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The ASEAN Way towards Piracy Challenge

Ikaningtyas and Patricia Audrey Ruslijanto*

Piracy is a universal crime that needs to be combated by all nations. International efforts have been done for many years in order to suppress growth of piracy for international maritime security, which resulted in provisions concerning piracy within United Nations Convention on the Law of the Sea. It refers piracy as a crime taking place on high seas. In addition, International Maritime Organization also attempts to widen the definition of piracy. Even so, tackling piracy requires more than just a commitment of international community to define the term. Efforts must also be conducted by regional community to make them more effective, especially with their national legal instrument. Association of Southeast Asian Nations (ASEAN) as the regional organization in Southeast Asia region has sought to better cooperation among the members bringing the six behavioral principles laid in Treaty of Amity and Cooperation 1976 and also ASEAN Charter 2007 for the purpose of eliminating piracy within their region. Unfortunately, piracy is manifestly not easy to be eradicated in reality. This paper tries to identify and analyze the challenges that underlie ASEAN efforts to solve the piracy problem within the region.

Keywords: piracy, universal crime, United Nations Convention on the Law of the Sea, ASEAN Community

I. Introduction

"Pirata est hostis generis human" which means piracy is a crime of mankind is a term that had been recognized by world community. The existence of piracy has been recognized long time ago specially related with the robbery effort that happened in water area. The latest happenings of Somali's piracy over Indonesian vessel by taking its crew as hostage for an exchange of huge ransom from Indonesia's government and Strait Malacca piracy have triggered world community attention to realize that pirate's territory has no boundaries to excuse their action.

Many aspects have entailed the problem of the existence of piracy, from the old time tales of pirates to rule over the ocean to the excuse of defending their environment problem such as: illegal fishing and tremendous erosion of fish stocks severely constrained the ability of

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locals to earn a living and start to band together to protect their resources. This condition forced many of them turns to piracy, as to protect their fishing ground and waters since the absence of national coast guard and armed force. However, after seeing the profitability of piracy and ransom are usually paid, warlords began to facilitate pirate activities and splitting the profits with the pirates that make financial gain, though the pirates have not harmed their prisoners.

With regard to this matter international regulations also show their support by the establishment of the 1982 United Nations Convention on Law of the Sea (UNCLOS) that came into force on November 16th 1994, as a comprehensive convention to be made as relevant theme to refer on piracy as defined as crime act that happened in the high sea. Another effort also made by International Maritime Organization that expanded the definition of piracy to widened area such as internal water in archipelago islands and territorial water for coastal states.

The establishment of this Convention will not be effective without the support of regional legal instrument, which is the involvement of Association of South East Asia Nation (ASEAN) that founded on August, 8, 1967 that has transformed itself from a small sub regional organization into a major voice for peace, justice and moderation in the Asia-Pacific and world affairs.

The distinct conditions of ASEAN which comprised ten member states namely: Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam by its own geographical background and the closeness state position of one over another have made ASEAN as an organization of one root historical background, on the basis of accelerating economic growth, social progress and cultural development yet to foster the promotion of regional peace and stability.

In November 2007, the heads of ASEAN member states took historic steps towards establishing an "ASEAN Community" when they convened in Singapore for the 13th ASEAN Summit that consisted of three pillars, which are: ASEAN Security Community, ASEAN Economic Community, and ASEAN Social-Culture Community.

First and foremost, they signed the ASEAN Charter, which provides the organization with a formal legal personality and expands upon its values and institutional mechanisms. In addition, the member states

adopted the ASEAN Economic Community Blueprint, which paves the way for the establishment of a regional common market by 2015.

As also said by Cicero as *pirata non est ex perduellim numero definitus, sed communis hostis omnium* regards piracy is a crime where all people need to defeat it at all states because it can happen anywhere and everywhere, as also international law had treat piracy as a universal crime. By recognizing piracy as international crime, surely it will give their legal status on the jurisdiction of international court, instead of ordinary criminals or combatants that also mean states will not need to cope with the burden of prosecution alone.

This paper attempts to analyze what is the perspective of international law over piracy crime and the challenges that underlie ASEAN effort to solve the piracy problem.

