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Symposium on Maritime Piracy in International Law

PIRACY AND INTERNATIONAL CRIMINAL LAW

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1. Introduction

Piracy has been recognized as an offence in all epochs.[1] For centuries, it also has constituted a 'crime against the law of nations' (*delictum iuris gentium*). International criminal law as a new branch of law, being in common with public international and criminal law, incorporated piracy within its spheres of interests. The basic problems regulated and researched by international criminal law in connection with piracy became: the legal basis for regulating piracy in international criminal law the same as in criminal international law, defining piracy as a crime and a crime of international character, distinguishing between piracy

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[1] See: A. Aust, *Handbook of International Law*, Cambridge 2005, at p. 269; I. Bantekas, S. Nasch, *International Criminal Law*, 2nd ed., London–Sydney–Portland 2003, at pp. 95–98; J. Crawford, S. Olleson, *The Nature and Forms of International Responsibility*, [in:] M.D. Evans (ed.), *International Law*, Oxford 2003, at p. 447; W.G. Grewe, *The Epochs of International Law*, Berlin–New York 2000, at pp. 130, 131; A. Tarwacka, *Romans and Pirates: Legal Perspective*, Warszawa 2009, at pp. 101–137.

and privateering and, finally, providing a basis for state cooperation in combating and penalising piracy, including the most important problem of defining the jurisdiction of national courts to categorise criminal acts as amounting to piracy.

We must remember certain different meanings attributed to the term 'piracy'. The historical background of this concept defines acts of piracy as offences committed at sea. Nowadays, however, the scope of regulation is much wider and includes crimes committed not only at sea but also in the air (air-piracy) or on land (traffic-piracy). Reference is even made to piracy in connection with acts infringing on the exclusive rights in creative works (copyright piracy).[2] In this article, piracy will be understood in its classical sense, meaning maritime piracy, despite the fact that certain acts undertaken in respect of airplanes may also be qualified in an identical or similar manner.

2. Historical Regulations

The Latin formula *pirata est hostis humani generis*, which defines pirates as enemies of mankind, formed the legal background of piracy regulations as an unlawful act and consequently a crime.[3] The first

[2] C.M. Correa, Xuang Li (eds.), *Intellectual Property Enforcement: International Perspectives*, Cheltenham 2009, at p. 208. See also: *International Criminal Law. Genocide, Piracy, Crime against Humanity, War Crime, Universal Jurisdiction, Nuremberg Code, Convention on the Prevention and Punishment of the Crime of Genocide, Civilian Casualties, War Crimes Law, List of War Crimes, Special Tribunal for Lebanon*, Memphis 2011, at p. 56.

[3] Marcus Tullius Cicero probably as a first stated that "pirata (...) est (...) communis hostis omnium". *M. Tvlli Ciceronis de Officiis Liber Tertivs*, § 107, available at: http://www.thelatinlibrary.com/cicero/off3.shtml (accessed: 1.1.2012). In the 17th century those words were paraphrased by Sir Edward Coke as "Pirata est hostis humani generis" ("Pirate is an enemy to the human race"). Sir E. Coke, *The Third Part of the Institutes of the Laws of England; Concerning High Treason, and Other Pleas of the Crown and Criminal Causes*, 4th ed., London 1669, at p. 113, available at: http://books.google.co.uk/books?id=E5A0AAAAIAAJ (accessed: 1.1.2012). See also H. Fielding, *An Enquiry into the Causes of the Late Increase of Robbers, etc. with Some Proposals for Remedying this Growing Evil*, London 1751; reprint [in:] M.R. Zirker (ed.), 'An Enquiry into the Causes of the Late Increase of Robbers and Related Writings (The Wesleyan Edition of the Works of Henry Fielding)', Oxford 1988, at p. 156. On Roman origin of this formula see A. Tarwacka,

historical examples of legal measures penalizing piracy and pirates were adopted in England in 1391, and subsequently in 1536, and are well--known as the Piracy Acts on penalizing pirates and robbers at sea. The adoption of such legal acts occurred at regular intervals, with the next such statutes appearing in 1698, 1721, 1744 and 1850. This is unsurprising since England, being an island state, had considerable experience of acts of piracy. Similar regulations were adopted in the United States, where the competences of Congress to penalize acts of piracy were incorporated into the Constitution in 1787 (Article I § 8).

In conclusion, the features of historical regulations concerning piracy are connected with domestic legal systems and include a very wide range of sources, including those of a constitutional nature. This evidences the seriousness of the piracy problem both historically and contemporaneously, since piracy unfortunately continues to exist even in the second decade of the 21st century.

Historical reminiscences continue to influence the judiciary right up until today. The analogy with piracy as an offence committed by *hostis generis humani* is very attractive for international tribunals and national courts seeking to justify conclusions in favour of applying universal jurisdiction to a particular case. This was the practice of the Israel and American courts and also of the International Criminal Tribunal for the Former Yugoslavia (ICTY).

In its judgment of 11.12.1961, in case of *The Attorney General v. Adolf Eichmann*, the District Court of Jerusalem stated that: "Maritime nations have, since time immemorial, enforced the principle of universal jurisdiction in dealing with pirates, whose crime is known in English law as 'piracy *jure gentium*' ".[4] The court also cited the words of Sir William Blackstone from 1769:

> Lastly, the crime of piracy, or robbery and depredation upon the high seas, is an offence against the universal law of society; a pirate being,

op. cit., pp. 56–100, 164–169. On Roman Criminal Law see J. Zabłocki, A. Tarwacka, *Publiczne prawo rzymskie [Public Roman Law]*, Warszawa 2011, at pp. 34–35, 116–119, 174–176, 197–198.

[4] *The Attorney General v. Adolf Eichmann*, District Court of Jerusalem, Criminal Case No 40/61, § 13, available at: http://www.nizkor.org/ftp.cgi/people/e/eichmann.adolf/transcripts/Judgment (accessed: 1.1.2012).

> according to Sir Edward Coke (...) hostis humani generis. As, therefore, he has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him; so that every community hath a right by the rule of self-defence, to inflict that punishment upon him which every individual would in a state of nature have been otherwise entitled to do, for any invasion of his person or personal property.[5]

The Israeli Court placed great emphasis on Emer de Vattel's opinion from 1758, which said that:

> For, nature does not give to men or to nations any right to inflict punishment, except for their own defence and safety (...); whence it follows, that we cannot punish any but those by whom we have been injured. (...) But this very reason shows, that, although the justice of each nation ought in general to be confined to the punishment of crimes committed in its own territories, we ought to except from this rule those villains, who, by the nature and habitual frequency of their crimes, violate all public security, and declare themselves the enemies of the human race. Poisoners, assassins, and incendiaries by profession, may be exterminated wherever they are seized; for they attack and injure all nations, by trampling under foot the foundations of their common safety. Thus, pirates are sent to the gibbet by the first into whose hands they fall.[6]

During the A. Eichmann trial, the court also cited Henry Wheaton, who in 1836 indicated that "the judicial power of every independent state (...) extends (...) to the punishment of piracy and other offences

[5] Sir W. Blackstone, *Commentaries on the Laws of England in Four Books*, Book IV, Oxford 1769, at p. 71. Sir William Blackstone's *Commentaries on the Laws of England*, from the Avalon Project at Yale Law School, available at: http://avalon.law.yale.edu/18th_century/blackstone_bk4ch5.asp (accessed: 1.1.2012).

