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PIRACY OFF THE COAST OF SOMALIA: IN SEARCH OF THE SOLUTION

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"Illegal activity off the coast of Somalia is not necessarily something which will get solved at sea. The solution lies ashore".

Rear-Admiral Peter Hudson, Operation Commander EU NAVFOR.

INTRODUCTION

There's an old Greek proverb which says - "Where there is a sea there are pirates". Given issue states that piracy emerged along with the seaborne trade. However, it is not a phenomenon of the past. Modern pirates have exceeded their medieval colleagues in scope and technical level. Modern piracy has become a profitable business, especially off the coast of Somalia, where thousands of pirates are currently involved in criminal activity targeting all kinds of vessels from fishing boats to oil supertankers.¹

In 2009, the International Maritime Bureau Piracy Reporting Center reported about 406 actual and attempted attacks against different types of vessels in 38 countries. 217 of them were committed by Somali pirates mostly on the high seas close to Somalia and the Gulf of Aden.² However, recent oil tanker attacks about 1000 nautical miles from Mogadishu³ and 800 miles of the coast of Somalia⁴ demonstrate that modern pirates are equipped with advanced technology devices and use high-priced motor-boats.⁵ High operational costs are justified, as Somali pirates receive about \$80 million in

¹ The Telegraph, *Somali Pirates Free Oil Tanker the Sirius Star*, <http://www.telegraph.co.uk/news/worldnews/piracy/4208045/Somali-pirates-free-oil-tanker-the-Sirius-Star.html> (last visited May 29, 2011).

² *Piracy and Armed Robbery Against Ships – Annual Report 2010* (ICC-IMB, London, United Kingdom), January 2011, at 5-6.

³ USAfricaonline.com, *Somali Pirates Attack Tanker 1,000 Nautical Miles From Mogadishu*, <http://www.usafricaonline.com/2009/11/09/somali-pirates-attack-oil-tanker-off-mogadishu/> (last visited May 29, 2011).

⁴ Barry Kolodkin, *Tracking Al-Qaeda to The Ends of The Earth But Not 1000 Miles for the Somali Pirates*. 2009 Dec 6 [cited 2010 Dec 6]. Available from: <http://usforeignpolicy.about.com/b/2009/12/06/tracking-al-qaeda-to-the-ends-of-the-earth-but-not-1000-miles-for-the-somali-pirates.htm>

⁵ Joaquín Salido Marcos, *Modern pirates use GPS in Somalia* [Internet]. 2008 May 26 [cited 2010 Dec 6]. Available from: <http://www.cafebabel.co.uk/article/24678/modern-pirates-use-gps-in-somalia.html>

ransoms annually,⁶ with the highest ransom of \$9,5 million for the Korean oil tanker in 2010.⁷ Although economic loss due to piracy is measured in billions of dollars, its human component is quantitatively less but more painful. From 867 crewmembers taken hostage in 2009, 10 had been murdered and 4 killed with one still missing.⁸ This statistic motivated both international organisations and global powers to seek for a solution to the global phenomenon of piracy.

Over the past two years, the United Nations Security Council has passed several resolutions⁹ regarding the situation off the coast of Somalia, which authorise military raids against pirates “on land and by air”.¹⁰ However, the resolutions made a provision merely for military operations but not for the problem of trying alleged perpetrators. Lack of legal frameworks for trying and prosecuting pirates has created the atmosphere of impunity,¹¹ motivating the world powers to take immediate steps for combating piracy. After President Barack Obama had assured his Russian colleague Dmitry Medvedev that US would resume military co-operation targeting piracy in the Horn of Africa,¹² the Russian party proposed the establishing of an international anti-piracy tribunal.¹³ At its 6301 meeting on 27 April 2010, the UN Security Council adopted Russia’s drafted resolution and, *inter alia*, requested the Secretary-General to submit a report offering effective counter-piracy measures.¹⁴ The “Report of the Secretary-General on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia” was drafted by the

⁶ Patrick Mayoyo, Kenyan firms make killing from piracy [Internet]. 2010 Jul 18 [cited 2010 Dec 6]. para. 3. Available at: <http://www.nation.co.ke/News/Kenyan%20firms%20make%20killing%20from%20piracy/-/1056/960260/-/i017v6/-/index.html>

⁷ Kassim Mohamed, Somali pirates "not guilty" in Kenya [Internet]. 2010 Nov 12 [cited 2010 Dec 6]. para. 9. Available from: <http://www.rnw.nl/africa/article/kenya-cant-try-somali-pirates>

⁸ *Supra*, note 2 at 21.

⁹ UN Doc. S/RES/1814 (2008); UN Doc. S/RES/1816 (2008); UN Doc. S/RES/1838 (2008); UN Doc. S/RES/1844 (2008); UN Doc. S/RES/1846 (2008); UN Doc. S/RES/1851 (2008); UN Doc. S/RES/1897 (2009).

¹⁰ Colum Lynch, U.N. Authorizes Land, Air Attacks on Somali Pirates [Internet]. 2008 Dec 17 [cited 2010 Dec 6]. Available from: <http://www.washingtonpost.com/wp-dyn/content/article/2008/12/16/AR2008121602848.html?hpid=sec-world>

¹¹ RIA Novosti, Russian sailors release Somali pirates - Defense Ministry source [Internet]. 2010 May 6 [cited 2010 Dec 6]. Available from: <http://en.rian.ru/russia/20100506/158906539.html>

¹² The White House, Office of the Press Secretary: U.S.-Russia Relations: “Reset” Fact Sheet (Washington, DC: 2010), para. 19. Available from: <http://www.whitehouse.gov/the-press-office/us-russia-relations-reset-fact-sheet>

¹³ RIA Novosti, Obama interested in Russian proposals on battling piracy [Internet]. 2010 May 13 [cited 2010 Dec 6]. Available from: <http://en.rian.ru/world/20100513/159008809.html>

¹⁴ UN Doc. S/RES/1918 (2010), art. 4.

Secretary General three months later in July 2010 and suggested seven possible methods.¹⁵ The five of the proposed options offered to set up the domestic legal institutes in one or another form with or without UN involvement; the other two suggested to establish an international tribunal either on the basis of UN-sponsored agreement or under Chapter VII of the UN Charter.¹⁶

Another possible option would be including piracy within the jurisdiction of the International Criminal Court, which will be considered further along with the previously mentioned variants. Besides, as each of the proposed options has already been used as a model for the recent international and domestic courts and tribunals, their practical realisation in one or another form will be thoroughly examined for identifying the most relevant solution to the problem of piracy.

However, to be appropriately addressed and punished, piracy needs to be shaped and concluded. The practical inability of the states to deal with the crime of piracy derives from its supposedly obscure interpretation under international law.¹⁷ Besides, the proliferation of global organised crimes is creating a new challenge for drawing a distinct line between “piracy” and other maritime crimes, such as “robbery at sea” and “terrorism”. The specific elements of the crime of piracy will further be developed to resolve this issue.

¹⁵ *Report of the Secretary-General on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including, in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements, taking into account the work of the Contact Group on Piracy off the Coast of Somalia, the existing practice in establishing international and mixed tribunals, and the time and resources necessary to achieve and sustain substantive results*; UN Doc. S/2010/394.

¹⁶ *Ibid* at 1.

¹⁷ “The writers on public law do not define the crime of piracy with precision and certainty”. *United States v. Smith*, 18 U.S. 5 Wheat. 153 153 (1820).

CHAPTER I. THE CRIME OF PIRACY: HISTORICAL OVERVIEW, CHARACTERISTICS AND ELEMENTS.

There were numerous attempts to define piracy under the law of nations. The definition of piracy is also provided by the recent treaties adopted within the frameworks of prominent international organisations, such as the United Nations and the International Maritime Organisation. However, many countries still rely on their national legislation considering international definitions vague and insufficient.¹⁸

This chapter describes how piracy is defined under the law of nations and by contemporary international treaties. It will further discuss why the crime of piracy is widely recognized as *jus cogens*. The elements of the crime will be outlined in the end of this section.

1.1. Piracy under the law of nations

United States, the greatest opponent to the contemporary definitions of piracy, has been applying the US piracy statute since 1819, which, in 18 U.S.C. Section 1651, provides that:

Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.¹⁹

However, the Statute does not explain how piracy is defined under the law of nations. One year later, in *U.S. vs. Smith* (1820) case, the US Supreme Court defined piracy as “robbery at sea”, that for centuries has become a guiding precedent blocking all further initiatives to prosecute pirates for the crime of piracy in any other interpretation.²⁰

There is a logical question, whether the crime of piracy is precisely defined under the law of nations? The answer is “no”. As the international law publicist J.L. Brierly stated in his book “The Law of Nations” (1928):

¹⁸ *Ibid.*

¹⁹ “Piracy under law of nations.” Title 18 *U.S.Code*, Sec. 1651. 2010 ed.

