

**TO HAVE OR NOT TO HAVE A SPECIAL TRIBUNAL
FOR SOMALI PIRATES?
(AN INTERNATIONAL RESPONSE TO NATIONAL FAILURE)**

Pavel Bureš

Abstract: Acts of piracy have their own legal features in international customary law and treaties (e.g. UN Convention on the Law of the Sea). Piracy, being considered as a crime under international law, has special characteristics due to the place where it is committed. Other specific issues have arisen in the counter-piracy activities off the coast of Somalia undertaken by the international community under the auspices of the UN Security Council. The creation of a special tribunal is one of these measures for combating piracy. This paper tries to find an answer to the question of whether or not such a unique measure is likely to be successful.

Resumé: Pirátské útoky mají své právní zakotvení v mezinárodním právu obyčejovém i ve smlouvách (např. Úmluva OSN o mořském právu). Pirátství považované za zločin podle mezinárodního práva se vyznačuje zvláštními charakteristickými rysy vzhledem k místu, kde bylo spácháno. Další specifické otázky vyvstaly při protipirátských aktivitách mezinárodního společenství vedeného Radou bezpečnosti OSN v oblasti somálského pobřeží. Vytvoření zvláštního tribunálu je jedním z opatření boje proti pirátství. Článek se snaží najít odpověď na otázku, zda takové ojedinělé opatření směřuje k úspěchu či nikoliv.

Key words: piracy, crimes under international law, Somalia, Somali special tribunal, universal jurisdiction, inverse right to hot pursuit.

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1. Introduction

Far from being merely a frightening story relating to oceanic adventures in centuries past, piracy is presently an important phenomenon of maritime security and is considered to be an extreme danger for vessels ploughing the waves around the world's oceans. The number of acts of piracy and armed robbery against ships is still increasing¹ – the coast of Somalia having been the best-known region of piracy acts in the last couple of years. The measures for combating piracy range from operational or preventive solutions (Code of Conduct) to repressive ones (allied naval forces or judicial repression). The present paper, after expounding on piracy as a crime under

¹ According to the International Maritime Organization, there were 489 attacks in 2010 as compared to 406 in 2009.

international law and presenting the specific situation in Somalia, turns to analyzing one of the possible solutions for combating acts of piracy, namely the creation of a special tribunal.

2. Piracy as a crime under international law

In traditional international law, all acts committed by private ships on the high seas with the intent of robbery were deemed to be unlawful and pirates were treated as enemies of mankind (*hostis generi humani*). In modern international law, piracy was defined for the first time in the 1958 Convention on the High Seas, in article 15. This definition was later picked up word for word and used in the 1982 United Nations Convention on the Law of the Sea (UNCLOS), in article 101. The conventional definition² comprises five elements – piracy is an illegal act of violence, committed for private ends, by passengers or crew of a private ship (aircraft), against another ship (aircraft), on the high seas or in a place outside the jurisdiction of any State. The traditional element of piracy, the intention to steal (*animus ferandi*)³ is nowadays covered by the more general term of “private ends”.⁴ Acts of piracy, being so defined, have always been considered as an international crime⁵ (*crimen juris gentium*)⁶ because of their very harmful impact on international trade and international relations in general. Piracy as a crime under international law has some specific characteristics in comparison with other unlawful acts having the same features. First, the issue of the repression of these acts as crimes under international law has never been doubted,⁷ and this was so even for international customary law. Since other offences, lately considered as crimes under international law (torture, crime of genocide, slavery), previously fell solely within the jurisdiction of states (*domaine réservé des Etats*), piracy was always seen as a breach of the international order.⁸ Noting that the international

² It is not within the scope of this article to address whether or not the customary law definition of piracy covers the conventional one completely.

³ Momtaz, D., La piraterie en haute mer, in.: Ascencio, H., Decaux, E., Pellet, A., *Droit international pénal*, Pédone, Paris, 2000, p. 506. See also, Šturma P., Černá vlajka pirátů znovu nahání strach? Opatření proti pirátství a ozbrojenému lupičství na moři na začátku 21. století, *Trestněprávní revue*, 2009, No. 7, pp. 193-197.