[6] E. de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury, edited and with an Introduction by Béla Kapossy and Richard Whitmore*, Indianapolis 2008, available at: http://oll.libertyfund.org/title/2246/212459; http://www.lonang.com/exlibris/vattel/vatt-119.htm (accessed: 1.1.2012).

against the law of nations, by whomsoever and wheresoever committed".[7] The Israeli Court also relied upon the words of Viscount Sankey, who in 1934, as Lord Chancellor and a judge, quoted the following words of Hugo Grotius:

> With regard to crimes as defined by international law, that law has no means of trying or punishing them. The recognition of them as constituting crimes, and the trial and punishment of the criminals, are left to the municipal law of each country. But whereas according to international law the criminal jurisdiction of municipal law is ordinarily restricted to crimes committed on its terra firma or territorial waters or its own ships, and to crimes by its own nationals wherever committed, it is also recognized as extending to piracy committed on the high seas by any national on any ship, because a person guilty of such piracy has placed himself beyond the protection of any State. He is no longer a national, but 'hostis humani generis' and as such he is justiciable by any State anywhere.[8]

Furthermore, as the US Court of Appeals for the Second Circuit stated in its *Filártiga v. Peña-Irala* judgment of 30.6.1980:

> Among the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him hostis humani generis, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.[9]

The ICTY also mentioned the international status of piracy, as confirmed by the Trial Chamber's judgment of 10.12.1998 in *Prosecutor v. Anto Furundzija*, having cited in support the judgment of a US Court in *Filártiga v. Peña-Irala*. Whilst piracy is not an international crime, but

[7] H. Wheaton, *Elements of International Law (Wheaton's Elements of international law)*, 5th English Ed., London–New York 1916, at p. 104.

[8] Grotius *(1583–1645) De Jure Belli ac Pacis*, Vol. 2, cap. 20, § 40, [in:] *re Piracy Jure Gentium. Special Reference to Privy Council*, also reported as: *[1934] A.C. 586*, available at: http://www.uniset.ca/other/cs5/1934AC586.html (accessed: 1.1.2012).

[9] *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir., No 79-6090, 30.6.1980), § 54.

rather an international offence, the ICTY referred to the construction of *hostis humani generis* in the context of torture and this served to support this qualification as having high status in the international normative system, It formulated the following conclusion: „The prohibition against torture exhibits three important features, which are probably held in common with the other general principles protecting fundamental human rights".[10]

Rules of piracy investigation were also used by the ICTY to support its judgment in the *Prosecutor v. Duško Tadić* case. In the Appeals Chamber's Decision on the defence motion for interlocutory appeal on jurisdiction, it stated that: "This is all the more so in view of the nature of the offences alleged against Appellant, offences which, if proven, do not affect the interests of one State alone but shock the conscience of mankind".[11] The ICTY noted in this context that:

> As early as 1950, in the case of General Wagener, the Supreme Military Tribunal of Italy held: 'These norms [concerning crimes against laws and customs of war], due to their highly ethical and moral content, have a universal character, not a territorial one. (...) Such crimes, therefore, due to their very subject matter and particular nature are precisely of a different and opposite kind from political offences. The latter generally, concern only the States against whom they are committed; the former concern all civilised States, and are to be opposed and punished, in the same way as the crimes of piracy, trade of women and minors, and enslavement are to be opposed and punished, wherever they may have been committed (articles 537 and 604 of the penal code).[12]

Piracy as a classical international offence became the model for punishing natural persons who committed forbidden acts within this legal order. Numerous academic writers, such as Władysław Czapliński and Anna Wyrozumska, have compiled an enumeration of the international offences capable of prosecution on the basis of universal jurisdiction, and

[10] *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, Judgment of 10.12.1998, § 147.

[11] *Prosecutor v. Duško Tadić*. Case No. IT-94-1-AR72, Decision on the defence motion for interlocutory appeal on jurisdiction, 2.10.1995, § 57.

[12] 13.3.1950, [in:] 'Rivista Penale' 753, 757 (Supreme Military Tribunal, Italy 1950; unofficial translation). After: *ibidem*.

begin with the offence of piracy which "with no doubt" constitutes such an offence.[13] Malcolm D. Evans indicates that "piracy is the oldest and most well-attested example of an act attracts universal jurisdiction".[14]

Naturally any comparison drawn between, on the one hand, serious violations of international criminal law capable of prosecution on the basis of universal jurisdiction and, on the other hand, piracy *per se* has given rise to dispute in academic writing, particularly amongst those who argue that the gravity of the offence does not justify comparison with international criminal offences.[15] Nevertheless it remains a fact that piracy, as one of the first (if not the first) international offences, represents a model to enforce the criminal responsibility of perpetrators who committed more serious crimes, despite the fact that these were only penalized in the international legal order at a much later date.

The concept of pirates as *hostis generis humani* became so intellectually attractive that it was also used in academic writings to explain the sense of punishing natural persons on the basis of international law for their membership of organizations and groups categorised as criminal by the International Military Tribunal (Nuremberg Tribunal). It is interesting that the *'Kronjurist'* of the Third Reich, Carl Schmitt, formulated this theory.[16]

[13] W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe [Public International Law. Systemic problems]*, 2nd ed., Warszawa 2004, at p. 235. *Cf*. V. Lowe, *Jurisdiction*, [in:] M.D. Evans (ed.), *International Law*, Oxford 2003, at p. 343; M.N. Shaw, *International Law*, 5th ed., Cambridge 2004, at pp. 593–594.

[14] M.D. Evans, *The Law of the Sea*, [in:] M. D. Evans (ed.), *International Law*..., at p. 639.

[15] J.M. Goodwin, *Universal jurisdiction and the pirate: time for an old couple to part*, 'Vanderbilt Journal of Transnational Law', May 2006, available at: http://findarticles.com/p/articles/mi_hb3577/is_3_39/ai_n29305971/. See also: E. Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 'Harvard International Law Journal' 2004, Vol. 45, No. 1, at p. 192; T. Ostropolski, *Zasada jurysdykcji uniwersalnej w prawie międzynarodowym [The Principle of Universal Jurisdiction in International Law]*, Warszawa 2008, at p. 70.

[16] On the C. Schmitt's legal and political thoughts see: P. Graczyk, *Katolicyzm polityczny [Political Catholicism]*, 'Kronos' 2008, No. 3, at p. 132–136; K. Jonca, *Koncepcje narodowosocjalistycznego prawa w Trzeciej Rzeszy [Notions of National-socialist law in the Third Reich]*, 'Studia nad Faszyzmem i Zbrodniami Hitlerowskimi' 1977, Vol. III, at pp. 72–74, 83–89, 98–99; F. Ryszka, *Carl Schmitt w nauce prawa i polityki XX w. [Carl Schmitt in Legal and Political Science of 20th Century]*, 'Studia nad Faszyzmem i Zbrodniami Hitlerowskimi' 1996, Vol. XIX, at pp. 5–39; R. Wonicki, *Polityka władzy i wolności w myśli*

He explained his understanding of the model of penalizing natural persons for their mere membership of the NSDAP, SS, SD and Gestapo by analogy with a pirate ship's crew. That means it is not necessary to impute any individual offence to a person, if he or she is a member of such a collective criminal subjects (or groups).[17] Penalization of the members of these groups took place by way of executing the provisions of an Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis,[18] signed in London on 8.8.1945 and annexed to the Charter of the International Military Tribunal (Nuremberg Tribunal). Carl Schmitt, speaking *post factum* in 1973 to Franciszek Ryszka, compared a criminal organization to a pirate ship:

> Pirate was of yore an 'enemy of all' (*hostis generis humani*). The membership to the crew of pirate ship was treated as criminal. Before the case was precisely and more humanitarian regulated in *piracy acts* from the turn of

Carla Schmitta i Hannah Arendt [Politics of authority and freedom in thougths of Carl Schmitt and Hannah Arendt], 'Kronos' 2008, No. 3, at pp. 170–180.

