

## **THE DEFINITION OF PIRACY UNDER ARTICLE 101 OF THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA – AN ATTEMPTED LEGAL ANALYSIS**

The definition of piracy introduced in Article 101 of the United Nations Convention on the Law of the Sea signed on 10 December 1982 in Montego Bay (known as the Jamaica Convention) is an almost direct quotation of Article 15 of the 1958 Territorial Sea Convention (known as the Geneva Convention). In their work on piracy regulations for the Geneva Convention, the International Law Commission relied heavily on the results of a private project developed in 1932 under the supervision of Professor Joseph Bingham from the Harvard University, known as the Harvard Draft Convention on Piracy (hereinafter the Harvard Draft).<sup>1</sup> The current definition of piracy introduced in Article 101 of the Jamaica Convention is:

Piracy consists of any of the following acts:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
  - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
  - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

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<sup>1</sup> Under the Harvard Draft the following activities constituted piracy: 1) Robbery committed by using a private ship to attack another ship. 2) Intentional, unjustifiable homicide, similarly committed for private ends. 3) Unjustifiable violent attack on persons similarly accomplished for private ends. 4) Any unjustifiable depredation or malicious destruction of property similarly committed for private ends. 5) Attempts to commit the foregoing offences. 6) Cruising with the purpose of committing any of the foregoing offenses. 7) Cruising as professional robbers in a ship devoted to the commission of such offenses as the foregoing. 8) Participation in sailing a ship (on the high sea) devoted to the purpose of making similar attacks in territorial waters or on land, by descent from the sea. See: Harvard Draft Convention, p. 773-775.

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

Under Article 101, only acts committed for private ends are considered acts of piracy. The term “private ends” is one of the most controversial parts of the definition. It is largely disputed whether this condition excludes politically motivated terrorist activity from the definition of piracy.<sup>2</sup>

The Geneva Convention was a “product of its time” – the Cold War era. The works of the International Law Commission were greatly influenced by the events of the 1950s when Taiwanese nationalists regularly attacked ships heading for Chinese ports. These activities posed a major threat to the freedom of navigation in the Far East. In October 1954, the Soviet government proposed an initiative to start international collaboration over combating piracy on Chinese waters by expanding the agenda of the 9th session of the United Nations General Assembly with the following item: The breach of free navigation in Chinese seas zone.<sup>3</sup> By reference to the stipulations of the Nyon Agreement, the Soviet government postulated that the activity of the Taiwanese fleet should qualify as piratical operations. The communist states led by the Soviet Union (the People’s Republic of Poland<sup>4</sup> included) had the position that politically motivated activities of both warships and independent vessels should qualify as acts of piracy. The Commission’s final decision was, however, to accept the position of democratic states and to restrict the definition of piracy to those acts of violence made at high sea which were committed for private/personal ends only.

Neither the 1982 Convention on the Law of the Sea nor the 1958 Convention on Territorial Sea and the Contiguous Zone contains any explanation of what private ends are. Hence, the travaux préparatoires of the Geneva Convention and the Montego Bay Convention may become useful.<sup>5</sup> Authors of the definition in Article 101 clearly did not mean to restrict piracy solely to acts committed out of the desire for profit (*lucri causa*). In the comment to high sea articles developed by the 7th Maritime Law Commission in 1955, it is stipulated that while an act of piracy needs to be committed for private ends, the desire for profit (*animus furandi*) is not required and acts of piracy may be driven by hatred and vengeance rather than

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2 The first attempts to develop international regulations on piracy were made in 1922 by the League of Nations. After three years of negotiations the works were abandoned as member states were unwilling to accept the proposed solutions. Even at that stage, however, it was postulated that the notion of piracy should include any acts of violence at sea irrespective of the violators’ ends and motives. In the end, this proposal was rejected and the issue of piracy was clearly separated from politically motivated acts.

3 J. Machowski, *Piractwo w świetle historii i prawa*, Warszawa 2000, p. 229.

4 See: position of the People’s Republic of Poland: UN Doc. A/CONF.13/37, p. 99.

5 Under Article 32 of the Vienna Convention on the Law of Treaties of 23 May 1969, reference to preparatory works related to treaties may form a complementary method of interpretation whenever the understanding of explicit regulations as defined in Article 32 is obscure.

merely the 'desire for profit. 6 Hatred and vengeance are, as a matter of fact, some of the most critical drives behind terrorism.

