

CHAPTER TWO

LITERATURE RIVIEW

A. The Definition of Ratification

International law has regulated the provisions of ratification in a conference held in Vienna on 1969. The Conference results in a convention called the Vienna Convention on the Law of Treaties, which until recently becomes guidelines of the International Covenant Law in various countries.¹

Ratifying the international treaties is such a very important thing. Indonesia has a law which rules on the provision of ratification as judicial basis. Giving place to international agreements in the national law system is one reflection of constitutional enforcement.

In Indonesia, the term ratification is similar to legalization. It could be seen with the definition of legalization itself. Legalization is a legal act to enter into international agreements in form of ratification, accession, reception, and approval.² Ratification of international treaties is the most important step in treaty making process. In this stage, the state gives its consent to be bound definitively. In this case, ratification also means giving up a bit of state sovereignty to an international agreement.³

¹ Karmila Hippy, 2013, *Praktik Ratifikasi Perjanjian Internasional di Indonesia*, Vol. 1 No. 2 April-June, Manado, Lex Administratum, p. 89

² See Article Article 1 of Law No. 24 of 2000 on International Treaties

³ Boer Mauna, 2005, *Hukum Internasional: Pengertian, Peranan, dan Fungsi dalam Era Global*, Bandung, Alumni, p. 186

In Indonesia, the example of ratification of the international treaty is ratification of the ICESCR with Law No. 11 of 2005 on Legalization International Covenant on Economic, Social and Cultural Rights. Article 1 paragraph (2) states that "A copy of the original manuscript of the International Covenant on Economic, Social and Cultural Rights and the Declaration of Article 1 in English and its Bahasa translations as attached, is an integral part of this Act."⁴

It stated that the ratification of international treaties by the Government of the Republic of Indonesia shall take place as long as it is required by the treaty, and shall be done through the Law or the Presidential Decree. However, after the enactment of Law No. 10/2004 on the Establishment of Laws and Regulations, the ratification of agreements between Republic of Indonesia and other countries or international bodies can no longer be done by Presidential Decree but by Presidential Regulation. This is in accordance with the provisions of article 46 paragraph (1) letter c point 1 of Law no. 10/2004.⁵

Further, it is stipulated that the ratification of an international treaty is made by law when it comes to:

1. Political, peace, defense and state security issues;
2. Change of territory or stipulation of territorial borders of the Republic of Indonesia;

⁴ Nurhidayatulloh, 2012, *Dilema Pengujian Undang-Undang Ratifikasi oleh Mahkamah Konstitusi dalam Konteks Ketatanegaraan RI*, Vol 9 No 1 (2012), e-ISSN: [2548-1657](https://doi.org/10.25488/1657), Jakarta, Jurnal Konstitusi, p. 6

⁵ See Article 9 of Law No. 24 of 2000

3. Sovereignty or sovereign rights of the state;
4. Human rights and the environment;
5. The establishment of new legal norms;
6. Foreign loans and / or grants.⁶

B. The Definitions of Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP)

Southeast Asia has been plagued by well-organized pirate groups for centuries, long before piracy renewed rise in the late 20th century. Although it has not received as much media attention as pirate activity in the Gulf of Aden, Southeast Asia was considered the world's principal piracy hotspot before the previous decade's surge in attacks off the coasts of Somalia. It is important to note that since the 1990s, about half of all reported piracy events in the world took place in and around the South China Sea.

The Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) is the first regional government-to-government agreement which has the aims to promote and also to enhance cooperation against piracy and armed robbery against ships in Asia. It was finalized on November 11th 2004 and entered into force on September 4th 2006.

ReCAAP adopted the IMO's definition of armed robbery against ships

⁶ See Article 10 of Law No. 24 of 2000

that is to enable cross-border cooperation in the fight against maritime violence and depredation.⁷

To date, 20 States which become Contracting Parties to ReCAAP. The 20 Contracting Parties to ReCAAP are Australia, the People's Republic of Bangladesh, Brunei Darussalam, the Kingdom of Cambodia, the People's Republic of China, the Kingdom of Denmark, the Republic of India, Japan, the Republic of Korea, the Lao People's Democratic Republic, the Republic of the Union of Myanmar, the Kingdom of the Netherlands, the Kingdom of Norway, the Republic of the Philippines, the Republic of Singapore, the Democratic Socialist Republic of Sri Lanka, the Kingdom of Thailand, the United Kingdom, the United States of America and the Socialist Republic of Viet Nam.⁸

The general obligations of ReCAAP are:⁹

- 1) Each Contracting Party shall, in accordance with its national laws and regulations and applicable rules of international law, make every effort to take effective measures in respect of the following:
 - (a) to prevent and suppress piracy and armed robbery against ships;
 - (b) to arrest pirates or persons who have committed armed robbery against ships;

⁷ Carolin Liss and Ted Biggs, 2007, *Piracy in Southeast Asia: Trends, Hot Spots, and Responses*, New York, Routledge.

