisdiction are often surrounded by this crime. In order to combat such issue, Malaysia may invoke principles of international law as mentioned above to justify the jurisdiction over suspected pirates. Both domestic and international laws may be applied concurrently at the Malaysian court. However, it is uncertain whether an act prohibited by UNCLOS can be tried if it is not defined as a criminal

³⁹ Ruslan.

offence under Malaysian law. Since Malaysia does not have single and unified legislation catering specifically to the crime of piracy, therefore, a proper comprehensive domestic anti-piracy enactment is required in Malaysia to ensure a more effective framework and to improve the legal regime concerning piracy. It would further dispel any uncertainty in prosecution and ensure judicial process successfully held.

The Challenges of Prosecuting Maritime Pirates

The framing of the charges per se

The first legal challenge in prosecuting piracy is to frame the charges under the definition of piracy under UNCLOS itself. The latter only makes piracy as an offence and prescribes the punishment for the said offence. The definition of piracy under UNCLOS only provides a "western" definition of piracy. When it comes to reality, it is limiting the definition of piracy an illegal act is done in high seas.⁴⁰ As discussed earlier, the UNCLOS has provided four fundamental elements of piracy: 1) an illegal act involving violence, detention or depredation; 2) committed for private ends; 3) on the high seas; 4) involving at least two ships. These are the elements that need to be satisfied in order to charge and prosecute pirates under international law of piracy.

Given that, scholars criticised the first element because it categorically excludes all attempted hijackings or clandestine attacks, where attackers board at night and steal cargo without the knowledge of the crew.⁴¹ When the attacks happened without the second element of private ends under the UNCLOS definition, it is embroiled with uncertainties when it carries a motive requirement that excludes political terrorism and non-profit attacks. For an example, an armed attack is to bring international attention to a group's struggle with the motive of independence is not executed for "private ends" because it is not performed to profit the attackers.

Moreover, the presence of "two ships" requirement excludes mutiny as an act of piracy because the internal seizure of a ship does not involve two separate ships. Scholars have often debated whether to include political terrorism and mutiny to the definition of piracy under UNCLOS. Finally, on the element of "high seas", the UNCLOS definition of piracy may apply best to Somali piracy, but it is a severe limitation on Southeast Asian piracy. Most attacks in Southeast Asia occur in narrow straits that fall within a nation's territorial seas. Therefore, in Southeast Asia, even if caught, the attackers cannot be prosecuted for piracy because their acts would not fall within the definition of piracy under UNCLOS.

The international legal framework on piracy is flawed because it does not provide a universally applicable definition of piracy, and it does not create uniform guidelines for the prosecution and punishment of pirates. Strictly speaking, most of the cases that brought before the domestic courts for the trial are not piracy cases by the definition of international law due to the absence of the essential element of piracy as stipulated under Article 101 (a) of UNCLOS. The lack of uniformity in the regulation referring to piracy can end in controversial or different decisions by court for the same offence.

⁴⁰ Nurulizwan Ahmad Zubir & Wan Siti Adibah Wan Dahalan, 'Maritime Violence: Implications to Malaysia', *The Faculty of Law, Universiti Kebangsaan Malaysia*, 6.1 (2012), 1-74.

⁴¹ Diana Chang.

The Loophole in Municipal Law

The UNCLOS does not stipulate any specific punishment for the perpetrators of the offence of piracy on its own and the penalties to be imposed is left to the domestic laws and courts of Member States. The states are in charge of prosecuting perpetrators based on municipal law and regulate this crime. Consequently, this invokes another problem, namely the sentences imposed on pirates are varied from one state to another. It would be unjust for offenders to receive harsher or more lenient sentences for the same crime, and it is undesirable. Especially, when the developing countries incorporate international definitions of piracy in their legal system compared to the less developed countries, it caused the side effect of imposing a western view of retribution and punishment on pirates by developing countries.

In general, there is no contention in referring to piracy cases to domestic courts. However, the problem arises when the court reached an opposite conclusion in connection with its jurisdiction, and the punishments are varied from one domestic jurisdiction to another. Consequently, it would lead to injustice for pirates to serve different sentences on the basis of the domestic law of the states which arrests and prosecutes them. A lack of uniformity and coherence in the sentencing of the international crime of piracy raises a fundamental question of fairness.

For example, Malaysia had taken legal action against Somali pirates.⁴² In January 2011, the attack in the Gulf of Aden by seven Somali pirates was captured by the Malaysian Navy while they were trying to hijack the Bunga Laurel, chemical tanker registered in Panama, owned by a Japanese shipping company, and chartered by the Malaysian International Shipping Corporation (MISC). They also fired against the Malaysian Navy, and three pirates were wounded in a gun battle. The offenders were sentenced with imprisonment from 8 to 10 years.