Based on preparatory works of the 1958 Geneva Convention and the 1982 Jamaica Convention, the notion of private ends has been used in Article 101 for the purpose of excluding from the definition of piracy activities undertaken by rebels who have not been recognised as a combating party by the state they are fighting against but who restrict their attacks solely to targets belonging to this country.<sup>7</sup> The authors of this definition intended to avoid a situation where governments fighting against rebels could qualify their rebellious operations as piracy.<sup>8</sup>

In practice, however, it may be difficult to tell rebellious activities from terrorism. One critical criterion for such differentiation seems to be whether the organisation's attack is aimed at a single country or if it harms interests of several countries. We will compare two widely known cases of ship hijacks to test this criterion. The hijacked ships were Santa Maria in 1961 and Achille Lauro in 1985. Both of them were hijacked by members of organisations pursuing specifically defined political ends. In both attacks there was a single fatal victim. The Santa Maria hijackers were, however, never labelled terrorists for a number reasons. First and foremost, the hijackers of this Portuguese ship were themselves Portuguese citizens. They were acting in the authority of general Humberto Delgado, leader of anti-governmental opposition, and hijacking the ship was supposed to facilitate him to seize power in Portugal. As importantly, no citizen of another country suffered as a result of the hijackers' actions (the only fatal victim was the ship's third officer from Portugal). In the court trial, which was held in Brazil, not only did the court not qualify the hijack as a terrorist attack but it also refused to classify the hijackers as pirates, which was postulated by Portugal.<sup>9</sup> This was justified by the political motives behind the act and the fact that it was addressed solely against the Portuguese government. The Achille Lauro hijack of 1985 was different. By hijacking the ship, Palestine Liberation Front members acted against the Israeli government demanding that it releases several dozen Palestinians from Israeli prisons in exchange for people taken to hostage on board the ship. The fatal victim selected from the group of passengers was not, however, an Israeli but an American citizen and the hijacked ship was under Italian flag. The hijackers' actions were politically motivated and they were against the interest of several countries. Under such circumstances, the Achille Lauro hijack was qualified as an act of terrorism rather than piracy or rebellion.<sup>10</sup>

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6 United Nations General Assembly A/CN.4/94, p. 20. See report at : [http://untreaty.un.org/ilc/documentation/english/a\\_cn4\\_94.pdf](http://untreaty.un.org/ilc/documentation/english/a_cn4_94.pdf)

7 M. Halberstram, Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime safety, *American Journal of International Law* 1988, vol. 82, p. 277.

8 D.R. Burgess, *The world for ransom. Piracy is terrorism, terrorism is piracy*, New York 2010, p. 136.

9 D. Heller-Roazen, *The Enemy of All. Piracy and the Law of Nations*, New York 2009, p. 174.

10 M. Münchau, *Terrorismus auf See aus völkerrechtlicher Sicht*, Frankfurt am Main 1994, p. 109.

As mentioned before, when developing their maritime law regulations, the United Nations Maritime Law Commission based their works on piracy regulations from the Harvard Draft. In the comment to Article 3 of the Harvard Draft (Draft Convention, *Supra* Note 23, 786), all politically motivated illegal attacks on persons and property were excluded from the definition of piracy, irrespective of whether they were committed in the authority of a state, a recognised rebellious organisation or an unrecognised rebellious organisation.<sup>11</sup> This might be indicative of the intention to exclude from the definition of piracy any politically motivated acts, terrorism included. Here the historical background may, however, be of significance. For authors of the Harvard Draft and for the International Law Commission, the notion of a “political end” was closely related to the area of state activities. Both entities assumed that political ends could be implemented either by a state (state piracy by warships) or an entity acting in the authority of a state (privateering) or of a rebellion government. They failed, however, to foresee the emergence of a completely new non-state danger, namely the current international terrorism.<sup>12</sup> The intention of authors of the Harvard Draft was to differentiate between piracy and any legal war activities conducted at sea.<sup>13</sup> In 1932, wars were traditionally classified into classic international wars and civil wars. No one could predict that several dozen years later a new threat to international security would emerge: terrorism.

