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International Law versus Piracy: Issues in Legal Theory

Alexander N. Vylegzhanin and Ekaterina S. Anyanova

Abstract--- *The article examines the theoretical framework of interpreting the existing rules of international customary and treaty law applicable to the repression of piracy. The main characteristics of crime "piracy" are their focus on the high seas or to the exclusive economic zone (EEZ), or to another place "outside jurisdiction of any State" and the crime of piracy is committed for "private ends" by a "private" ship or aircraft against another ship (or other ships). Such criteria are provided, in concreto, in art. 100 of the UN Convention on the Law of the Sea (UNCLOS). However, interpretation of UNCLOS rules on piracy raises questions. While addressing them, this paper contains an executive summary of problems concerning piracy in the context of applicable norms of international law making special emphasis on the necessity to respect relevant customary rules. In this context, the paper examines questions such as the legal concept of piracy in historical perspective; the "humanitarian" attitude towards pirates, suggested in UNCLOS; States' conduct of anti-piracy operations; various interpretations of conventional terms, including "for private ends" and "against another ship"; current enforcement measures against piracy; and examination of other theoretical issues in the legal combat against piracy. In addition to introducing key elements of analysis and the results, the paper reviews rationales for related research studies and existing literature on the subject. This review is followed by focus on the research methodology and procedures used in the study and a discussion of data analysis techniques. Special attention is also paid to existing gaps in legal research as well as to inconsistencies and/or controversies in applicable treaty rules or in relevant legal teachings. A conceptual framework explaining the main findings and the results of this enquiry are summarized. Examples of piracy attacks provided in the article include their statistics, while highlighting that only about half of piracy attacks and relevant damage to ship-owners is officially reported. The paper also addresses managerial implications, limitations and directions for further research on the topic under investigation. The article ends with an appropriate conclusion and references.*

Keywords--- *Piracy, International Custom, UNCLOS, SUA Convention, Repression of Piracy, High Seas, International Law of the Sea, Seizure of a Pirate Ship, Hostis Humani Generis.*

I. INTRODUCTION

This paper examines the legal concept of repression of piracy within the broad framework of international law, including its customary rules. The context in which this research is conducted and questions driving this research focus on a fair interpretation of international law rules applicable to the repression of piracy, and the duty to cooperate in repressing piracy as an *erga omnes* obligation. The article provides a theoretical framework to address a number of current issues relating to the legal basis for combating piracy.

Alexander N. Vylegzhanin, Doctor of Legal Science, Professor, Head of the Programme of International Law of MGIMO-University, Moscow.

Ekaterina S. Anyanova, Candidate of Legal Science, Magister Legum, Doctor Juris, Legal consultant at LLC BALTTORG, Kaliningrad, Russia.

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In exploring the characteristics and dynamics of international law applicable to the repression of piracy in historical perspective, this research study addresses, first and foremost, applicable customary rules, as formulated in the "Lotus case" judged by the Permanent Court of International Justice in 1927. It is in the context of customary international law that applicable treaty rules are considered, including those provided in the Geneva Convention on the High Seas of 1958; the UNCLOS of 1982; and the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation ("SUA Convention") of 1988, as amended by the 2005 Protocols.

As for the UNCLOS main criteria for qualifying a maritime crime as piracy, special attention is devoted to the interpretation of the following criteria: 1) high seas and exclusive economic zone specified as the only maritime area for this kind of crime, 2) "private ends" of a criminal act; 3) existence (for legal qualification) not only of a pirate ship but also of another ship, the latter being the victim of the act of piracy; 4) the legal identification of piracy (international law's exclusion from piracy crimes ship hijacking, attacks of criminals onboard and so on). In addition, it is assessed, with regard to applicable rules of international law, that numerous attacks happen in territorial seas and internal waters and, consequently, such attacks do not fall under the definition of piracy provided by UNCLOS.