⁴ Not all acts of violence committed with political purposes are considered to be acts of piracy. These acts, where the best example is the hijacking of the Italian cruise ship *Achille Lauro*, are nowadays repressed by the 1988 Convention on the Suppression of Unlawful Acts against Safety of Maritime Navigation. On the other hand, all attacks of Somali pirates are conducted for purely economic/financial ends – the intention to steal has been replaced by the intention to obtain a ransom.

⁵ In contemporary terminology, a crime under international law. The term of international crime is used here in its broader sense and not in the sense suggested for the violation of the peremptory norms to oppose an international delict.

⁶ Condorelli, L., Présentation – La définition des infractions internationales, in.: Ascencio, H., Decaux, E., Pellet, A., *Droit international pénal*, Pédone, Paris, 2000, p. 242.

⁷ In the *Lotus* case, judge Moore in his dissenting opinion strictly defers „piracy by law of nations“ and „piracy in municipal laws“. See PCIJ, Ser. A, No. 10 (1927) p. 70. Moore contends that piracy under law of nations is of universal cognizance and so is punishable by all nations.

⁸ The term of *hostis generi humani* explains well the legal characteristics of piracy in traditional law.

character of the crime of piracy results especially from international norms than from national criminal legislation.⁹ The second specificity relates to the legal consequences of where the act of piracy is committed. This *locus specialis*¹⁰ (high seas or a place outside the jurisdiction of any State) confirms somehow the international character of this crime and thereby involves the specific approaches of repression. Because of the specific place where piracy happens and its dangerous implications for the safety of maritime navigation, any state may seize a pirate ship, arrest the persons involved and decide on the penalties to be imposed (art. 105 UNCLOS). Traditional types of jurisdiction (principles of territoriality, nationality, passive personality or protective) are not to be applied in situations consisting of acts of piracy. So, the repression of piracy is a well-known and leading example of universal criminal jurisdiction, rooted (as is the international character of this crime) in international customary law. International practice¹¹ and theory¹² differentiate between two sub-categories of universal jurisdiction according to whether or not the suspected person is on the territory of the State applying the jurisdiction – universal jurisdiction *in absentia* (unconditional, absolute, pure) and conditional universal jurisdiction (with presence). Here again, a specificity regarding universal jurisdiction of the crime of piracy occurs: as pirates are totally unknown persons, it is difficult to imagine States exercising universal jurisdiction *in absentia*, i.e. unconditional universal jurisdiction (e.g. *Pinochet* case, *Yerodia* case, *Khaddafi* case or *Castro* case). According to UNCLOS art. 105, the possibility of every State to arrest pirates and to decide on sanctions to be imposed implies the exercise of conditional universal jurisdiction. Noting that in the first moments the jurisdiction is not exercised when the suspect is on State territory, but (being captured) when they are under State control.¹³ The last specificity to be stressed in this paper regards the obligation of States to prosecute the crime of piracy. There is no specific obligation on States to suppress piracy. Only a very broad interpretation of UNCLOS art. 100¹⁴ could lead to it. The question

Piracy could not be seen as a breach of international law (shipmen committing piracy were not holders of specific rights and duties). However, the unlawfulness of acts of piracy came from the international legal order rather than from a domestic one. It does not mean, however, that domestic legislation did not deal with piracy at all. It did (specific criminal procedure, sanctions), but the unlawfulness came from the legal system of international relations.

⁹ The UN Security Council notes in its resolution S/RES/1851 (2008) that a lack of domestic legislation leads to the fact that pirates are released without facing justice.

¹⁰ This specificity consists of the fact that piracy can only be committed on the high seas and outside of State authority.

¹¹ National legislation and Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3.

¹² Cassese, A., *International Criminal Law*, Oxford, 2nd edition, pg. 338., Cryer, R., Friman, H., Robinson, D., Wilmhurst, E., *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2007, p. 45.

¹³ One may consider this type of jurisdiction as a jurisdiction *sui generis* and not as a specific case/example of universal jurisdiction.

