

THE REGULATION OF PIRACY AND ARMED ROBBERY AT SEA IN INTERNATIONAL LAW

Gerald A. Bunga

Fakultas Hukum, Universitas Nusa Cendana

gerald.bunga@yahoo.com

Received 09-09-2020; Revised 21-10-2020; Accepted 10-12-2020

<https://doi.org/10.25216/jhp.9.3.2020.425-448>

Abstract

This paper examines the regulation of piracy and armed robbery at sea in international law applicable globally and applicable only in a certain region. This research will review the elements of piracy and armed robbery at sea then made a distinction between both crimes. It will be found that there are problems that still not legally regulated in existing international regulation concerning piracy and armed robbery at sea or it has been regulated but still cause a problem in the prosecution of both crimes. It is a normative research which concludes that the regulation of armed robbery at sea is found only in regional international legal rules, unlike the regulation of piracy that exists in international rules that applied globally. The existing regulations leave problems concerning areas where a crime such as piracy-like act will be difficult to categorize as piracy or armed robbery at sea.

Tulisan ini mengkaji tentang pengaturan piracy dan armed robbery at sea yang ada dalam hukum internasional yang berlaku global maupun yang berlaku hanya dalam kawasan tertentu saja. Untuk itu dalam penelitian ini akan melihat unsur-unsur yang ada dalam piracy dan armed robbery at sea kemudian dilakukan pembedaan antara dua tindakan kejahatan ini sehingga nanti akan ditemukan permasalahan-permasalahan yang secara hukum masih belum diatur maupun yang sudah diatur tapi tetap saja menimbulkan masalah dalam penindakan dua tindak kejahatan ini. Penelitian ini adalah penelitian normatif dan menghasilkan kesimpulan bahwa pengaturan mengenai armed robbery at sea hanya ditemui dalam aturan-aturan hukum internasional regional, tidak seperti pengaturan piracy yang dapat ditemui dalam aturan hukum internasional yang berlaku global. Pengaturan-pengaturan yang ada juga masih menyisakan permasalahan seperti adanya wilayah yang mana suatu tindak kejahatan seperti pembajakan akan sulit untuk dikategorikan sebagai piracy maupun armed robbery at sea.

Keywords: Piracy, Armed Robbery at Sea, Law of the Sea

Introduction

A. Background

The sea, since a long time ago, was used as a navigation line and trade route massively by various states. Technological developments that have led to more modern and faster transportation than sea transportation do not reduce the navigation at sea. This is due to the cheaper cost that one has to spend using sea transportations than air transportation and sea transportation can also load more cargos. It is why the majority of trade transactions still carried out by sea navigation. The trade transactions carried out by sea navigation also attracts piracy activities carried out against these ships.

Piracy is a crime to which universal jurisdiction can be imposed because it is considered as a common enemy of all humanity (humanist generic host) and is the oldest internationally recognized crime.¹ The act referred here shall be seen as piracy committed on the high seas or outside of any country's jurisdiction so that it may be subject to universal jurisdiction.² This definition is in accordance with the definition of piracy adopted in the United Nations Convention on The Law of the Sea 1982 (1982 UNCLOS). The term of piracy in this study must be distinguished from the notion of piracy which, in some national laws of a country, is broader than the definition adopted in 1982 UNCLOS. For example, the United States and Britain categorize slave trade as an act of piracy in their national law. In The Act of 15th May 1820 the United States declares that every citizen is found guilty of piracy crimes when engaged in slave trade or aboard a ship wholly or partly owned by a US citizen.³

The difference between piracy under 1982 UNCLOS and piracy under some municipal law is described as follows: "piracy under the law of nations (*jure gentium*) may be tried and punished in the courts of justice of any nation, by whomsoever and wheresoever committed. But piracy created

¹ Malcom N. Shaw, 2001, *International Law: Fourth edition*, Cambridge University Press, United Kingdom, hlm.423, also see: Peter Malanczuk, 1997, *Akehurst's Modern Introduction to International Law, Seventh revised edition*, Routledge, New York, p.112.

² William A. Schabas, "International crime" in David Armstrong, ed, 2008, *Routledge Handbook of International Law*, Taylor & Francis e-Library, United Kingdom, p.259.

³ Henry Wheaton, 1855, *Elements of International Law*, Little Brown and Company, Boston, p.xxi.

by municipal law can only be tried by that state within whose territorial jurisdiction, and on board of whose vessels, the offence created was committed”.⁴ There are acts considered to be piracy in the national law of a country but are not included in the definition of piracy under 1982 UNCLOS. Such acts are not subject to universal jurisdiction but to the national law of the state concerned.

Piracy does not occur only in open sea territories or areas outside of the jurisdiction of any country, there is also acts of piracy committed within the territorial sea of a country, which is not included in the definition of piracy under 1982 UNCLOS. In international law literature or in discussion of piracy at sea issues, this act is often referred to as modern piracy, armed robbery at sea, or sea robbery. This research uses only one term that is an armed robbery at sea. Armed robbery at sea is any illegal act of violence, detention and depredation against ships, which is still within a country's jurisdiction.⁵ The handling of this action is entirely subject to the country's jurisdiction in which such action occurs. Piracy and armed robbery have become threats and obstacles in international shipping.

B. Problems of Research

The problem to be discussed in this paper is concerning the weakness of existing legal rules of piracy and armed robbery at sea, to find the gap and what to do to fulfil the gap.

C. Method of Research

This is a normative research which is a legal research that examines written law from various aspects, namely aspects of theory, history, philosophy, comparison, structure and composition, scope and material, consistency, general explanation and article by article, formality and legal binding strength of law, as well as the legal language used.⁶ This research uses aspect of theory, comparison, scope and material, legal binding strength and legal language used. This research uses secondary data. This secondary data consists of primary legal materials, secondary legal materials, and tertiary legal materials.⁷

⁴ <http://www.duhaime.org/LegalDictionary/P/PiracyJureGentium.aspx>, [online] (accessed on 18th May 2012).

