



SEA VIEWS

MIMA'S ONLINE COMMENTARY ON MARITIME ISSUES

No. 2/2011

21 February 2011

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Easier to walk the plank?

Melda Malek, Researcher at Centre for Ocean Law and Policy, evaluates the legal challenges in prosecuting Somali pirates under the principle of universal jurisdiction

Pirates ahoy!

There has been no effective government in Somalia since the fall of the regime of Mohamed Siad Barre in 1991. Currently, the country has only an interim, provisional government and is undergoing severe economic difficulties exacerbated by decades of factional fighting, floods, drought, and famine. Due to its barely functioning state, unscrupulous parties have taken advantage of the situation by depleting fish stocks in Somali waters by their illegal fishing activities, or worse, dumping drums of toxic wastes into the sea.

What started as a vigilante move on the part of irate Somali fishermen hassling foreign trawlers and waste-dumpers for a fee, has turned into full fledge piratical enterprise when everyone discovered the lucrative prospects. Now, no merchant vessel or oil tanker plying the region is safe from the marauding pirates. Even vessels operated by the World Food Programme, tasked with delivering food and aid to Somalia, were hijacked by these scourges of the seas.

The recent pirate attack on a Panamian-flagged, Malaysian-chartered, Filipino-crewed, Singapore-bound tanker, the MT *Bunga Laurel* in the high seas off the Gulf of Aden highlighted the escalating seriousness of the piracy threat in that region. Only the quick and decisive action of the Royal Malaysian Navy's elite team of commandos, PASKAL, prevented the horrific possibility of a hijacking and kidnapping for ransom of the vessel and the 23 crew on board.

Seven pirates were apprehended and brought to Malaysia to face the music. The event also highlighted the complexity of the piracy situation worldwide, especially on the question of what to do with the apprehended pirates. Unfortunately, it is not as easy as making them walk the plank. Various factors have to be taken into consideration such as costs, logistics, ability to prosecute, due process, and human rights aspects. The prosecution of the captured Somali suspects would be Malaysia's first trial involving high sea piracy and as such careful planning and implementation of the trial is essential to ensure successful prosecution of perpetrators.

The legal tangle

It is well set under customary law and codified in The Law of the Sea Convention 1982 (UNCLOS) under Article 100, that high seas piracy is a universal crime and that it is the obligation of all States to co-operate in the repression of piracy on the high seas. Pirates are described as *hostis humani generis* or enemy of mankind and, as such, all sovereign nations have the universal jurisdiction to apprehend, prosecute, and punish acts of piracy regardless of where it happens.

Article 101 of UNCLOS defines piracy as:

- (a) 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 against 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;
- (b) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) Any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

It has to be noted however, that universal jurisdiction only applies to piracy on the high seas or in a place outside the jurisdiction of any State. Article 58 (2) of UNCLOS, extends the definition of piracy under Article 101 (a) (ii) to include the exclusive economic zone (EEZ) in so far as it is not incompatible to the provisions of Part IV of UNCLOS on the EEZ. Pirate-like acts that take place within the jurisdictional waters of a State, such as those that occur now and then in the

Straits of Malacca, remain the responsibility and under the jurisdiction of that littoral state and perpetrators are often charged for armed robbery.

Apart from UNCLOS, other international instruments and bodies such as the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA), the International Maritime Organisation (IMO) and the International Maritime Bureau (IMB) have come out with different versions of what constitutes piracy.

Universal jurisdiction confers states the right and responsibility to prosecute pirates under domestic legislation irrespective of a pirate's nationality, the registry of the ship or the destination of the cargo.

This distinction is especially significant in the *MT Bunga Laurel* incident, as the nexus between Malaysia and the incident appear to be only in respect of the arresting party as well as the charterer of the vessel. Any action taken to prosecute must, however, come under the framework of local legislation.

Despite the *carte blanche* nature of universal jurisdiction, many countries are wary of or unwilling to shoulder the responsibility of prosecuting apprehended pirates. Some are unsure of how to incorporate international provisions into their own jurisdictions. Further, the logistical and legal burdens, the length of time the pirates have to be kept in custody pending transportation and trial, the piecing together of evidence and the gathering of witnesses who may be scattered across the globe, the trial, language barriers, legal assistance to the accused, the escalating costs of it would all prove to be major hurdles in efforts to successfully prosecute high-sea pirates.

Underage pirates will also add another layer of complexity to the matter in terms of the different laws applicable as well as the need to adhere strictly to human rights standards. Yes, they are pirates, but they are also humans and therefore entitled to due process and fair treatment whilst in custody.

Political concerns can also be a deterrent. 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 the concern over the likelihood of the suspects receiving harsh treatment in Somalia upon deportation which would violate British Human Rights Act. Due to these concerns, some patrolling navies have even adopted the 'catch and release' policy due to their states' unwillingness to be embroiled in the uncertainties and complications of prosecuting pirates.

To counter the various legal concerns and logistical difficulties of transporting pirates over long distances to be tried in the arresting state, the US, UK, EU nations, Canada, and China have signed agreements with Kenya in 2009 to host the prosecution of any pirate caught by the navies of the signatory states.

In April 2010 however, Kenyan officials voiced their unwillingness to accept further prosecution due to a massive caseload, strained justice system, and failure of some countries to give adequate financial support. Following Kenya's reluctance, another East African state has stepped up and agreed to receive and prosecute pirates. Seychelles has recently amended its criminal code as well as established a special court to enable it to prosecute pirates caught by foreign navies.