Conclusions resulting from this research give a deeper understanding of legal ways to battle piracy. For example, not only the international experience of the repression of piracy in regions such as Somalia, the Strait of Malacca and South-Eastern Asia is to be taken into account to combat this crime in other problematic regions of the world. It is suggested to develop and agree upon a kind of 'precautionary approach' for anti-piracy measures in the most recent global shipping routes (i.e. arctic navigational routes).

The academic importance of this topic is substantiated by a number of previous research studies on the legal repression of crimes committed at sea, which mention both opinions of various scholars and inconsistencies and gaps in numerous legal documents relating to combat against piracy.

According to many authors, for a example, a new concept of maritime violence has emerged which comprises all crimes at sea such as piracy, terrorist attacks, illegal transportation of weapons and drugs, armed robbery, slave trade, illegal migration, transnational organized crimes and illegal waste dumping at sea. This approach is based on the SUA Convention. While agreeing that the concept of maritime violence is not finally formulated in international law, we doubt that the SUA Convention could change the existing legal customary rules directing at repressing piracy. This legal regime may have gaps, yet this reason is not sufficient to drastically substitute this regime for the SUA Convention regime.

In this context, this paper focuses more on legal mechanisms of international cooperation for combating piracy and relevant multilateral action with a view to identifying the best available practices in combating crime at sea. The academic and practical importance of the article is also illustrated in the *de lege ferenda* aspect of the topic. In other words, the paper reviews additional anti-piracy measures taken by State laws and policies (identification of the personality of people getting onboard and their luggage, security plans, alternative maritime routes, enhanced regulation of access on board vessels, training on the security matters, etc.) and suggests "an anti-piracy precautionary approach" for the future legal regime of the Northern Sea Route and the North-West Passage.

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Aims, Purposes

The main aim of this study is to establish a comprehensive theoretical framework of international law rules applicable to combat against piracy, to start with the legal qualification of an offence as a crime of piracy. Many researchers dwell on "the limited concept" of piracy in international law, analyzing the UNCLOS characteristics of piracy such as high seas and exclusive economic zone as the only marine area where piracy is present, the "private ends" criterion and the requirement for the presence of "another ship" as being the victim of an act of piracy). This paper, however, considers customary rules to be the most important component, asserting that any attempt to ignore this component risks undermining the comprehensive and historically established legal regime of combating piracy.

The key question underlying the present research study can be formulated as following: What are the main components of the contemporary legal regime of the repression of piracy, and are customary rules of international law the key component of such a regime? In this theoretical and practical context, legal differentiation between piracy and other crimes at sea seems important, as shown in this paper. The specific research objective of this research is to analyze various interpretations of rules of international treaty law applicable to piracy.

The study also aims to reveal whether some authors are right in introducing historically established legal rules on combating piracy in the context of the recent concept of "maritime violence". On one hand, the paper highlights elements peculiar to piracy and other crimes committed at sea and, on the other, it differentiates them. This approach is due to a number of reasons, the most important of them being the fact that there are no customary rules of international law applicable to the repression of relatively recent offences such as illegal migration.

II. METHODS AND MATERIALS

Criminal attacks on ships at sea and piracy hotspots are reviewed in the article first of all on the basis of statistics available, as a data collection method. Only officially registered and published data and statistics are used. However, it is taken into account that ship owners are reluctant to report incidents of piracy against their ships because of their concerns for their vessels being delayed in ports during investigations as well as for their loss of clients. Also, this information could have a negative impact on the image of their company or result in increased insurance payments.

Furthermore, a significant factor behind piracy is leakage of information relating to costs of freight, vessel construction and navigation routes. This research study also uses sampling methods which are scientifically justifiable, given that not all necessary statistics and data on piracy are available. Information is analyzed systematically and the main concepts of the study are scrutinized.

III. LITERATURE REVIEW

This paper contributes to international law research on combating piracy, covering the classical legal qualification of piracy and evolving the concept of maritime security law, according to which piracy is one of numerous crimes at sea. As for the latter, this paper draws mostly on modern studies by European, American and Russian researchers, devoted to piracy in international treaty law and to maritime violence in general. According to Graham C., 90 % of world trade is carried out by means of the maritime transportation. Dutton Y. (2010-2011:234) point out the extent of damage to transportation due to piracy. From this perspective, the present study provides a

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strong empirical support from practices of International Maritime Bureau and their statistical reports, including that on piracy against ships.