[17] On the international criminal responsibility of legal persons see: K. Karski, *Korporacje ponadnarodowe w systemie Narodów Zjednoczonych [International Corporations in the system of the United Nations]*, [in:] G. Mioduszewska (ed.), 'Reforma ONZ. Stanowisko Grupy Polskiej Stowarzyszenia Prawa Międzynarodowego (ILA')' [UN reform. View of ILA Polish Group], 'Zeszyty Akademii Dyplomatycznej MSZ', No. 24, Warszawa 2005, at p. 21; *Idem*, *Odpowiedzialność podmiotów zbiorowych na podstawie przepisów międzynarodowego prawa karnego (uwagi de lege lata i de lege ferenda) [Responsibility of Collective Entities on the Basis of International Penal Law Provisions]*, [in:] J. Menkes (ed.), 'Prawo międzynarodowe. Księga pamiątkowa Profesor Renaty Szafarz' [International Law. Commemorative Book for Professor Renata Szafarz], Warszawa 2007, pp. 227–257; *Idem, Problem statusu korporacji ponadnarodowych w prawie międzynarodowym (globalizacja a podmiotowość prawa międzynarodowego) [Problem of Legal Status of Supranational Corporations in International Law (Globalisation and Legal Subjectivity in International Law)*, [in:] E. Dynia (ed.), 'Nauka prawa międzynarodowego u progu XXI wieku' [International Law Science in the Beginning of 21st Century], Rzeszów 2003, at pp. 130–131; *Idem*, *Zakres podmiotowości korporacji transnarodowej w prawie międzynarodowym [The Extent of Legal Subjectivity of Transnational Corporation in International Law]*, [in:] J. Menkes, T. Gardocka (eds.), 'Korporacje transnarodowe. Jeden temat, różne spojrzenia' [Transnational Corporations. One subject, different views], Warszawa 2010, at pp. 186–198. See also: E. Karska, *Korporacje transnarodowe wobec międzynarodowego prawa humanitarnego [Transnational Corporations and International Humanitarian Law]*, [in:] J. Menkes, T. Gardocka (eds.), *op. cit.*, pp. 159–174.

[18] 82 UNTS 279.

> the 17th century, every pirate was located outsider law. In practice gallows waited all members of the crew – from a pirate captain to an ordinary pirate seaman, without to go into a question who did wrong and what each person did wrong. Than the leadership of Nazi state could be, than, like a pirate ship 'the enemy of mankind'.[19]

However, it must be admitted that, even today, the explanation that a person was merely a cook on a pirate ship does not preclude their criminal responsibility for participation in a pirate criminal group. A Somalian man, Abdulahi Husseen Maxamuud, encountered this situation in 2001 when he was sentenced by a South Korean court for his role in the hijacking of South Korean MV *Samho Jewelry*. Mr Maxamuud was tried separately and, in his testimony before the Court, he claimed that he was merely a cook and said: "I sincerely apologise for what happened... I was not involved in the crime because I was just the cook". Nevertheless, the court sentenced him to 15 years imprisonment. He "was cleared of attempting to murder the ship's captain, [but] he was convicted of maritime robbery and other charges. The Court said he deserved a heavy penalty because he was involved in piracy and showed little repentance".[20] This obviously does not mean that pirates are incapable of being simultaneously prosecuted for crimes they perpetrate individually, as seen from the example of Mr Maxamuud's colleague who, having also been found guilty of murder, was sentenced to life imprisonment.[21]

[19] F. Ryszka, *Państwo stanu wyjątkowego. Rzecz o systemie państwa i prawa Trzeciej Rzeszy [Martial Law State. On System of State and Law of the Third Reich]*, 3rd ed., Wrocław––Warszawa–Kraków–Gdańsk–Łódź 1985, at p. 224. Summing up these considerations, F. Ryszka stated that: „An idea maybe bizarre, but not being too far away from the truth" (*ibidem*). Comparison of members of a criminal organization to a crew of a pirate ship by C. Schmidt analyses also K. Karski, *Osoba prawna prawa wewnętrznego jako podmiot prawa międzynarodowego [Legal Person of Domestic Law as an International Law Subject]*, Warszawa 2009, at p. 220.

[20] *Somali pirates sentenced in South Korea's first piracy trial*, 'DefenceWeb', 3.6.2011, available at: http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=15889:somali-pirates-sentenced-in-south-koreas-first- piracy-trial&catid=51:Sea&Itemid=106 (accessed: 1.1.2012).

[21] IF, *S. Korea court upholds Somali pirate sentence*, 'The Voice of Russia', 22.12.2011, available at: http://english.ruvr.ru/2011/12/22/62667608.html (accessed: 1.1.2012); B. Knight, *International court could curb Somali piracy*, 'Deutsche Welle', 26.8.2011, available at: http://www.dw-world.de/dw/article/0,,15346753,00.html (accessed: 1.1.2012).

3. Legal Basis of Regulations in International Law

The legal basis for piracy regulations can be found in the whole range of international legal sources including international custom, treaty law and general principles of law. Recently, considerable attention has been paid to piracy by international organizations formulating secondary acts of international law, mainly resolutions, which also refer to many aspects of contemporary piracy. International customary rules as a legal basis provide a foundation for the practice of penalizing pirates on the basis of universal jurisdiction. As Janusz Symonides writes:

> (...) according to rules and in case of pirates, found as enemies of mankind, all states were granted with universal jurisdiction in an open sea, the right to capture and bring to justice all pirates. Piracy was recognized as a crime of the law of nations and its prohibition lies in the interest of the international community as a whole.[22]

An analysis of the legal basis for piracy regulations in international criminal law brings us to the conclusion that there is no single convention which focuses solely and comprehensively on piracy as a crime. The Harvard draft convention represented one such attempt but, unfortunately, it remains nothing more than an academic project and never made its way into binding international law.

International norms on piracy were codified in Articles 14–21 of Geneva Convention on the High Seas of 29.4.1958.[23] The main innovation of the UN International Law Commission for international practice, accepted by the Geneva Conference at that time, was to extend the scope of piratical acts to those committed against airplanes.[24] Further

[22] J. Symonides, *Współpraca międzynarodowa w zwalczaniu przestępczości na morzu otwartym [International Cooperation aimed at Combating Crime at the High Sea]*, 'Studia Nauk Politycznych' 1985, Vol. 73, No. 1, at p. 139 and literature cited there.

[23] 450 UNTS 11.

