LAW *vision*

Need for ratification of the 1988 Rome Convention

Ensuring safety of navigation for maritime commerce

NASER ALAM

MARITIME piracy and armed robbery at sea has become a major concern for the nation. Despite some efforts taken by the previous government, the intensity of these criminal and terrorist activities has yet to be controlled by the concerned authority. Rather it is increasing at a fast pace. The present economic activities of the country greatly rely on our territorial waters as well as the high seas. We have two major seaports directly involved and contributing to the significant economic development. An alarming increase in the organised criminal activities against the maritime vessels including the crew and cargo within our territorial waters as well as in the Bay of Bengal brings the longstanding issue as to the government's position to introduce new laws to deal with piracy and armed robbery at sea into careful scrutiny. The recent developments in the coastal waters of Bangladesh clearly indicates that urgent action from the new government is necessary to ratify the 1988 Rome Convention on the Suppression of Unlawful Acts against the Safety of Navigation (1988 Rome Convention) and to take measures to introduce new legislation to ensure safety of navigation and marine life within the coastal areas and beyond. Bangladesh's international obligation under the 1982 United Nations Convention on the Law of the Sea also dictates in the present circumstances for ratification of the Rome Convention.

The International Maritime Organisation (IMO), a wing of the International Chamber of Commerce (ICC) for the last two decades has advocated widely for maritime safety and urged all governments concerned to take, as a matter of highest priority, all measures necessary to prevent and suppress acts of piracy and armed robbery against ships in or adjacent to their waters, including strengthening of security measures.

A division of the ICC, the International Maritime Bureau (IMB), and the Commercial Crime Service, the maritime anti-crime wing of the ICC, has also been actively involved in combating piracy and armed robbery against ships in accordance with the policy set up by IMO within the framework of the United Nations. Both the IMO and IMB strongly recommends all coastal states to ratify the 1988 Rome Convention so that it becomes easier for the governments to prosecute pirates and set the piracy elimination in motion.

The nature of piracy and the *situs* of the crime in many cases make it difficult for a particular country to enforce its municipal laws to prosecute the pirates or maritime terrorists. The question of jurisdiction over the persons as well as the criminal act committed is the single most important issue faced by the governments in dealing with some instances of piracy. The nature of the problem can easily be identified by reference to the applicable principles of international law. The nature of the international maritime voyages as well as the international law principles of state jurisdiction makes it clear that in determining what principles of international law apply to a particular maritime crime, the most important factor is where the acts took place. If the acts of piracy do not take place within the boundary of a state, the state would not have any jurisdiction over it. A country with a coastal link has jurisdictions over crimes committed within its territorial waters and not beyond. Crimes committed in the high seas or the Exclusive Economic Zone are beyond the jurisdiction of the sovereign jurisdiction.

However, if the criminal act constitute "piracy" under international law, any state can seize the pirate ship and arrest and prosecute the offenders. Piracy has been defined by the United Nations Convention on the Law of the Sea 1982 (UNCLOS) as:

Article 101
Definition of piracy

Piracy consists of any of the following acts:

(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)."

International Maritime Bureau, however, takes a broader view as to the definition of piracy. It defines piracy as:

"An act of boarding or attempting to board any ship 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".

This definition includes piracy attacks against ships in the territorial sea or archipelagic waters as well as attacks from shore when the ship is anchored or berthed in port.

The 1988 Rome Convention does not define piracy as such but indicates that the following acts would suffice to constitute it:

Article 3

1.Any person commits an offence if that person unlawfully and intentionally:

a.seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or

b.performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or

c.destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or

d.places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or

e.destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or

f.communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or

g.injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f)."

Any attempt etc. to commit the above offences would also amount to piracy.

These definitions underlie the importance of maritime commerce and safety of navigation. It does not matter where the incidents take place, either in the territorial waters or the high seas, the whole purpose is to make these activities as enforceable criminal acts under the laws of the coastal states. However, several obstacles as to enforcement have been identified as follows:

"Many states do not have legislation making piracy on the high seas or in the EEZ an offence under their laws. If pirates enter their ports after committing acts on the high seas or in the EEZ, such states have no power under their domestic laws to arrest and prosecute the pirates. Flag states are often not interested in pursuing pirates who operate from ships flying their flag. Many states do not assert criminal jurisdiction over criminal acts committed by their nationals outside their territory. Therefore, the state of nationality of the perpetrators is not able to arrest and prosecute its nationals if they have been accused of committing acts of piracy or armed robbery in international waters or in the territorial sea of another state. There is often no legal basis for states to extradite their nationals to other states when they are suspected of committing acts of piracy or armed robbery against ships, or for co-operating with states who are investigating such cases."