In particular, a commentary to the UN Convention on the Law of the Sea, 1982, Vol. III (Editor-in-Chief M.H. Nordquist) is cited with a view to properly understanding the exact meaning of the relevant UNCLOS terms.

For piracy attacks in Eastern Africa, Latin America and the Indian Ocean, references are made to Combs C.; Slann M. (2007:257).

Mejia M.; Cariou P.; Wolff F.-C. (2008:103) confirm that piracy has always been an ever-present threat in the high seas.

Cases and materials on international law collected by M. Dixon and R. McCorquodale demonstrate that many courts used to consider a person having committed piracy as *"hostis humani generis"* rather than as a national.

In this regard, Reuland R.C.F. (1989:1178) highlights the general acceptance of the universal jurisdiction of piracy.

Golitsyn V. (2012:1159); Sidorchenko V.F. (2004:354); Jacobsson M. (2002:159) and Qureshi W.A. (2017) provide an overview on the historical evolution of the legal definition of piracy after 1982, when researchers of the Law of the Sea began to re-focus on conventional rules for combating piracy and, first and foremost, on the rules established by UNCLOS.

Geiss R. and Petrig A. (2011:223); König D., Salomon T.R., Neumann T., Kolb A.S. (2017:54); Kelley R.P. (2018:2307); Paige T.P. (2015:35) report on the piracy crisis in Somalia. Ehrhart H.-G., Petretto K., Schneider, P. (2011:21); Guilfoyle D. (2011:86); Todd P. (2010:3); Talley W. (2008:94); Anyiam H.I. (2014); Konte E. (1990:3-4); Kovalev A., Chernichenko S. (2008:354); Murphy M. (2009:45); Romashev Y.S. (2012:215); Talley W., Rule E. (2008:94) rely, once again, on UNCLOS in their research on the definition of piracy and legal ways of combating piracy.

Researchers such as Jenisch U. (2009:124); Graf A. (2011:9) introduce the concept of maritime violence, underpinned by the SUA Convention.

Gebert H. (1914:26); Münchau M. (1994:170); Özçayir Z. (2010:167) underline the importance of enforcement measures for anti-piracy combat, including visits to suspected vessels and the legal concept of hot pursuit.

Isanga J. (2009-2010:1300) conducts research on the present-day international cooperation between States aimed at combatting piracy and, in particular, at undertaking appropriate multilateral actions.

Shapiro A. (2012:147); Romashev Y.S. (2012:152); Mineau M. (2010:73); Talley W., Rule E. (2008:91); Azubuike L. (2009:408); Joyner C. (2009:89) investigate current legal practices related to the repression of piracy.

Anyiam D. (2002:29) and Bartels-Leipold B. (2012:377 – 385) propose to refer to the International Tribunal for the Law of the Sea to consider cases of piracy and armed attacks. This suggestion is not supported in this paper for reasons explained further.

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IV. RESULTS AND DISCUSSION

Baseline Overview

According to many authors, maritime transportation[1] accounts for about 90% of world trade and, therefore, anti-piracy legal measures play a crucial role in ensuring the stability of maritime transportation and modern trade in general. In the past centuries, pirates were beyond any legal order or moral constraints. Nowadays, even deliveries of international humanitarian aid from the UN World Food Programme and other international programs addressing poverty and instability continue to fall victims to piracy acts[2].

Global figures show that less than 230 attacks against vessels were registered in 1996, 252 attacks in 1997; 245 attacks in 2014, 246 in 2015, 191 in 2016, 180 in 2017, 201 in 2018 and 78 in 2019. More specifically, in 2018 48 attacks were committed in Nigeria, 36 in Indonesia[3], until July 2019, 21 in Nigeria and 11 in Indonesia.