[24] J. Symonides, *op. cit.*, at p. 140.

codifications of the law of the sea took place in the UN Convention on the Law of the Sea, adopted at Montego Bay on 10.12.1982 (UNCLOS).[25]

Two other examples which come close to constituting international criminal law standards are the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 10.3.1988,[26] and the International Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking Convention) of 16.12.1970.[27]

As Article 3.1 of the 1988 Convention provides:

> 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).

But according to Article 1 of the 1970 Convention:

> Any person who on board an aircraft in flight: (a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or b. is an accomplice of a person who performs or attempts to perform any such act commits an offence (...).

[25] 1833 UNTS 396.
[26] 1678 UNTS 221.
[27] 860 UNTS 105.

4. Legal Basis for Regulations in National Criminal Law

In addition to international law regulations, mention should be made of national criminal codes that criminalise acts of piracy. Historically, certain of these codes preceded international conventions, which leads to the conclusion that piracy was recognized as a crime first by national law and subsequently by written international law. The same may also be said of sanctions for the commission of piracy. It remains a matter for national law regulations to decide how strict the applicable sanctions should be, since international law provides no rules on this matter, nor indeed any requirements for any kind of penalty to be imposed on those who commit acts of piracy. Jacek Machowski noticed that international law not only fails to provide any sanctions for the commission of piracy but also fails to regulate the issue of what should happen to the pirate's ship and the property located thereon. Such issues are left to the national legislation of the state exercising jurisdiction over the captured pirates and their property.[28]

The UN International Law Commission, during its work on a *Draft Code of Offences against the Peace and Security of Mankind* from 1947 onwards discussed a catalogue of offences later included in this document. Finally, they decided that ordinary offences of international law such as piracy, drug trafficking, slavery, forced labour, and individual acts of terrorism should not be included. They decided to regulate only the 'core' international crimes. This opinion was also shared by the UN General Assembly when, in 1988, it began work on a *Draft Code of Crimes against the Peace and Security of Mankind*. Certain states, such as the United Kingdom, expressed contradictory opinions on this matter during the different stages of work on this document. The statement accepted by UN International Law Commission was also influenced by the work on

[28] Regulation of the President of the Republic of Poland of 11.7.1932 – Criminal Code (Polish O.J. 1932, No 60, Item 571 as amended). See J. Machowski, *Piractwo w świetle historii i prawa [Piracy in the light of history and law]*, Warszawa 2000, at pp. 23–24.

the International Criminal Court Statute. Finally, there is no known international tribunal or court that would possess material jurisdiction (*rationae materiae*) over acts of piracy.[29]

As regards international criminal law provisions concerning enforcement, there is a rule that this is regulated by law-makers, meaning states, which are obliged to punish perpetrators of international offences before their national courts. This rule is equally applicable as regards punishing pirates. Only in exceptional cases have states created international judicial organs to exercise jurisdiction in this matter. This rarely occurs and – at the present moment – only in case of the most serious international offences, namely international crimes. As noted above, the international community of states has not found it necessary to create common organs to punish pirates, which is why this remains within the exclusive competence of states.

It is interesting to examine how one State – Poland – has coped with this task. Let us first take as an example the Polish Criminal Code of 11.7.1932, which provided in Article 9 for universal jurisdiction and stated that Polish criminal law was applied independently from any provisions binding in the place where the crime was committed and was equally applicable to Polish citizens and foreigners who was not surrendered, having committed any offence such as piracy, slave trade, or trade in women or children outside Poland. Article 260 of the same Polish Criminal Code of 1932 provided that people organizing ships to be used in the commission of any crime at sea or people serving on such ships may be sentenced to 10 years imprisonment.[30]

[29] See: United Nations, *Summary records of the sixth session 3 June – 28 July 1954*. A/CN.4/SER.A/1954, 'Yearbook of the International Law Commission' 1954, Vol. I, at p. 133; *Summary records of the meetings of the fortieth session 9 May–29 July 1988*. A/CN.4/SER.A/1988, at pp. 78, 101 'Yearbook of the International Law Commission' 1988, Vol. I. *Cf*. K. Karski, *Realizacja idei utworzenia międzynarodowego sądownictwa karnego [Realisation of the Concept of Creation of International Criminal Judicature]*, 'Państwo i Prawo' 1993, Vol. 569, No. 7, at pp. 70–74; H. von Hebel, D. Robinson, *Crimes within the Jurisdiction of the Court*, [in:] R.S. Lee (ed.), 'The International Criminal Court: The Making of the Rome Statute. Issues, Negotiations, Results', The Hague–London––Boston 2002, at pp. 80–81; M. Płachta, *Międzynarodowy Trybunał Karny [International Criminal Court]*, Vol. 1, Kraków 2004, at pp. 78–82.

[30] J. Machowski, *op. cit.*, at p. 24.

Post-war, the Polish Criminal Code of 19.4.1969 did not provide for any crime of piracy.[31] A general regulation was included in Article IX of the Introductory Act to the Criminal Code.[32] This provision also punished robbery at sea and in the air. According to Article 145 § 1 of the Polish Criminal Code of 1969, any person who violates, even unintentionally, the safety rules applicable to land traffic, water traffic or air traffic, and thereby causes unintentional physical harm to other persons or serious property damage, could be punished by up to 3 years imprisonment. The same Polish Criminal Code of 1969 envisaged the possibility to punish the crime of robbery by 3–15 years imprisonment and, in the event that a weapon was used to perpetrate the robbery, the death penalty could be imposed (Article 210).

The version of the Polish Criminal Code currently in force, adopted on 6.6.1997,[33] governs maritime piracy and air piracy by general rules laid down in Article 166 § 1, which provides that whosoever rapes a person, or threatens to rape, and thereby seizes control of a water ship or airplane will be liable to punishment by imprisonment for 2–12 years. Pursuant to Article 166 § 22, any person who (acting as described in Article 166 § 1) directly endangers the life or health of many people will be liable to imprisonment for a minimum period of 3 years. If the act described in § 2 results in the death or serious physical injury of many people, the perpetrator will be imprisoned for a period not shorter than 5 years or 25 years. Article 166 Polish Criminal Code of 1997 implements Article 6 of the 1988 Convention and Article 2 of the 1970 Convention, by virtue of which Poland – and the other signatories – agreed to extend the jurisdiction of its courts to include acts defined in those international agreements.[34]

[31] Law of 19.4.1969 – Criminal Code (Polish O.J. 1969, No 13, Item 94 as amended). See: J. Machowski, *ibidem*.

[32] Law of 19.4.1969 – Introductory Act of the Criminal Code (Polish O.J. 1969, No 13, Item 95 as amended). See: J. Machowski, *ibidem*.

[33] Law of 6.6.1997 – Criminal Code (Polish O.J. 1997, No 88, Item 553 as amended). See: J. Machowski, *op. cit.*, at p. 25.

[34] R.A. Stefański, *Przestępstwa przeciwko bezpieczeństwu powszechnemu i w komunikacji. Rozdział XX i XXI Kodeksu karnego. Komentarz [Crimes against Public Security and Communication Security. Chapter XX and XXI of Criminal Code. A Commentary]*, Warszawa 2000, at pp. 75–76.