⁸ ReCAAP, "About ReCAAP", <http://www.recaap.org/AboutReCAAPISC.aspx> accessed on Tuesday, 8th November 2016, 8:12 p.m.

⁹ See Article 3 Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia

(c) to seize ships or aircraft used for committing piracy or armed robbery against ships, to seize ships taken by and under the control of pirates or persons who have committed armed robbery against ships, and to seize the property on board such ships; and

(d) to rescue victim ships and victims of piracy or armed robbery against ships.

2) Nothing in this Article shall prevent each Contracting Party from taking additional measures in respect of subparagraphs (a) to (d) above in its land territory.

The agreement thus established cooperative mechanisms and the antipiracy obligations of member countries, and also focused on the capacity building initiatives.¹⁰

¹⁰ Andrew T H Tan, *op. cit.*, p. 121

Picture 1:

Official annual report from ReCAAP ISC 2016



Photo from ReCAAP ISC, downloaded at http://www.recaap.org/AlertsReports/IncidentReports.aspx?Command=Core_Download&EntryId=503

ReCAAP reinforces existing obligations to make measurement to prevent and also suppress piracy and armed attacks against ships. Its major innovation was the establishment of an Information Sharing Centre (ISC) which located in Singapore and it was launched in November 2006.

The work of the ISC forms is one of the most important aspects of ReCAAP activities as it maintains a database of piracy which related information and assists communication between various national agencies which persecute piracy cases. To this end, the ReCAAP agreement obligates contracting states to notify the ISC of all reported or imminent

attacks; to take measures against vessels and individuals who committed piracy or robbery attacks if so requested by another contracting state; to extradite such individuals to another contracting state upon request; and to render mutual legal assistance in criminal matters.¹¹

The purpose of ISC is to share information, to help improve national responses, and to enable the development of operational coordination. The first executive director ISC was Japanese and Japan provided the funding. The jurisdictional and territorial sensitivities that have inhibited operational cooperation are reflected in the agreement.¹²

C. The Definition of Piracy

The word “pirate” has its root from the Latin word *pīrāta* where the notion of ‘sea robber’ originated and from the Greek word *peirātés* that means ‘marauder’ or ‘attacker’ as noun originating from the verb *peiran* and its signifying closer to ‘attack’ or ‘attempt’.

Piracy is as old as ships and man’s acquisitive nature. Pirates of all eras and the earliest pirates, too, were driven by one primary motive—to acquire wealth—and one form of wealth was the human being, captured, enslaved, and sold. Sometimes pirates were just pirates and nothing more. Sometimes they were explorers or traders in long ships, as ready to trade with the strong and vigilant as they were to plunder the weak or incautious. Sometimes the plunderers were warriors on their way to the

¹¹ See Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia

¹² Donald E. Weatherbee, *op. cit.*, p. 182

theater of war, or, warriors in the theater of war, who plundered their enemies or the neighbors of their enemies, or warriors on their way home from the theater of war.¹³

Picture 2:

Indonesian navy sailors escort men accused of piracy, after they were arrested for attacking a Singaporean ship in Indonesia's Karimata strait from a navy ship in Jakarta's Tanjung Priok Harbor.



Photo by CNBC, downloaded at <http://webcache.googleusercontent.com/search?q=cache:http://www.cnbc.com/2014/09/15/worlds-most-pirated-waters.html>

For the British jurist C.S. Kenny is defining piracy as any armed violence at sea which not a lawful act of war is. Kenny's definition was echoed by J.L. Anderson, who characterized piracy as a subset of violent maritime predation in that it is not part of a declared or widely

¹³ Bradford, Alfred S, 2007, *Flying the Black Flag- A brief History of Piracy*, Westport, Connecticut: Praeger, p.4

recognized war.¹⁴

International law currently defines piracy in several conventions and also provides for specific basis under which countries may capture and prosecute pirates.

For the purposes of this Agreement, "piracy" means any of the following acts:¹⁵

- (a) any illegal act 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 against persons or property on board such ship;
 - (ii) against a ship, 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).