In the Gulf of Aden alone, 100 and 33 attacks were committed in 2009 and in 2010 respectively;20 cases of piracy attacks in 2011; 1 attack was committed in 2016, 2 in 2017 and 1 in 2018[4]. No attacks have been reported in 2019[5].

The authors have reached some theoretical conclusions, resulting logically from the above figures, and have also considered available research on incidents of piracy and other armed attacks taking place in Eastern Africa, Latin America and seas of Indian Ocean as well as the necessary relevant legal and statistical data[6]. The precise lear legal definition of pirates in the past centuries as *the enemy of mankind* seems to blur after adoption of numerous legal documents on suppression of unlawful acts against maritime navigation safety, according to which pirates have become "*persons*" protected by law. This being said, the question arises whether the customary rules on combating piracy are still a part of modern international law. Discussion on this issue will start with a brief outline of the history of piracy-related international law.

The Legal Concept of Piracy in Historical Perspective

Piracy at sea is one of the oldest crimes, recognized at the international level as the most dangerous threat for maritime shipping[7]. Previous research of the legal aspects of piracy as a crime was primarily based on the *Lotus case* considered by the Permanent Court of International Justice in 1927. According to this legal precedent, Judge Moore described piracy as "an offence against the law of nations" and pirates as "the enemy of mankind – *hostis humani generis* – whom any nation may in the interest of all capture and punish"[8]. The word

[1] Graham C. Maritime Security and Seafarers' Welfare: Towards Harmonization. // WMU Journal of Maritime Affairs. Vol. 8. 2009. No. 1. PP. 71-87. P. 73.

[2] Dutton Y. Bringing pirates to justice: a case for including piracy within the jurisdiction of the International Criminal Court // Chicago Journal of International Law. Vol. 11. 2010-2011. PP. 197 – 241. P. 234

[3] ICC International Maritime Bureau. Piracy and armed robbery against ships. Report for the period. 1 January – 31 December 2018. URL: www.icc-ccs.org (visited at: 02 April 2019). P. 6.

[4] As for relevant trends in previous years see: Geiss R., Petrig A. Piracy and armed robbery at sea: the legal framework for counter-piracy operations in Somalia and the Gulf of Aden. Oxford: Oxford University Press, 2011. 321 p. P. 223.

[5] Piracy and armed robbery against ships. Report for the period 1 January - 31 June 2019. London: ICC IMB, 2019 // International Chamber of Commerce International Maritime Bureau (ICC IMB). [2019]. URL: http://www.icc-ccs.org/ (visited at: 06 August 2019).

[6] Combs C., Slann M. (eds.) Encyclopedia of terrorism. New York: Facts on File, 2007. 478 p. P. 257.

[7] Mejia M., Cariou P., Wolff F.-C. Ship piracy: ship type and flag // Talley W. Maritime safety, security and piracy. London: Informa, 2008. 344 p. PP. 103-120. P. 103.

[8] S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7). Publications of the Permanent Court of International Justice, Series A - No. 10; Collection of Judgments, A.W. Sijthoff's Publishing Company, Leyden, 1927.

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"punish" was not limited, so, in practice, these *hostis humani generis* were put to death at sea: for instance, they could be hanged on a yardarm by order of an officer. This legal principle was confirmed in 1934 by the Judicial Committee. According to it, a person guilty of piracy committed on the high seas «has placed himself beyond the protection of any State. He is no longer a national, but *hostis humani generis* and as such he is justifiable by any State anywhere»[9]. Logically, according to this legal principle, since pirates "are not nationals", they are not under the protection of any human rights conventions or any other legal tools.

The universal jurisdiction of piracy is correctly pointed out[10]. Piracy is the *erga omnes* crime that violates the law of nations and interests of all states with the jurisdiction based primarily in international customary law[11].

It is in 1926 that the League of Nations examined the first draft of the Convention on the combat with piracy[12]. The draft was not approved, however, so customary rules relating to measures against pirates remained the sole legal basis[13].