These problems as to jurisdiction and enforcement of piracy activities in the high seas, which include arrest and prosecution of the alleged offenders, were sought to be removed by the introduction of the 1988 Rome Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation. This Convention provides for the signatory states to extend its jurisdiction over piracy either at high seas or in the territorial waters with some specified exceptions. IMO and IMB believe that ratification of this Convention would destroy the safety net of difficulty of effective law enforcement, which has benefited the pirates for years. Pirates will then be unable to seek sanctuary in countries that have armed their courts with powers to prosecute.

The causes of concern

Modern piracy has become ruthless, sophisticated and much organised. It has now become the global enemy of commerce and mankind "depriving the international shipping of freedom of seas". Its impact on national security, exploration and protection of natural and marine resources within the EEZ and the life of innocent persons and their property cannot be undermined. There have been growing concerns in the recent years over the sharp increase in the piracy attacks throughout the world. The annual piracy report of the IMB shows that in 1999, there were 285 attacks of piracy and armed robbery against ships either at sea, at anchor or in port which reflects a 40% increase than the attacks made in 1998. It also shows that since the 90's the number of reported incidents have tripled. In 2000, worldwide attacks rose to 460, an increase of 56% over 1999. It needs to be noted that these are the reported incidents only and IMB believes that many of the incidents are not reported.

Not only that the increasing nature of the piracy attacks are alarming, but also the fact that the waters of Asia are in particular the most vulnerable. Majority of the attacks was made in the waters of Indonesia, Malaysia and the Malacca Strait region. After that comes the water of the Bay of Bengal. In 2000, a total of 90 piracy attacks were reported in this region out of which 61% (55 attacks) of the attacks were in fact reported in the territorial waters of Bangladesh. The year 2000 figure is a sharp increase from 25 reported attacks in 1999 the piracy activities have more than doubled in a single year. While regionally Bangladesh are in the second most piracy-prone zone in the world, it is also the third most piracy-affected country in the world. These figures clearly establish how far our failure to tackle the issue has rendered our territorial waters unsafe for the international maritime and commercial activities.

It need to be stressed here that our unsafe waters has long been used by the pirates and smugglers which not only affect the daily commercial maritime activities, but there has been press reports of terrorist activities involving illegal arms trade in the Bay of Bengal. These unlawful activities by highly organised criminal groups are reminiscence of the global phenomenon of terrorism. We have had so many years to deal with this serious issue of piracy, but we have neglected it throughout only to find out that we are not only the most corrupt country in the world, but we are also world's one of the leading unsafe country as to maritime navigation. How long do we need to bear this and let the organised criminals become more powerful at the expense of the most important commercial activities? And why should we not legislate to prevent and punish piracy and robbery at sea rather than providing sanctuary to them through inaction and ineffective legislation?

The obligation of Bangladesh

It needs to be mentioned that Bangladesh has ratified the UNCLOS and are, therefore, under a general obligation to co-operate "to the fullest possible extent" in the repression of piracy. The 1988 Rome Convention has been a major step towards the prevention and control of piracy. Subsequent developments led the IMO to introduce a Code of Practice to investigate crimes on the high seas as well as to issue various circulars to suggest methods to curb piracy and armed robbery. Bangladesh has yet to ratify the 1988 Convention and, therefore, despite the alarming rate of piracy in our territorial and adjacent waters, Bangladesh has failed to co-operate to the fullest possible extent under the terms of the UNCLOS. This failure to heed to our agreed general obligation expressed to the international community has been costing our domestic and international commerce to a great extent. The time has reached now for the government to take concerted action to deal with the problem. Given the alarming rate of piracy, if the government still plays deaf and dumb, it is not very far that the persons, agencies and companies involved in international maritime seafaring would turn their back against us.

India, Pakistan and Sri Lanka have already ratified the 1988 Rome Convention. Where our regional allies under SAARC has taken the matter seriously, what reasons could there be in not acting to the demand of the hour. If Bangladesh ratifies the IMO Convention, it would not only provide headway to enact adequate national laws on piracy and armed robbery at sea, and it would also provide all the incentives to forge a regional piracy co-operation agreement among the key coastal countries within SAARC. Effective regional agreements are already in place in between Singapore and Indonesia, which is a combined sea-robbery petrol arrangement called the Indo-Sin Co-ordinated Patrols (ISCP).