It is worth mentioning that the Polish Criminal Code does not make the criminal act dependant on the ship's location – identical liability will be incurred for acts taking place on the high seas, internal waters or territorial seas. This Code, by replacing the word 'sea ship' by 'water ship' allows piracy and 'normal' robbery to be combatted on the same legal basis. Accordingly, the current Polish Criminal Code includes international standards and norms as regards piracy. It also distinguished between separate acts connected with that crime, graduating the extent of the imprisonment penalty and abolishing the death penalty.[35]

5. Qualification of the Offence

According to Article 15 of the 1958 Geneva Convention on the High Seas:

> Piracy consists of any of the following acts:
>
> (1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
>
> (*a*) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
>
> (*b*) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
>
> (2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
>
> (3) Any act of inciting or of intentionally facilitating an act described in subparagraph 1 or subparagraph 2 of this article.

The present binding regulations on piracy are defined further in Article 101 of the UNCLOS. According to this rule:

> 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;

[35] J. Machowski, *op. cit.*, at p. 24–25; R. A. Stefański, *op. cit.*, at p. 79.

(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).

Accordingly, both Conventions define piracy in a similar manner. In international criminal law literature, considerable attention is paid to the problem of how piracy is legally qualified. It is widely recognized as a crime having international character, just as an act of piracy is criminal in character. There are, of course, different opinions. For example, Antonio Cassese rejects the qualification of piracy as an international crime and reserves this term only to those categories of crimes which remain under the jurisdiction of international criminal tribunals.[36] Piracy has been qualified as an international offence and the crime of the law of nations (*delictum iuris gentium*), and as such can be penalized by every state on the basis of universal jurisdiction, regardless of the ship's flag or the nationality of the perpetrator.

According to J. Symonides, a qualification should be made to the conventional definition of piracy, which views piracy as "unlawful" act of robbery. It is worth asking whether there is any lawful act of robbery? The conclusions of the Special Rapporteur of International Law Commission, J. P. A. François, in 1954 made reference to "all acts of robbery" without adding the additional adjective "unlawful".[37] In older definitions provided by Henry Wheaton and Lassa F. L. Oppenheim, the term "unauthorized" is deployed, which distinguishes on a different basis and indicates that the crime was committed pursuant to an order.[38]

The definition of piracy provided by both Conventions is extremely wide. It extends to: "any illegal acts of violence, detention or any act of depredation". It does not cover only 'robbery'. For this reason, a US Court expressed concerns regarding this definition when dealing with the case

[36] A. Cassese, *International Criminal Law*, Oxford 2003, at p. 24.

[37] J. Symonides, *op. cit.*, at p. 141.

[38] *Ibidem*.

of Somali pirates charged in relation to the attack of 10.4.2010 on the USS *Ashland* (LSD-48), an amphibious dock landing ship. The US District Court in Norfolk (Judge Raymond A. Jackson) "determined that he must interpret the piracy statute as it was meant at the time it was enacted, which was 1819.[39] He found, citing an 1820 Supreme Court case [*US v. Smith*], that piracy is defined only as robbery at sea. Since there was no robbery of the *Ashland*, he threw out the piracy charge. The government appealed and the case was halted".[40] In another case, the same US District Court in Norfolk (Judge Mark S. Davis) "upheld piracy and related charges in a 14-count indictment against the five Somalis charged in the April 1st, 2010 attack on the [USS] *Nicholas* [FFG-47], a Norfolk-based frigate".[41] It is noteworthy that, although the USA ratified the Geneva Convention on the High Seas in 1961, it has still not ratified UNCLOS, but this does not alter anything as regards the binding force of this norm.

The question arises as to whether a provision of international law may directly form national criminal law norms and thereby lead to criminal liability for individuals or, rather, whether such a provision merely obliges a national legislator to adjust its national legal order so as to comply with the international obligations of the state. In this case, we should assume that it was a codified international custom, which expresses common and consensual practice of states, including the USA and its dynamic manner of understanding the term "piracy". This practice also accords with the common activity of the US President and the US Senate – in ratifying the Geneva Convention on the High Seas. According to Article VI of the US Constitution "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land". In the context of Geneva Convention, we must also interpret 19th century legal acts, and it will not be an expression of judicial activity.

[39] 18 USC § 1651.

[40] T. McGlone, *Federal judges in Norfolk wrestle over definition of piracy*, 'The Virginian-Pilot', 8.11.2010, available at: http://hamptonroads.com/2010/11/federal-courts-norfolk-wrestle-over-definition-piracy (accessed: 1.1.2012).

[41] USS *Nicholas* (FFG-47) was attacked in international waters west of the Seychelles. *Ibidem*; *U.S. warship captures suspected pirate mother ship*, CNN, 1.4.2010, available at: http://news.blogs.cnn.com/2010/04/01/u-s-warship-captures-suspected-pirate-mother-ship/ (accessed: 1.1.2012).

David Glazer pays attention to this by stating that the 1819 statute, which laid down the elements of the crime of piracy, merely refers to "piracy as defined by the law of nations". He added, that:

> the Smith holding simply states that robbery is piracy (all that was necessary under the facts of that case); it doesn't say that *only* robbery is piracy" and "since the 1819 statute refers to the law of nations rather than to a specific definition of piracy, what logically ought to be locked in by the rule of interpretation the court relies upon is the reference to the law of nations, not the definition of piracy contained therein. While the court does find some modern sources stating that the definition of piracy is unsettled in customary international law, that view flies in the face of the two widely ratified treaties, the 1958 High Seas Convention and the 1982 UN Convention on the Law of the Sea which include the same definition in reasonably precise language. Given Senate advice and consent to the ratification of the 1958 treaty, it seems to me that language fairly becomes the operative definition of piracy for U.S. courts under the last in time rule and the supremacy clause. So even a judge with an aversion to international law in general can ground their decision in written federal law. Oddly, however, the court treats these two widely ratified treaties, including one that is the law of the land, as mere secondary sources entitled to no more weight than scholarly commentary. I think that is a fundamental error.[42]

D. Glazer also mentioned that:

> The treaty language, ratified by both the U.S. and Somalia, surely satisfies the constitutional due process requirement which the court noted requires fair warning that the defendant's conduct is proscribed. Surely it is fairer to hold a Somali defendant to notice of a treaty his (admittedly dysfunctional) nation has ratified than to a foreign 1820 Supreme Court decision.

[42] D. Glazier, *How to Define Piracy (Cont'd): A Critique of U.S. v. Said*, 'Opinio Juris', 18.8.2010, available at: http://opiniojuris.org/2010/08/18/how-to-define-piracy-contd-a-critique-of-us-v-said/ (accessed: 1.1.2012). See also: J. Ku, *How to Define Piracy Under U.S. Law and the "Law of Nations"*, 'Opinio Juris', 14.8.2010, available at: http://opiniojuris.org/2010/08/14/how-to-define-piracy-under-us-law-and-the-law-of-nations/ (accessed: 1.1.2012); J. Ku, *How to Define Piracy (Cont'd): U.S. Judge Dismisses Piracy Charges*, 'Opinio Juris', 17.8.2010, available at: http://opiniojuris.org/2010/08/17/how-to-define-piracy-contd-us-judge-dismisses-piracy-charges/ (accessed: 1.1.2012).

> I haven't read any of the parties' filings, but from the text of the opinion it appears that both sides engaged in a battle of law office history, using often obscure historical examples to bolster their positions. I would hope that on appeal, and certainly in the other ongoing Norfolk piracy case with similar facts, the government will argue for the application of the treaty language as effective law rather than as a mere secondary source.[43]

As regards the criminal qualification of piracy, it is also important that the perpetrator need not possess any special features and that anyone may be a pirate. Furthermore, if it is an international crime, it can only be committed with a direct attempt.