During the first UN Conference on the Law of the Sea, the 1958 Convention on the High Seas[14] was adopted, outlining treaty obligations of all States, first and foremost, *to cooperate to the fullest possible extent in the repression of piracy* (art. 14). In fact, article 14 is identical to article 38 of the Draft Articles on the Law of the Sea, prepared in 1956 by the International Law Commission. The conventional definition of piracy was also provided, limiting to the high seas only the area where a crime may be qualified as piracy. Moreover, the 1958 Convention set rules on liability for the seizure of a ship or aircraft on suspicion of piracy without reasonable grounds[15]. This was the first time that *conventional rules* relevant to piracy appeared and, from the very outset, these rules seem different from the above-mentioned *relevant customary rules* stipulatinng punishment of pirates "anywhere", even on board a vessel at sea, since they are not "nationals".

UNCLOS: Humanitarian Attitude towards Pirates?

During the 3rd UN Conference on the Law of the Sea, the trend for supporting a "humanitarian attitude" towards pirates was further supported. The new humanitarian "piracy concept" was reflected in articles 100-107 of the UN Convention on the Law of the Sea, 1982 (UNCLOS), adopted at the 3rd UN Conference. Given that almost all States are today parties to UNCLOS, many authors sometimes consider these articles as a global principle-applicable law against piracy, which is not correct in our opinion.

Certainly, article 100 of UNCLOS reflects relevant customary law as it obliges every State-party to it to cooperate with other states "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". However, what does this mean exactly? In our opinion, in the context of

[9] M.Dixon & R.McCorquodale. Cases and Materials on International Law. 4th Ed. Oxford University Press. 2003. P. 148.
[10] Reuland R.C.F. Interference with Non-National Ships on the High Seas Peacetime Exceptions to the Exclusivity Rule of Flag-State Jurisdiction // Vanderbilt journal of transnational law. 1989. № 22. PP. 1161 – 1229. P. 1178.
[11] S.S. Lotus, 1927 P.C.I.J. Ser. A. N 10, at 70 (Mr. Moore, dissenting) // Hudson M. World Court Reports.
[12] Golitsyn V. Maritime security (case of piracy). // Hestermeyer H. [et al.] Coexistence, Cooperation and Solidarity. Lieber Amoricum Rüdiger Wolfrum. Vol.II. Leiden: Martinus Nijhoff Publishers, 2012. 2211 p. PP. 1157 – 1176. P. 1159.
[13] Sidorchenko V.F. Morskoe piratstvo. St. Petersburg: Izdatel'skij Dom S.-Peterburgskogo gosudarstvennogo universiteta, Izdatel'stvo juridicheskogo fakul'teta S.-Peterburgskogo gosudarstvennogo universiteta, 2004. 400 p. P. 354.
[14] (Genfer) Übereinkommen über die Hohe See, 29 April 1958 (BGBl 1972 II, 1089).
[15] Jacobsson M. Terrorism at sea // Mukherjee P.K. et al. (eds.) Maritime violence and other security issues at sea: the proceedings of the symposium on maritime violence and other security issues at sea Malmö: WMU, 2002 PP. 157-163. X, 270 p. P. 159.

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applicable customary law, the words "to the fullest possible extent" do not indicate any limitation regarding the repression of piracy. States remain under the *erga omnes* obligation to prevent and punish piracy. Therefore, the remaining legal option is that *even today* a person engaged in piracy becomes "*hostis humani generis*" and losses protection under human rights conventions. Another legal approach might be that these humanitarian conventions are applicable for the protection of pirates as human beings, but only States that are parties to such conventions are under obligation to provide protection to pirates.

In view of the above, a state that combats pirates in a specific maritime area can take any legal approaches, because there is no legal identity between customary rules and norms of UNCLOS relevant to the repression of piracy. Consequently, according to customary international law, offences of piracy even today struck at the whole of humankind and shock the conscience of nations. Using the terms of the District Court materials of 1961), they are "grave offences against the law of nations itself (*delicta juris gentium)*"[16]. The UNCLOS, however, avoids to employ strong wording in this respect.