One could accuse the authors of the Montego Bay Convention that by merely copying the definition of piracy from the 1958 Convention on the Law of the Sea, they not only ignored over 20 years of developments in the phenomenon of piracy but also the emergence of international terrorism and the building up of correlations between terrorism and piracy.<sup>14</sup> By strictly applying the requirement that pirates should aim for private ends (personal benefit) and excluding the political ends, we face the risk that many contemporary acts of piracy will not fulfil the conditions stipulated in Article 101 of the Convention and that offenders will not qualify as pirates thereunder. How do we, for example, treat Somali pirates who transfer a major part of the ransom they get for hijacked ships to an extremist Islam militia al-Shabaab, which has contacts with al-Qaeda and has been qualified by the US as a terrorist organisation fighting to seize control over Somalia from the internationally recognised Temporary Federal Government?<sup>15</sup>

In his reference to the works of the International Law Commission, Professor D.H.N. Johnson judged that it would be much more beneficial to assume that the factor

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11 International human rights litigation in U.S. courts, B. Stephens, M. Ratner (ed.), 2nd ed. Boston; Leiden: Martinus Nijhoff Publishers, 2008, p. 137.

12 D.R. Burgess, *The world for ransom...*, op. cit., p. 145.

13 *Ibidem...*, p. 137.

14 P.W. Birnie, *Piracy: Past, Presence and Future*, [in:] Editors: E. Ellen, *Piracy at Sea*, London 1989, p. 139.

15 Piracy ransoms funding Somalia insurgency, <http://www.reuters.com/article/2008/08/24/us-somalia-piracy-interview-idUSLO00572320080824>, of 3 March 2011.

defining piracy is no state's authorisation rather than the private ends condition.<sup>16</sup> The no-state-authorisation condition is historically justified in the differentiation between piracy and privateering.<sup>17</sup> The difference between privateers and pirates was that the prior acted officially on the authority of a state awarded to them as letters of marque while the latter acted out of their own initiative. The motivation behind operations of both groups was not, however, significantly different. Pirates acted for private ends, out of their desire for profit and the same was true of privateers. Although they acted in the political interest of a specific country, they did so to have a percentage share in the booty.

The assumption that no state authorisation forms a condition constituting piracy is not an innovation. For example Paragraph 162 of the Portuguese penal code of 1886 said: that "a sea bandit is a commander of an armed ship who sails at sea without authorisation of a ruler or of a sovereign state in order to commit robbery or any other acts of violence".<sup>18</sup> The same solution was used in the Nyon Agreement on Combating Piracy signed on 14 September 1937 which classified attacks of submarine vessels not belonging to any state as acts of piracy.

This solution requires no amendments to treaties and may be successfully used in the existing legal order. Professor Gerald Fitzmaurice believes that political, or public, ends are those which have previously been authorised by relevant state authorities. This leads to the conclusion that activities conducted for private ends, as stipulated in Article 101 of the Jamaica Convention, are those which have not been authorised by any recognised government.<sup>19</sup>

In this context, in 1927 the Permanent Tribunal for International Justice ruled that: "the distinctive mark of piracy is independence or rejection of State or equivalent authority".<sup>20</sup> By accepting this line of reasoning we could qualify a large part of acts of terrorism as piracy. Professor Halberstram believes that despite no historical or teleological justification for applying regulations of the Geneva Convention and the Montego Bay Convention to acts of maritime terrorism, it would be beneficial to regulate this issue in an international agreement.<sup>21</sup>

Another highly disputable issue in the definition of piracy is its restriction to high sea and other territories outside of jurisdiction of any state (*terra nullius*). Consequently, under Article 101 of the Jamaica Convention, armed robbery attacks committed on the territorial waters of a given country do not constitute piracy

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16 D.H.N. Johnson, *Piracy in Modern International Law*, Grotius Society Transactions. Problems of Public and Private International Law 1957, Vol. 63, p. 77.

17 M. Murphy, *Piracy and UNCLOS: Does International Law Help Regional States Combat Piracy?* [in:] *Violence at Sea. Piracy in the age of global terrorism*, ed. P. Lehr, New York 2007, p. 160.

18 L. Gelberg, *Piractwo na morzach chińskich. Próba analizy prawnej*, Warszawa 1956, p. 82.

19 M. Halberstram, *op. cit.*, p. 281.

20 M. Murphy, *op. cit.*, p. 161.

21 M. Halberstram, *op. cit.*, p. 291.

*ius gentium*. Such acts are defined as maritime armed robbery and are subject to jurisdiction of the state where they were committed.