⁵ Article 1 Paragraph (2) point a of Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ship in Asia (ReCAAP) Agreement

⁶ Abdulkadir Muhammad, 2004, *Hukum dan Penelitian Hukum*, Citra Aditya Bakti, Bandung, p.101-102.

⁷ *Ibid*, p.67

The data is analyzed qualitatively and elaborated. Based on the elaboration then conclusions are taken as answers to the problems studied.

Results and Discussions

A. The Regulation of Piracy in 1982 UNCLOS

1982 UNCLOS is an international rule governing maritime issues ratified by many states. Nowadays, 168 countries have ratified it.⁸ This makes 1982 UNCLOS influences the regulation of marine areas in various regions,⁹ In addition, 1982 UNCLOS also contains norms that are universal so that what is set in it can be viewed as an international customary law.¹⁰

The regulation of piracy in 1982 UNCLOS can be found in chapters 100 to 107. Based on the definition of piracy in article 101, it can be seen that piracy has three elements, namely:

- a. The action is committed for private ends. Thus, such action cannot be made under the permission or authorization of a government;
- b. The action is committed against another ship. This means that at least two ships involved in this action are required. The mutiny is not considered as piracy;
- c. Such action is committed on high seas or other territory outside of the jurisdiction of any state.

in order to be classified as piracy, a private ends is the requirement, this means that the action cannot be done by permission or authorization of a government, or piracy committed for political purposes is not included in the category of piracy.¹¹ From the second characteristic above it can be seen that in piracy, the involvement of at least two ships is also a must. Therefore, the mutiny does not fall into the category of piracy. The ships controlled by

⁸ https://treaties.un.org/pages/ViewDetailsIII.aspx?src=IND&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en , (accessed on 19th of November 2020).

⁹ Joyce Dela Pena, 2009, "Maritime Crime In The Strait of Malacca: Balancing Regional and Extra- Regional Concerns", *Stanford Journal of International Relation*, X, (2) 1, p.5.

¹⁰ James Karaska, *op.cit*, p.127.

¹¹ John O'Brian, *op.cit*, p.426.

the mutineer can only be detained by the flag state of the ship.¹²

The emphasis on the third characteristic above is essential to distinguish piracy from armed robbery at sea which will have implications for the handling of the action. As regulated in 1982 UNCLOS, piracy may be subject to universal jurisdiction. Universal jurisdiction is a jurisdiction imposed on a crime based on the nature of the crime, regardless of where the offence is committed, the nationality of the offender, the citizenship of the crime victim, or the state which carries on such jurisdiction.¹³ Thus each state has the authority to deal with piracy regardless of the nationality of the offender and the victim of the crime as long as it is conducted on high seas or conducted in the territory outside of the jurisdiction of any state. This is reflected in Article 100 of 1982 UNCLOS which states that every state must fully cooperate to combat piracy on the high seas or in territories outside the jurisdiction of other states. Under Article 300, the Obligation to cooperate shall be carried out in good faith.

Article 103 regulates the limitation of a ship or aircraft of pirates which includes any ship or aircraft used by the person controlling it to perform the acts set forth in Article 101 concerning the definition of piracy. Article 103 also stipulates that ships or aircraft carrying out the acts referred to in Article 101 shall be deemed to be pirate ships or aircraft while remaining under control by pirates. Against such ships or aircraft, the possibility of maintaining nationality in accordance with the place of registration of ships or aircrafts are still open, because of the loss or retention of the nationality of a ship or aircraft engaging in piracy, pursuant to Article 104, shall be established by each State through its national legislation. Nevertheless, it is clear from the provisions of Articles 100 and 101 that ships or aircraft of the pirates are no longer subject only to the jurisdiction of the flag state in which they have been registered and have obtained its nationality, but also subject to universal jurisdiction. Thus, ships or aircraft of the pirates considered to have no nationality, unless otherwise provided in the national law of the country concerned.

Article 102 regulates piracy conducted by warships or government

¹² D.J. Harris, *op.cit.*, p.459.

¹³ Mihaela AgheniÑei dan Luciana Boboc, 2011, "Universal Jurisdiction And Concurrent Criminal Jurisdiction", hlm.1, [online] www.usyd.edu.au (accessed on 4th of July 2012), also see: Ma'ximo Langer, 2011, "The Diplomacy Of Universal Jurisdiction: The Political Branches And The

Transnational Prosecution Of International Crimes", *The American Journal Of International Law*, 151 (1), p.1.

ships. In this article it is stipulated that warships or government ships are considered as vessels that carry out piracy when their crew committed mutiny and performs the actions referred to in Article 101. It should be noted that only the crew committed the mutiny who should be considered as the perpetrator of piracy. When a warship or government ship does so, the immunity given to it under Article 95 and Article 96 will automatically be lost and each country can detain it as it did with other pirate ships.

Detention of ships conducting piracy, based on Article 107, can only be carried out by warships or government vessels authorized to carry out detention. Article 105 authorizes the detention of pirate ships to each state including detain people and items aboard it. The person conducting such crime can be punished based on the national law of the state that made the detention. The detention referred to in Article 105 can only be carried out on pirate ships that are on the high seas or outside the jurisdiction of other states. Pirate ships cannot be detained in territorial waters, archipelagic waters and internal waters without the approval of the coastal state, even if the piracy had previously occurred on the high seas. For example in dealing with piracy and armed robbery at sea in Somalia, the government of Somalia requests the international assistance to deal with piracy and armed robbery at sea, even give consent for the states and international organization who collaborate with Somali government to conduct the operations to combat piracy and armed robbery at sea not only on the waters off the coast of Somalia but they also can enter the Somali waters.¹⁴

1982 UNCLOS regulates piracy, but not one article in it regulates the issue of armed robbery at sea, even though these two actions are two different things and have different legal implications.¹⁵ In April 1984, the Maritime Safety Committee (MSC), an agency of IMO, determined that piracy and armed robbery at sea were different problems.¹⁶ The regulation regarding the armed robbery at sea itself can be found in international rules that bind states in certain regions or in documents of international marine

¹⁴ United Nations, 2008, "Security Council, Resolution 1816 (2008) Adopted by the Security Council at its 5902nd meeting on 2 June 2008", [online] <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/361/77/PDF/N0836177.pdf?OpenElement>, (accessed on 29th of March 2012)

¹⁵ Yvonne M. Dutton, 2010, "Bringing Pirates To Justice: A Case For Including Piracy Within The Jurisdiction Of The International Criminal Court", One Earth Future Foundation, p.8.