Furthermore, a Yemeni Court also tried 12 Somali pirates for killing two crew members and wounding four others in hijacking a Yemeni oil tanker, off the coast of Aden in April 2009. The court sentenced six pirates to death and others to ten years imprisonment. While in the same year, five Somali pirates were allegedly arrested for attempting to board the cargo ship in the Gulf of Aden. Although the prosecutors had pushed for the sentence to be for at least seven years, however, the court has decided to sentence the pirates for only five years of imprisonment.

The discrepancy of punishment for piracy can be seen from five years to even be up to death penalty depending on the seriousness of the crime committed.⁴³ Although the outlawing of piracy is well established, international law provides no standard for the appropriate punishment. Therefore, universal jurisdiction is ineffective in punishing the offenders of piracy because it relies on the national legal framework for the prosecution and punishment of piracy which is failed to address the modern piracy concern.

Even though the prosecution of pirates is solely vested in the domestic jurisdiction of various states, many states are unwilling to shoulder the responsibility of prosecuting the offenders of

⁴² Andrea Bottorff, 'Malaysia Court Charges Suspected Somali Pirates', *Jurist Legal News and Research Services, Inc.*, 2011.

⁴³ Abdul Ghafur Hamid @ Khin Maung Sein & Ashgar Ali Ali Mohamad Kyaw Hla Win @ Md Hassan Ahmed, 'Prosecution of Pirates under International Law: In Limbo', *MLJ Lxxxiv*, 4 (2014).

piracy before their domestic courts.⁴⁴ Moreover, some states are reluctant to take the burden of prosecuting the offenders of piracy on their soil due to lack of resources. Individual states are also unwilling to expend their resources to capture and prosecute pirates. As a result, it becomes vital to search for a possible mechanism to combat the prosecution of pirates under international law effectively across the world.

In some states, the loophole in municipal laws becomes an obstacle for domestic courts from prosecuting the offenders of piracy. For example, in 2010, the Danish naval forces simply had to release ten pirates without prosecuting due to the lack of legal basis for extraditing them to Denmark for trial. This sort of 'catch and release' is a typical strategy as no one is willing to prosecute pirates, and it will undermine international anti-piracy efforts and fail to provide efficient deterrent from committing such offence.

Technical Problems of Prosecution

Since the states are in charge of prosecuting the pirates based on municipal law, some states do not have any specific legislation. So there are serious technical issues, not to mention that even if it is regulated under their domestic law, the judges are not trained for the unique characteristics of these cases, and the lack of experiences because many of the judges have never faced the prosecutions of this crime before.

Besides that, the identification of suspects or witnesses is crucial for an effective investigation and prosecution. It has been noted that witnesses are difficult to trace, mainly due to lack of a specific address of those involved, primarily stateless pirates. These people often do not have any documentation that can prove their identity or age, which causes complication in court procedures, primarily when prosecuting underage people. The absence of official documents on the basis which the identity of suspects and/or witnesses are to be determined results in complications in the court procedures. The sharing of data such as photographs, fingerprints and other biometric data is recognised as essential information or pieces of evidence for the prosecution. Even evidence collected by some states is useful to others, especially where suspects are alleged to commit the act of piracy repeatedly.

Prosecutions of maritime piracy are often faced with difficulties on data sharing and information exchange with naval forces. Searching abroad, collecting evidence and getting the necessary information from witnesses and victims are vital elements in order to prosecute perpetrators effectively.⁴⁵ However, the piecing of evidence and gathering of witnesses who may be scattered across the globe is a significant hurdle in the effort of successfully prosecute the pirates. The risk of destroying evidence in the vessel due to weather conditions, e.g. humidity or strong wind) or particular location (a vessel is always rolling) will cause a troublesome to the prosecution in proving the case.

⁴⁴ Kyaw Hla Win @ Md Hassan Ahmed, *Critical Analysis of the Feasibility of the 2005 Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988* (Kuala Lumpur, 2010). Paper presented at the 7th Asian Law Institute Conference, 25 and 26 May 2010, IIUM, Kuala Lumpur, Malaysia. P. 12-14.

⁴⁵ Henri Fouche & Jacques Meyer, 'Investigating Sea Piracy: Crime Scene Challenges.', *WMU Journal of Maritime Affairs*, 11.1 (2012), 33-50.