²⁰ *Supra*, note 17.

Any state may bring in pirates for trial by its own courts, on the ground that they are *hostes humani generis*. This applies only to persons who are pirates at international law... There is no authoritative definition of international piracy, but it is of the essence of a piratical act to be an act of violence, committed at sea... by persons not acting under proper authority.²¹

Describing pirates as “*hostes humani generis*” or “*enemies of mankind*”, Mr. Briery, who later worked as a special rapporteur for the UN International Law Commission, probably talked about an inextricable link between the universal jurisdiction and the crime of piracy. This approach was challenged by another scholar, Mr. Wheaton, who also pointed out problematic character of the definition of piracy under the law of nations. Opposing to Briery, who heavily relied on the phrase “*hostis humani generis*” as a sufficient ground allowing any country to prosecute captured pirates, Wheaton considered it as “neither a definition nor as much as a description of a pirate, but a rhetorical invective”. He more relied on other factors:

It is true, that a *pirate jure gentium* can be seized and tried by any nation, irrespective of his national character... The reason must be, that the act is one over which all nations have equal jurisdiction, i.e. upon the high seas; and, if on board ship, and by her own crew, then the ship must be one in which no authority reigns.²²

Concluding two almost similar opinions, it is possible to say that the crime of piracy was not universally defined under the law of nations,²³ but its [law of nations] importance is significant, as it not only recognised universal jurisdiction over pirates, but also prepared the ground for modern universal definitions.

1.2. Contemporary Definitions of Piracy

The most comprehensive definitions of piracy have been developed within the frameworks of two prominent international organisations, the United Nations (UN) and the International Maritime Bureau (IMB) in 1982 and 1992, respectively. The latter, being a structural division of the International

²¹ Manley O. Hudson director. *Research in International Law*. Harvard Law School: Cambridge, Mass, 132. p. 749-750.

²² *Ibid.*, at 806-807.

²³ *Ibid.*, at 749.

Chamber of Commerce, established the Piracy Reporting Centre (PRC), which in its annual and quarterly reports defines piracy and armed robbery as follows:

An act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in the furtherance of that act.²⁴

This definition plays complementary role to that of provided by the UN Convention of the Law of the Sea (UNCLOS) that will be described further. Unlike the latter, the IMB's definition also covers piracy acts committed within the jurisdiction of a state. This approach is explained by the principle of state sovereignty, as any state has the right to exercise its own jurisdiction within territorial waters.²⁵ As IMB's norms are of non-binding character, this approach does not come into conflict with the principle of state sovereignty and is used only for the reporting purposes. Therefore, the IMB adopted the definition of piracy in its Code of practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships as it is provided by UNCLOS.²⁶ It is necessary to note that UNCLOS adopted the definition of piracy as it was provided by the 1958 UN Convention on the High Seas. However, the UNCLOS's definition will be used as the only UN source in this paper to avoid any confusions.

UNCLOS's provisions are generally accepted as customary international law.²⁷ In Article 101, it defines piracy as follows:

- (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).²⁸

²⁴ *Supra*, note 2 at 3.

²⁵ Hyslop, I.R. (1989). *Contemporary Piracy*. In Eric Ellen Q.P.M. (Ed.), *Piracy at Sea*. Redverse Ltd., England. p.7, para. 1

²⁶ IMO Doc. A 22/Res.922, Annex. art. 2(1). Available from:
http://www.lex.unict.it/risorseinternazionali/seminari/270409/IMO_A922%2822%29.pdf

²⁷ R. Chuck Mason, *Piracy: A Legal Definition*. Congressional Research Service (2010). P.2, para.2

The given definition is widely recognised as universal due to its comprehensive approach to the problem of piracy. Unlike the US, some other common law countries have adopted or incorporated the UNCLOS's definition into domestic legislation. The United Kingdom's Merchant Shipping and Maritime Act (1997), for example, considers this definition as "constituting part of the law of nations".²⁹ Amended in 2010, the Australia's Crimes Act 1914 has gone further by incorporating the entire UNCLOS's definition along with precise interpretation of relevant terms, such as "place beyond the jurisdiction of any country" and "high seas".³⁰

Maritime zones are more precisely defined by the UNCLOS, which also regulates the wide range of maritime aspects from the sovereign immunity issues to the protection of marine environment, including the modern definition of the high seas. However, it seems like there is a confusion, as UNCLOS recognises 6 maritime zones with *Territorial waters* and *High Seas* listed first and last, respectively.³¹ When a state is allowed to exercise its jurisdiction within 12 nautical miles that is defined by the UNCLOS as *Territorial waters*, the *High seas* are recognised as "the area beyond the outer limit of a coastal state's continental shelf", which [the Continental shelf area] is "12–200 nautical miles, but can be farther under certain circumstances". However, this wording, being inconvenient for defining the crime of piracy because it demonstrates the 188-mile gap between the territorial water and the high seas, is avoided by the clause (ii) of Article 101 admitting the act of piracy might be committed outside the jurisdiction of any state, but not only on high seas.

The importance of the UNCLOS, that up to now has been signed by 157 and ratified by 161 states, is obvious, as its definition of the crime of piracy has been adopted and incorporated into national

²⁸ UN General Assembly, *Convention on the Law of the Sea*, 10 December 1982, available at: <http://www.unhcr.org/refworld/docid/3dd8fd1b4.html> [accessed 30 May 2011].

²⁹ See Merchant Shipping and Maritime Security Act, 1997, ch. 28, § 26 (U.K.) ("For the avoidance of doubt it is hereby declared that for the purposes of any proceedings before a court in the United Kingdom in respect of piracy, the provisions of the United Nations Convention on the Law of the Sea 1982 . . . shall be treated as constituting part of the law of nations.").

³⁰ *Crimes Act 1914 Vol. 1 (as amended up to Act No. 127 of 2010)* [Australia], 1 January 2011, ss. 51-53, available at: <http://www.unhcr.org/refworld/docid/4d3409d92.html>

³¹ *Supra*, note 28.

legislation by many countries. Likewise the law of nations, the UNCLOS also recognises the universal jurisdiction over the crime of piracy in Article 107 authorising a seizure on account of piracy.³² But now we need to find where this recognition is originated from and why piracy is subject to universal jurisdiction.

1.3. Why piracy is *jus cogens* and subject to universal jurisdiction

What makes the crime of piracy subject to the universal jurisdiction? First, over its long history, piracy has always been accompanied by severe violence against people and caused huge economic damage to states. Second, pirates usually attack ships irrespective of their belonging to one or another state that makes this crime as of international character. Third, most of the incidents take place on the high seas, which are beyond territorial jurisdiction of any state. All these problems motivated states to proclaim piracy as an offence over which every state should have authority to prosecute and punish those accused of being pirates.³³

According to Lord Millet of the UK House of Lords, a crime is subject to the universal jurisdiction if it meets two requirements. First, the crime should be widely recognised as *jus cogens* or peremptory norm of international law, which are non-derogable in any circumstances. Second, the crime should be serious in scope and gravity.³⁴

It is necessary to find whether the crime of piracy is *jus cogens* in nature. A Distinguished Research Professor of Law Emeritus at DePaul University College of Law Cherif Bassiouni suggests examining the crime in 4 dimensions:

- (1) International pronouncements, or what can be called international opinion juris, reflecting the recognition that these crimes are deemed part of general customary law; (2)

³² *Ibid.*

³³ *Supra*, note 17. *US v. Smith* provides that: "...pirates being *hostes humani generis*, are punishable in the tribunals of all nations".

³⁴ *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*. United Kingdom, House of Lords, 24 March 1999. Pinochet III, [199] 2 All ER 97, 170, 2 WLR 827, 38 I.L.M.581, 644 (199). Discent opinion of Lord Millett. para. 1.

language in preambles or other provisions of treaties applicable to these crimes which indicates these crimes' higher status in international law; (3) the large number of states which have ratified treaties related to these crimes; and (4) the ad hoc international investigations and prosecutions of perpetrators of these crimes.³⁵

The first requirement can be satisfied by the widely accepted recognition of piracy as *hostis humani generis*, namely a “*crime against all humanity*”. This definition with respect to pirates was first introduced by famous Dutch scholar Hugo Grotius in 17th century³⁶ and was later mentioned in many scientific researches and legal decisions, such as *U.S. vs. Smith*.³⁷ Second and third options can be referred to the prohibition of piracy under Article 101 of the UNCLOS, which is signed by 157 and ratified by 161 states. Despite the absence of a special ad hoc international tribunal, the last option can be satisfied by the recent UN Secretary General report that outlined 7 options, with 2 of them recommending prosecuting pirates by the especially established international tribunals.³⁸

More specifically, the second requirement of seriousness can be satisfied by the fact that the Security Council has issued 7 resolutions for the last 3 years with respect to Somali pirates. Each of the seven resolutions in the second paragraph states that the Security Council is “*Gravely concerned* by the threat that acts of piracy and armed robbery”. Besides, all resolutions in one or another wording authorise states to use force against Somali pirates on the high seas on the stipulation that “measures undertaken ... shall be undertaken consistent with applicable international humanitarian and human rights law”.³⁹ The IMO statistics mentioned in the introductory section of this paper also illustrates the wide scope of the crime of piracy off the Somalia coast and the number of casualties that satisfies the last requirement of gravity making the crime piracy subject to universal jurisdiction.