¹⁶ Yonah Alexander and Tyler B. Richardson, 2009, *Terror On High Seas, From Piracy To Strategic Challenge, volume I*, ABC-CLIO, LLC, Santa Barbara, California, p.512.

institutions such as IMO. Further, the discussion on this subject is discussed in the next sub-section.

B. *IMO Resolution A.922(22) Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships*

The Definition of armed robbery at sea in IMO Resolution A.922(22) Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships can be found in its annex, point 2.2, which define armed robbery at sea as: “any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, directed against a ship or against persons or property on board such a ship, within a state’s jurisdiction over such offences.”

In Point 3.1 it is recommended that states take steps needed to establish their jurisdiction against crimes of piracy and armed robbery at sea, including adjusting their laws and regulations so that the state can detain and prosecute the perpetrators of these crimes. Thus the jurisdiction of a state against the crime will be established when the crime has been regulated in its national legislation.

In Point 3.3, states are also encouraged to make efforts to help ship owners report the incidents of piracy and armed robbery at sea they have experienced. In order to achieve this, coastal states are asked to do endeavor and not burden shipowners with additional costs of reporting such crimes. Through Point 3.4, coastal states are also encouraged to collaborate bilaterally or multilaterally in investigating crimes against piracy and armed robbery at sea. This means that states that make such agreements must cooperate in investigating the crimes that happened, and not just exchanging information. In this resolution it also regulates the existence of investigators who are in charge of evaluating the crimes of piracy and armed robbery at sea, which according to Point 2.3 gives definition of the investigator as: “those people appointed by the relevant state(s) to intervene in an act of piracy or armed robbery against a ship, during and/or after the event”.

Point 5 describes as to how cooperation or relations between agencies or states might be involved in dealing with piracy and armed robbery at sea. In Point 5.4, it is emphasized the need to identify the person or agency in charge of conducting investigations. This is necessary to prevent confusion or delay in the investigation process which can result in the loss of

evidence or endanger the internee. Based on Point 5.5 it is also stipulated that recognition must also be given to the national interests of other states that may be involved in each case that occurs, for example: the flag state; states that have territorial waters where crime occurs; state of origin of the offender; state of people on board; state of cargo owner; and the state where the crime was committed. Point 5.5 also emphasizes that in the case of piracy and armed robbery at sea occurred outside of territorial waters, those who hold responsibility are flag states, and in the case of armed robbery at sea the state that holds the responsibility is the state that have jurisdiction over the territorial sea where the crime happened. Nonetheless, it must be admitted that other states have legal interests in every event that occurs, therefore cooperation between them is vital for the success of the investigation. In addition to states that may be involved in the process of investigating piracy and armed robbery at sea, Point 5.6 also open the chance for the involvement of other international bodies such as Interpol and IMB in the case that there is the possibility of organized transnational crime.

Based on IMO Resolution A.922(22) Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships above, there are three important things to be noted:

1. There is a “gray area” in combating armed robbery at sea

This resolution produces a gray area where there is an action that would be difficult to be classified into piracy or armed robbery at sea. In this resolution, armed robbery at sea is described as an act of violence, detention or hijack, in addition to piracy, which occur within the jurisdiction of a state. Furthermore, in Point 5.5 it is stipulated that for piracy or armed robbery at sea that occurs outside territorial waters of any state, the investigation process will be under the responsibility of the flag state, while for armed robbery at sea, those responsible for investigating are the state that has the jurisdiction over the territorial sea where the crime happened. Thus it can be understood that the sentence "within a jurisdiction" which is stated in the definition of armed robbery at sea in Point 2.2 of this resolution refers to an area that is no more than the territorial waters of a state. In other words this resolution limits that armed robbery at sea is an action carried out within the territory to the territorial waters only. If connected with 1982 UNCLOS which stipulates that piracy occurs in the high seas or in areas outside of the jurisdiction of a country, then an area will arise in which an act of violence, detention or piracy against another ships is not included in in terms of piracy and armed robbery at sea. The gray area here is referred to the EEZ and contiguous zones in which the state only has sovereign rights. In EEZ states only has sovereign rights for the purpose of exploring, conserving, and managing the biological and non-living resources there. The coastal state also

has jurisdiction in the establishment of artificial islands, installations and buildings, marine scientific research, and protection and preservation of the marine environment in EEZ. Meanwhile in contiguous zone, states only have jurisdiction in field of customs, fiscal, immigration, and sanitary.

The regulation of Contiguous zone and EEZ in 1982 UNCLOS does not mention that states have jurisdiction over piratical act in these area but it also does not clearly state that if the piratical act occurs in these area they should befall under the definition of piracy or armed robbery at sea.

1982 UNCLOS clearly states that locus delicti of piracy is the high sea and an area outside of the jurisdiction of any state, but which is not further defined which sea area is included in the terminology of area outside the jurisdiction of any state. This has caused a lot of debate whether acts of violence, detention, or piracy against other ships in the EEZ are included in armed robbery at sea or not. If not, the crime can be included in the sense of piracy and subject to universal jurisdiction. This will obviously be very detrimental to the coastal state which, although limited, still has jurisdiction based on sovereign rights in that area. The involvement of foreign parties in handling crimes in the region, if they are subject to universal jurisdiction, will greatly reduce the role of the coastal state, because the handling will be subject to the provisions of Articles 100-107 of 1982 UNCLOS. Warships of other countries can enter the coastal state EEZ to deal with such crimes. which potentially threatens natural resources and marine ecosystems in the area.