Article 100 of UNCLOS on the duty to cooperate in the repression of piracy is identical to article 14 of the 1958 Convention on the High Seas. What makes is distinctly different is that, according to UNCLOS, the exclusive economic zone up to 200 miles (EEZ) is not considered high seas whereas the 1958 Convention does not provide for EEZ at all. Still, article 100 of UNCLOS on cooperation in the repression of piracy applies to the EEZ according to article 58 of UNCLOS, as correctly noted in the Commentary to UNCLOS[17].

Importantly, UNCLOS sees the repression of piracy as a necessity. As noted in the Commentary to the UNCLOS, "the pirate being considered the enemy of every State"; such a pirate is liable to be captured and "punished by any State"[18].

Article 101 defines piracy as "any illegal act of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed":

1. On the high seas (or "in a place outside the jurisdiction of any State") "against another ship or aircraft", or against "persons or property on board such ship or aircraft";
2. Any act of "voluntary participation in the operation of a ship or of an aircraft";
3. Any act "of inciting or of intentionally facilitating the acts" described above.

In this context, the authors of the bestseller entitled *Thomas Jefferson and the Tripoli Pirates* (2015-2017 editions) are wrong, in legal terms, when they call "pirates" trained crews of vessels from Islamic states attacking ships along the coast of Africa and Iberian Peninsula. These vessels were controlled by states. Even France and Great Britain paid annual "gifts" to leaders of such "pirate states", according to the authors.

Neither can we accept the journalistic use of the term "piracy" when referring to recent acts of seizure by Iran of a British tanker in the Iranian territorial sea and by Great Britain of an Iranian tanker in the Strait of Gibraltar. Both these seizures have nothing to do with piracy for the following reasons: 1) they did not take place "on the high seas"

[16] M.Dixon & R.McCorquodale. Cases and Materials on International Law. 4th Ed. Oxford University Press. 2003. P. 147.
[17] UN Convention on the Law of the Sea 1982. A Commentary. Ed.-in-Chief M.H. Nordquist. Vol.III. Martinus Nijhoff Publishers. 1995. P.184.
[18] Ibid.

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or in EEZ; 2) they were not committed "by the crew or the passengers of a private ship"; and 3) they were not committed "for private ends".

Acts of piracy are crimes committed only by individuals, not States, for private ends - rather than for national interests, however they may be defined - against private ships or aircrafts. Not only participation in such acts but also inciting or facilitating such acts constitute an international crime called "piracy". As for actions of piracy against aircrafts, it is correctly noted that "an illegal act of violence against a seaplane floating on the high seas clearly falls within article 101" of UNCLOS (definition of piracy). However, acts committed "by one aircraft against another in the air and not on the high seas" do not fall within the scope of this definition[19].

In addition to articles on piracy provided in UNCLOS, the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988 with Protocol 2005,* ("SUA Convention") is regarded by IMO as a "relevant treaty" for the repression of piracy[20]. Some authors consider that the SUA Convention goes one step "further" than the UNCLOS by regarding political offenses as piracy[21]. We are not inclined to support this opinion, not only because the 2005 Protocol to the SUA Convention has less than 50 ratifications as of 2019. More importantly, the SUA Convention disregards some important aspects of customary rules on combating piracy.

We want to highlight the following. Legal basis for the repression of piracy is provided by international law. It is a relevant international custom (that is, "evidence of a general practice accepted as law", according to art. 38 of the Statute of the ICJ) that provides legal liberty to every state to punish pirates, or *hostes communis omnium.* From the very start, however, these rules of international law are most often *enforced* by States. Practices of different States regarding such enforcement are *not legally identical*.

Anti-piracy Operations: State Practice

There are some notable examples of combat with piracy, starting with the situation in the *Strait of Malacca*, a global strategic waterway in the contemporary trade system. Although coordinated patrols have been conducted in the Straits of Malacca and Singapore since July 2004, the piracy problem still exists in the area. The piracy phenomenon is addressed in *Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP),* an international agreement, concluded on 29 January 2009 at the intergovernmental meeting *on maritime security, piracy and armed robbery against ships for Western Indian Ocean, Gulf of Aden and Red Sea States* in Djibouti (26-29 January 2009).