The condition that an act of piracy should be committed at high sea is not a novatory solution (it was present in the 1952 Convention on the Law of the Sea) and it would not give rise to controversy were it not for the new maritime law institutions which were introduced under the Convention, such as territorial sea reaching 12 miles off shore (Article 3), the contiguous zone (Article 33), the archipelago waters (Articles 46-54) and, most of all, the exclusive economic zone (Articles 55-75). As a result, a large part of sea areas which used to qualify as high sea was now excluded from the same and acts of piracy committed in those areas no longer qualified as piracy. It is estimated that only 7-15% of incidents which qualified as piracy *iure gentium* before the Geneva Convention came into force would be considered as such under the new regulations.<sup>22</sup>

Before the 1982 Convention on the Law of the Sea became effective, the general assumption was that territorial sea was 3 miles wide. Now, under the Convention's Article 3, coastal countries were allowed to set territorial sea borders 12 sea miles (22 kms) away from the coast. Further, under Jamaica Convention's Article 7, baselines used to set the width of territorial waters might – in specific circumstances – be set using the so-called straight baselines method. In this method, territorial sea borders may be moved even further than with the use of conventional methods.<sup>23</sup>

Part IV of the Convention on the Law of the Sea introduces a new category of territorial waters: archipelago waters. This way even more high sea areas were transferred under the exclusive jurisdiction of individual countries and any pirate acts committed in those waters ceased to constitute acts of piracy *iure gentium*. In countries with relatively weak central authority, such as Indonesia and the Philippines, this development stimulated growth of piracy in their territorial waters.<sup>24</sup>

Setting the territorial sea width to 12 sea miles resulted in the expansion of contiguous zones from 12 to 24 sea miles. The contiguous zone is a peculiar sea area which is, by definition, adjacent to but also external from the territorial sea area. Although the contiguous zone falls under the same legal regime as the high sea, coastal countries have certain rights in this area to protect their important interests and sea borders. This may lead to confusion in interpretation. On the one hand, coastal countries are allowed to operate in the contiguous zone to prevent violations of the tax, duty, sanitary and immigration regulations or to pursue and punish persons guilty of such violations but on the other hand, they are forbidden – under external

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22 P.W. Birnie, Piracy: past, present and future, *Marine Policy*, 1987 Vol. 2, No. 3, p. 173.

23 M.N. Shaw, *Prawo międzynarodowe...*, op. cit., p. 321.

24 M.N. Murphy, Small boats, weak states, dirty money. Piracy and Maritime Terrorisme in the Modern World, London, 2010, p. 16.

regulations – to combat piratical acts committed in these waters. It is, therefore, likely that third-party countries may be unwilling to combat piracy in these waters under international maritime regulations.<sup>25</sup>

Of particular significance for the combat with piracy is the Geneva Convention's provision that an economic zone of 200 miles (370.4 kms) may be established. The exclusive economic zone (EEZ) is a *sui generis* area, not belonging either to territorial waters or to the high sea. Some commentators claim that under Article 58 (2) of the Geneva Convention, and particularly the piracy combat regulations in Part VII, also apply in EEZ, which means that any country may capture pirates in this area to judge them according to their own penal regulations as is the case at high sea. Other authors present a different view and claim that while the traditional freedoms of the high sea do apply in EEZ, the zone's legal regime resembles one for territorial waters rather than for high sea. This view is supported with Article 58 (3) which stipulates that any country exercising its rights in EEZ should give consideration to the rights, obligations, acts of law and regulations issued by the coastal countries unless they are in breach of the Convention.<sup>26</sup>

The unclear status of EEZ is further confirmed in Article 58 (1) of the Jamaica Convention. Under this article and without prejudice to other relevant stipulations of the Convention, any country, whether coastal or otherwise, may exercise traditional freedoms of the high sea in EEZ. It is not clear, however, to which of the Convention's stipulations those restrictions apply. This results in confusion whose root causes lie in the concept of EES and the unwillingness of the states which developed the Convention to accept a more accurate legal framework for EEZ which, in turn, resulted in the rejection of such proposals put forward by the commission preparing content of the Geneva Convention.<sup>27</sup>

The concept of exclusive economic zone is a relatively new institution in international law and is subject to regular updates. Also, the rights and obligations of coastal and other countries in EEZ are constantly evolving.<sup>28</sup> The unwillingness to remove the confusion concerning the legal status of EEZ may lead to the conclusion that certain countries may seek to gradually expand their jurisdiction onto EEZ (creeping jurisdiction) so as to be able to respond more intensively to events

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25 P.W. Birnie, *op. cit.*, p. 172.