Cherif Bassiouni suggests another approach to universal jurisdiction from the perspective of international criminal law. He states that the fact the crime of piracy is *jus cogens* in nature

³⁵ M. Cherif Bassiouni. “*International Crimes: Jus Cogens and Obligatio Erga Omnes*,” in 59 Law & Contemp. Probs. 60, 63 (Duke: Duke Law Press), 1996.

³⁶ Grotius, Hugo. *De jure belli ac pacis*, (Francis W. Kelsey trans., 1925); p. 1625

³⁷ *Supra*, note 17.

³⁸ *Supra*, note 15.

³⁹ UN Doc. S/RES/1851 (2008), art. 7.

automatically gives rise to the *obligatio erga omnes*, namely imposes on states the duties and responsibilities either to prosecute or extradite the alleged pirates.⁴⁰ As pirates might not fall into the jurisdiction of the State as they are neither its nationals nor they attacked a ship that belongs to the State, there is another link between the perpetrator and the State, which allows the latter to exercise its jurisdiction over the crimes defined as *delicta juris gentium* or *crimes under international law*. This link is *lex loci deprehensionis*, in other words, the fact that the offender remains on the territory of the State.⁴¹

The universal jurisdiction over the crime of piracy is based on two principles, namely *rationae materiae* and *rationae personae*. The first principle is “of a specific nature” and allows exercising the universal jurisdiction if the crime is prohibited by international treaty [UNCLOS in our case] that gives a power to any state party to the treaty to prosecute the offenders. Unlike the previous, second principle is “of a general nature” and admits universal jurisdiction only in the presence of both *lex loci deprehensionis* and *delicta juris gentium*.⁴² Thus, Cherif Bassiouni’s approach seems to be more comprehensive than that of Lord Millet, as it not only defines the crime of piracy as *jus cogens* from which no derogation is permitted, but also explains why this offence is subject to *obligatio erga omnes* obliging states to prosecute or extradite the alleged perpetrators.

1.4. Elements of the crime of piracy and its distinction from other maritime crimes

Many authors use wording “piracy and armed robbery”, when the US defines piracy only as “robbery at seas”.⁴³ However, piracy and robbery are two completely different crimes and this difference could be best illustrated by the IMB-PRC’s definition:

⁴⁰ *Supra*, note 35.

⁴¹ Bassiouni, Cherif (1973). A Treatise on International Criminal Law. In Barry H. Dubner (Ed.), *The law of international sea piracy*. Martinus Nijhoff Publishers, the Hague p.34

⁴² *Ibid.*

⁴³ *Supra*, note 17.

“Armed robbery against Ships means any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of “piracy”, directed against a ship or against person or property on board such ship, within a State’s jurisdiction over such offences”.⁴⁴

IMB’s position is clear: armed robbery can be committed only within the territorial waters of a state, when similar acts occurred outside state’s jurisdiction fall into the category of piracy. In simple words, the IMB differentiates these two crimes on the basis of the principle of territoriality. Besides, the IMB-PRC defines armed robbery as “other than an act of piracy” avoiding any confusion by this interpretation. However, this example seems to be much easier than another problem of distinction the global phenomenon of piracy from another global crime, namely terrorism.

Growing number of hostages, enormous ransoms paying by companies, advanced weapons and latest technique of seizing vessels cause wrongful opinion that piracy is no other than maritime terrorism. As a response to these facts, American jurist and historian *Douglas R. Burgess Jr.* makes two arguments: piracy is terrorism, and terrorism is piracy.⁴⁵ In support of his position, he examines three basic elements of the crime: the *mens rea*, or guilty mind, the *actus reus*, or guilty act, and the *locus*, or place of crime. His wrongful approach is relevant to illustrate the distinction between these two global crimes.⁴⁶

Unlike the crime of piracy, which is shaped by many treaties, the crime of terrorism has not been defined universally. For the purposes of this paper, there will be applied a definition provided by the Security Council defining terrorism as:

criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act...⁴⁷

⁴⁴ *Supra*, note 2.

⁴⁵ Douglas R. Burgess. *The world for ransom: Piracy is terrorism, terrorism is piracy*. Prometheus Books, 2009.

⁴⁶ The author doesn’t agree with the arguments provided by Burgess, but plans to use his model to describe the difference between the crime of piracy and terrorism.

⁴⁷ UN Doc. S/RES/1566 (2004), clause. 3

First, the *mens rea* of the crime of terrorism is significantly broader and includes *specific intent* to murder or cause serious damage and the main purpose of intimidating people or having influence over the state. The aspect of a *specific intent* in the crime of piracy is narrow, as all criminal actions should be committed “for private ends”, in other words, for pirates using of violence is mean to achieve the purpose rather than the purpose itself. Besides, unlike pirates targeting people and state’s property only for their own enrichment, terrorist as a rule pursue completely different goals of religious, economic or political character.

Second, the *actus reus* of the crime of terrorism is broader indeed, as it includes *any act* that means that terrorists might commit an act of terrorism in any form, such as bombing, taking of hostages, targeted killing, poisoning of water supplies, destruction of sacred object etc. The crime of piracy is limited in actions due to its private ends and usually includes only acts of violence against people and robbery in various forms.⁴⁸

Third, the *locus* of the crime of terrorism is also significantly broader, as terrorists often target important or strategic objects that means that act of terrorism might occur anywhere, on or under the ground, in the airspace and even on the waters.⁴⁹ As it has been stated throughout the history of this crime, the act of piracy can be committed only on the high seas.

There are indeed many similarities between piracy and terrorism, as both pirates and terrorists practice hostage taking, violence or even ransom demands and robbery, as both kinds of criminal activity requires a lot of money for salaries, recruitment, weapons, bribing militia and officials, etc.⁵⁰

⁴⁸ However, this fact should not narrow the scope of crimes, as “violence, detention and depredation” might take one or another form in different situations. Otherwise there will be the same situation as with the US, which historically defines piracy as a “robbery at sea” and thus is limited in its ability to prosecute pirates.

⁴⁹ In 2008, the most spectacular terrorist attack was committed by al-Qaeda off the Mumbai shore resulting in about 200 casualties. Yonah Alexander (2008). Preface. In Yonah Alexander and Tyler B. Richardson, *Terror on the High Seas*, vol. 1. ABC-CLIO, LLC. p. xxxiii

⁵⁰ For detailed information see Gurule, Jimmy. *Unfunding Terror: the legal response to the financing of global terrorism*. Edward Elgar Publishing Limited; 2008. p. 23; Mary Harper, *Chasing the Somali piracy money trail* [Internet]. 2009 May 24 [cited 2010 Dec 6]. Available from <http://news.bbc.co.uk/2/hi/africa/8061535.stm>

However, all abovementioned differences allow not only to illustrate the distinction of the crime of piracy from other maritime crimes, but also to develop its specific elements.

First, piracy is not only robbery at sea, but also due to the intent to commit the crime using the violence, could include other elements of a crime, such as hostage taking, bodily harm or even murdering. Second, the act of piracy due to the aspect of state sovereignty could be committed only on the high seas. Third, piracy is a *jus cogens* crime imposing *obligatio erga omnes* and thus subjected to universal jurisdiction.

Conclusion

Despite its long history and numerous attempts to be precisely defined under the law of nations, the crime of piracy had been universally shaped only in 20th century. On the basis of the comprehensive analysis of the universal definition of piracy, we have developed the specific characteristics of the crime. First, it is subject to universal jurisdiction due to its *jus cogens* nature that means every state have jurisdiction over the alleged pirates remaining on its territory. Second, *jus cogens* nature of the crime of piracy automatically imposes *obligatio erga omnes* that means states also have a duty to prosecute or extradite the perpetrators to avoid impunity. Third, the crime of piracy is unique in its nature and differs from other maritime crimes, like “armed robbery” or “terrorism”.