2. The complexity in determining jurisdiction over piracy and armed robbery at sea that occur outside territorial waters

Point 5.5 stipulates that: "... In cases of piracy and armed robbery against ships outside territorial waters, the flag should take lead responsibility ...". The words outlined indicate the mixing of two different forms of crime in the same area. Piracy has universal jurisdiction while the armed robbery at sea is subject to the state jurisdiction where the crime occurred. The difference between these two actions is piracy occurs on the high seas or outside the jurisdiction of any country while armed robbery at sea occurs within the jurisdiction of a country. Thus, these two actions cannot occur in the same locus delicti. But in Point 5.5 both of these actions have been determined to be included in the same area, namely areas outside of territorial waters, which if seen under 1982 UNCLOS include contiguous zones and EEZ. This will cause complexity in determining jurisdiction over crimes that occur. It complicates the classification of violent, detention or piracy crimes that occur in the EEZ area and contiguous zone, whether included in piracy or armed robbery at sea.

C. Regional Regulation Regarding Armed robbery at Sea
1) Regional Cooperation Agreement on Combating Armed Robbery against Ships in Asia (ReCAAP)

ReCAAP is a collaboration on eradicating armed robbery at sea which has been most ratified by states in the world. ReCAAP was approved in Tokyo, Japan, on November 11th, 2004, and became effective on September 4th, 2006. The agreement was attended by 16 states, namely Japan, China, South Korea, India, Bangladesh, Sri Lanka and 10 ASEAN states. However, in signing, China, Malaysia and Indonesia refused to sign the agreement.¹⁷ Further, China change its consideration and decide to sign and to ratify it. Malaysia also has signed and ratified it. Meanwhile, until now Indonesia has not yet determined its position, whether accepting the ReCAAP proposal or not. The content of ReCAAP is essentially a mechanism of cooperation in the effort to combat armed robbery and acts of piracy in Asia. In Article 2 of ReCAAP defines armed robbery at sea as: “Any illegal acts of violence or detention, or any act of depredation, committed for private ends and directed against a ship, or against persons or property on board such ship, in a place within a Contracting Party’s jurisdiction.” Therefore, this action must occur within the jurisdiction of the coastal state in order to be included in the armed robbery at sea definition based on this article, but it is not explained in ReCAAP regarding the extent of the territory which is still included in a coastal state’s jurisdiction.

In ReCAAP there are three main pillars namely: information sharing, capacity building, and cooperative regulations. Information sharing is done through the Information Sharing Center (ISC). ISC consists of the Governing Council and the Secretariat. The Governing Council consists of representatives of each party and the Secretariat is headed by an executive director selected by the Governing Council.

Based on Article 14, in order to increase the capacity of the contracting state in handling piracy and armed robbery at sea, each contracting state must provide great assistance to other states requesting it. Capacity building can be done through the provision of technical assistance such as education and training programs.

Regarding the cooperative regulations, which regulated in Article 15, it can be carried out through joint training or other forms of cooperation approved by the contracting states. In addition to the three ReCAAP pillars, Article 12 also regulates the extradition of piracy and armed robbery at sea

¹⁷ Bateman Sam, et al, 2009, “Good Order At Sea In Southeast Asia”, *Rajaratnam School of International Studies Policy Paper*, Nanyang Technological University, p 36.

perpetrators among contracting states which have jurisdiction over them.

From the explanation above, it can be seen that ReCAAP promotes multiregional collaboration in dealing with piracy and armed robbery at sea. This is reflected in the existence of ISC which consists of representatives from all contracting states. The cooperation was not only limited to technical assistance, or coordinated patrols such as those carried out by Indonesia, Malaysia and Singapore, but there were also joint exercises that could be carried out among contracting states. Among the contracting state there are also quite sharp differences in the classification of piracy and armed robbery at sea that have not been clarified jointly by them.¹⁸

2) The Regulation in Handling Piracy and Armed Robbery Off the Territorial Sea and Waters of Somalia

Piracy and armed robbery at sea outside the territorial sea of Somalia and Somali waters emerged after the state fell into an internal crisis after the coup carried out in 1990. The crisis triggered a variety of social problems and caused increased poverty due to lack of employment.¹⁹ Piracy and armed robbery at sea in this region increased in 2008 and attracted international attention. It can be seen from the amount of international attention to this matter since 2008 until 2012 with the issue of 9 United Nation Security Council (UNSC) resolutions relating to the handling of piracy and armed robbery at sea off the coast of Somali Waters and within Somali waters, namely, UNSC Resolution 1816 (2008), UNSC Resolution 1838 (2008), UNSC Resolution 1846 (2008), UNSC Resolution 1851 (2008), UNSC Resolution 1897 (2009), UNSC Resolution 1918 (2010), UNSC Resolution 1950 (2010), UNSC Resolution 2015 (2011), and UNSC 2020 Resolution (2011).

In these nine resolutions there are several important things that can be seen relating to the handling of piracy and armed robbery at sea outside the territorial sea and Somali waters, namely:

- a) Authorization of the Transitional Federal Government (TFG) as an official government in Somalia

From all the resolutions mentioned above, it can be seen that the basis of the authorization given to states and international organizations

¹⁸ Steven Yohanes Pailah, 2008, “*Pengelolaan Isu-Isu Keamanan di Selat Malaka Periode 2005- 2006*”, p.40.

¹⁹ Kenneth Menkhaus, 2003, “Somalia: A Situation Analysis And Trend Assessment”, *Writtenet Independen Analysis*, hlm.1-2, <http://www.unhcr.org/refworld/pdfid/3f7c235f4.pdf> (accessed on 24th of February 2012).

involved in handling piracy and armed robbery at sea outside the territorial sea and Somali waters in this agreement is come from TFG. This can be seen from the various statements contained in this resolution, for example in the UN Security Council Resolution 1816 (2008) states that: “Taking further note of the letter from the Permanent Representative of the Somali Republic to the United Nations to the President of the Security Council dated 27 February 2008, conveying the consent of the TFG to the Security Council for urgent assistance in securing the territorial and international waters off the coast of Somalia for the safe conduct of shipping and navigation”. These underlined words clearly show that the approval of the TFG as Somalia's official government is very important in giving authority to the international community to assist TFG in handling piracy and armed robbery at sea, even when it carries out within the territorial waters which is the jurisdiction of Somalia.