6. International Criminal Law on Piracy in Action

Theoretically, conducting a trial against pirates is very simple. As Malcolm N. Shaw clearly described:

> Any and every state may seize a pirate ship or aircraft whether on the high seas or on *terra nullius* and arrest the persons and seize the property on board. In addition, the courts of the state carrying out the seizure have their jurisdiction to impose penalties, and may decide what action to take regarding the ship or aircraft and property, subject to the rights of third parties that have acted in good faith.[44]

Whilst this may be true, international criminal law is unfortunately not an effective instrument with which to punish the perpetrators of modern piracy. Trials in such cases are rather rare. When states, especially European states, and their warships caught pirates, they usually let them free after having disarmed them. In special situations they surrendered pirates to the place of their origin, which does not guarantee that they will brought to justice. In other cases, pirates cannot be surrender to be brought to justice in the state of their nationality since their human rights may be violated, for instance by threat of the death penalty or by

[43] D. Glazier, *ibidem*.

[44] M.N. Shaw, *op. cit.*, at p. 551.

dangers presented by armed conflicts underway there.[45] On the other hand, the mere fact of holding a trial may mean that – for the same reason – following execution of the penalty in the warship flag state which apprehended the pirates, they may not be returned to their state of nationality. It may be necessary to grant them the status of refugees and to detain them not only in a prison but also – until the end of their lives – following acquittal.

The first European trial of pirates in the new era ended in 2010 with the sentencing of five Somalians to five years in prison by a Rotterdam court. The Danish warship HDMS *Absalon* (L16) arrested the pirates after they approached the Dutch Antilles-flagged ship MV *Samanyolu* in the Gulf of Aden. The Dutch Court said that: „Piracy is a serious crime that must be powerfully resisted".[46] The defendants stated that: "The Netherlands doesn't like Muslim people. This is not legal", but: "Nobody wants to go back to Somalia".[47] One of them, Ali Garaar, added: "I want to live in a democratic country. I would like to find work in future to contribute to society here".[48] Under Dutch law, it is unlikely that the pirates will be returned to Somalia following their sentence, since it is considered too dangerous for deportation. Some of them applied for asylum in the Netherlands. Many lawyers, like Willem-Jan Ausma, note that "trials in European courts would encourage, rather than deter, pirates from committing crimes of piracy. (...) Anything is better than Somalia".[49] The Netherlands is known for high standards of human rights protection.

[45] Such a danger takes place i.e. in Yemen for its citizens and also for foreigners. On sentencing Somali pirates suspended by Yemen navy to death penalty and long lasting imprisonment see: *Yemen sentences Somali pirates to death*, BBC News, 18.5.2010, available at: http://news.bbc.co.uk/2/hi/8689129.stm (accessed: 1.1.2012).

[46] H. Foy, *Somali pirates jailed by Dutch court. Five men sentenced to five years in Europe's first conviction for robbery at sea in modern times*, 'The Guardian', 17.6.2010, available at: http://www.guardian.co.uk/world/2010/jun/17/somali-pirates-jailed-netherlands (accessed: 1.1.2012); L.M. Sørensen, *'Absalon' slap 83 pirater fri. Somaliske pirater skal gribes på fersk gerning, hvis de skal retsforfølges, mener 'Absalon's chef*, 'Politiken.dk', 17.4.2009, available at: http://politiken.dk/indland/article691125.ece (accessed: 1.1.2012).

[47] H. Foy, *ibidem*.

[48] *Ibidem*.

[49] *Ibidem*.

In 2008 "the [Dutch] Royal Navy was instructed by the [Dutch] Foreign Office not to arrest pirates for fear of breaching their human rights".[50]

The next analogous trial is currently being held in Germany. It is the trial of 10 Somali pirates, some of whom are aged under 18, and who were taken to Hamburg in 2010. This process is recognized by German public opinion, and equally by the accused, as being almost surrealistic. The Somalians acknowledge that they are happy to come to this state. Finally they are not hungry, what is also confirmed by their advocates. The 'alleged pirates', arrested with guns in their hands, do not wish to return to Somalia. Practically, there is no such possibility. They also hope that their families will be able to join them. Juvenile criminals certainly will not be sent to prison. It is very probable that non-custodial sentences will be handed down in their cases. Adults are detained for no longer than five years imprisonment. This represents the first piracy trial in Germany for 400 years. The last piracy trial took place in Hamburg in1624. Following the hijacking in 2010 of a German container ship, MV *Taipan*, Somali pirates were arrested by a Dutch warship Hr. Ms. *Tromp* (F803). The Dutch, being afraid of human rights violations of the 'alleged pirates', did not wish to surrender them to a place where their rights could be violated or even threatened by such violation, and they received consent from Germany for taking control over the arrested people.[51]

Somali pirates trials have also taken place in Spain. A Spanish court sentenced two Somalians to jail terms amounting to 439 years each.

[50] *Ibidem*.

[51] M.S. Moore, *A Precedent or a Farce? Court Faces Daunting Hurdles in Hamburg Pirate Trial*, 'Spiegel Online', 18.1.2011, available at: http://www.spiegel.de/international/world/0,1518,740122,00.html (accessed: 1.1.2012); B. Lakotta, *German Justice Through the Eyes of a Somali Pirate. Torture? Execution?*, 'Spiegel Online', 4.7.2011, available at: http://www.spiegel.de/international/world/0,1518,755340,00.html (accessed: 1.1.2012); tro, dpa, apn, ddp, *Seeräuber in Hamburg vor Gericht. Gutachter schätzt einen Piraten auf 15 Jahre*, 'Spiegel Online', 11.6.2010, available at: http://www.spiegel.de/panorama/justiz/0,1518,700117, 00.html (accessed: 1.1.2012); bart, *Somalijscy piraci będą mieli proces w Niemczech [Somalian Pirates to have Trial in Germany]*, 'Gazeta Wyborcza', 15.4.2010, available at: http://wyborcza.pl/1,86733,7772171,Somalijscy_piraci_beda_mieli_proces_w_ Niemczech.html (accessed: 1.1.2012). On legal aspects of trial before District Court in Hamburg see: F. Ebert, *Moderne Piraterie. Deutschland macht Seeräubern den Prozess*, 'Legal Tribune Online', 22.11.2010, available at: http://www.lto.de/de/html/nachrichten/1981/deutschland-macht-seeraeubern-den-prozess/ (accessed: 1.1.2012).

In 2011 the first trial of pirates in South Korea was completed – they were caught by South Korean navy commandoes after hijacking a South Korean merchant vessel. The pirates were sentenced to terms ranging from 13 years to life imprisonment. The US courts have also conducted similar trials. For example, a pirate who was the only one of his group to survive the US Navy's reconquering of an American merchant ship, MV *Maersk Alabama*, was sentenced to more than 33 years in prison.