However, the crime labeled as *hostis humani generis* and presumably being subject to universal jurisdiction is still suffering from inability of many states to apply the comprehensive universal jurisdiction during the trials relying on their domestic definitions instead. In the next chapter we will examine why pirates often escape the punishment and what should be done to make perpetrators criminally liable for the acts of piracy.

CHAPTER II. PROSECUTING PIRACY ON REGIONAL OR NATIONAL LEVEL

In his report, the UN Secretary General Ban Ki-Moon outlined 7 possible options; 5 of them suggest supporting of national or regional initiatives for prosecuting piracy. Mr. Ki-Moon offers strengthening the potential of Somalia's domestic courts, relying on the recently opened high-security courtroom for prosecuting pirates in Kenya, or establishing the regional court with or without UN participation. In this chapter we will be considering all three variants.

2.1. OPTION ONE: Strengthening the potential of local courts in Somalia

There are two suggestions repeatedly mentioned by the UN Secretary General in his report, namely strengthening the potential of Somalia's domestic courts with the purpose to make them capable of trying and sentencing its own citizens charged with the crime of piracy and relying on the Kenyan courts currently prosecuting Somali pirates. As the second option will further be discussed in this section, it seems to be appropriate to start from analysing the potential of Somalia for the proposed purposes.

After the military coup in 1969, the country become involved in three brutal armed conflicts with the most intensive in 1991-1992 resulted in more than 250,000 casualties and culminated in signing a peace agreement between the Transitional Federal Government of Somalia and the opposition Alliance for the Re- Liberation of Somalia in 2008.⁵¹

There is no functioning government in Somalia since 1991 with an absence of any political party. The state is still suffering from irregular invasions of Islamist insurgents with the last taken place in October 2010.⁵² Somalia is struggling for territorial integrity, as two northern parts, namely

⁵¹ The World Bank. Conflict in Somalia: Drivers and Dynamics (Report). World Bank Publications, 2005. Available from: <http://siteresources.worldbank.org/INTSOMALIA/Resources/conflictinsomalia.pdf>

⁵² Mohammed Ibrahim. Somali Government and Allies Attack Insurgents [Internet]. 2010 Oct 18 [cited 2010 Dec 6]. Available from: http://www.nytimes.com/2010/10/19/world/africa/19somalia.html?_r=1

“Somaliland” and “Putland”, *de facto* consider themselves independent and do not recognise the transitional government.⁵³

The legislative power is not functioning, as the Constitution has not been adopted yet. Therefore, Somalia courts cannot ensure the guarantees of fair trial for alleged pirates; nor it can apply the international norms, as the mechanism of implementation is still missing due to the absence of the main enforcing document, namely the Constitution.

The judicial power is in analogous situation – the Supreme Court is not operating, the domestic secular courts are useless in a practical manner. Justice is informally exercised by the Sharia courts, which strengthened their positions after the 2006 invasion of the Union of Islamic Courts (UIC),⁵⁴ whose predecessor, the Al-Ittihad al-Islami (AIAI), was designated as a Foreign Terrorist Organisation by US Department of State.⁵⁵ In its 2008 Mission report, the UN Office of the High Commissioner on Human Rights characterised situation with the administration of justice in Somalia as “an absolute culture of impunity”.⁵⁶

As we may see, there are no prerequisites for the prosecution pirates in the country that has no stable government, functional judicial system, or even Constitution. Therefore, the attempts to rely on such knowingly disastrous variant seem to be futile.

2.2. OPTION TWO: Strengthening the potential of local courts on the particular example of the high-security courtroom in Mombasa, Kenya

In his report, the Secretary General repeatedly refers to the recently established high-security courtroom in Mombasa, Kenya, which in his opinion “has achieved some success” in prosecuting

⁵³ OHCHR Preliminary Human Rights Assessment on Somalia – Mission Report 19 July to 2 August 2008. p. 5. para. 15-16. Available from http://www.ohchr.org/Documents/Countries/somalia_assessment_mission_report.pdf

⁵⁴ US Department of State. Background note: Somalia (Washington, DC, 2010). Available from: <http://www.state.gov/r/pa/ei/bgn/2863.htm>

⁵⁵ US Department of State. List of Foreign Terrorist Organisations (FTO); Annex (Washington, DC, 2008). Available from: <http://www.state.gov/documents/organization/31947.pdf>

⁵⁶ *Supra*, note 53. p. 8. Para. 29.

pirates.⁵⁷ The potential of Kenyan domestic courts to deal with cases of piracy had also been admitted by the European Union, which, on 6 March 2009, exchanged of official letters with the Government of Kenya obliging the latter to accept the persons arrested by the European Union-led Naval Force (EUNAVFOR) for prosecution with further service of term on the territory of Kenya.⁵⁸ However, the provisions of the bilateral agreement made EUNAVFOR responsible for technical support only, such as providing any evidence or records and handing over the seized property to the Kenyan part,⁵⁹ but were unable to assist in resolving the problem of overcrowding of the prisons or large amount of pending cases. Just a year after signing the agreement, Kenyan Foreign Minister Moses Wetangula reported about the state's plans to suspend accepting the persons arrested by the EUNAVFOR and renounce its obligations before the international community, because the latter didn't want to share the burden of trying and punishing pirates.⁶⁰ Donor countries immediately reacted with the offer of financial assistance to the Kenyan domestic courts and through the United Nations Office on Drugs and Crime's Counter-Piracy Program (UNODC-CPR) promised to invest about \$9.3 million in Kenya and Seychelles' court systems.⁶¹ Up to now, Kenya has received about \$3 million from the UNODC, most of which was spent for creating a high-security courtroom opened on 24 June 2010 in Shimo La Tewa, Mombasa.⁶² In addition to the new court premise, Kenyan Government received its 6 state prisons renovated and fully equipped to host 123 suspected pirates expecting trial.⁶³ Thereby, Kenya had had all necessary technical and logistical support prior to the trials of the alleged pirates.

⁵⁷ *Supra*, note 15.

⁵⁸ "Letters dated 6 March 2009". Official Journal of the European Union, L 79/49. Available from: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:079:0049:0059:EN:PDF>

⁵⁹ *Ibid.*, Annex. section 6

⁶⁰ BBC News. Kenya ends trials of Somali pirates in its courts [Internet]. 2010 Apr 1 [cited 2010 Dec 6]. Available from: <http://news.bbc.co.uk/2/hi/8599347.stm>

⁶¹ Hillary Stemple. UN announces \$9.3 million in donations to fund piracy courts [Internet]. 2010 Jun 15 [cited 2010 Dec 6]. Available from: <http://jurist.org/paperchase/2010/06/un-announces-93-million-in-donations-to-fund-piracy-courts.php>

⁶² BBC News. Kenya ends co-operation in hosting Somali pirate trials [Internet]. 2010 Oct 1 [cited 2010 Dec 6]. Available from: <http://www.bbc.co.uk/news/world-africa-11454762>

⁶³ Official website of the United Nations Office on Drugs and Crime (UNODS). New courtroom in Mombasa to bring pirates to justice [Internet]. 2010 Jun 25 [cited 2010 Dec 6]. Available from: <http://www.unodc.org/unodc/en/frontpage/2010/June/new-courtroom-in-mombasa-to-bring-pirates-to-justice.html>

Despite the plans of international community to rely on Kenyan courts in prosecuting pirates, the leading French human rights organisation “Lawyers of the World” represented about 40 Somalians arrested by EUNAVFOR, challenged Kenya’s capability to ensure the fair trial for those accused of piracy. In its letter to the UN, EU and Kenya’s Ministry of Foreign Affairs, the organisation called the parties upon creation of joint monitoring mechanism to ensure rights of the accused pirates during the trial and further imprisonment. It also expressed a doubt regarding Kenya’s jurisdiction over the crimes committed on the high seas.⁶⁴ Therefore, the problems pointed out by the French NGO require examination of Kenya’s ability to try pirates in compliance with the international standards of fair trial and providing the appropriate treatment to the convicted pirates in custody. The jurisdiction over the crime of piracy will also be considered.

First of all, it is important to establish how piracy is defined under the Kenyan legislation. National court in Kenya are guided by the Penal Code (hereinafter “the Code”), which is a primary criminal legislation applying within the territory of Kenya.⁶⁵ Before it was amended in 2009, the Code had been the only applicable law since 1967 for the cases of piracy, that in Section 69 (1) provided the following:

“S. 69 (1) any person who, in territorial waters or upon the high seas, commits any act of piracy *jure gentium* is guilty of the offence of piracy.”⁶⁶

The third paragraph of this article imposed an imprisonment for life on those “guilty of the offence of piracy”.⁶⁷

The given wording of the Kenyan Code is very close in the meaning to that of adopted by the US Code in 1820.⁶⁸ Both domestic acts refer to the law of nations, but do not explain how the crime of

⁶⁴ Sarah McGregor. EU, Kenya Somali-Pirate Treaty ‘Violates Rights’, Lawyers Say [Internet]. 2009 Aug 19 [cited 2010 Dec 6]. Available from: http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aDs_bA4DXiTg

⁶⁵ Laws of Kenya. The Penal Code. Revised edition 2009 (2008), available from: <http://www.kenyalaw.org/Downloads/GreyBook/8.%20The%20Penal%20Code.pdf>.