Other parts of the resolutions also show the same thing. In each renewal period for the international community to remain involved in handling piracy and armed robbery at sea outside the territorial sea and Somali waters, it always states that the TFG have previously given approval on this matter, for example, Article 10 UNSC Resolution 1846 (2008) states that: “Decides that for a period of 12 months from the date of this resolution States and regional organizations cooperating with the TFG in the fight against piracy and armed robbery at sea off the coast of Somalia, for which advance notification has been provided by the TFG to the Secretary-General”. These underlined words show that only with the authority given by TFG, the handling of piracy and armed robbery at sea outside the territorial sea and Somali waters can be carried out within a certain period as stipulated in the resolution.

- b) There is a time and place limitation of the authority applied in handling piracy and armed robbery at sea off the coast and territorial waters of Somalia

Of all the resolutions outlined above, it is clear that measures to deal with piracy and armed robbery at sea carried out outside the territorial sea and waters of Somalia based on these resolutions can only be applied outside the territorial sea and Somali waters. This is reflected in the statements in these resolutions stating that the authority given in these resolutions was only applied in relation to the crisis situation in Somalia and did not become a customary international law. For example, we can see the statement

contained in Article 10 of the UN Security Council Resolution 1851 (2008), which states that: “Affirms that the authorization provided in this resolution apply only with respect to the situation in Somalia and underscores in particular that this resolution shall not be considered as establishing customary international law”. The same thing continue to be restated in other resolutions.

In addition to limiting that these resolutions only apply to the crisis situation in Somalia and are not intended to be a customary international law, the resolutions also limit that the actions permitted are in accordance with the resolution only can be applied within a certain period of time. For example, it is stated in UNSC Resolution 1897 (2009) that: “Noting the several requests from the TFG for international assistance to counter piracy off its coast, including the letters of 2 and 6 November 2009 from the Permanent Representative of Somalia to the United Nations expressing the appreciation of the TFG to the Security Council for its assistance, expressing the TFG’s willingness to consider working with other States and regional organizations to combat piracy and armed robbery at sea off the coast of Somalia, and requesting that the provisions of resolutions 1846 (2008) and 1851 (2008) be renewed for an additional twelve months.” Thus, this resolution limits that the handling of piracy and armed robbery at sea is limited to only 12 months.

c) It is not explained about the definition of armed robbery at sea

In the nine UNSC resolutions mentioned above it is always mentioned the term armed robbery at sea along with piracy (these resolutions use the term piracy), but not single resolution explains the definition of armed robbery at sea.

In these resolutions, it was mentioned about 1982 UNCLOS as the legal framework in combating piracy and armed robbery at sea, which from 1982 UNCLOS, as explained in the previous sub-section, will only be found the regulations regarding piracy but not armed robbery at sea. For example, in UNSC Resolution 1950 (2010) states that: “Further reaffirming that international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS), sets out the legal framework applicable to combating piracy and armed robbery at sea, as well as other ocean activities”.

3) Regulations for Handling Armed Robbery at sea in the Malacca-Singapore Strait

a. The 2005 Batam Joint Statement of the 4th Tripartite

Ministerial meeting of the Litoral States on The Straits of Malacca and Singapore (The Batam Joint Statement)

The Batam Joint Statement is a joint statement of three foreign ministers from three coastal states which border with the Malacca-Singapore Strait, namely Indonesia, Malaysia and Singapore, regarding the management of the Malacca-Singapore Strait, which was signed on August 2nd 2005. The Batam Joint Statement was set forth in the fourth meeting between foreign ministers from three states bordering the Malacca-Singapore Strait in Batam, Indonesia. At that time Indonesia was represented by Minister of Foreign Affairs H.E. Dr. N. Hassan Wirajuda, Malaysia was represented by Foreign Minister Hon. Dato 'Seri Syed Hamid Albar, and Singapore was represented by Foreign Minister H. E. George Yeo.

In the Batam Joint Statement, a number of matters concerning the management of the Malacca-Singapore Strait are stipulated which can be divided into three parts, namely safety of navigation, environmental protection, and maritime security issues. It is stated in Point 3 that to deal with the issue of environmental protection in the Malacca-Singapore Strait, a meeting of three ministers from the three states bordering the strait will be held annually to discuss this issue and a meeting between Tripartite Technical Experts Groups (TTEG) on Safety of the navigation and Environmental Protection and Revolving Fund Committee (RFC) will also be held to discuss technical issues regarding environmental protection in the strait.

In Point 4, it is affirmed regarding the sovereignty and sovereign rights of the coastal states bordering the strait of the Malacca-Singapore as stipulated in the 1982 UNCLOS as the strait used for international navigation. Therefore, the main responsibility in handling safety of navigation, environmental protection and security issues in the Malacca Strait-Singapore is in the hand states bordering the strait, namely Indonesia, Malaysia and Singapore. Point 5 of this joint statement recognizes the interests of the strait user states and other relevant international bodies, and the role they can apply in it, but the implementation of all these must take into account the existence of a coastal states bordering the strait which hold the main responsibility for managing the strait.