In some cases Somali pirates were surrendered to be judged by authorities in Kenya and the Seychelles, with those trials held on the basis of universal jurisdiction. In 2010 Kenya ceased to accept more pirates for prosecution before their courts because of insufficient financial support.[52] As 'Der Spiegel' informed in 2009:

> In the latest dispute over the European Union's anti-piracy mission off the coast of Somalia, lawyers representing two suspects being detained in Kenya have filed suits against the German government. They want Berlin to foot the bill for the suspects' defense and ensure they are given a fair trial. (...) Two suspected pirates detained by German naval forces in a mission off the coast of Somalia on March 3rd, 2009, who were later turned over to Kenyan officials for prosecution, are now suing the government in Berlin for a fair trial. (...) Attorneys for the men filed a suit on Tuesday demanding that the German government pay for the men's defense and provide support to a group of suspected pirates currently being held in the Shimo La Tewa prison in Mombasa.[53]

[52] *Somali pirates go on trial in South Korea*, 'Indepth Africa Magazine', 23.5.2011, available at: http://indepthafrica.com/news/east-africa/somali-pirates-go-on-trial-in-south-korea/ (accessed: 1.1.2012); bart, *ibidem*; *Somali pirates sentenced in South Korea's first piracy trial...*; *Kenya: Seven Somali Pirates Sentenced to Five Years in Jail*, 'The Maritime Executive', 17.1.2011, available at: http://www.maritime-executive.com/article/kenya-seven-somali-pirates-sentenced-five-years-jail (accessed: 1.1.2012); *Somali pirate sentenced to 33 years in US prison*, BBC News, 16.2.2011, available at: http://www.bbc.co.uk/news/world-us-canada-12486129 (accessed: 1.1.2012); *Somali pirates sentenced to 10 years in Seychelles*, BBC News, 26.06.2010, available at: http://www.bbc.co.uk/news/world-africa-10763605 (accessed: 1.1.2012); J. Zebley, *South Korea court sentences 4 Somali pirates*, 'Jurist', 27.05.2011, available at: http://jurist.org/paperchase/2011/05/south-korea-court-sentences-4-somali-pirates.php (accessed: 1.1.2012).

[53] After: K. Anderson, *Lawyers for Detained Pirates File Suit in Germany*, 'Opinio Juris', 15.4.2009, available at: http://opiniojuris.org/2009/04/15/lawyers-for-detained-pirates-file-suit-in-germany/ (accessed: 1.1.2012). See also: J. Ku, *U.S. Will Prosecute More*

Such problems unfortunately lead to attempts to solve the problem by quicker means, which explains the existence of extrajudicial executions, such as in the situation experienced by ten Somali pirates, including three wounded, who on 5.5.2010 in the Gulf of Aden hijacked the Liberian-flagged Russian oil tanker MV *Moscow University*. The next day, the ship was retaken by the Russian Navy's destroyer *Marshal Shaposhnikov* (BPK 543). After the first announcement that they would be sent to the Russian Federation for trial, following which they would sentenced to 15 years imprisonment for the commission of a robbery on the high sea, it was decided that the "imperfection of international law" and "the absence of a legal base to carry out prosecution procedures against pirates" rendered it impossible to prove them guilty. They argued that they were not pirates but rather their victims. With guns in their hands on board the ship, they argued that they were found by accident after the perpetrators had left the ship directly after hijacking it. The crew of the Russian tanker, imprisoned for the entire time of the hijacking in the engine room, was unable to recognize them. The Russians, by the way, stated that they could not be certain of their identity or nationality.[54]

As stated by the Russian side, the Russian warship finally decided to "set them free". The pirates were taken to their own rubber motor boat, having already been deprived of their navigation instruments. This was done about 300 NM (560 km) from the nearest shore. After an hour of drifting, boat disappeared from radar contact. On 10.5.2010 the Ministry of Defence of the Russian Federation announced a communication in which it was stated that "according to the latest information none

Pirates in the Eastern District of Virginia, 'Opinio Juris', 22.4.2010, available at: http://opiniojuris.org/2010/04/22/us-will-prosecute-more-pirates-in-the-eastern-district-of-virginia/ (accessed: 1.1.2012).

[54] wj, *Uwolnieni przez Rosjan piraci potopili się w oceanie [Pirates, freed by the Russians, drowned in the Ocean]*, 'Gazeta Wyborcza', 11.5.2010, available at: http://wyborcza.pl/1,86744,7869146,Uwolnieni_przez_Rosjan_piraci_potopili_sie_w_oceanie.html (accessed: 1.1.2012); AP, *Military Says Freed Pirates Didn't Reach Land*, 'The Moscow Times', 12.5.2010, available at: http://www.themoscowtimes.com/news/article/military-says-freed-pirates-didnt-reach-land/405739.html (accessed: 1.1.2012); *Somalia: Russia executed all Somali pirates – spokesman*, 'Somalilandpress', 12.5.2010, available at: http://somalilandpress.com/somalia-russia-executed-all-somali-pirates-spokesman-1555 (accessed: 1.1.2012).

of the pirates reached the shore (...) Evidently, they are deceased".[55] Human rights organizations announced ironically that "It would be more humanitarian to hang them immediately on spars".[56] The Spokesman of the Somali pirates stated they were killed on the boat directly after conquering the ship. He said that: "The Russians never released the young men instead they shot them point-blank range then loaded their lifeless bodies back on the boat"[57]. Neither of these solutions may be viewed as consistent with international legal standards.

7. Final Remarks

Piracy is historically one of the first, if not the first, offence of international law (*delictum iuris gentium*). This means that it is often cited in academic writings and by the judiciary, even when the topic of discussion is not piracy. An appreciation of piracy allows a better understanding of many institutions of international law. For example, the construction of *hostis generis humani* is deployed in many other contemporary international crimes. So it may be said, for a certain period, academia and judicial jurisprudence paid great attention to it, despite the fact that it did not exist in practice.[58]

There are certain paradoxes in this. Piracy is an offence of international law, non-highly placed in the hierarchy of dangers caused thereby. The UN International Law Commission expressed this. International law formerly penalized piracy not because of the gravity of the act, but because of

[55] wj, *ibidem*.

[56] *Ibidem*,

[57] *Somalia...*, *ibidem*.

[58] A. Aust, *op. cit.*, at pp. 312–313; R. Bierzanek, J. Symonides, *Prawo międzynarodowe publiczne [Public International Law]*, 8th ed., Warszawa 2004, at p. 231; W. Czapliński, A. Wyrozumska, *op. cit.*, at p. 167, 457, 458–459; R.K. Gardiner, *International Law*, Harlow 2003, at pp. 320, 406, 416; W. Góralczyk, S. Sawicki, *Prawo międzynarodowe publiczne w zarysie [Outline of Public International Law]*, 13th ed., Warszawa 2009, at p. 225; V.N. Guculiak, *Miezhdunarodnoie morskoie pravo (publichnoie i chastnoie)*, Rostov-na-Donu 2006, at pp. 214–229; J. Pieńkos, *Prawo międzynarodowe publiczne [Public International Law]*, Kraków 2004, at pp. 581–582; R.N. Swift, *International Law: Current and Classic*, New York–London–Sydney–Toronto 1969, at pp. 213–214; R.M.M. Wallace, *International Law*, 4th ed., London 2002, at pp. 71, 113–114, 153–154.

the place of commission since, otherwise, investigation and punishment of an act committed on the territory outside of any state's territorial sovereignty would be impossible. But piracy is a model to punish crimes which represent a huge to the security of mankind, such as genocide or crimes against humanity. Such crimes are very often compared, for example in judgments of international criminal tribunals, despite differences in their scope.