¹⁴ „All States shall cooperate 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.“

arises whether the duty to “cooperate in the fullest possible extent in the repression of piracy” means the obligation of prosecution once pirates are captured and (moreover) the obligation of piracy issues national legislation. There is also the question of whether and how the principle of *aut dedere aut iudicare* common to crimes under international law could be applied to the crime of piracy.¹⁵

These general comments on the specific, characteristic issues regarding the crime of piracy under international law have other, more practical and current implications in the case of piracy off the coast of Somalia.

3. Specificity of piracy off the coast of Somalia

The phenomenon of piracy off the Horn of Africa is greatly related to the political situation in Somalia. A civil war began at the beginning of the 1990's and had started to be considered by the UN Security Council in 1992.¹⁶ No central government controlled the whole territory of the State and two self-governing regions were established in the meantime (Somaliland as an unrecognized sovereign State and Puntland). Since 2004, Somalia has been governed by the Transitional Federal Government which was internationally recognized and serves to cooperate with States and the UN in all aspects regarding security matters.

However, in the fourteen years from 1992 (SC Res. 733–1992) to 2006, the situation in Somalia was dealt with by the UN Security Council (only) from the point of view of arms embargo resolutions and the supply of humanitarian aid (especially by vessels). In 2006, in its resolution,¹⁷ the Security Council, for the first time on the basis of International Maritime Organization and World Food Programme reports and still acting from 1992 under Chapter VII of the UN Charter, began to be “concerned about the increasing incidents of piracy and armed robbery against ships in the waters off the coast of Somalia, and its impact on security in Somalia” without yet taking any measures. In 2007, the Council “stressing its concern in the upsurge in piracy”¹⁸ encourages states operating with vessels and aircraft in the region to be “vigilant to any incident of piracy therein and to take appropriate action to protect merchant shipping, in particular the transportation of humanitarian aid”.¹⁹

Security Council resolution S/RES/1816 (2008) represents a turning-point in the Council's involvement in piracy issue because of two reasons: Firstly, it encompasses an exceptional and “inverse” right to hot pursuit.²⁰ The Security Council has decided

¹⁵ The principle of *aut dedere aut iudicare* is set up in the 1988 Convention on the Suppression of Unlawful Acts against Safety of Maritime Navigation. However, the interference between the crime of piracy and the principles of jurisdiction settled by 1988 Convention is not gained. There is no possibility to exercise jurisdiction except in accordance with the principles of active and passive personality, territoriality, State of flag (see art. 6). And this is not the situation in every case of piracy.

¹⁶ SC Res. 733 (1992).

¹⁷ S/RES/1676 (2006), preamble.

¹⁸ S/RES/1772 (2007), preamble.

¹⁹ *Ibid.* par. 18.

²⁰ See UNCLOS art. 111.

that in the struggle against piracy, States may “enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea”.²¹ So States’ naval forces started their counter-piracy operations having a right to pursue pirate ships even in Somali territorial waters.²² And secondly, as maritime navigation was getting worse and attacks of piracy off the coast of Somalia kept on growing (in number, gravity and ransom payments), the Security Council, being “gravely concerned by the threat that acts of piracy and armed robbery against vessels pose to the prompt, safe and effective delivery of humanitarian aid to Somalia”²³ has changed its material approach to international security and has determined „that the incidents of piracy and armed robbery against vessels in the territorial waters of Somalia and the high seas off the coast of Somalia exacerbate the situation in Somalia which continues to constitute a threat against international peace and security in the region“.²⁴ Since then, piracy off the Horn of Africa has turned out to be a relevant element influencing the situation in Somalia, being so considered by the Security Council as a threat against international peace and security.²⁵ Generally speaking, attacks of piracy off the coast of the West Africa region have their origin in a split of the governmental functions exercised in Somalia. Acts of piracy, which at the beginning (in the 1990’s) were aimed at preventing illegal fishing, have changed to become an element of everyday life, providing substantial financial resources to a great part of the Somali population, in particular in the Putland region of Somalia, as a so called “failed State” could not and cannot deal with this type of rising criminality.²⁶ The lack of capacity on the part of the Somali government to combat such piracy has brought about the involvement of the international community – through the Security Council resolutions, IMO operative measures and other international cooperation (Djibouti process, UNODC,²⁷ CGPCS²⁸) – to take specific counter-piracy measures ranging from preventive ones (recommendations to ships crossing the area to follow the rules of conduct and safe guidelines, enactment of counter-

²¹ S/RES/1816 (2008), par. 7 a).