To aid the work of TTEG on Safety navigation and Environmental Protection, then in Point 12 it is stipulated regarding the establishment of TTEG on Maritime Security. The establishment of this body strengthening the position of the states bordering the strait as the holder of jurisdiction and in the management of this strait including in terms of safety of navigation, environmental protection and maritime security in the Malacca-Singapore

Strait. This affirmation is important considering there have been efforts to press the coastal state bordering the Malacca-Singapore Strait in order to involve the international actors in securing the strait. These efforts continued to be intensified by Japan and the United States when the armed robbery rate increased in the strait in 2000.²⁰

In Point 13, it is clarified about the limitations of the involvement of strait user states and relevant international bodies in the management of the Singapore-Malacca Strait. Their involvement is limited to areas related to capacity building, training and technology transfer, and other assistance in accordance with 1982 UNCLOS. Based on this, it can be seen that the involvement of parties other than states bordering the Malacca - Singapore Strait is limited to the provision of technical assistance not directly involved in securing the strait. For this reason, Indonesia has always refused the attempt of foreign parties to involve in securing the strait directly, including rejecting the efforts of the United States who want to place military force in the Malacca-Singapore Strait to help secure the strait from attack by pirates. Indonesia prefers to conduct coordinated patrols with Malaysia and Singapore in securing the strait, which is called MALSINDO.²¹

b. The 2007 Co-Operative Mechanism Between the Littoral States and User States on Safety of Navigation and Environmental Protection in the Straits of Malacca and Singapore

In Singapore meeting 4-6 of September 2007 it has been agreed between three coastal states, established in Singapore Statement, regarding the establishment of Cooperative Mechanism (CM). Furthermore, CM is regulated in the Co-Operative Mechanism Between the Littoral States and User States on Safety of Navigation and Environmental Protection in the Straits of Malacca and Singapore.

Point 7 stipulates that the main objective of the CM is to encourage more dialogue and cooperation between coastal states bordering the strait, strait user states and other stakeholders. This is carried out according to principle of recognition of sovereignty, sovereign rights, jurisdiction and territorial integrity of coastal state on that strait. The cooperation is also must be

²⁰ Catherine Zara Raymond, 2009. "Piracy And Armed Robbery In The Malacca Strait :A Problem Solved?", *Naval War College Review*, 62, (3) 31, p.35.

²¹ Ian Storey, 2009, "Maritime Security in Southeast Asia: Two Cheers For Regional Cooperation", *Southeast Asian Affairs*, p.41.

carried out in accordance with Article 43 of 1982 UNCLOS. The cooperation is carried out in the framework of the Tripartite Technical Experts Groups (TTEG) on the Safety of Navigation in the Straits of Malacca and Singapore and the main responsibility in handling safety of navigation and environmental protection is in coastal states bordering the strait. Point 7 also recognizes the interests of user states and the role they can play in relation to the existence of the strait. Collaboration between coastal states bordering the straits and user states, and other stakeholders is carried out on a voluntary basis.

CM, based on Point 22, is a flexible and simple collaboration. This collaboration can be formed in various forms of regulation as long as it does not conflict with the CM framework which places the main responsibility on the coastal states bordering the strait. The instance of the forms of cooperation can be formed in the 3 + 1 forum, meaning that 3 coastal states bordering the strait plus strait user states or other stakeholders. In essence, it must always involve 3 coastal states bordering the strait. For this reason, any cooperation regarding safety of navigation and environmental protection is carried out through TTEG on Safety of Navigation and Environmental Protection, while cooperation in technical assistance in matters of security in the Malacca-Singapore Strait can be carried out bilaterally.²²

Thus, it can be seen that in the cooperation established between the coastal states bordering the strait and other parties outside them is based on the recognition of sovereignty, sovereign rights and coastal state jurisdiction over the Malacca-Singapore strait, and the main responsibility lies with the coastal state bordering the strait. The involvement of other parties is also limited to certain level which mostly technical in nature, especially in relation to the issue of maritime security in the strait. The handling of maritime security, including the handling of armed robbery problems, is more focused on the role of Indonesia, Malaysia and Singapore as the state bordering the strait and having jurisdiction over it.²³

²² Kementerian Luar Negeri Indonesia, 2006, "*Masyarakat Internasional Mengakui Keberhasilan Negara Pantai Dalam Mengamankan Selat Malaka*", [online] http://www.deplu.go.id/_layouts/mobile/PortalDetail-NewsLike.aspx?l=..&ItemID=8e294d9d-590f-4a6f-8328-4118f8f76cd1, (accessed on 11th June 2012).

²³ From the searches carried out by the author to the Ministry of Foreign Affairs, actually there are other agreements relating to the security of the Malacca-Singapore Strait, but the agreement cannot be shown to the public because it contains the placement of Indonesian military forces in the strait which if it is published to public

D. Differentiation of Piracy and Armed Robbery at Sea

Based on 1982 UNCLOS, it is clear that piracy is any act of violence, detention, or seizure carried out on another ship or person or item contained on it. This crime must be carried out in areas outside of the jurisdiction of any state or high seas.

The emphasis on piracy, based on this definition, is that the crime takes place outside the territory that falls under jurisdiction of any state or on the high seas. This action will be subject to universal jurisdiction which means that all states are given the authority to take action against these crimes. In this case the jurisdiction of the flag state that applies when the ship is on the high seas will be lost. As the oldest crime, piracy is considered as enemy of all mankind, so that in all national laws it is considered a crime.²⁴

Armed robbery at sea, as regulated in ReCAPP and the International Maritime Organization Resolution A.922 (22) Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships, is an act of violence, detention or seizure carried out on ships, person or item on it. The crime referred to here is carried out in the area that falls under the jurisdiction of a state. Because it is in the jurisdiction of a state, the crime will be subject to the authority of the state where the crime occurred. The other party has no jurisdiction over the crime. The involvement of foreign parties is only possible on the basis of the agreement of the state that has the jurisdiction. For example, the handling of armed robbery at sea in Somalia's territorial waters carried out jointly by TFG and other states as well as other regional and international organizations. It was done based on a letter dated November 10th, 2011 submitted by a permanent representative of Somalia at the UN to the UN Security Council.²⁵

Thus, it can be seen that the difference between piracy and armed robbery at sea lies in two things:

- a) The area where the crime occurred (*locus delicti*). In the case of piracy the area where the crime occurs must be outside of the jurisdiction of any state or on the high seas, whereas armed

will threaten the security of Indonesia's territory.

²⁴ Christopher C. Joyner, 2005, *International Law In The 21st Century, Rules For Global Governance*, Rowman & littlefield publisher, USA, p.137.