Moreover, affected commercial interest and possible damages to be suffered by the ship owning companies, may result in the unwillingness of those companies to reveal information to the authorities. Besides, failure to comply with the applicable rules and regulations during detention onboard naval vessels of the suspects may result in procedural complications and objections brought by the defence counsel during the prosecution of trial. Sometimes, hunger strikes among the suspects, demands for better conditions, attempts to escape or overboard pose additional challenges as the vessels are typically not equipped as prisons. Even though, rarely question referred to detention facilities thus far, there is a possibility of growing attention to the said issue and the prosecutors must aware of the situation.

The Difficulties Affecting the Trial

Respect for human rights and fair trial requirements are significant concerns in some maritime piracy cases due to its extraordinary circumstances. Underage pirates are one of the complexities to the prosecution in terms of the different laws applicable which is required to comply with human rights standards strictly. Generally, the basic principle that applied to the juveniles or minors is, given a low sentence and specific arrangements in a court proceeding for them. If the suspect is established to be a juvenile or minor, the specific code or statutes applied in prosecuting the crime. In some countries, a specialised court for minor is competent to hear the case.

When assessing juvenile or minor involved, the court has to take into consideration his specific role in the act as well as a specific action, i.e. whether he only carried a weapon or he used it against the victim or Navy officers. Although they are pirates, they are also a human being, and therefore they are entitled to due process and fair treatment during their custodial and prosecution. The suspected pirates are entitled to the fundamental human rights, and they must be respected, must be provided with fair trial including legal assistance and provide translation (if required) during trial although all these are expensive.

Generally, cases of piracy involve different nationality of people. Therefore, there is a necessity for foreign investigation, and international information arises. Also, the existence of different languages and dialects adds complexity in the investigation of the case. In one case, the national authorities were faced with difficulties related to the fact that potential witnesses only spoke Farsi, in the absence of an interpreter, made it impossible to record personal data correctly and take the statements.

Furthermore, this process is prolonged and is susceptible as the court has to hear the trial where two or more languages need to interpret, to understand by the parties such as suspected pirates, witnesses, and navy officers and then to conduct the trial. Translations and interpretations during the court proceedings are not an issue. However, piracy is an offence at sea. The language of the naval officer is complicated in its technical meanings. Language such as port side, starboard side, bridge to bridge and other such essential words or phrases, if not translated accurately, it can give a totally different meaning.

Jurisdictional Issues

Since piracy is an offence committed cross-border nature, the issues on jurisdiction are often surrounded of no exception to this particular crime. The effective establishment of the state that

has jurisdiction and willing to prosecute and bring justice to the suspected pirates is significant to the entire judicial process. Although there are principles to apply on the jurisdictional issue, i.e. universal or extraterritorial principle, some legal issues are still reporting as a challenge.

As defined under Article 101 of the UNCLOS, piracy takes place on the high seas or in a place outside the jurisdiction of any state. Therefore, the location of the criminal act and seizure need to be verified before accepting a case. For example, in the Netherlands, the naval forces have permission to operate in Somali territorial waters. However, its universal jurisdiction for piracy applies only if the criminal acts have taken place in international waters. Otherwise, the criminal offence falls within the definition of an armed assault.

In cases where one country has jurisdiction, and the suspects are arrested by or reside in another country, extradition may be requested. In December 2008, the United Kingdom arranged with Kenya to transfer the captured pirates to Mombasa for prosecution. In January 2009, the US made a similar arrangement with Kenya. When custodial state receives more requests for extradition and due to massive caseload, it may cause more pending trial cases or backlog cases. In addition to the jurisdictional issue arise concerning the act of piracy, the competent national authorities face other challenges associated with the particular incident and the specific actions of the parties involved.

Other Issues Affecting the Prosecution

Political concerns are also a restrictive issue in the prosecution of piracy. In the UK, for example, the possibility of pirates staying indefinitely as asylum seekers after incarceration or due to failed prosecution has deterred the UK from transporting captured pirates for prosecution on UK soil. Further, there is also concern over the likelihood of the suspects receiving hard treatment in Somalia upon deportation, which would violate the British Human Rights Act. Due to these concerns, some patrolling navies have been adopted the 'catch and release' policy due to their states unwillingness to be embroiled in the uncertainties and complication of prosecuting pirates.