⁶⁶ Laws of Kenya, 1970, Government Printer, Nairobi, Kenya, 1970 rev. ed., Chapter 63.

⁶⁷ *Ibid.*

piracy is defined under it. Thereby, Article 69 of the Code was repealed by the enactment of the Merchant Shipping Act, which came into force on 1 September 2010 and describes piracy as:

- (a) any 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) against another ship or aircraft, or against persons or property on board such ship or aircraft; or
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any voluntary act of participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; or (c) any act of inciting or of intentionally facilitating an act described in paragraph (a) or (b).⁶⁹

The Merchant Shipping Act almost entirely adopted the definition provided by the UNCLOS with one minor exception. The drafters excluded the term “high seas” from the new law using the wording “outside the jurisdiction of any State” instead. In the previous section, we saw that these two elements are completely different,⁷⁰ and this omission would have been problematic. However, not this loophole, but lack of jurisdiction *ratione loci* has become a stumbling block.

On 9 November 2010, the High Court of Kenya at Mombasa delivered a ruling that not only overrode the decision of the first-instance Chief Magistrate’s Court at Mombasa, but also ruined the attempts of international community to label Kenya as a key player in prosecuting pirates on African continent. The court of appeal headed by judge Mohammed Ibragim found in the case *In Re Mohamud Mohamed Dashi & 8 Others [2010] eKLR*⁷¹ that M. Dashi, who had been accused of piracy along with eight other alleged perpetrators by the trial court and sentenced to various terms of imprisonment, must have been immediately released.⁷² In its decision the High Court stated:

The net result from the foregoing is that the Magistrate court ... and any other Magistrate’s Court in Kenya do not have jurisdiction to try the charges against the Applicants in this

⁶⁸ *Supra*, note 19.

⁶⁹ *The Merchant Shipping Act, 2009*. art. 69. p. 275. Available from: http://www.kenyalaw.org/Downloads/Acts/The_Merchant_Shipping_Act_2009.pdf

⁷⁰ See p. 7.

⁷¹ *In Re Mohamud Mohamed Dashi & 8 Others [2010] eKLR*. Available from: http://kenyalaw.org/Downloads_FreeCases/78571.pdf

⁷² *Ibid.*, p. 30. “...I do hereby Order the immediate and unconditional release of the Applicants from Prison custody and they shall be so released unless otherwise lawfully held”.

case and the court has no jurisdiction over the Applicants and matter before it in the circumstances.⁷³

But what are “the circumstances” under which the High Court issued such decision? First, provisions of the new Merchant Shipping Act could not be applied to the case, as the Magistrate’s Court had issued its verdict on the basis of the repealed Penal Code.⁷⁴ Thus, the appeal court was prevented from using the new definition and applied the wording of the repealed Sections 69 (1) that, in opinion of the court, is vague and put obstacles in prosecuting those accused of piracy.⁷⁵ Second, after comprehensive debates about the interpretation of the definition of piracy, the judgment was made on the basis of the provisions of Section 5 of the Penal Code, which set up the territorial jurisdiction of the local courts as follows:

5. The jurisdiction of the Courts of Kenya for the purpose of this Code extends to every place within Kenya, including territorial waters.⁷⁶

With the purpose to define the high seas under the applicable repealed law, the Court referred to the UNCLOS, which in Article 87 provides the clear definition of the high seas allowing the Court to conclude that “the High Seas as contemplated by section 69 (1) excludes territorial waters. In other words, the High Seas are outside the territorial jurisdiction of the Kenyan Courts”.⁷⁷

The question is still open why the trial courts did not check their jurisdiction before trying the pirates, or why Kenyan lawmakers didn’t initiate the process of amending the national legislation to make it work for the particular purpose of prosecuting Somali pirates, who *de facto* do not fall into the jurisdiction of Kenya,⁷⁸ but *de jure* should be subject to universal jurisdiction over piracy *jure gentium*.

In Re Mohamud Mohamed Dashi & 8 Others [2010] eKLR case could also have negative impact on the

⁷³ *Ibid.*, p. 30

⁷⁴ *Ibid.*, p. 6-7. Mr. Magolo’s (advocate of the applicants) submissions 1, 2 and 3

⁷⁵ *Ibid.*, p. 25. The Court refers to the similar position in the paper of famous Kenyan scholar, Dr. Paul M. Wambua: “The definition of piracy in the repealed Section has often presented a problem to both the prosecutions and the court as no specific definition is given of the offence of piracy *jure gentium* and therefore the elements of the offence are not given”

⁷⁶ *Ibid.*, p. 16

⁷⁷ *Ibid.*, p. 15

⁷⁸ *Ibid.*, p. 5. Applicants are arguing that the trial court has no jurisdiction as “(a) That the alledged attack took place in/at the Gulf of Aden, (b) That at no time did the attack proceed to Kenyan waters or Kenyan Territory, (c) That no Kenya goods, crew or ship was involved”

other rulings of trial courts already issued against Somali pirates, many of whom have served half of the sentence.⁷⁹ It is expected that those already convicted in accordance with the repealed Section 69 (1) could not only appeal the decision at the trial courts and win the case on the basis of the precedent of *In Re Mohamud Mohamed Dashi & 8 Others [2010] eKLR* case, but could also claim a compensation for judicial errors.

Another question that cast doubts on the competence of Kenyan domestic courts to prosecute alleged pirates is whether the courts was able to ensure the universal principles of fair trial during the process. According to the bilateral agreement signed with the EU, Kenya admitted to adopt and use the UNCLOS's definition of piracy and obliged to ensure the right to fair trial to all parties of the court process.⁸⁰ However, there have been some facts that might be used as recognition of Kenya's inability to comply with their obligations before the EU.

The high-security court in Mombasa was immediately labeled as "fast track court" after establishing.⁸¹ The right of being tried without a reasonable delay is provided by the Article 4 (2 (c)) of the International Covenant on Civil and Political Rights (ICCPR), but the court process must be comprehensive and impartial.⁸² However, some statements made by Kenyan officials cast doubts that the requirements of fair trial had been observed during the process. For example, Mombasa chief magistrate Rosemelle Mutoka characterised the cases of piracy as "often simpler than other cases". "If you bring 10 to 15 witnesses, we can finish this in a week or two," said Kenyan official to Mr. Jack Lang, the UN special adviser on legal issues related to Somali piracy.⁸³

⁷⁹ According to Kenya's Police Commissioner Matthew Iteere, there are 124 alleged pirates in the possession of law-enforcement bodies waiting for the prosecution, from whom "18 have been convicted, 10 sentenced to seven years in jail while eight got 20 years each. We have 106 suspects still in remand custody awaiting hearing and judgement". Available from: <http://af.reuters.com/article/topNews/idAFJJOE65N0UF20100624?pageNumber=2&virtualBrandChannel=0>

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⁸¹ BBC News. Kenya opens fast-track piracy court in Mombasa [Internet]. 2010 Jun 24 [cited 2010 Dec 6]. Available from: <http://www.bbc.co.uk/news/10401413>

⁸² International Covenant on Civil and Political Rights, (1976) 999 UNTS 171, art. 4(2(c)). Also available from: <http://www2.ohchr.org/english/law/ccpr.htm>

⁸³ World Countries. Missing witnesses stall piracy cases [Internet]. 2010 Oct 12 [cited 2010 Dec 6]. Available from: <http://kenya.world-countries.net/archives/32215>

There is a question how “10 to 15 witnesses” could satisfy the court’s needs to try 84 suspected pirates? It is clear that the chief magistrate violated a number of principles of fair trial provided by the ICCPR: “the presumption of innocence” (Article 14 (2)) promising to “finish” the cases;⁸⁴ “the right to have adequate time for the preparation of his [accused] defense” (Article 14 (3 (b)) by stating that “we can finish this in a week or two”;⁸⁵ and “the right to public hearing by a competent, independent and impartial tribunal” (Article 14 (1)) as the judge presumably concluded the decision before its actual end.⁸⁶

International assessment to Kenyan judicial system was made by the Transparency International, the world’s leading organisation in fighting against corruption, which in its 2009 Global Corruption Report placed Kenya 147th out of 180 countries, mainly due to the problem of dominance of executive power over legislative and judicial authorities.⁸⁷ However, Kenyan judicial system is suffering not only from lack of independence, as the conclusions recently made by Mr. Christof Heyns, UN Special Rapporteur on extrajudicial, arbitrary or summary executions, during his 2009 visit to Kenya, demonstrate state’s inability to ensure the standards of fair trial because of widespread corruption in Kenya’s courts, which “could not conceivably bring justice in relation to post-election violence matters stands as an extraordinary indictment of the bankruptcy of the judicial system as it currently stands”.⁸⁸ The problem of post-election violence mentioned by the UN Special Rapporteur has lead to the situation, when there are more than 800,000 criminal cases pending before the courts now.⁸⁹ This fact again raises the problem noted in previous paragraph, when the the justice has quantative character rather than qualitative.