26 M.N. Murphy, *Piracy and UNCLOS...* *ibidem*, p. 162.

27 M.N. Murphy, *Small boats...*, *op. cit.*, p. 16.

28 G.V. Galdorisi, A.G. Kaufman, *Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict*, *California Western International Law Journal*, vol. 32, p. 254. Despite the fact that Article 57 of the Geneva Convention limits the width of EEZ to the maximum of 200 sea miles from the baseline, at the UN forum, several countries have already attempted to move it to 350 sea miles which is the maximum external border of the continental shelf. See: Lisbon moves forward with EEZ extension bid at UN, <http://www.theportugalnews.com/cgi-bin/google.pl?id=1057-34> oraz Nigeria eyes extension of its Exclusive Economic Zone, <http://www.afriqueavenir.org/en/2010/05/03/nigeria-eyes-extension-of-its-exclusive-economic-zone/> (31.03.2011).

occurring in those areas. There is also the threat that countries may want to expand their jurisdiction beyond the 200-mile zone, which in connection to the creation of the so-called “security zones” where international law will be either restricted or abandoned altogether, may lead to the transformation of EEZ to “quasi-territorial sea”.<sup>29</sup> Since EEZ’s cover 30-34% of the World Ocean’s area, it might lead to the unwelcome exclusion of a great number of piracy-related events from the definition of piracy introduced in Article 101 of the Montego Bay Convention.

The restriction of piracy to high sea and other territories beyond jurisdiction of a single country, as stipulated in Article 101 of the Jamaica Convention, gives rise to the question whether an act of piracy may also be committed on land. Historically, pirates robbed people at sea but also on land. More, there are stories about pirates plundering entire towns. An attack on coastal towns by descent from the sea was much more profitable than an attack at sea. Based on such historic evidence, authors of the Harvard Draft accounted for acts of piracy both at sea and on land by descent from the sea.

The occurrence of piracy on land has been accepted in the international law doctrine for a long time. For example, a Soviet manual of international law (1952) reads that: “Sea piracy or buccaneerism are violent acts committed either by ships and their crews upon other ships at sea or they are attacks committed by ships upon seashore locations, mostly for robbery or to hijack ships and kidnap people, and less frequently for other illegal purposes.”<sup>30</sup>

Such a solution is also present in penal regulations of several countries. For example, Paragraph 1661 in Chapter VIII of the U.S. Code, devoted to piracy and privateering reads: whoever, being engaged in any piratical cruise or enterprise, or being of the crew of any piratical vessel, lands from such vessel and commits robbery on shore, is a pirate, and shall be imprisoned for life.

The Harvard Draft’s stipulation expanding the concept of piracy onto attacks on land by descent from the sea is not present either in Article 14 of the 1958 Geneva Convention or in Article 101 of the 1982 Jamaica Convention. Both articles assume that an act of piracy may be committed either on open waters or in places outside of jurisdiction of any country. It might be investigated whether, in the light of the aforementioned evidence and the fact that the conventions do not explicitly exclude such a possibility, the attack on a coastal town by descent from the sea is not an act of piracy under common law. This, however, is a purely academic issue. Nowadays, the danger of pirates’ attacking by descent from the sea seems rather unlikely, contrary to the threats of maritime terrorism. Contemporary piracy occurs only at sea. This

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29 Martin N. Murphy, *Small boats...*, op. cit., p. 16.