²² This inverse right to hot pursuit is an exception to the UNCLOS rule. The exception consists firstly of the direction – hot pursuit is operated from the coast (territorial sea / contiguous zone to the high seas), and secondly of the exercise of foreign naval jurisdiction in the territorial waters of Somalia after its consent.

²³ S/RES/1816 (2008), preamble.

²⁴ *Ibid.*

²⁵ NATO, the EU (operation Atalanta) and many States have launched specific operations to patrol maritime convoys of vessels supplying humanitarian aid to Somalia and to chase away pirates.

²⁶ This fact was even emphasized in Security Council resolution S/RES/1846 (2008) where the Council takes “into account [...] the lack of capacity of the Transitional Federal Government (“TFG”) to interdict pirates or patrol and secure either the international sea lanes off the coast of Somalia or Somalia’s territorial waters”. Or again e.g. in S/RES/1872 (2009) where the Security Council is recognizing that the ongoing instability in Somalia contributes to the problem of piracy and armed robbery at sea off the coast of Somalia.

²⁷ United Nation Office on Drugs and Crime.

²⁸ Contact Goup on Piracy off the Coast of Somalia created by Security Council resolution S/RES/1851 (2008).

piracy national legislation in Somalia, delimitation of Somali maritime zones²⁹) to repressive or judicial ones (request by the Security Council to all States to repress acts of piracy,³⁰ IMO and Interpol activities, involvement of Kenya, Seychelles and Mauritius to prosecute piracy perpetrators, or the Djibouti Code of Conduct³¹). The way pirates are prosecuted by the national courts of the region is largely welcomed and commended by the Security Council. However, this approach presents many obstacles these States are facing, namely: insufficient scope of national legislation criminalizing piracy;³² insufficient scope of the national legislation establishing universal jurisdiction in the case of the crime of piracy; problems with administering items of evidence, the issue of procedural guarantees of the captured persons³³ and in general the practical issues related to capturing persons at sea, lack of penitentiary capacities in States exercising jurisdiction over caught pirates. All these theoretical but more practical problems lead to the “catch and release” practice in the struggle against piracy.³⁴

These problematic aspects on the side of third States and the impossibility of successfully combating piracy on the Somali side have triggered a discussion about the creation of special tribunal.

4. Special tribunal for Somali pirates

In April 2010 the Security Council requested, in its resolution,³⁵ the Secretary General to present a report with “options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal”.³⁶ Three months later the Secretary-General drew up the requested report³⁷

²⁹ Despite the fact that Somalia is a contracting Party to the 1982 UNCLOS, by its national legislation the width of the territorial sea is extended to 200 NM. (See the Report by the Special Adviser to the Secretary-General on legal issues related to piracy off the coast of Somalia prepared by Mr. Jack Lang on the basis of S/RES/1918 (2010), p. 27 – S/2011/30, or the Report).

³⁰ According to the Security Council, the international law reflected in UNCLOS encompasses a “legal framework applicable to combat piracy and armed robbery at sea”. (See S/RES/1950 (2010), preamble.)

³¹ The Djibouti Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden.

³² Neither UNCLOS nor the Djibouti Code of Conduct are able to create a real legal obligation of States to enact the criminalization of piracy. The former because it is too general and the latter because it is drawn up in a non-binding manner.

³³ Namely the constitutional requirements in the case of liberty deprivation of not more than 24 or 48 hours.

³⁴ More than 9 out of 10 pirates are released after being caught. See the Report p. 17.

³⁵ S/RES/1918 (2010), this not having acted under Chapter VII of the UN Charter and without having stressed that piracy off the coast of Somalia is a threat to international peace and security.

³⁶ S/RES/1918 (2010), par. 4.