⁸⁴ *Ibid.*, art. 14 (2).

⁸⁵ *Ibid.*, art. 14 (3(b)).

⁸⁶ *Ibid.*, art. 14 (1).

⁸⁷ Transparency International. Global Corruption Report 2009: Corruption and the Private Sector. United States of America by Cambridge University Press, New York, 2009. P. 188. Available from: <http://www.transparency.org/content/download/46187/739801/>

⁸⁸ UN Special Rapporteur on extrajudicial, arbitrary or summary executions Mission to Kenya 16-25 February 2009. Available from: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=8673&LangID=E>

⁸⁹ Peter Chalk. An Old Scourge Needs a Modern Solution [Internet]. 2010 Sept 3 [cited 2010 Dec 6]. para. 7. Available from: <http://www.rand.org/commentary/2010/09/03/IHT.html>

Another argument of EU's shortsided approach is the fact that Kenya's standards of imprisonment are far from those of the UN Minimum Rules for the Treatment of Prisoners, which are widely recognised as universal standards of imprisonment.⁹⁰ In 2007, the UN Committee against torture concluded that Kenya's detention facilities are filled to twice their capacity.⁹¹ Nothing has changed since 2007, as Kenya's Prisons director of programmes in charge of rehabilitation, Ms Mary Khaemba repeated the Committee's figures in 2010.⁹² Some researchers provide even more impressive figures about state's prisons overcrowded by prisoners which number exceeds the holding capacity by 300-400%. Besides, the Shivo la Tewa jail, mentioned as a place of detention of 9 accused pirates in *In Re Mohamud Mohamed Dashi & 8 Others [2010] eKLR*, recently suffered a cholera outbreak that carried away 61 prisoners.⁹³

As we may see, international society's attempts to rely on Kenya failed long before the actual decision to refer those committing the crime of piracy for the prosecution in domestic courts. Thus, now there is a need of improving the situation, which, after the disappointing High Court's decision, could worsen. One option is to transfer the remaining pirates for the prosecution to the Seyshells courts also trying Somali pirates.⁹⁴ However, the problem with already accused pirates is still actual as many of them have already served their term and cannot be tried again due to the principle of *ne bis in idem* or *double jeopardy*. Another option is to bring a motion before the Constitutional Court of Kenya with the

⁹⁰ UN General Assembly, *United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)* : resolution / adopted by the General Assembly., 14 December 1990, A/RES/45/110, available at: <http://www.unhcr.org/refworld/docid/3b00f22117.html> [accessed 30 May 2011].

⁹¹ UN Convention Against Torture: Consideration Of Reports Submitted By States Parties Under Article 19 Of The Convention. UN Doc. CAT/C/KEN/1, 2007. Available from: www.bayefsky.com/reports/kenya_cat_c_ken_1_2007.doc

⁹² Dorothy Kweyu. The price of justice: Only the poor end up in prison [Internet]. 2010 Oct 29 [cited 2010 Dec 6]. Available from: <http://www.nation.co.ke/News/The%20price%20of%20justice%20Only%20the%20poor%20end%20up%20in%20prison%200/-/1056/1043144/-/jelids/-/index.html>

⁹³ *Ibid.*

⁹⁴ Jay Carmella. Seychelles announces creation of UN-backed piracy court [Internet]. 2010 May 6 [cited 2010 Dec 6]. Available from: <http://jurist.org/paperchase/2010/05/seychelles-announces-creation-of-un-backed-piracy-court.php>

purpose to apply Article 2 (5) of the new Constitution that recognises general rules of international law and thus should admit the principle of universal jurisdiction over the crime of piracy.⁹⁵

2.3. OPTION THREE: The establishment of a regional tribunal on the basis of a multilateral agreement among regional States, with United Nations participation

This option has a promising start owing to the Sub-regional meeting convened by the IMO in Djibouti from 26 to 29 January 2009.⁹⁶ The meeting, that communed together not only 18 participating and 12 observing States but 4 relevant UN bodies and 12 high-ranking intergovernmental and non-governmental organisations, adopted a number of resolutions calling upon the states to provide appropriate financial and in-kind assistance to each other and strengthening the potential of officials designated by the States.⁹⁷ However, the main achievement of the Djibouti Meeting was presented by the adoption of the Code of Conduct concerning the repression of piracy and armed robbery against ships in the Western Indian Ocean and the Gulf of Aden (hereinafter referred to as “the Djibouti Code of Conduct”) that could further encourage States to establish a regional tribunal with United Nations participation if the latter will take the leading role during the future meetings.⁹⁸

Unlike other “soft” legal acts adopted by the IMO, the Djibouti Code of Conduct will be binding upon 18 member states within two years from the date of its official adoption on 29 January 2009. Being initially signed by 9 countries, the Djibouti Code of Conduct, *inter alia*, establishes a number of important propositions for its participants. First, the document considers the UNCLOS as the international law that “sets out the legal framework applicable to combating piracy and armed robbery at

⁹⁵ The Constitution of Kenya, 2008. art. 2(5). Available from:

http://www.google.com/url?sa=t&source=web&cd=8&sqi=2&ved=0CEUQFjAH&url=http%3A%2F%2Fwww.parliament.go.ke%2Findex.php%3Foption%3Dcom_docman%26Itemid%3D88%26task%3Ddoc_download%26gid%3D460&rct=j&q=constitution%20of%20kenya&ei=jU34TLjLLs6s8AbWscWNAg&usg=AFQjCNEspCfybsKC-x8a5n-KMTToStTRqaQ&cad=rja

⁹⁶ C 102/14, available from: <http://www.imo.org/OurWork/Security/PIU/Documents/DCoC%20English.pdf>.

⁹⁷ *Ibid.*

⁹⁸ IMO on the Djibouti Code of Conduct, effective as from January 29, 2009, available from

<http://www.mfa.gr/softlib/%CE%9A%CF%8E%CE%B4%CE%B9%CE%BA%CE%B1%CF%82%20%CF%84%CE%BF%CF%85%20%CE%A4%CE%B6%CE%B9%CE%BC%CF%80%CE%BF%CF%85%CF%84%CE%AF.pdf>

sea”. In Article 1, the Djibouti Code of Conduct adopts the UNCLOS’s definition of piracy in full and further in Article 14 refers to the latter for resolving any claims for damages, injury or loss. Second, it obliges State members to amend their domestic legislation in compliance with international law, namely the UNCLOS.⁹⁹

The above mentioned prerequisites illustrate the potential advantages of the given option. First, the fact that it has already had the multilateral agreement among the states pursuing the same aim of combating against pirates in the region does reject the misgivings that the creation of such tribunal will take a long time. Second, this meeting is supervised by the main UN donor states, such as Canada, France, Italy, Japan, Norway, United Kingdom and United States, which allows to hope that this initiative could be financially supported by them, if the States will come to an agreement about the necessity of the creation of such tribunal. It is obvious that tribunal’s operation will require more financial expenditures than other national institutions; however the outputs will undoubtedly be greater than that of the previous four options and very close to that of international tribunals with significantly less financing. Besides, conjectural participation of such law-enforcement and military bodies as International Criminal Police Organisation (INTERPOL) and North Atlantic Treaty Organisation (NATO) would resolve the problem of transferring of suspects to the tribunal and then to the third countries for serving sentence if convicted.

Realisation of this option would also be useful for participating states in terms of capacity-building, as it is expected that regional tribunal’s example could encourage domestic courts to follow the standards of fair trial in their work. A sufficient base of precedents would be another advantage of the tribunal. In its report, the UN Secretary General noted regional tribunal’s “possibly greater capacity than

⁹⁹ *Ibid.*

a special chamber within a national jurisdiction”¹⁰⁰ that makes this option seemingly the most effective among the five proposed national legal institutions.