Piracy is defined by the United Nations Convention on the Law of the Sea (UNCLOS) as:

Piracy consists of any of the following acts:

¹⁴ Martin N. Murphy, 2007, *op. cit.*, p. 11

¹⁵ See Article 1 Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia

- 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:
 - 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;
- 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; any act inciting or of intentionally facilitating an act described in subparagraph (a) or (b).¹⁶

While the International Maritime Board (IMB) defines piracy pragmatically as an act of boarding or attempting to board any ship with the intent to commit theft or any other crimes and with the intent or capability to use force in the furtherance of that act.¹⁷ While it is not binding international definition, it is certainly better characteristics for policy response in Southeast Asia's maritime threat.¹⁸

Pirates can be divided into two types. The first is called a pirate. This pirate performs illegal activities at sea, and contrary to the applicable law. Then, the second is *korsario*, or pirate issued by the government for illegal pirate hijack. In the sense, pirates of this type can be called as a legal

¹⁶ Article 101 of United Nations Convention on the Law of the Sea 1982

¹⁷ Martin N. Murphy, 2007, *op. cit.*, p 11

¹⁸ Donald E. Weatherbee, 2009, *op. cit.*, p. 180

pirate, that the activity was approved by the government. They also aim to hijack or capture the ships sailing in their territorial sea.¹⁹

International Maritime Bureau (IMB), as an organization under the ICC (International Chamber of Commerce), which aims to fight crime in marine has characterized the activities of piracy at sea into:²⁰

1. Low levels of armed robbery

This piracy activity is in small coastal lines which usually operates in ports and harbors due to a lack of oversight by the port security officers. The pirates here are generally interested in the wealth of the crew equipment.

2. Medium level of armed assault and robbery

This type of pirates are medium-scale pirates who operate at the high seas and territorial waters. Usually, they are well-organized (organized piracy).

3. Major criminals hijack

This type of pirates, which possesses the highest pirate activity, has very large capital and also perform the activities more organized with the involvement of international criminal organizations. The pirates have been trained to use fire weapons. Motives of piracy at sea are

¹⁹ Adrian B. Lopian, 2009, *Orang Laut Bajak Laut Raja Laut: Sejarah Kawasan Laut Sulawesi Abad XIX*, Jakarta, Komunitas Bambu, p. 117

²⁰ Chalk Peter Grey, 1997, *Area Phenomena in South East Asia: Piracy, Drug Trafficking and Terrorism*, Canberra, ANU, p. 24

generally not just an economic motive but can also be political or terrorism motives.²¹

Some scholars such as Benard Sanga and Antonio Cassese stated that piracy is a serious crime which is influencing international society and the international law solution needs to consider it carefully.

D. The Definition of Armed Robbery

Increasing the extent of a state's boundary makes another more specific difficulty about the blurring of the difference between piracy and armed robbery at sea.²² According to international law, armed robbery is an attack that does not belong to piracy but the crime committed in the territorial sea is the same as armed robbery that takes place on the mainland and it should be harmed by the coastal state police where the incident occurred.

Modern variations of the attack are inseparable from the deception in which people who commits crimes pretend to be coast guards or tax overseers.²³ Armed robbery is a legal terminology used to describe attacks on merchant ships at ports or territorial sea, in contrast to piracy activities commonly conducted on the high seas outside the jurisdiction of a State.

According to international law, the offshore attack is not an act categorized as piracy but rather a crime on kaal or crew, the same as armed

²¹ Melda Kamil Ariadno, 2007, *Hukum Internasional Hukum yang Hidup*, Jakarta, Diadit Media, p.169

²² David F. Marley, 2011, *Modern Piracy*, United States of America: ABC-CLIO, p. 20

²³ *Ibid*

piracy that may occur at the territorial sea or port.²⁴ Thus armed robbery should be handled by the coastal state.

The discussion of armed robbery is a new thing therefore there is no one article in UNCLOS which is ruled on armed robbery. UNCLOS only recognizes conventional piracy definitions that occur in the open seas outside the jurisdiction of a state.

Therefore, armed robbery does not occur in the high seas so there should be further definitions on this subject. IMO as one of the organs under the auspices of the United Nations provides a definition of what is meant by armed robbery.²⁵

According to IMO, armed robbery is:²⁶

1. Any illegal act of violence detention or any act of depredation, or threat thereof, other than act of piracy, committed for private and directed a ship or against persons or property on board such as a ship, within a State's internal waters archipelagic waters and territorial sea:
2. Any acts of inflicting or of intentionally facilitating an act described above.

Basically the definition of armed robbery made by IMO is still imbued with the definition of piracy in UNCLOS. This can be seen from the definition given there is only a distinction about the place of the

²⁴ *Ibid*, p. 277

²⁵ Ginting Supriyanto, 2012, *Kerja Sama Regional dalam Memberantas Piracy dan Armed Robbery di Laut Cina Selatan dan Selat Malaka*, Depok, Universitas Indonesia, p. 24

²⁶ International Maritime Organization, *Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships*, IMO Assembly Reslution A. 1025 (26) (adopted 18 December 2009).

occurrence of armed robbery, namely in the interior waters, territorial sea, and archipelagic waters.²⁷

²⁷ Ginting Supriyanto, *op. cit*, p. 24