II. Legal Perspective of Piracy

Referring to Justinian Digest in 529 AD and King John's Ordinance of 1201 were the early references to piracy but a law governing the piracy's issue documented in seventeenth century. The English passed a law on piracy in 1698 at national level followed by other states like Germany and United States.¹ But the first legal document governing piracy in international law was the 1856 Treaty of Paris, and then followed by 1889 Montevideo Convention accepted the principle that the suppression of piracy was the responsibility of mankind. Then, Nyon Agreement in 1937 defined unidentified attack as 'acts of piracy'.²

There was some conflict of ideas by writers regarding piracy definition. The definition had been used and been defined in different way. This followed by diverse terms to describe the omission such as maritime terrorism, arm robbery at sea or arm robbery against ship.³ According to W. E Hall, pirates are persons who deprecate by sea or

¹ Zou Keyuan, "New Development in the International Law of Piracy", *Chinese Journal of International Law*, Vol. 8, No. 2, 2009, p. 323-345.

² *Ibid.*, p 324.

³ Samuel Pyeatt Menefee, 'International Legal Framework (UNCLOS, SUA & UN Resolutions): How adequate are they in tackling piracy?', paper presented in Kuala Lumpur International Conference On Piracy and Crimes at Sea, The Royale Chulan Kuala Lumpur, 18-19 May 2009.

land without authority from a sovereign.⁴ Thomas Joseph observed that piracy act must be done outside the territorial jurisdiction of any civilized state.⁵

The standard of legal definition regarding piracy is found in the provision of the United Nations Convention Law of the Sea 1982. But attempt had been made before as early as 1924 to make provision on piracy during the era of League of Nations. Due to piracy was not a crucial problem nor faced by all states during that time the issue was then dropped out.⁶

According to the Polish Representative, M. Zaleski on 13 June 1927 approved by the Council of League of Nations stated:

*It is perhaps doubtful whether the question of piracy is of sufficient real interest in the present state of the world to justify its inclusion in the program of the (proposed) conference, if the scope of the conference ought to be cut down. The subject is in any case not one of vital interest for every State, or one the treatment of which can be regarded as in any way urgent, and the replies of certain Governments with regards to it indicate that there are difficulties in the way of concluding a universal agreement.*⁷

Therefore in 1958 Convention on the High Seas, the convention parties agreed to define piracy's issue expressly in the Convention through Article 14-21. Followed by the UNCLOS 1982 simply expressly put the same anti piracy provision in High Seas Convention 1958 stated in the Article 101 without any amendment that is:

1. Any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew of the passengers of a private ship or a private aircraft, and directed ;
 - a. On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - b. Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

⁴ W. E Hall, *International Law*, Oxford University Press, 1880, p. 214-215.

⁵ Thomas Joseph Lawrence, *The Principles of International Law*, p. 233.

⁶ Lawrence Azubuike, "International Law Regime against Piracy", *Annual Survey of International Law & Comparative Law*, Vol. 15, Iss. 1, 2009, p 3.

⁷ *Ibid*, p 3.

2. 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;
3. Any act inciting or of intentionally facilitating an act described in sub paragraph (a) or (b).

Under Article 105 UNCLOS 1982, any states have a right to seize a pirate ship as long as the ship on the high seas and other places outside jurisdiction of any state. The courts of law of the states have power to impose any penalties according the municipal law. In addition, there is an opinion that piracy suppression clause is also applicable to the exclusive economic zones (EEZs) as long as it is consistent with the relevant provisions of the Law of the Sea Convention regarding EEZ.⁸ Even though EEZ is a maritime zone within national jurisdiction but due to high seas freedom had been infringed, therefore piracy endangers navigation and affects the exercise of the navigational freedom which had been preserved by user state. As a result, it cannot be viewed as an infringement on coastal states right at that maritime zone (EEZs).

In some ways, UNCLOS might make fighting piracy harder. There are five elements need to be proved for the act of piracy, that are: a) the acts complained against should be crimes of violence such as robbery, murder, assault, and rape. b) The act must be committed on the high seas beyond the land territory or territorial sea, or other territorial jurisdiction, of any State; c) by private ships or public ship which does not have effective control of the States which owns it; d) for private ends e) from one ship to another, it means at least two ships are involved. This presents an opportunity for pirates to take advantage of the territorial waters of weak or failed states yet can have an important effect in gulfs, straits, and archipelagoes, where international shipping must transit through or close to sovereign waters.

