

MALAYSIA

Response to the request from the International Law Commission for information and observations on the topic “Prevention and repression of piracy and armed robbery at sea”

12 May 2023

This note provides the response of the Government of Malaysia pursuant to the request from the Office of Legal Affairs of the United Nations vide Note Verbale no. LA/COD/74 dated 2 December 2022, and the International Law Commission (“ILC”) at its seventy-third session for Member States and relevant international organisations to provide information and views concerning –

- (a) the legislation, case law and practice of States relevant to the topic, including in relation to articles 100 to 107 of the United Nations Convention on the Law of the Sea;
- (b) the agreements entered into by States under which persons accused of piracy or armed robbery at sea are transferred with a view to prosecution; and
- (c) the role of international, regional and subregional organisations regarding the prevention and repression of acts of piracy and armed robbery at sea.

For the purpose of the above, Malaysia will provide information and views regarding items (a) and (b).

(a) The legislation, case law and practice of States relevant to the topic, including in relation to articles 100 to 107 of the United Nations Convention on the Law of the Sea (UNCLOS)

Current Legal Framework

1. It should be noted that while Malaysia is a State party to the UNCLOS, the International Maritime Organisation (IMO) and the International Convention against the Taking of Hostages and Convention of the Safety of Life at Sea 1974 (SOLAS Convention), Malaysia is not a party to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988 (SUA Convention) and the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia 2004 (ReCAAP). It should first be established that the crime of piracy according to UNCLOS is a crime committed in the high seas and does not cover the crime of the same nature committed in territorial sea or the maritime zone within certain state’s jurisdiction which usually is referred to as armed robbery at sea.

2. Albeit Malaysia does not have a specific law on anti-piracy, the Penal Code [Act 574] has been the principal law to prosecute pirates for the crimes of maritime piracy. This is because the Penal Code has defined and criminalised major offenses such as gang-robbery, armed robbery, murder, causing hurt, death or threat of causing hurt or death, hostage-taking, and extortion. In spite of a specific anti-piracy law, there exists

a wide selection of laws to apprehend, prosecute and punish the pirates for the crimes of piracy in Malaysia.¹

3. Not only is the Penal Code the principle legislation to prosecute piracy or piracy-like activities which is generally treated as robbery or armed robbery, when there are other elements of crime involved such as the use of arms, firearms, hostage taking, asking for ransom, destruction of property and etc., the charge will include other relevant provisions or even statutes to each respective crime committed.²

4. Procedural wise, there are two important statutes used by the authority to bring pirates at the high seas to Malaysian shore to be prosecuted, namely: the Court of Judicature Act 1964 [Act 91] (**CJA**) and the Criminal Procedure Code [Act 593] (**CPC**). Under section 22(1)(a) of CJA, the High Court of Malaya shall have the power to try all offences committed on the high seas including the offence of piracy as defined by the international law.³

5. Furthermore, under section 22(1)(b) of CJA and section 127A(1) of CPC, the Malaysian authority shall have the necessary power to apprehend and prosecute almost all cases of piracy at the high seas provided that the Attorney General can satisfy the court that the alleged offence being committed has in any manner affected the security of the state. These mechanisms enable the use of Penal Code as the principal Act to try offences committed within and beyond the territorial jurisdiction of the Malaysia⁴.

6. Other than the Penal Code, CJA and CPC, the Malaysian Maritime Enforcement Agency Act 2004 [Act 633], Arms Act 1960 [Act 206], Police Act 1967 [Act 344], Corrosive and Explosive Substance and Offensive Weapons Act 1958 [Act 357], Kidnapping Act 1961 [Act 365], Immigration Act 1959/63 [Act 155], Prevention of Crimes Act 1959 [Act 297], Security Offences (Special Measures) Act 2012 [Act 747] and Prevention of Terrorism Act 2015 [Act 769] are among other relevant Acts that the Malaysian authority may utilise to bring the suspects to justice. Each may be applied in accordance with certain criteria of the offender, nature of the act, available evidence, procedural requirement and prospect penalty against the offenders.⁵