²⁵ UNSCR 2020 (2011). United Nations, "Security Council, Resolution 2020 (2011) Adopted by the Security Council at its 6663rd meeting, on 22 November 2011", [online] <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/604/21/PDF/N1160421.pdf?OpenElement>, (accessed on 29th March 2012).

robbery at sea occurs within the territory which is still the jurisdiction of a state; and

- b) Jurisdiction for crimes that occur. Universal jurisdiction will be applied to piracy which gives authority to all states to take action against these crimes, while against the armed robbery at sea, the jurisdiction of the state where the crime is committed will be applied.

From these differences it can be understood that the place where an event occurred will affect the jurisdiction of the incident. With regard to piracy and armed robbery at sea issues, against acts of violence, detention, or seizure carried out against other vessels in areas outside of the territorial sea and also not on the high seas, there is still much debate as to whether these actions include piracy or armed robbery at sea. Determination of the classification of actions is very important because it will affect the jurisdiction imposed on it.

From the elaboration above it can be seen that one of the differences in piracy and armed robbery at sea lies in the *locus delicti*. Piracy occurs on high seas or outside the jurisdiction of any state, while armed robbery at sea occurs within the jurisdiction of a state. The area which is still the jurisdiction of a state in 1982 UNCLOS includes, internal water, archipelagic water, 12 nautical miles territorial sea, 24 nautical miles Contiguous Zone and 200 nautical miles EEZ measured from the baseline. In these areas the coastal state Jurisdiction are still recognized. The implication is that armed robbery at sea is subject to the jurisdiction of the state where the incident occurs in contrast to piracy which universal jurisdiction can be applied to it.

In the definition stated by IMO an emphasis is added that armed robbery at sea, besides occurring in the jurisdiction of a state, is an action other than piracy. The implication of the existing definition is that armed robbery at sea is subject to the jurisdiction of the state where the incident occurs in contrast to piracy which universal jurisdiction can be applied to it.

Regarding piracy and armed robbery at sea, difficulties arising from act of piracy in the EEZ which categorized as piracy, though it should be categorized as armed robbery at sea.²⁶ This is compounded by the distortion of data produced by the agency that records piracy and armed robbery at sea throughout the world, for example, reports of loss of things of passing crew members also includes in IMB data.²⁷ Data generated by IMB or ReCAAP

²⁶ Russel Denise, 2010, *Who Rules the Waves? Piracy, Overfishing, and Mining the Ocean*, Pulto Press, New York, p.62.

²⁷ Steven Yohanes Pailah, *op.cit*, p.76

regarding piracy and armed robbery at sea also do not distinguish between these two crimes.

Another example is the case of Alondra Rainbow, a Japanese cargo ship, which was robbed in the Malacca-Singapore Strait, precisely in the waters included in Indonesia's jurisdiction. The ship was pirated by 35 people who used a cargo ship that was turned into a pirate ship. The pirates were then arrested by the Indian navy a month after the incident hundreds of miles from Indonesia and taken to trial in Mumbai.²⁸ This event categorically was not piracy so that the Indian navy did not have jurisdiction to arrest the perpetrators, because it occurs in Indonesian waters, this is included in the definition of armed robbery at sea and those who have jurisdiction over these crimes are Indonesia.

Problems regarding the armed robbery at sea that occur in the EEZ also appear in the definition of armed robbery at sea produced in the sub-regional meeting on the Western Indian Ocean, Gulf of Aden, and Red Sea areas held in Dar es Salaam, Tanzania, from 14-18 April 2008, in this forum, it was agreed on the definition of armed robbery as:

armed robbery against ships means any unlawful 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 against person or property on board of such a ship, within a State's internal waters, archipelagic waters, and territorial sea.

The definitions produced in this forum have been modified from the definitions contained in ReCAAP and IMO Resolution A.922 (22) Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships by adding the motives of private ends into the definition and replacing the sentence "within a state jurisdiction" becomes "within a State's internal waters, archipelagic waters, and territorial sea".²⁹ This definition states nothing about crimes that occur in the EEZ region. This raises a polemic about whether there is armed robbery at sea in EEZ or not. If not then what is contained in it is piracy which will be subject to universal jurisdiction. Actually, if you look at the existing definition of piracy, it will easily determine whether there is armed robbery at sea in EEZ or not. Daniel Heller-Roazen argues that there are four characteristics regarding the problem of piracy, namely:

²⁸ Russel Denise, *op.cit.*, p.66.

²⁹ James Karaska, *Op.cit.*, p.210.

- a. Piracy involves an area in which an extraordinary rule of law is applied;
- b. Piracy involves individuals who commit acts of crime, which are crimes that have a "universal" nature and are often also called "enemy of all";
- c. As a result of the first and second characteristics, pirates cannot be considered common criminals or lawful enemy;
- d. Because it is not included in common criminals or lawful enemy, the handling of piracy must be done with extraordinary measures.³⁰

The four characteristics above can only be applied to crimes of piracy, not to armed robbery at sea. Armed robbery at sea does not meet all the qualifications above. Because Armed robbery at sea is carried out in the jurisdiction of a state, it is categorized as a common criminals which are subject to the jurisdiction of the state \where the incident occurred, thus the crime also does not have a "universal" or "enemy of all" nature. Based on this, if we see similar crimes occurs in the EEZ, we will easily categorized it into armed robbery at sea because even though in the area a state only has sovereign rights with limited jurisdiction, it does not deny that the coastal states, by 1982 UNCLOS, are given jurisdiction in it. This reaffirms the definition of Article 101 of 1982 UNCLOS which requires piracy to occur in areas outside of the jurisdiction of any state or on the high seas, and that EEZ is not included in this area. Therefore, the crime (common criminals) that occurs in it is armed robbery at sea. Thus, it cannot be said that there is piracy in the EEZ area.

1982 UNCLOS only regulates the problem of piracy but not single articles regulates armed robbery at sea. In ReCAAP it does regulate armed robbery at sea, but ReCAAP is not enough to facilitate the differentiation of regulations between piracy and armed robbery at sea, because acceptance by Asian states themselves are not so large, so that it has no big influence. In addition, states that signed ReCAAP are still debating about the classification of piracy and armed robbery at sea. The definition of armed robbery at sea from IMO is also only in the form of soft law, namely a resolution to guide the handling of piracy and armed robbery against ships, so that it does not have a strong binding power for existing states.