Conclusion

The great expectations of international community regarding the special high-security court in Mombasa have failed due to the weakness of Kenyan judicial system and short-sighted policy of international organisations. The idea of strengthening the local courts in Somalia is also utopian, as international donors will probably spend more money investing to the collapsed legal system of the country than on the proposed “high cost” international tribunal. The only option, that was not mentioned by the Secretary General, but outlined above, would be establishing the regional tribunal on the basis of the Sub-regional meeting in Djibouti.

As we may see, the national mechanisms are still ineffective, while the regional have not been decided yet. Therefore, the need to examine whether there is a room for an international tribunal is still topical.

¹⁰⁰ *Supra*, note 15, art. 86.

CHAPTER III. PROSECUTING PIRATES ON INTERNATIONAL LEVEL

Two of the seven options outlined by the Secretary General require creation of an international body either under the resolution of the UN Security Council or on the basis of multilateral treaty. In his report, the Secretary General not only refers to the existing UN-based international mechanisms, such as the two *ad hoc* tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), as a possible model for the creation of proposed international tribunal, but also mentions currently operating international judicial bodies, such as the International Tribunal for the Law of Sea (ITLS), African Court on Human and People's Rights (ACHPR), and the International Criminal Court (ICC).

This chapter will try to answer on two questions. First, whether the currently operating international courts can deal with the crime of piracy? Second, what are advantages of the possible international piracy tribunal before the domestic courts and what model should be used for establishing of such tribunal?

3.1. Existing international mechanisms

There are 3 existing international judicial institutions mentioned in the report of Secretary General, namely International Tribunal for the Law of Sea (ITLS), African Court on Human and People's Rights (ACHPR), and International Criminal Court (ICC). There is no need to spend a lot of time explaining why the first two bodies cannot prosecute pirates, as both the ITLS and the ACHPR are classic treaty-based international courts not designed to prosecute individuals just as courts of general

jurisdiction do. Thus, this section will be focused on the potential of the ICC to become the international solution for prosecuting pirates rather than proposed international tribunal.

There are many advantages of the ICC before the international *ad hoc* tribunals and domestic courts. First, the ICC is a permanent judicial organ not limited in time of its operation that makes it a long time serving mechanism for prosecuting the most serious crimes.¹⁰¹ Unlike ICTY and ICTR, which were established for the specific period of time and now are under the time pressure-completion strategy affecting their work performance,¹⁰² the ICC has no similar problems and will be able to try pirates unless Somalia puts in order its judicial system. Second, the ICC's Rules of Procedure and Evidence contains the set of norms that not only ensure the international standards of fair trial, but also provide the security guarantees to the victims and witnesses.¹⁰³ Third, the principle of complementarity could allow the ICC to deal with the cases of piracy only when "the State is *unwilling* or *unable* genuinely to carry out the investigation or prosecution."¹⁰⁴ This provision might help the ICC not to be blocked up with enormous amount of pending cases focusing only on those of the most serious gravity.

As we may see, there are many advantages that might help the ICC to prosecute pirates more effectively than domestic courts or non-existing international tribunal. Now there is a need to examine whether the ICC could technically be involved in prosecution of pirates in near future. First obstacle is that the crime of piracy is not included into ICC's jurisdiction that now allows it to deal only with the crimes of genocide, crimes against humanity and war crimes. Rome Statute admits the amendments made by any State-party, which after three month should be decided by the Assembly of State Parties.¹⁰⁵

¹⁰¹ Currently, the ICC's subject matter jurisdiction includes four crimes: genocide, crimes against humanity, war crimes and crime of aggression. However, it cannot deal with the crime of aggression yet.

¹⁰² Sixty-fifth General Assembly Plenary 27th Meeting (AM). *Top Officials from United Nations War Crimes Tribunals for Former Yugoslavia, Rwanda, Appeal to Assembly for Resources, Help with Staffing Woes*, 2010. para. 3. Available from: <http://www.un.org/News/Press/docs/2010/ga11008.doc.htm>

¹⁰³ Rome Statute: *Rules of Procedure and Evidence*. Official Records ICC-ASP/1/3. Available from: http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf

¹⁰⁴ UN General Assembly, *Rome Statute of the International Criminal Court (last amended January 2002)*, 17 July 1998, A/CONF. 183/9, available at: <http://www.unhcr.org/refworld/docid/3ae6b3a84.html> [accessed 30 May 2011] , art. 17.

¹⁰⁵ *Ibid* at art. 121.

However, the process of expanding the jurisdiction of the ICC over the crime of piracy seems to be too long, as the decision making process might be more than three months due to the interpretation of text of the Rome Statute that reads as follows “no sooner than three months from the date of notification”.¹⁰⁶ As Assembly’s sessions take place once a year,¹⁰⁷ the amendment process could procrastinate and, bearing in mind another year for an amendment to enter into force, the whole process might take years.¹⁰⁸ Besides, even if Somalia that is not a party to the Rome Statute yet, accepts the ICC’s jurisdiction by joining the treaty, the Court will be able to consider only the crimes committed “after the entry into force of this statute for that State”.¹⁰⁹ To avoid this obstacle, Somalia can make a declaration accepting the ICC’s competence over the crimes committed before signing the treaty, but it is also allowed to make another declaration to block Court’s jurisdiction for seven years.¹¹⁰

Another important problem is presented by the subject-matter jurisdiction of the ICC. The Rome Statute recognises only “the most serious crimes of concern to the international community as a whole”¹¹¹ or “a crime threaten the peace, security and well-being of the world”.¹¹² It is obvious that the modern crime of piracy, despite its grave character, cannot be compared in gravity to those of the genocide, war crimes and crimes against humanity. However, even not being characterised as a crime of high gravity, piracy could meet the requirements of being a “part of a widespread or systematic attack”, as IMB’s statistic demonstrates that numerous piracy attacks taking affecting many countries are “widespread” and “systematic” due to their regular character and thorough planning and preparedness. Besides, the seriousness of the attacks of Somali pirates has been determined in several UN Security Council resolutions stating that “the incidents of piracy and armed robbery at sea off the coast of

¹⁰⁶ *Ibid.*

¹⁰⁷ The international Criminal Court. Rules of Procedure of the Assembly of States Parties. ICC-ASP/1/3. p. 160. rule 4. Available from: http://untreaty.un.org/cod/icc/asp/1stsession/report/english/part_ii_c_e.pdf

¹⁰⁸ See *supra* note 104, art. 121

¹⁰⁹ *Ibid.*, art. 11 (2)

¹¹⁰ *Ibid.*, art. 124

¹¹¹ *Ibid.*, art. 4 (2)

¹¹² *Ibid.*, Preamble. para 3

Somalia exacerbate the situation in Somalia, which continues to constitute a threat to international peace and security in the region”.¹¹³ Assuming the role of the Security Council in initiating the proceedings before the ICC, it is expected that its possible call for amending the Rome Statute would be unanimously supported by its all permanent members, including “intractable” China that recently agreed to take a part in the international anti-piracy operation.¹¹⁴

As we may see, this option is difficult for technical implementation, but will be effective if fulfilled. However, many countries call upon establishing an independent international tribunal for trying Somali pirates.

3.2. International Piracy Tribunal

Recent statement made by Kenyan Prime Minister Raila Odinga proposing an international tribunal for prosecuting Somali pirates not only show that the state implicitly admits its failure to deal with crime of piracy, but also demonstrates the seriousness of the problem, which could be effectively solved only by joint efforts of international community.¹¹⁵ Russia, Netherlands and UK are among other supporters of creation an international judicial mechanism. However, it’s not clear yet in which form this tribunal may be established or how long it will operate. This section will try to develop the potential model for an international tribunal dealing with the crime of piracy.