Case Law

7. The Malaysian Courts had dealt with the offence of piracy and armed robbery at sea in a few instances. A prominent case is the 2011 case involving pirates hijacking MV Bunga Laurel in the Gulf of Aden which occurred in the high seas approximately 250 nautical miles from Oman. The seven (7) offenders were charged in the High Court⁶ of Kuala Lumpur under section 3 of the Firearms (Increased Penalty) Act 1971 [Act 37] for the offence of discharging a firearm in a robbery (*i.e.* listed as a scheduled offence under Act 37) with intent to cause death or hurt to any person and was punishable with death. However, during the course of the trial, the offenders pleaded

¹ Jagdish Wamanrao Khobragade, Abhishek Kumar, Saidatul Nadia Binti Abd Aziz & Devesh Maurya (2021) The Anti-Maritime Piracy Law in India and Malaysia: An Analytical Study, *Journal of International Maritime Safety, Environmental Affairs, and Shipping*, 5:4, 208-219.

² *Ibid*

³ *Ibid*

⁴ Section 3 of the Penal Code

⁵ Muhammad Hameedullah Md Asri, Md Khalil Ruslan (2018) Prosecuting Piracy at the High Seas: The Experience of Malaysia, *IJUM Law Journal*, Vol. 26 No.2, 307 – 334.

⁶ First tier of superior courts in Malaysia.

guilty to an alternative charge under section 32(1)(a) of Arms Act 1960 [Act 206] offered by the Deputy Public Prosecutor and were subsequently sentenced with 8 and 10 years of imprisonment, respectively for youth and adult offenders.

8. In the 2018 case of MT Orkim Harmony, a Malaysian tanker was hijacked of at Malaysian waters by eight (8) persons. The offenders were arrested by the Vietnamese Coast Guard at Tao Cho Island, Vietnam and were extradited to Malaysia. At the Sessions Court⁷, all offenders were charged with section 395 of the Penal Code read together with section 397 of the same for gang-robbery and armed robbery. They pleaded guilty and two of them were sentenced to 18 years imprisonment while the other five to 15 years imprisonment and five strokes of the cane.

9. Another example of a court case involving armed robbery in Malaysian waters is whereby on 6 September 2017, MT MGT 1 an oil tanker registered in Thailand and belonging to Marine Global Transport, a company based in Thailand was hijacked whilst transiting near East Yu Besar Island, Terengganu, Malaysia. The hijackers were charged of committing gang robbery under Sections 395 and 397 of the Penal Code against 14 Thailand citizens being the crew of MT MGT 1, in Malaysian waters. The offenders pleaded guilty to the charge and were sentenced to 16 years of imprisonment and five strokes of the cane.

10. From the cases cited above, it can be seen that while Malaysia does not have specific laws with regard to piracy, the offenders do not go unpunished. As commented by scholars of an article entitled: *Prosecuting Piracy at the High Seas: The Experience of Malaysia*, not having a single anti-piracy law is not necessarily a disadvantage to the country when in fact, the Malaysian authority has a wide selection of laws to apprehend, prosecute and punish the criminals.⁸

Malaysia's State Practise: Regional cooperation

11. Under the auspices of **ASEAN**, the Senior Officials Meeting on Transnational Crime (SOMTC) in Kuala Lumpur in 2002 agreed to deal exclusively with the issue of piracy. This was followed by the issuance and implementation of a special plan containing 10 initiatives to combat piracy including commitments to work together to combat piracy in areas such as information exchange, cooperation in legal matters and law enforcement, training, institutional and capacity building and extra-regional cooperation.⁹

12. Furthermore, the adoption of the ASEAN Charter in 2007 enabled ASEAN to be more effective and expeditious in dealing with common regional problems in order to ensure regional peace and stability. Additionally, Malaysia, as an active member of ASEAN Regional Forum, has shown commitment towards realising its motto of 'promoting peace and security through dialogue and cooperation in the Asian Pacific' through the maritime security agenda, especially in controlling piracy and armed robbery in the region.¹⁰

⁷ Second and final tier of subordinate courts in Malaysia.