30 Editors: W.N. Durdieniewski, B. Kryłow, *Podręcznik Prawa Międzynarodowego*, Warszawa 1950, p. 269.



was accurately described by Martin N. Murphy: “piracy is a crime of the land that is manifested at sea”.<sup>31</sup>

Another highly disputed issue from Article 101 of the Convention on the Law of the Sea is the concept of “two ships”. After the *Santa Maria* and *Achille Lauro* were hijacked, it was disputed whether the notion of piracy requires that the pirates attack a ship while aboard another ship or whether it is sufficient that the attackers are already on board the attacked ship as crew members or passengers, as is the case with plane hijacks. Such doubts stem from Article 101 (a) (i) which says that an act of piracy at high sea may be directed “at another ship” or at persons or property on board another ship. This definition is unclear when compared with Item (ii) which claims that an act of piracy committed on the territory outside of jurisdiction of any state may be “directed at a ship”, or at persons or property on board the ship. Hence, the conclusion may be drawn that under Article 101, the act of seizing control over a ship by its passengers or rebellious crew will be classified as piracy only if committed in the territory outside of jurisdiction of any country which is not, at the same time, the high sea.<sup>32</sup> The reasons behind such a differentiation are unclear.<sup>33</sup> During the works on the 1958 Convention, the Chinese government submitted a draft amendment to Article 14, claiming that: “The article defines piracy in the restricted sense only and should be amended to include piracy in the broad sense of the term according to which any member of the crew or any passenger on board a vessel who, with intent to plunder or rob, commits violence or employs threats against any other member of the crew or passenger and navigates or takes command of the vessel, also commits piracy.”<sup>34</sup> This proposal was rejected without any specific explanation.

The two ships concept was also investigated during the Harvard Draft works. The project team came to the following conclusion regarding its limitations: “This limitation also is designed to exclude offences committed in a place subject to the ordinary jurisdiction of a State. The limitation follows traditional law. Some definitions of piracy are broad enough to include robberies and other acts of violence or depredation committed on board a merchant ship on the high sea by a passenger or a member of the crew who is not in control of the ship. Mutiny on the high seas has sometimes been included. The great weight of professional opinion, however, does not sanction an extension of the common jurisdiction of all States to cover

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31 M.N. Murphy, *Future Scenarios and Future Threats: What Happens if Piracy is not Controlled, and How Might Manifestations Change?*, [in:] *Global Challenge, Regional Responses: Forging a Common Approach to Maritime Piracys*, Dubai 2011, p. 37.

32 S.P. Menefee, *The new Jamaica discipline: problems with piracy, maritime terrorism and the 1982 Convention on the law of the sea*, *Connecticut Journal of International Law* Hall 1990, p. 144.

33 In the opinion of some, this inconsistency is a result of an editorial mistake. This claim may, however, be rejected on the grounds that there is an identical provision in Article 15 of the 1958 Convention. It is unlikely that such a major mistake would go unnoticed for over twenty years.

34 *Yearbook of the International Law Commission*, 1956, vol. II, p. 18, available at: [http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes%28e%29/ILC\\_1956\\_v2\\_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes%28e%29/ILC_1956_v2_e.pdf)

such offences committed entirely on board a ship which by international law is under the exclusive jurisdiction of a State whose flag it flies. Even though a mutiny succeeds, the common jurisdiction would not attach. It should attach, however, if the successful mutineers then set out to devote the ship to the accomplishment of further acts of violence or depredation (of the sort specified in Article 3, 1) on the high sea or in foreign territory.”<sup>35</sup>

Article 101 (a) argues against completely excluding the possibility of qualifying the crew’s rebellion or a passengers’ attack as an act of piracy by claiming that an act of piracy may be committed both by the crew and the ship’s passengers. It is unlikely that passengers might attack another vessel as pirates without assuming control over the ship carrying them. Therefore, if the crime of piracy may be committed by passengers, it is only so provided that they initially assume control of their own ship. This line of reasoning is supported by Article 103 which specifies that a ship is considered to be a pirate ship if the persons who control it are intending to commit one of the acts listed in Article 101. As a consequence, when the crew or passengers assume control over a ship at high sea, they commit an act of piracy only if they intend to take over the ship’s cargo or use the hijacked ship for further piratical activities. L. Oppenheim believes that if crew members kill the captain for personal vengeance and continue the cruise, they do not commit an act of piracy but rather an act of murder subject to national law of the given country and not by international maritime law. Such an act might constitute a piratical act if the rebellious crew commit the crime with the intention of assuming control over the ship and further committing acts specified in the Convention’s Article 101.<sup>36</sup> Otherwise, the incident on board the ship maintains its national character and is subject to the exclusive jurisdiction of the flag state. This situation will remain as long as consequences of the crime are limited to the hijacked ship and the persons on board and while the ship is not used for piratical activities.<sup>37</sup> As long as the crew’s or the passengers’ criminal activity does not harm interest of countries other than the flag country, they do not fall under international maritime law regulations on piracy.