This is compounded by the fact that, despite establish the definition of armed robbery at sea as stated above, in presenting data on piracy and armed robbery at sea that occur worldwide, IMO only distinguishes it from the

³⁰ Daniel Heller-Roazen, 2009, *The Enemy Of All, Piracy and The Law Of Nations*, Zone Books, New York, p.10-11.

event happened in international waters and one that happened in territorial waters or ports. This kind of presentation of data will result in a vague understanding of the armed robbery at sea, because UNCLOS recognizes the jurisdiction of a state not only in territorial waters and ports, but also to the EEZ.

Concluding Remarks

The regulation of piracy in international law have been carried out and contained in the global binding rules, namely in 1982 UNCLOS, but the regulation of armed robbery at sea have only been carried out and contained in regional rules which only bind several states. The regulation of armed robbery at sea is also incomplete as the regulation of piracy in 1982 UNCLOS which results in the emergence of other legal problems such as the incomplete armed robbery at sea definition in these rules limits the locus delicti from this crime so that it leaves the grey area where when this crime occurs in the area, it will be difficult to be categorized as piracy or armed robbery at sea. Thus a new regulation is needed regarding armed robbery at sea to answer these problems and it is better if these new rules are made in the UN forum so that they can be binding globally.

Bibliography

Regulation

1982 United Nation Convention On the Law of the Sea

UN Security Council Resolution 2020 (2011). United Nations, “Security Council, Resolution 2020 (2011) Adopted by the Security Council at its 6663rd meeting, on 22 November 2011”, [online] <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/604/21/PDF/N1160421.pdf?OpenElement>, (accessed on 29th of March 2012);

IMO Resolution A.922(22) Code of Practice for the Investigation of the Crimes

Books

Alexander Yonah dan Tyler B. Richardson, 2009, *Terror On High Seas, From Piracy To Strategic Challenge, volume I*, ABC-CLIO,LLC, Santa Barbara, California;

- Denise Russel, 2010, *Who Rules the Waves? Piracy, Overfishing, and Mining the Ocean*, Pulto Press, New York;
- Dutton Yvonne M, 2010, “*Bringing Pirates To Justice: A Case For Including Piracy Within The Jurisdiction Of The International Criminal Court*”, One Earth Future Foundation;
- Harris D.J, 2004, *Cases and Materials On International Law: Sixth Edition*, Sweet & maxwel, London;
- Heller-Roazen Daniel, 2009, *The Enemy Of All, Piracy and The Law Of Nations*, Zone Books, New York;
- Joyner Christoper C., 2005, *International Law In The 21st Century, Rules For Global Governance*, Rowman & littlefield publisher, USA;
- Kraska James, 2011, *Contemporary Maritime Piracy: International Law, Strategy, and Diplomacy*, Praeger, Santa Barbara, California;
- Malanczuk Peter, 1997, *Akehurst's Modern Introduction to International Law, Seventh revised edition*, Routledge, New York;
- Menkhaus Kenneth, 2003, “Somalia: A Situation Analysis And Trend Assessment”, *Writenet Independen Analysi*, <http://www.unhcr.org/refworld/pdfid/3f7c235f4.pdf> (accessed on 24th of February 2012);
- O'Brian John, 2001, *International Law*, Routledge-Cavendish, New York;
- Sam Bateman,dkk, 2009, “Good Order At Sea In Southeast Asia”, *Rajaratnam School of International Studies Policy Paper*, Nanyang Technological University;
- Schabas William A, “International crime” dalam David Armstrong, ed, 2008, *Routledge Handbook of International Law*, Taylor & Francis e-Library, United Kingdom;
- Shaw Malcom N, 2001, *International Law: Fourth edition*, Cambridge University Press, United Kingdom;
- Storey Ian, 2009, “Maritime Security in Southeast Asia: Two Cheers For Regional Cooperation”, *Southeast Asian Affairs*;

Journals

- Dela Pena Joyce, 2009, “Maritime Crime In The Strait of Malacca: Balancing Regional and Extra- Regional Concerns”, *Stanford Journal of International Relation*, X, (2) 1;
- Langer Ma’ximo, 2011, “The Diplomacy Of Universal Jurisdiction: The Political Branches And The Transnational Prosecution Of International Crimes”, *The American Journal Of Internationla Law*, 151 (1);
- Raymond Catherine Zara, 2009. “Piracy And Armed Robbery In The Malacca Strait :A Problem Solved?”, *Naval War College Review*, 62, (3) 31;

Thesis

- Pailah Steven Yohanes, 2008, tesis, “*Pengelolaan Isu-Isu Keamanan di Selat Malaka Periode 2005- 2006*”;

Internet

- AgheniÑei Mihaela dan Luciana Boboc, 2011, “Universal Jurisdiction And Concurrent Criminal Jurisdiction”, [online] www.usyd.edu.au (accessed on 4th of July 2012);
- Kementrian Luar Negeri Indonesia, 2006, “*Masyarakat Internasional Mengakui Keberhasilan Negara Pantai Dalam Mengamankan Selat Malaka*”, [online] http://www.deplu.go.id/_layouts/mobile/PortalDetail-NewsLike.aspx?l=..&ItemID=8e294d9d-590f-4a6f-8328-4118f8f76cd1, (accessed on 11th of June 2012);
- United Nations, 2011, “*Table recapitulating the status of the Convention and of the related Agreements*”, [online] http://www.un.org/Depts/los/reference_files/status2010.pdf , (accessed on 4th of July 2012);

Gerald A. Bunga

The Regulation of Piracy and Armed Robbery at Sea in International Law

Wheaton Henry, “*Piracy Definition: Piracy According To The Law of Nations*”, [online]
<http://www.duhaime.org/LegalDictionary/P/PiracyJureGentium.aspx>, (accessed on 18th May 2012);

Wheaton Henry, 1855, *Elements of International Law*, Little Brown and Company, Boston;