First, it is necessary to find how the tribunal should be established. The Secretary General suggests two options: by the Security Council’s resolution pursuant to Chapter VII of the UN Charter or under the multilateral treaty similar to Rome Statute. First option seems to be more time effective, as the treaty, which is not drafted yet, will require long time for entering into force. Besides, this initiative

¹¹³ UN Doc. S/RES/1851 (2008). P. 3. para 2

¹¹⁴ BBC News. China's anti-piracy role off Somalia expands [Internet]. 2010 Jan 29 [cited 2010 Dec 6]. Available from: <http://news.bbc.co.uk/2/hi/8486502.stm>

¹¹⁵ Keydmedia. Kenya Seeks Support for Piracy Tribunal for Somalia [Internet]. 2010 Dec 2 [cited 2010 Dec 6]. Available from: http://www.keydmedia.net/en/news/article/kenya_seeks_support_for_piracy_tribunal_for_somalia/

would be blocked by Somalia now actively resisting to the proposed international judicial mechanism.¹¹⁶ Another argument in favour of supporters of the international tribunal is that the UN Security Council has already issued a number of resolutions requesting for immediate solution of the problem, so it presumably would play the key role in establishing the international tribunal. As many states oppose creation of the tribunal under Chapter VII,¹¹⁷ there is third variant similar to that of so-called hybrid tribunals, such as the Special Court for Sierra Leone (SCSL) and the Special Tribunal for Lebanon (STL), which were established as a result of bilateral treaty signed between the Security Council and host countries.¹¹⁸ It is most likely that UN Security Council will be able to persuade Somalia, which has already expressed its willingness to work in co-operation with the former only.¹¹⁹

Second, the problem of piracy is mostly explained by the current crisis in Somalia and state's inability to rely on its domestic institutions. Assuming that this situation cannot go on forever and joint international efforts will help Somalia to recover soon, the tribunal should not be a permanent body similar to the ICC. It rather needs to provide an effective justice for the certain period of time unless the Somali domestic judicial system will not be re-established. This assumption allows to suggest that the international tribunal should be very close to the currently operating *ad hoc* international tribunals for the former Yugoslavia and Rwanda, as their efficiency is not in question. Since its establishing in 1993, the ICTY has delivered justice to 126 of the 161 accused with only two remaining on the run.¹²⁰ ICTR's

¹¹⁶ All Headline News. Somali Government Opposes Piracy Tribunal [Internet]. 2009 Jun 1 [cited 2010 Dec 6]. Available from: <http://allafrica.com/stories/200905310009.html>.

¹¹⁷ Radio Netherlands Worldwide. The Piracy Conundrum [Internet]. 2010 Sept 6 [cited 2010 Dec 6]. para. 7. Available from: <http://www.rnw.nl/international-justice/article/piracy-conundrum>

¹¹⁸ Schabas, William. *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*. Cambridge university Press; 2006. p. 48. para 2

¹¹⁹ See *supra* note 116.

¹²⁰ Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. UN Doc. A/65/205-S/2010/413. p. 4. para. 3. Available from: http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2010_en.pdf

achievements are more modest – 50 condemned in 42 trials with 10 remaining at large.¹²¹ Both tribunals work in close co-operation with the relevant states that helps to avoid any problems regarding the extradition of the alleged perpetrators.¹²²

Another significant advantage of the international tribunal would be its judgment database, which further will play an important role for the domestic courts not only for Somalia, but for other countries prosecuting pirates, such as Seychelles, Kenya, Mauritius and Tanzania. The precedent base will not only help to rely on judgments delivered in compliance with the international standards of fair trial, but would also solve the main problem that now affect many countries, namely establishing court's jurisdiction over the crime of piracy. The comprehensive interpretation of international norms by the tribunal will allow domestic courts, especially those of common law countries, to refer to the tribunal's precedents during the trial and thus to decide cases by analogy.

There is an apprehension that the tribunal will be overloaded with cases, as there are about 1,500 pirates operating off the coast of Somalia now.¹²³ However, this argument seems not to be strong enough to ruin the idea, as unlike the domestic courts of general jurisdiction, the proposed tribunal will deal only with the specific crime of piracy. Another risk is what to do with the accused pirates, as the tribunal will probably fulfill only judicial functions and will not be able to provide the facilities for further imprisonment. This problem could be resolved in analogy with the practice of *ad hoc* tribunals referring the accused to the relevant countries for sentencing the term. It is expected that the tribunal working in cooperation with neighbouring states will sign an agreement with those whose conditions of imprisonment meet the universal standards contained in the UN Minimum Rules for the Treatment of Prisoners.

¹²¹ "Letter dated 28 May 2010 from the President of the International Criminal Tribunal for Rwanda addressed to the President of the Security Council". UN Doc. S/2010/259. Annex 1. Available from: http://www.unicttr.org/Portals/0/English%5CFactSheets%5CCompletion_St%5CS-2010-259e.pdf

¹²² *Supra*, note 118.

¹²³ Robert I. Rotberg. Combating maritime piracy: a policy brief with recommendations for action. (policy brief #11). Cambridge, MA, 2010. p. 3, para. 2. Available from: http://www.worldpeacefoundation.org/WPF_Piracy_PolicyBrief_11.pdf

The only reasonable argument in favour of opponents to the international tribunal is high costs of such judicial body, as the 2010-2011 budgets for ICTY and ICTR are \$279,847,400¹²⁴ and \$227,246,500¹²⁵, respectively. Obviously, these figures are far more impressive than that \$3,000,000 received by Kenya for prosecuting pirates domestically. The only argument in this situation is the effectiveness of both tribunals that, except delivering justice to many perpetrators, left a “highly developed and sophisticated body of law”.¹²⁶ Again, the solution could be found in establishing the tribunal in the way very close to that of hybrid tribunals, as the 2010 budgets for both the ICSL and the STL are \$20.5 million¹²⁷ and \$55,4 million,¹²⁸ respectively. However, the legal legacy of these hybrid tribunals is less significant than that of the ICTY and the ICTR.

Conclusion

The creation of an international tribunal for prosecuting pirates seems to be more effective tool than strengthening the potential of domestic courts and expanding the jurisdiction of the ICC over the crime of piracy. As seen above on the examples of the existing tribunals, there are many advantages of the proposed international body before the national courts. First, international institutions always comply with the fundamental standards of fair trial. Second, they can directly apply the relevant international treaties, principles and customs of international law. Third, their impact on the process of development and codification of the whole system of international law is obvious, as judgments made by international tribunals could further be used as reliable precedents by domestic courts dealing with the crime of piracy.

¹²⁴ International Tribunal for the Former Yugoslavia. Weekly Press Briefing - 20 January 2010. para. 4. Available from: <http://www.icty.org/sid/10306/en>

¹²⁵ Official website of the International Tribunal for Rwanda. Available from: <http://www.unicttr.org/tabid/101/default.aspx>

¹²⁶ See *supra* note 118, p. 44, para. 2

¹²⁷ *Seventh Annual Report of the President of the Special Court for Sierra Leone*, May 2010, available from: <http://www.scs-l.org/LinkClick.aspx?fileticket=33ryoRsKMj1%3d&tabid=176>.

¹²⁸ *Special Tribunal For Lebanon: Annual Report (2009-2010)*, February 2010, available from: http://www.stl-tsl.org/x/file/TheRegistry/Library/presidents_reports/Annual_report_March_2010_EN.pdf.

To avoid the possible high cost of the international tribunal, the paper suggests its establishing in the form of currently operating hybrid tribunals. This variant also requires equal representation of international and national judges. In spite of the fact that this tribunal cannot be as efficient as currently operating *ad hoc* international tribunals in terms of a highly developed body of law, its significance is obvious, as this hybrid tribunal could be an effective tool for prosecuting pirates in accordance with international fair trial standards and in a reasonably short period of time.

CONCLUSION

The problem of piracy off the coast of Somalia, which has become a real threat to the peace and stability in African region in the last decade, cannot be resolved only by military operations. The solution could be found in establishing an effective legal mechanism for prosecuting pirates. Therefore, searching for the most proper solution seems to be a hard work, but priceless if the proper solution will be found.

As we may see, even being precisely defined under the contemporary international law and endowed with such a unique characteristic as *jus cogens*, this crime very often cannot be prosecuted due to the lack of necessary legal mechanisms in domestic systems. The analysis conducted in the second chapter allows to say that national courts are too far from dealing with the crime of piracy and solution could be found only on regional or international level.

The author believes that despite the criticism, there is a room for the international tribunal, which could provide the fair, impartial and effective prosecution. The analysis shows that none of the domestic courts can effectively deal with the crime of piracy, when international institutions demonstrate the ability to deliver justice in compliance with the fundamental principles of fair trial and in the most

effective way. Some opponents might say that national courts will not benefit if pirates are tried by the international tribunal. However, there is another argument in favour of those supporting the idea, namely the legacy or highly developed body of law that will serve for years helping national courts to prosecute pirates in the most productive way.

Another very important task is to enforce the universal definition of piracy in domestic legislation to combat impunity, as even such developed countries as the United States, Russia, and France now are suffering from inability to try pirates, because their domestic legislation does not contain the proper definition similar to that developed within the frameworks of the United Nations. Therefore, countries are encourage to adopt or incorporate the UNCLOS definition into their national laws, because the international tribunal is being suggested only as a temporary solution that could pave the way for future prosecution of pirates by national courts.

Finally, the need for co-operation seems to be the most important part for achieving the effective result. Only working in close collaboration, the states will be able not only to eliminate the global phenomenon of piracy, but also strengthen their economic and military co-operation. Both developed and developing countries would benefit from the joint efforts, as the former will secure the maritime routes for its vessels, when the latter will receive significant financial and logistic support necessary for the capacity building and strengthening their judicial and penitentiary systems capacity.