In spite of the afore-mentioned evidence supporting the position that under the Convention’s Article 101, acts of piracy may include activities performed on a single ship, this remains a controversial and largely disputed issue. Jose Luis Jesus

35 Research in International Law, Harvard Law School, p. 809-810, [in:] ILCYB 1955, vol. I, p. 42, available at: [http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes\(e\)/ILC\\_1955\\_v1\\_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1955_v1_e.pdf)

36 L. Oppenheim, *International Law: A Treatise*, Tom 1, p. 436-437.

37 It is also for this reason that the hijack of Achille Lauro liner by Palestinian terrorists in 1985 did not qualify as piracy. Hijacking the ship, taking passengers to hostage and killing an American tourist are criminal acts falling under exclusive jurisdiction of the flag state, i.e. Italy. The fact that the hijack was aimed to force Israeli authorities to perform certain operations was irrelevant. Although the motivation behind the hijack was to commit a specified crime, the act does not qualify as piracy because no operation specified in Article 101 was performed which would constitute a piratical act. The activities of the Palestine Liberation Front were not directed at the freedom of navigation and so they did not harm the interest of international community but only one of a specific country. See: M. Münchau, *Terrorismus auf See...* op. cit., p. 114.

claimed: “It is fair to say, especially having in mind the travaux préparatoires, that the piracy definition does not and was not supposed to contemplate the one–ship situation.”<sup>38</sup> J.L. Jesus believes that Article 101 of the Jamaica Convention clearly requires two ships for a criminal act to constitute piracy. This author judges that if people who developed this regulation intended to qualify criminal activities performed by the crew or passengers on board a ship as piracy, they would clearly indicate this possibility in Article 101. The provision of Article 101 (a) (ii) refers to a completely different situation. In this case the piratical act is directed against a ship, persons or property in a territory outside of the jurisdiction of any state. Further, J.L. Jesus points out that this regulation lacks any practical application, as currently there are no areas not covered by the jurisdiction of any country except for the Antarctic.<sup>39</sup>

The exclusion of piratical acts from territorial waters of any country under the Convention’s Article 101 is related to the issue of the so–called reverse hot pursuit. Under the Convention’s Article 111, any coastal country has the right to pursue any ship beyond its territorial waters if the ship’s crew committed a crime within the country’s territorial waters. The reverse pursuit means that a ship sailing under the flag of a given country may enter territorial waters of another country if it started pursuing pirates in open waters. Where a coastal country is incapable of effectively controlling its territorial waters, they become a perfect shelter for pirates. The reverse hot pursuit right was also included in Article 7 of the Harvard Draft<sup>40</sup>, which allowed the pursuit of a pirate ship on territorial waters of a third–party state if the pursuit was started in the territorial waters of the pursuing country or at high sea provided that the third–party state does not object to continuing the pursuit on its territorial waters. After assuming control of the pirate vessel on another country’s territorial waters, the pursuing country is obliged to yield the vessel, its cargo and crew to the country on whose territorial waters the seizure was made, unless this country is not interested in accepting them.<sup>41</sup>

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38 J.L. Jesus, *Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects*, p. 377, [in:] *The International Journal of Marine and Coastal Law* 2003, vol. 18, no. 3.

39 See: *ibidem*.

40 Article 7 (1) In a place within the territorial jurisdiction of another state, a state may not pursue or seize a pirate ship or a ship taken by piracy and possessed by pirates; except that if pursuit of such a ship is commenced by a state within its own territorial jurisdiction or in a place not within the territorial jurisdiction of any state, the pursuit may be continued into or over the territorial sea of another state and seizure may be made there, unless prohibited by the other state. (2) If a seizure is made within the territorial jurisdiction of another state in accordance with the provisions of paragraph 1 of this article, the state making the seizure shall give prompt notice to the other state, and shall tender possession of the ship and other things seized and the custody of persons seized. See: R. Geiss, A. Petrig, *Piracy and Armed Robbery at Sea, The Legal Framework for Counter – Piracy Operations in Somalia and the Gulf of Aden*, Oxford 2011, p. 230, [in:] *The Draft Convention on Piracy, Supplement: Research in International Law, Part IV – Piracy*, 26 *The American Journal of International Law*, p. 744. 3. If the tender provided for in paragraph 2 of this article is not accepted, the state making the seizure may proceed as if the seizure had been made on the high seas.