It may be a good idea to discuss the issue of piracy within the SAARC coast at the forthcoming SAARC meeting and to identify issues for future co-operation. Any future co-operation may become difficult if Bangladesh do not ratify the 1988 Convention and change its domestic law. We have to understand that thirteen years of neglect has made the territorial and adjacent waters of Bangladesh highly unsafe for maritime navigation. There is urgency in taking effective action by Bangladesh to prevent and eradicate piracy activities. Ratification of the 1988 Convention is needed to pave the way for tougher and effective enforcement mechanism. The issue of regional co-operation in combating piracy needs to be discussed at the appropriate forum. In the meantime, we should use all of our coastal enforcement powers to prevent and minimise any future attacks.

Naser Alam, Barrister-at-Law, is Advocate, Supreme Court of Bangladesh

LAW *watch*

To stabilize Afghanistan, fence out the neighbors

AMIN SAIKAL

THE United Nations is trying to be a catalyst in putting together a transitional government of national unity in Afghanistan. There are serious social and political divisions in the country. But the biggest problem may arise from demands by Afghanistan's neighbors that their conflicting regional interests be taken into account, at the cost of the Afghan people's right to self-determination.

Pakistan, which should have learned from its misguided policy of supporting the Taliban regime, still insists that it be given a major say in the construction of a post-Taliban political order in Afghanistan. It wants a dominant role in the transitional government for Pashtuns, the ethnic group which lives on both sides of the Afghan-Pakistani border and to which the bulk of the Afghan Taliban belong.

Islamabad insists that "moderate" Taliban be included in the government, although the term is an oxymoron. Pakistan wants a friendly regime on its border.

Yet Pashtuns have historically constituted no more than 40 percent of the Afghan population. They are entitled to substantial but not dominant representation in any post-Taliban political setup.

Russia, Iran and India have long opposed the Taliban and Pakistan's ambitions to dominate Afghanistan. They would not be averse to seeing the Northern Alliance in control of Afghan politics.

But Iran wants to see fellow Shiites figure prominently in any new power structure. Shiites form 15 to 20 percent of the Afghan population.

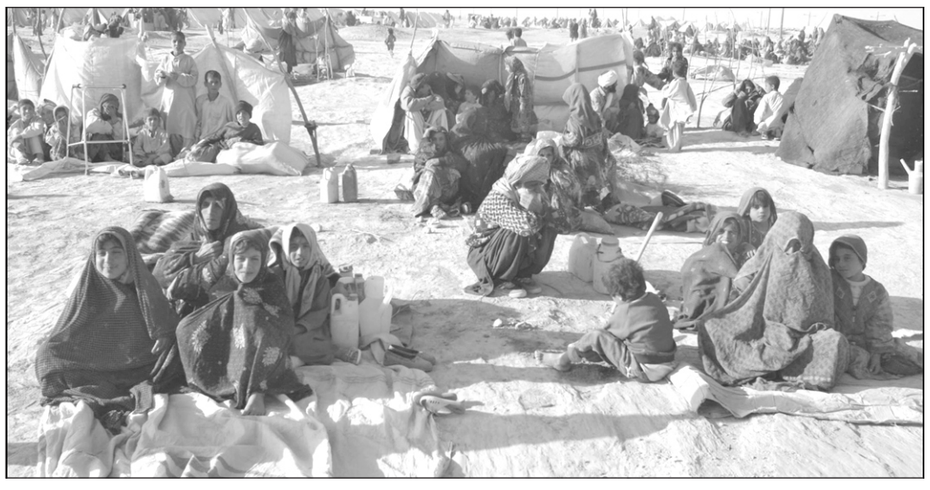
Russia and India lean toward the Tajik faction in the Northern Alliance, led by Burhanuddin Rabbani.

Uzbekistan, locked in a regional rivalry with Tajikistan and Russia, has long favored the Uzbek component of the alliance, including the warlord Abdul Rashid Dostum, who gained notoriety in the past for human rights abuses committed by his forces.