⁸ Hameedullah, see note.5.

⁹ Hendun Abd Rahman Shah, A Legal Analysis of Piracy and Armed Robbery at Sea in the Straits of Malacca: The Malaysian Perspective (2013) University of Birmingham Research Archive (e-theses repository).

¹⁰ Ibid.

13. In 2004, Malaysia, Singapore and Indonesia reached a trilateral agreement on the coordinated patrols of warships known as **MASLINDO** together with aerial surveillance known as **Eyes in the Sky (EiS)**. These two initiatives were later on codenamed **Malacca Straits Patrol (MSP)**. While facing some criticisms, the MSP is an ongoing effort by the littoral states which has resulted in the decrease of piracy incidents in the Malacca Straits. ReCAAP has reported an overall downward trend in their statistics for piracy and armed robbery incidents in the said Straits.¹¹

14. ReCAAP is the first multilateral agreement of its kind and has three basic elements, namely information-sharing, capacity building and cooperative arrangements. The idea of having this cooperation was first mooted as early as 1997 during the height of piracy incidences in Asian region where Malaysia played an active role in culminating the Agreement. It was finalised on 11 November 2004 and entered into force on 4th September 2006. Although Malaysia and Indonesia are not members to ReCAAP, both countries have indicated their preparedness to cooperate with the Information Sharing Centre (ISC) in the Batam Joint Statement adopted during the 4th Tripartite Ministerial Meeting of the Littoral States on the Straits of Malacca and Singapore on 1 – 2 August 2005 in Batam, Indonesia. The Malaysian Maritime Enforcement Agency (MMEA) shares information with the Information Sharing Centre of ReCAAP (ISC) including arresting suspected pirates and saving crew members of vessels falling victim to piracy incidents based on the information from ISC.¹²

15. In addition, Malaysia also supports information-sharing, capacity building and cooperative arrangements vide the Trilateral Cooperation Arrangement (“TCA”) between Indonesia, Malaysia and the Philippines. TCA was formed in view of the growing security challenges arising from armed robbery against ships, kidnapping, transnational crimes and terrorism in the maritime areas of common concern of Indonesia, Malaysia and the Philippines. The Foreign Ministers and Chiefs of Defence Forces of the three countries adopted the Joint Declaration on Immediate Measures to Address Security Issues in the Maritime Areas of Common Concern in Yogyakarta, Indonesia on 5 May 2016 during a meeting to discuss immediate regional maritime and security challenges affecting the three countries.

16. The cooperative arrangement between the three TCA countries was further defined in the Framework of the Trilateral Cooperative Arrangement, Indonesia-Malaysia-the Philippines on Immediate Measures to Address Security Issues in the Maritime Areas of Common Concern. This framework provides mechanism to operationalise immediate measures to address security issues in the maritime areas of common concern and also to facilitate further cooperation among the three countries.

17. There are several other measures and responses on countering sea robbery regionally, namely:

- i. The establishment of the Tripartite Technical Experts Group (TTEG) on Safety of Navigation by the littoral States of the Straits of Malacca in 1977 involving Indonesia, Malaysia and Singapore; and
- ii. The founding of the Cooperative Mechanism Forum, established in consultation with the International Maritime Organisation, and The

¹¹ Ibid.

¹² Ibid

Tripartite Technical Expert Group relating to the wellbeing of the Straits of Malacca including countering robbery at sea.

(b) The agreements entered into by States under which persons accused of piracy or armed robbery at sea are transferred with a view to prosecution

18. Malaysia has no specific extradition agreements relating to the offence of piracy or armed robbery at sea. However, thus far, Malaysia has entered into bilateral extradition agreements with Thailand, Indonesia, United States of America, Hong Kong, Australia, India, South Korea, Ukraine, Pakistan, Romania and Iran. In gist, these bilateral treaties use the same threshold *i.e.* corresponding offences as provided under Extradition Act 1992 [Act 479].

19. Further, at the regional level, ASEAN Member States are currently negotiating the ASEAN Extradition Treaty. It is worthy to note that piracy has been listed as one of the extraditable offences in the draft Treaty.