³⁷ S/2010/394, (26 July 2010): „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

and proposed 7 options³⁸ to be considered by the Security Council. In his report, the Secretary-General expounded on the general issues of the establishment of such a tribunal (temporal, geographic and personal jurisdiction, primacy and complementarity issues and financing) and stressed the advantages and disadvantages of individual options. Further options were raised in this report by the CGPCS – the Contact Group for Piracy off the Coast of Somalia (amendment of International Criminal Court Statute provisions of jurisdiction *ratione materiae*, or amending the International Tribunal for Law of the Sea, or the African Court of Human and Peoples' rights).³⁹ In a continuation of its work, the Secretary-General proposed to the Security Council to nominate a Special Adviser to the Secretary-General on legal issues related to piracy off the coast of Somalia.

The Secretary-General then appointed Mr. Jack Lang. His report⁴⁰ was presented to the Security Council in March 2011. In his report, having first analyzed the phenomenon of piracy off the coast of Somalia in its economic and security implications and taking into account the “seven options report” presented by the Secretary-General, Mr. Lang proposed two types of special tribunals: a Somali extraterritorial tribunal and two special courts – one in Putland and one in Somaliland. Comparing both reports, there is a great difference in the response to the origins of the problematic situation. The “seven options report” responds (especially) to the issue of Somali pirates' impunity, which is one of the main sources of piracy proliferation and the report makes several proposals for prosecuting and judging pirates. Mr. Lang's report, on the other hand, stresses that the basic roots of piracy stem from the inability of Somalia to prosecute pirates. So his report proposes the creation of special national (Somali) courts, stressing so and pointing out as its key point the (in)efficiency and (dys)functioning of the Somali system of courts.

As to the extraterritorial tribunal, Mr. Lang elaborates in detail on its location,⁴¹ establishment and functioning.⁴² For its establishment, three international agreements

Coast of Somalia, the existing practice in establishing international and mixed tribunals, and the time and resources necessary to achieve and sustain substantive results⁴³.

³⁸ Option 1: Prosecution and imprisonment by regional States. Option 2: The establishment of a Somali court sitting in the territory of a third State in the region, either with or without United Nations participation. Option 3: The establishment of a special chamber within the national jurisdiction of a State or States in the region, without United Nations participation. Option 4: The establishment of a special chamber within the national jurisdiction of a State or States in the region, with United Nations participation. Option 5: The establishment of a regional tribunal on the basis of a multilateral agreement among regional States, with United Nations participation. Option 6: The establishment of an international tribunal on the basis of an agreement between a State in the region and the United Nations. Option 7: The establishment of an international tribunal by Security Council resolution under Chapter VII of the Charter of the United Nations.

³⁹ All three options were rejected: ICC State Parties rejected that option at the Kampala Review Conference in June 2010. ITLOS and the African Court of Human and Peoples' rights have no criminal jurisdiction.

⁴⁰ Report by the Special Adviser to the Secretary-General on legal issues related to piracy off the coast of Somalia prepared by Mr. Jack Lang on the basis of S/RES/1918 (2010), p. 27 – S/2011/30, or the Report.

⁴¹ There is a possibility, with the consent of Tanzania, of using the premises of ICTY in Arusha.

⁴² See the Report, pp. 36-38.

are needed: firstly, the establishment of the extraterritorial jurisdiction of a Somali tribunal in a host State, secondly – an agreement between Somalia, the host State and the UN to determine the UN training support for all judges and staff, and thirdly – transfer agreements between a capturing State, Somalia and the host State. The special court should apply special counter-piracy legislative provisions encompassing the crime of piracy (in its UNCLOS definition) and using the universal jurisdiction. A special treatment relating to juvenile perpetrators should be enacted. For the special courts in Putland and in Somaliland, similar elements are proposed.⁴³ Some sort of support should be provided to these two courts by the extraterritorial tribunal in terms of the office of the prosecutor.