Another positive development that has taken place in the region takes the form of the IMO-sponsored meeting for East African states. Nine East African states signed the Djibouti Code which creates a network of information centers to report pirate attacks. Although not legally binding, signatories agree to arrest and prosecute pirates and to help repatriate hostages.

Malaysia however, has not signed any memorandum with Kenya or Seychelles or any other East African country that allows them to receive and prosecute pirates caught by the Malaysian navy. As such at the moment, the choices of what to do with captured pirates are restricted to *catch and release*, handing over to the barely functioning Somalia, or transporting them to be tried in Malaysian courts.

Catch and release will undermine international anti-piracy efforts and only encourage future acts of piracy. Handing them over to Somali authorities where they will most likely be treated harshly or released for being national heroes, is also not a viable option.

International pirates, local laws

It is certainly commendable that the Malaysian government has decided to prosecute the captured suspects on Malaysian soil thereby shouldering its international obligations towards repressing piracy. The universal jurisdiction conferred by UNCLOS and reflected in section 22(1) (a) (iv) of the Courts of Judicature Act 1964 (CJA) provides for the High Court with the criminal jurisdiction to try "all offences committed by any person on the high seas where the offence is piracy by the law of nations." Further, section 3 of the Penal Code allows for the punishment of offences committed beyond, but which by law may be tried within Malaysia. Jurisdiction is therefore firmly established.

Whilst UNCLOS provides for the universal jurisdiction for states to prosecute pirates, it does not provide for a legal framework to prosecute nor does it provide for any definition for the crime of piracy or what type(s) of punishment to be meted. It is up to the individual state to establish within its domestic legal framework the appropriate definition, elements to be fulfilled, and suitable punishment for the crime.

Malaysia does not have legislation or a provision catering specifically to the crime of piracy and has not incorporated any definition of piracy in domestic legislation. As such, the captured suspects will have to be tried for other crimes that could best fit the bill such as armed robbery, criminal conspiracy or even terrorism if certain elements are met.

The suspects could be brought here for the crime of piracy under the international principle of universal jurisdiction, yet when tried, charged under different offence(s). The question is whether Malaysia still retains the jurisdiction to try the suspects. As noted earlier the *MT Bunga Laurel* is neither a Malaysian registered ship, nor is any crew on board a Malaysian. It would be less complicated if the ship was Malaysian-registered as it would then provide Malaysia the extraterritorial jurisdiction to try the suspects for any offence under the Penal Code or under any other domestic legislation as provided for under section 22 (1) (a) (ii) of the CJA.

Piracy however, usually refers to a broad range of violent acts at sea. The first element under Article 101 (a) UNCLOS requires that the acts complained against should be crimes of violence such as armed robbery, murder or assault. As such, any violent act committed in the course of committing piracy could be tried as a crime on its own.

A comprehensive national anti-piracy enactment however, would ensure a more effective framework to try and punish pirates for various acts of piracy. It would provide for the definition of piracy whether within or beyond Malaysian jurisdiction and could cover acts such as hijacking, kidnapping for ransom, armed robbery or any other act that jeopardizes Malaysian interests at sea. It would dispel any uncertainty in conducting the prosecution and ensure that any piratical act committed would be met with just punishment. One has to find the right tool to do the job.

A look to the future

Malaysia and her neighbours have been exemplary in successfully suppressing pirate-like acts in the Straits of Malacca. High-sea piracy however, is a different kettle of fish. The recent attack on *MT Bunga Laurel* is not the first time that a Malaysian linked ship has been targeted by pirates. In August 2008, MISC tankers *MT Bunga Melati Dua* and *MT Bunga Melati Lima* were hijacked within days in the Gulf of Aden. Given that MISC vessels regularly ply the Gulf of Aden to carry energy, they are going to be continuously exposed to the threat of pirates actively operating in the area.

It is high time for Malaysia to improve her legal regime concerning piracy by enacting a national anti-piracy law. It was reported in the media not so long ago that a national anti-piracy legislation is in the pipeline. This is certainly a positive development towards enhancing and strengthening the domestic legal framework to deal with piracy that threatens Malaysia's maritime interests in whatever form. Perhaps the government could also look into the various regional efforts against piracy and consider entering into other joint cooperation efforts. Until a robust international legal regime dealing with piracy can be established and a strong domestic legal framework developed, and until law and order can be restored in Somalia, the best recourse would lie in taking the necessary deterrent steps to foil any pirate attacks before they occur.

Notes

It was reported on 11/2/2011 that all seven accused are being charged under section 3 of the Firearms Increased Penalty Act 1971, for discharging firearms at Malaysian Navy personnel during commission of robbery, an offence which carries a mandatory death penalty. According to the news report, the three juveniles, if found guilty, will be commuted to detention under the Criminal Procedure Code at the pleasure of the Yang di-Pertuan Agong. In another development, a US court recently sentenced the Somali pirate caught in 2009 to 33 years imprisonment for his role in the Maersk Alabama incident.

The author is indebted to Nazery Khalid, Amy Aai and Shantini Guna Rajan for their helpful comments and feedback.

A shorter version of this article appeared in the Star on 7 February 2011 and can be accessed at <http://thestar.com.my/maritime/story.asp?file=/2011/2/7/maritime/7925515&sec=maritime>