Besides that, the logistical burdens, the length of time the pirates have to be kept in custody pending trial, lengthy extradition procedures and the escalating costs of it would all prove the complexity in efforts to prosecute pirates. Prosecution cases mean a considerable financial burden to states because the perpetrators, victims, witnesses and evidence have to move to the location of the trial, which has its costs. Furthermore, the issue concerning post-trial transfers, the possibility of repatriation or request of asylum at the end of court proceeding also raised. The fact to protect the convicted person from serving the penalty in their home country has been pointed out, i.e. by Spain due to the tricky in identifying their nationality or due to their home country is a 'failed state'.

In order to reduce the logistical difficulties of transporting pirates over long distances to be tried in another state, the US, UK, EU nations, Canada and China have agreed with Kenya to host the prosecution of captured pirates. In April 2010, however, Kenyan official expressed their reluctance to accept pirates for prosecution due to massive caseload, strained justice system and failure to provide adequate financial support.

Moreover, in cases where suspected pirates are arrested by foreign authorities and need to be extradited to the prosecuting country, a speedy and efficient transfer is essential to proceed with

prosecution. However, the absence of an agreement or treaty on the matter between the countries concerned is an obstructing factor. The transportation of suspected pirates to the country also caused complexity with regards to the authorities of the countries on the transportation route to the prosecuting country, which is also affected due to the absence of an agreement.

CONCLUSION

The issue of prosecuting and sentencing offenders of piracy is difficult to settle mainly since the implementation of international law against piracy relies solely on the corresponding domestic national laws. Since each state has the discretion to determine the manner in prosecuting the pirates and punish them on a case to case basis, there is no robust legal framework as to the prosecution of pirates. As such, each regional piracy tribunal's involvement could enforce a definition of piracy that suits their region, provide uniform procedures and penalties apart from being an alternative forum for the states that lack resources to prosecute pirates. Other international crimes or attack such as genocide, a crime against humanity, war crimes and the crime of aggression⁴⁶ can be referred to the ICC.⁴⁷ However, piracy has no access to any international forum. Piracy under UNCLOS not only can be considered as an international crime, but it can also be incorporated under the jurisdiction of the ICC. When there is no state is willing to take the burden to prosecute and request for extradition, then the offenders should be prosecuted before the ICC. Because of the same, the ICC must extent its jurisdiction to prosecute the crime of piracy similarly as other international crime stated above. In this formulation, there will be no place for offenders to escape from prosecution. By having a single court that has jurisdiction over all acts of piracy, perpetrators of piracy can be prosecuted faster without any political dispute which always behind the pirate attack.

Meanwhile, between States, there should be more bilateral and multilateral agreement to curb the problems of piracy attacks. Bilateral and multilateral treaties create binding obligations between member states and may help in solving jurisdictional and prosecutorial issues. Moving towards to current international trend, the cooperation and coordination from regional piracy tribunals should play a vital role to investigate international maritime pirates and to provide litigation support for States seeking to prosecute international maritime offenders. Thus, international organisations such as the United Nations or the IMO could combine the existing regional cooperation with the IMB's investigative capabilities as a foundation for the creation of regional piracy tribunals.⁴⁸

⁴⁶ Articles 5, 6, 7, 8 and 9 of *The Rome Statute of the International Criminal Court*.

⁴⁷ International Criminal Court, *Jurisdiction and Admissibility*.

⁴⁸ For a discussion concerning strengthening regional cooperation, see generally *Hearting on International Efforts to Combat Maritime Piracy*, *supra* note 6, at 17(statement of Admiral William Baumgartner, J. Advocate Gen. and Chief Counsel, U.S Coast Guard, U.S. (Coast Guard). For the ICC-IMB's investigative capabilities, see IMB Investigation Services, *supra* note 28. <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1012&context=iclr>. (accessed 24 May 2019).

In a nutshell, it can be concluded that UNCLOS does not stipulate uniform definition that covers all types of piracy attacks and even beyond the region and punishment for perpetrators for the crimes of piracy. In order to have an effective piracy prosecution, the change in the existing international definition to a uniform definition of piracy followed by domestic legislation is required. Thus, it is suggested that UNCLOS should provide some legal guidelines as to the maximum and minimum punishment for the offenders. This way, all State Parties would be able to incorporate punishments prescribed under UNCLOS into their respective domestic laws and offenders will serve the same degree of punishments for the same crime in any part of the globe and be served a fair trial.

Thus, cooperation between related organisations and international maritime law enforcement might help states in broadening their powers to detain pirates in their territorial seas. It is equally essential for international organisations to support financially and also to facilitate unique pieces of training to the naval forces, investigating officers and prosecutors. Additionally, improving communications among the concerned sectors most importantly, shipping industries in proceedings is the way to adequate trial.

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