41 K. Johansson, *Changes in the Views on Jurisdiction over Piracy under International Law*, University of Lund 2006, p. 23. Text available at: <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1558803 &fileId=1564776>.

Unfortunately, the Harvard Draft regulations on reverse pursuit were not included either in the 1958 Convention on the Territorial Sea and the Contiguous Zone or in the 1982 Convention on the Law of the Sea. Under such circumstances, reverse pursuit should be considered as a breach of the international maritime law and the pursuing country may face the consequences of violating the territorial sovereignty of another country. In this context, we might consider the legal status created for the territorial waters of Somalia under the resolution of the United Nations Security Council. Of paramount importance in this situation is Resolution no. 1816 (2008) issued on 2 July 2008 at the request of the Somali provisional government.<sup>42</sup> Item 7 (a) of this Resolution countries collaborating with the Somali government were given permission to enter its territorial waters and to take any measures permissible under international law regulations to combat the acts of piracy and armed attacks at sea. The Security Council made an exception to the territorial sovereignty of Somalia by allowing third-party countries to undertake actions on the country's territorial waters to fight any piracy-related activities in compliance with the regulations applicable at the high sea. This way the Security Council legalised the right of reverse pursuit on Somalia's territorial waters. The resolution does not, however, introduce any new standard to the international common law which would make it possible to pursue pirates on territorial waters of other countries as is the case in Somalia. In the resolution's Paragraph 9, there is a clear restriction that the permission covers exclusively the territorial waters of Somalia, does not affect the rights and obligations of third-party countries and does not introduce a new standard to international common law. In spite of all this, the resolution does set the direction for the required changes in jurisdiction concerning piracy under the 1982 Convention on the Law of the Sea.<sup>43</sup>

The conclusion is that the provisions of the 1982 Convention on the Law of the Sea do not reflect the threats posed by the phenomenon of contemporary piracy. Nowadays, pirates tend to operate in proximity to the coast so largely within the boundaries of territorial waters of individual countries. The Montego Bay Convention does not apply in those areas. Authors of the Convention clearly assumed that individual states are capable of responding to piratical acts in their respective territorial waters. As a matter of fact, this is actually the case. Unfortunately, no provision was made to account for countries lacking resources to guarantee security on their territorial waters (e.g. the Philippines, Indonesia, Nigeria). This refers even more to countries suffering from statehood crises. The territorial waters of such countries are a safehaven to pirates. On the one hand, their national law is enforced only to a limited degree on territorial waters or is not enforced at all, while on the other hand the international law does not apply. This situation stimulates the development of criminal activities at sea.

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42 Text available at: <http://daccess-ddsny.un.org/doc/UNDOC/GEN/N08/361/77/PDF/N0836177.pdf?OpenElement>.

43 T. Ostropolski, *Jurysdykcja uniwersalna wobec piractwa morskiego w prawie międzynarodowym*, „Państwo i Prawo” 2/2011, p. 52-55.

## **DEFINICJA PIRACTWA NA PODSTAWIE ART. 101 KONWENCJI NARODÓW ZJEDNOCZONYCH O PRAWIE MORZA – PRÓBA ANALIZY**

Piractwo morskie to najstarsza forma morskiej działalności przestępczej. Mimo podejmowanych na przestrzeni wieków licznych prób wyeliminowania tego procederu, na początku XXI w. zjawisko to przeżywa swój kolejny rozkwit, stanowiąc poważne zagrożenie dla międzynarodowej żeglugi. Artykuł ten stanowi próbę analizy prawnej definicji piractwa zawartej w art. 101 Konwencji Narodów Zjednoczonych o prawie morza z 10 grudnia 1982 r. Celem tej analizy jest rozróżnienie piractwa od aktów terroryzmu morskiego oraz ocena przydatności jej zapisów w walce z fenomenem współczesnego piractwa morskiego.

Key words:

Piracy, maritime, terrorism, international, law