If the United Nations and the U.S.-led coalition are to help Afghans to determine their future free of the influence of surrounding states, they will need to keep these actors at arm's length. Then the chances are that the Afghans will be able to work out a viable power-sharing arrangement and a lasting political order. They had these from 1930 to 1978,when foreign interference was at its minimum and Afghanistan was one of the most peaceful and stable states in the region. The UN secretary-general's representative for Afghanistan, Lakhdar Brahimi, needs to bear in mind that ethnicity is not a good base for working out a political order. The boundaries between various ethnic groups are blurred. There is no reliable census to determine the precise size of each group, and considerable links exist between various groups.

Many Pashtuns live in non-Pashtun regions and have been Afghanized in their national identity to the extent that they no longer even speak the Pashtu language. An example is the ex-king, Mohammed Zahir Shah, whom the United Nations sees as a potential rallying point for national unity.

Similarly, many non-Pashtuns have lived in Pashtun areas for decades, even centuries. Ethnicity is therefore of little help in tackling Afghanistan's political problems. The quality to stress is the Afghan character of all citizens. This was the rule before the Soviet invasion in 1979 and the subsequent Pakistani policy of ethnicizing the conflict in support of the Taliban, as representing the Pashtuns. Afghanistan should be treated as a single political unit divided into regions, with each having proportional representation in the transitional government.



Amin Saikal, who directs the Centre for Arab and Islamic Studies at the Australian National University, contributed this comment to the International Herald Tribune.

Star LAW *report*

An abettor is liable for the probable consequence of abetment

Appellate Division (Criminal Jurisdiction),
The Supreme Court of Bangladesh
Islami Bank Bangladesh Ltd---Appellant
Vs
Muhammad Habib and others---Respondents
Criminal Appeal No. 10 of 2000
Before Mahmudul Amin Choudhury, CJ, Mainur Reza Chowdhury, Mohammad Gholam Rabbani and Md Ruhul Amin, JJ
Judgment: 22 August 2001
Result : Appeal allowed

Judgment

Mohammad Gholam Rabbani, J: Respondent No.1, Muhammad Habib and his son respondent No. 2 Ahmed Abdullah Lokman and two others are the accused in a criminal case bearing GR No 929 of 1998 of the Court of Metropolitan Magistrate, Chittagong. The case was initiated upon the FIR lodged by the appellant Islami Bank Ltd, Khatunganj Branch, Chittagong.

The fact

Respondent No 2 is the proprietor of General Distribution Company. He was given credit facilities of Taka twelve lac sixty thousand by the appellant Bank and with the said loan he imported Dano Full Cream Powder Milk. Muhammad Habib and his son (Respondent No. 1) stood guarantor for the loan. The cartoons containing the said imported goods were kept in the godown owned by another accused Mohammad Islam. There was a tripartite agreement among the Bank, the importer and the godown owner with the conditions amongst other that the imported goods would be under the ownership of the Bank and the godown owner would deliver that quantity of goods to the importers as the Bank would direct against the payment of the bank dues.

It was alleged in the FIR that an officer of the Bank went to the godown on 22.3.98 and did not find the stock of the imported goods and the godown owner told that the goods were delivered to the importer that is Ahmed Abdullah Lokman (accused-respondent No. 2) on the request as well as on the promise of the guarantor that the guarantor would replace the entire stock within a short time. It was alleged in the FIR that the accused persons thus committed offences under section 406/420 of the Penal Code.

Both the respondents then sought quashment of the said proceedings against them invoking the jurisdiction of the High Court Division under section 561A of the Code of Criminal Procedure in Criminal Miscellaneous Case No 1156 of 1999.

Previous decisions

A Division Bench made the rule absolute and quashed the said proceedings against them by the judgment and order dated 17-8-99 which is impugned in the instant appeal.

The High Court Division quashed the proceedings on the reasoning which are quoted from the judgment as hereunder:

"The statement as made in the FIR shows that there was a 'request' on behalf of the present petitioner No 1 for giving delivery of the stock to the importer. In so many cases it has been finally decided that to constitute an offence under section 420 of the Penal Code there must be allegation of deception at the initial stage of the transaction. The present FIR does not disclose any such deception on the part of the present petitioner, so we are of the view that the allegations made in the FIR do not disclose any offence either under section 406 or 420 against the present petitioners."

Leave was granted to consider the submissions made on behalf of the appellant Bank that "in the FIR it has been stated that on the request of respondent No. 1 the disputed Dano Milk Powder was delivered to the importer and this statement by itself cannot be ground for quashing the proceeding when there is clear allegation that the accused persons in collusion with each other misappropriated the goods."