However, in respect to the latest rapid development of pirate attack shown in widespread attack type, this weakness was remedied by the United Nations Security Council in June 2008. Resolution 1816 authorizes the international force patrolling the Gulf of Aden to "enter the territorial waters of Somalia for the purpose of repressing acts of piracy" and while there to "use...all necessary means to repress act

⁸ Zou Keyuan, *supra* note 1.

of piracy.”²⁷ The resolution is an unprecedented grant of authority to interdict coastal piracy. By removing a classic legal refuge of pirates – minimally governed sovereign coasts – the resolution, whose 6-month mandate was extended for another year in December 2008,²⁸ granting legal powers to fight piracy that were arguable even greater than existed under the classic law of nations. The Security Council’s action, which essentially authorized the use of military force in Somalia territory, was taken with the explicit consent of the country’s nominal transition government.²⁹ Nonetheless in the wake of the resolution, pirate attacks became, if anything, bolder.³⁰ Significantly, pirates began seizing vessels further from the Somali coast than ever before. One might speculate that this is because the resolution equalized the legal status of coastal waters on the high seas, reducing pirates’ incentives to focus their attacks on the former.

Another regulation also established by International Maritime Organization (IMO) that adopted the broad definition of piracy an act of boarding any vessel with the intent to commit theft or any other crime and with the intent or capability to use force in the furtherance of that act.⁹

Also there was an establishment of 2004 Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) as the first non legal binding international treaty, and the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 2005

Another important legal document to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) is 2005 SUA Protocol. This convention covered wider area either for political ends or private ends. It aims to punish any persons who commit the crime intentionally or unlawfully. This treaty allows any signatory³⁷ to prosecute anyone who “seizes or exercises control over ship by force or threat of force or any other form of intimidation.”

III. ASEAN Efforts in Combating the Challenges of Piracy

The long miles effort of ASEAN in strengthening its position as a

⁹ ‘Co-operation for Law & order at sea’, CSCAP Memo 5, p.14

regional organization in support its cooperation among member states elaborated in the establishment of ASEAN Charter that serve some following purposes, such as : (1) establish ASEAN as a legal entity; (2) stipulate ASEAN goals and objectives; (3) provide ASEAN with effective legal and institutional frameworks; (4) set the direction to ASEAN future; (5) define rights and obligations of member states; (6) specify ASEAN working procedures principles; (7) specify dispute-settlement mechanism among Member States. More over in carry out its functions effectively, the principal organs of ASEAN may comprise as follow: a) ASEAN Summit b) General Council for ASEAN Community c) ASEAN Standing Committee d) ASEAN Secretariat e) ASEAN Court of Justice f) ASEAN Peace and Reconciliation Council.

In accordance with the work of ASEAN itself, there are series of six behavioral principles set forth in the 1976 Treaty of Amity and Cooperation that consist of: (1) respect for state sovereignty; (2) freedom from external interference; (3) noninterference in internal affairs; (4) peaceful dispute settlement; (5) renunciation of the use of force; and (6) cooperation among members.

Ironically, the challenges of tackling piracy are not that simple to solve with, which are:

A. The abolishment war against pirates

A change of paradigm on a pirates treatment from the classic law of nations that regard them as criminals and military enemies, includes all treatment if they captured and tried to fight, a killed effort can be executed. They could be dealt with either militarily or criminally depending on the convenience of the capturing nation. Under modern international law, the situation is reversed. Pirates are not regarded as belligerents under the laws of war, and certainly not as illegal combatants.⁴⁶ Furthermore, a central provision of the Law of the Sea convention reserves the high seas for "peaceful purposes." Except in situations of immediate self-defense, naval forces cannot make war on pirates, but rather must seek to apprehend them.

B. Difficulties of procedural rights prosecution

The application of universal jurisdiction over pirates is not an easy issue, since some issue in piracy is not their "full" time job.

Moreover establishing the very identity of captured individuals will be difficult, as they are unlikely to carry identification or other indicators of nationality. Yet, some aspect of the prosecution such as providing counsel and translation services into the defendants' native language would be extraordinarily difficult. Transporting prosecution witnesses and evidence to a foreign court would be burdensome. Naval officers in active service would be called upon to testify.

In tackling piracy problem, there are some essential works that can be conducted: (1) emphasize decision making through informal consultation among diplomats, which facilitates group consensus at official meetings; (2) refer to the redefinition use of transnational crime in international customary law that include piracy itself as one of non-traditional security threat in ASEAN Security Community work ; (3) strengthening ASEAN members cooperation in tackling piracy crime and fulfilling the use of vote-system between ASEAN members in solving transnational dispute, that refer also to the use of UNCLOS 1982 and SUA Convention 2005 in tackling piracy problem.

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