One may see as interesting the fact that the Report has completely put aside six options proposed in the “seven options report” without any further explanation. (Only the special extraterritorial tribunal has remained). However, from the perspective of what was mentioned earlier, combating piracy off the coast of Somalia in a manner that is real, efficient and long-term requires the support of the judicial system in the country. Prosecution and imprisonment of Somali pirates by the States of the region and the establishment of national courts within their jurisdiction, with or without UN participation, is not a feasible project of a long duration. This does not mean, however, that the national courts of the region (and even every State patrolling the high seas in the region) should abandon from one day to the next the exercise of universal jurisdiction over the crime of piracy.

As for the establishment of an international tribunal on the basis of an agreement between a State in the region and the UN, or creating one on the basis of a Security Council resolution (as a UN Security Council subsidiary organ), the argumentation is the same. Moreover, great financial and technical impacts arise with these options. Piracy off the coast of Somalia considered as a threat to international peace and security cannot be compared to the atrocities committed in the former Yugoslavia or in Rwanda, where the response of the international community had to be prompt and the establishment of the *ad-hoc* tribunals led to the restoration of peace and security in the region. However, the mere establishment of an *ad-hoc* criminal tribunal could not stop the commission of all atrocities, but it could assist and facilitate, and did so in the case of ICTY and ICTR, the re-establishment of international peace and security in the region.

Piracy off the coast of Somalia is a by-product of the armed conflict in Somalia and of the so called failed State’s inability to combat it effectively. However, it is still characterized by the element of “private purposes” which differentiates it distinctly from other crimes under international law being usually committed in a time of war, conflict or during internal disturbances. Consequently, the jurisdictional response of the international community cannot be the same. A total (e.g. ICTY, ICTR) or hybrid (e.g. SCSL, Lebanon, Cambodia or others) internationalization of jurisdiction against the crime of piracy off the coast of Somalia therefore does not seem to be

⁴³ *Ibid.* p. 38.

a good path to take in view of the scale, contemporaneity and private character of piracy. On the other hand, as the judicial system and the executive powers in Somalia in general are far from being effective in the struggle against piracy, international support consisting in peacekeeping measures would go a long way towards restoring the functioning of a Somali government.

The sole, effective long-term solution to the current problem of piracy is the total support of the rule of law in Somalia and the training of judges, and this especially through the creation of a special tribunal with extraterritorial jurisdiction,⁴⁴ assisted by two special courts in Somaliland and Putland. The unique solution of extraterritorial jurisdiction encompasses the advantages of the principle of active personal jurisdiction together with the executive effectiveness of the State hosting the special extraterritorial tribunal with UN organizational support. The recommendation forged by the Special – Adviser, Mr. Lang, for the creation of special anti-piracy courts was welcomed by the Security Council in its resolution⁴⁵ and the Council decided to urgently consider their establishment and requested the Secretary-General to report within two months on the modalities of the prosecution mechanism.⁴⁶

5. Conclusion

Bearing in mind the ineffectiveness of Somali courts (and government – TFG) to confront piracy off the coast of the Horn of Africa and in view of the real operational inability of the States in the region (or of the other States operating and patrolling there) to prosecute the rapidly growing number of acts of piracy, real and concrete international support and assistance is requested. The establishment in a host State of a Somali special anti-piracy tribunal with extraterritorial jurisdiction would be a unique solution (and the response of the international community) tailor-made for the situation in Somalia. As one of the basic elements of the crime of piracy is its private character, there is no need to internationalize the court's jurisdiction as was the case for the situations where there was an absence of political stability and neutrality (post-conflict situations). A real, prompt and efficient response to the acts of piracy off the coast of Somalia would be to have a special *ratione materiae*, efficient and functioning (i.e. outside of the territory of Somalia, thus extraterritorial), anti-piracy tribunal in the nature of a provisional (short-term) operation, which would have a long-term impact on the security of maritime navigation on the high seas.

⁴⁴ The parallel with the Lockerbie tribunal, a Scottish court exercising its jurisdiction in Netherlands, seems to be obvious but the *raison d'être* for its establishment being the neutral character of the hosting State. Additionally, the scale (two accused persons in case of the Lockerbie trial as opposed to thousands of suspected pirates) cannot be easily compared as these components influence the very functioning of the tribunal.

⁴⁵ S/RES/1976 (2011), 11 April 2011, par. 26.

⁴⁶ *Ibid.*