The verdict

We have heard the learned Advocates for both the parties and we need not record their submissions in the judgment as the issue before us is a very simple one. It is found from the quoted portion of the judgment of the High Court Division that the learned Judges failed to notice that the allegation in the FIR was not that the godown owner delivered the goods simply on the request of the accused guarantor, but it was further alleged that the delivery was made on the promise of the guarantor that he would replace the stock to be delivered within a short period. For this mistake the learned Judges failed to notice that the accused petitioners before them (herein the respondent Nos. 1 and 2) committed an offence of abetment under section 109 of the Penal Code for the alleged promise.

It is a well-settled principle that a person who abets the actual perpetration of the crime at the very time when it is committed is a 'principal of the second degree' under section 109 of the Penal Code. This is applicable to the accused-importer. There is, however, no distinction between 'principal in the first degree' and 'principal in the second degree.' Under section 111 of the Penal Code an abettor is liable for a different act if that was probable consequence of the abetment. This is applicable to the accused guarantor. Thus we finally conclude that the High Court Division on a wrong notion proceeded to decide the issue before it and overlooked the relevant laws and consequently came to the wrong conclusion.

In the result, this appeal is allowed without costs. The impugned judgment and order as aforesaid are set aside. The aforesaid criminal proceedings shall continue against all the accused including the respondent Nos. 1 and 2 in accordance with law.

Disputed claims cannot be decided in writ jurisdiction

Appellate Division (Civil Jurisdiction),
The Supreme Court of Bangladesh
Emdadul Haque Bhuiyan .....Petitioner
Vs
The Court of District Judge and Bankruptcy Court, Narayangonj, subsequently on transfer the Court of Bankruptcy and Additional District Judge, Court No. 1, Narayangonj and another .....Respondents
Civil Petition for leave to Appeal No. 1195 of 1999
Before Latifur Rahman, C J; Bimalendu Bikash Roy Choudhury, A M Mahmudur Rahman, Mahmudul Amin Choudhury and Kazi Ebadul Hoque, JJ
Judgement: 23 January 2000
Result: Petition dismissed

Judgment

A M Mahmudur Rahman J: This petition for leave to appeal by the writ-petitions is from the judgement and order dated 4.8.99 passed by a Writ Bench of the High Court Division in Writ Petition No. 2048 of 1999 rejecting the writ petition summarily.

The defendant-writ-petitioner in the writ petition challenged the impugned proceeding of Bankruptcy Suit No. 1 of 1999 of the Court of District Judge and Bankruptcy Court, Narayangonj stating, inter alia that the plaintiff-City Bank Ltd instituted the suit for declaration that the defendant was a Bankrupt and for realisation of Tk 163,39,72,000/-.

The defendant in the suit field an application under section 28 of the Bankruptcy Act, 1997 for dismissal of the plaint on the ground that he was not loanee but merely a guarantor of the loanees and he stood guarantor by mortgaging his properties and that the loan being secured the plaint was liable to be dismissed. The application was rejected by the order dated 8.7.99 leading to filing this writ petition.

The learned Judges of the High Court Division summarily dismissed the writ petition on the findings that in the Bankruptcy court the defendant failed to produce any material for dismissal of the suit to the satisfaction of the court that no order of adjudication should be made and that the claim of the parties giving rise to a disputed question of fact can not be decided in writ jurisdiction of the High Court Division.

Mr Md Ozair Farooq learned Advocate for the petitioner, submits that the learned Judges of the High Court Division fell in error in not considering that the defendant was a guarantor and not a loanee and that the plaintiff-Bank without recource to appropriate step for realisation of the loan from the loanee instituted the suit which was nothing but an abuse of process of court and was instituted without lawful authority and that in that view of the matter the learned Judges were wrong in not holding that the plaint was liable to be dismissed under section 28 of the Bankruptcy Act. In an application under section 28(b) of the Act the defendant in a bankruptcy suit must undisputedly satisfy the court that he has sufficient ability to repay the debts for which he stands guarantee on behalf of the loanee and that he is not a willful defaulter. Merely because he stands as guarantee he is not entitled to an order for dismissal of the suit.

In view of the above discussion, we do not find any infirmity in the impugned judgement and order.

There is no merit in this petition.

The petition is dismissed.