History shows that piracy as a social problem has not disappeared. The United States was wrong in its 1926 response to questionnaires of the League of Nations to state that piracy was unworthy of discussion since it had disappeared.[59] Incidents of piracy during the 1970's in the Caribbean Sea, Nigeria and Thailand were not seriously treated as crimes. At the beginning of the 21st century, the international community had to cope with the serious problem of Somali piracy. Unfortunately, it is also a very difficult problem and maybe one which is more social in character. It shows that piracy has existed throughout the centuries and has only changed so as to adjust to the relevant epoch and technical development.

Piracy has its 'renaissance' today. It seemed to be even deserted phenomenon. But in some states it is necessary today– for the first time in hundreds of years – to hold piracy trials. Such cases are held before national courts.[60] Theoretically, it is possible to create an international tribunal to judge pirates.[61] Such proposals were presented to the UN Security Council in 2011 by Jack Lang, the Special Adviser to the UN Secretary-General on Legal Issues related to Piracy off the Coast of Somalia. Julian Ku indicates that:

> In his report to the Security Council, Mr. Lang (...) proposed the establishment, for a transitional period, of a Somali "extraterritorial jurisdiction court' in the northern Tanzania town of Arusha to deal with piracy cases. (...) The international component of the cost to train judges, prosecutors, lawyers, prison guards is "essential," Mr. Lang said, adding that the UN, the African Union, the European Union and other organizations should contribute. (...) The cost of the measures he has

[59] J. Symonides, *op. cit*., at p. 140.

[60] K. Kittichaisaree, *International Criminal Law*, Oxford 2001, at p. 15.

[61] M.N. Shaw, *op. cit*., at p 234.

proposed is estimated at about $25 million, a "relatively modest" expense compared to the estimated $7 billion which he said was the cost of piracy.[62]

To date, however, no such tribunal has been created. Jurisdiction over pirates is exercised directly by states. Within States, such competence is exercised by national courts. The definition of piracy is provided by international law, including the Geneva Convention on the High Seas and in UNCLOS. Besides those regulations, the content of piracy crimes is reflected in international customary law, which explains why States adopt different ways of ensuring the harmonization of their national laws with international law. It is possible to penalize piracy directly on the basis of national criminal law. Certain known solutions see the offence qualified as any illegal act of violence committed either on the high seas, territorial waters or internal waters. Accordingly, such provisions will extend to piracy, but they will not be provisions which exclusively refer to piracy.

Article 14 of the Geneva Convention on the High Seas of 1958, and Article 100 of the UNCLOS, provides an obligation to cooperate in the repression of piracy. They provide that: "All States shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any state".

Prosecution of piracy is a right, but not an obligation, of States,[63] who may organise trials on the basis of universal jurisdiction. In many cases pirates are captured by warships of third states, i.e. states which are not the flag state of the attacked ship or states whose nationals suffered as a result of the pirate attack. Nevertheless, we can note that in practice – as regards the organisation of trials – in order to bring pirates to justice, they are surrendered to the flag state of the attacked ship, since this State is considered to be the victim.

Court proceedings against pirates held on the basis of universal jurisdiction, i.e. by third states, do not occur very often. They took place in Kenya and Seychelles under agreements in return for technical and

[62] J. Ku, *U.N. Considers Special Courts for Pirates,* 'Opinio Juris', 14.8.2010, available at: http://opiniojuris.org/2011/01/27/un-considers-special-courts-for-pirates/ (accessed: 1.1.2012). See also B. Knight, *ibidem*.

[63] K. Kittichaisaree, *op. cit.*, p. 39. Cf. R. Cryer, H. Friman, D. Robinson, E. Wilmshurst, *An Introduction to International Criminal Law and Procedure*, Cambridge 2007, at p. 44.

financial support for their judicial system from the European Union and certain European and non-European states (for instance the United Kingdom, the United States, Denmark, China and Canada). Such trials rarely take place in states whose ships and nationals were victimized by pirates. Their prosecution constitutes a troublesome and expensive activity, and the convicted person – even after having served their penalty – may forever stay at the expense of the state to which he was transferred. In many cases, the International Law of Human Rights renders it impossible to send pirates back to their state of nationality, since their human rights could be violated or threatened, which leads to frequent situations wherein pirates, following their disarmament and fingerprinting, are freed. The Danish warship HDMS *Absalon* (L16), during a piracy operation on the Indian Ocean lasting a few months, could take pride in having captured 88 pirates. However, only 5 of these were brought to justice before the courts of the Netherlands, as the flag state of the attacked ship. The remaining 83 were realeased. Denmark is proud of possessing the most effective warship participating in the European Union Naval Force for Somalia (EU NAVFOR), also known as Operation Atalanta.[64]

Official explanations offered for such action vary considerably. Evidently, no State wishes to admit that it is uninterested in punishing the perpetrators of piracy. Accordingly, they often state that the pirates were not caught "red-handed", which complicates their prosecution. As an indication of such clever responses, see the words of Andrew J. Shapiro, Assistant Secretary for Political-Military Affairs at the U.S. State Department. In his Keynote Address to American University Law Review Symposium, which took place in Washington, DC on 31.3.2010, he stated that:

> [a]nd while we will continue to pursue the 21st Century solutions that Secretary Clinton has spoken about, we will also look to the past for ideas. For instance, the Danish-led working group is actively considering how to enhance the ability of states to prosecute attempt or conspiracy to commit piracy – those cases where we do not capture the suspects in the act of attempting to pirate a vessel but do encounter them laying in wait for their next victim ship with all the trappings of would-be pirates.

[64] L.M. Sørensen, *ibidem*.

One way to do this might be to infer the intent to commit an act of piracy from the possession of piracy-related equipment and the circumstances in which the suspects are encountered. In the 19th Century, states interested in combating the slave trade agreed that vessels found carrying specific 'articles of equipment' used for the slave trade, such as shackles and handcuffs, could be declared evidence of a ship's employment in the slave trade and, unless satisfactorily accounted for by the owner or master, could provide the necessary grounds for condemnation of the ship.

If we were to proceed by analogy in the present piracy context, perhaps states could agree that the mere possession of certain ladders, grappling hooks, and certain armaments at sea in an area known to be a high risk area for piracy attacks should be sufficient to establish intent to commit an act of piracy.[65]

The acceptance of such solutions requires no change of international law. Their implementation remains within the domain of national law. States willing to execute their rights are able to regulate this substance in their own capacity. There is, of course, nothing to prevent concluding this matter in the form of an international agreement, following which all excuses concerning the "the absence of a legal base to carry out prosecution procedures against pirates"[66] and the "imperfection of international law"[67] would cease to exist.

[65] A.J. Shapiro, *Counter-Piracy Policy: Delivering Judicial Consequences*, U.S. Department of State, 31.03.2010, available at: http://www.state.gov/t/pm/rls/rm/139326.htm (accessed: 1.1.2012). See also: J. Ku, *A New Approach to Counter-Piracy: Lower the Burden of Proof for Prosecuting Pirates*, 'Opinio Juris', 31.03.2010, available at: http://opiniojuris.org/2010/03/31/a-new-approach-to-counter-piracy-lower-the-burden-of-proof-for-prosecuting-pirates/ (accessed: 1.1.2012).

[66] wj, *ibidem*.

[67] *Ibidem*.