Another example of successful international legal measures against piracy are those addressing the Somalia crisis. In 2006, 10 attacks were registered in the Somalia region; since 2007, the region has become some kind of an organized criminal structure[22], with 78 attacks registered in 2007, 44 attacks in 2009, 51 attack in 2010 and 125 attack in 2011. International legal and political measures taken later gave positive results: 2 attacks were registered in 2017, 1 attack in 2018 and no attacks in 2019.

[19] Ibid. P. 201.
[20] Ibid. P.185.
[21] Qureshi W.A. The Prosecution of Pirates and the Enforcement of Counter-Piracy Laws Are Virtually Incapacitated by Law Itself//19San Diego Int'l L.J.95 (2017). URL: http://digital.sandiego.edu/ilj/vol19/iss1/5 (visited at: 02 April 2019). P. 96.
[22] Transnational piracy: to pay or to prosecute? // American Society of International Law Proceedings. Vol. 105, 2011. PP. 543 – 554. P. 551.

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Piracy off the coast of Somalia was addressed in a number of resolutions of the United Nations Security Council and the General Assembly (UN SC resolutions 1816 (2008), 1838 (2008), 1846 (2008) and 1851 (2008) and of UN GA resolution 63/111). According to these resolutions, adopted with the consent of the Transitional Federal Government of Somalia, the military patrolling of states combating piracy are extended from the high seas to the territorial waters of Somalia. According to some authors, the UN Security Council resolutions 1368 and 1373 are to be interpreted cautiously, given that they do not imply the authorization to enter the territorial waters if not agreed express is verb is by the coastal state. In our view, Somalia, like the vast majority of States in the world today, is a Party to the UN Charter. Obligations under the UN Charter prevail in the event of a conflict with the obligations of any Party "under any other international agreement" (art. 103 of the UN Charter). Additionally, all Parties to the UN Charter "agree to accept and carry out the decisions of the Security Council" in accordance with the Charter (art. 25). Therefore, it is according to the powers of the Security Council under the Charter and not to the "authorization" for each case of the coastal state combating with pirates is extended to the territorial sea of specific coastal States.

Moreover, the UN Security Council Resolution 1851 extends to land-based operations its permission to combat piracy. This resolution also authorizes law enforcement officers to sail on board ships flying the flag of another state and to arrest pirates[23].

The UN Security Council authorized military operations for repression of piracy in a number of cases, according to the UN SC resolution 2020 (2011), for example. The Operation Atalanta of the European Union; Operations Ocean Shield and Allied Protector of NATO; the Combined Task Force of the Combined Maritime Forces are examples of states acting in their "national capacities" in cooperation with the coastal state – Somalia – to suppress piracy and to protect ships navigating through the waters off the coast of Somalia[24]. In the "Somalia crisis" the Somalian Government alone was unable to combat piracy (and most probably, no national consensus was available for such a combat); therefore, the international community intervened, probably even too late, in the situation[25].

Another example of international legal measures implemented against piracy is "the hot spot activity" in the Gulf of Guinea, located along the coasts of Benin, Cameroon, Equatorial Guinea, Conga, Togo, Cote d'Ivoire, Ghana, Nigeria and Democratic Republic of Congo. In 2011, piracy in the waters off these coasts triggered another international crisis, especially off the coast of Nigeria. For example, piracy was responsible for an up to *70 percent* (!) decrease of trade through the port of Cotonou in 2012[26]. In the Gulf of Guinea, however, most attacks occurred in marine areas under the jurisdiction of the Gulf's coastal states. Althought political leaders call these attacks piracy,

[23] Kelley R.P. Note: UNCLOS, but No Cigar: Overcoming Obstacles to the Prosecution of Maritime Piracy // Minnesota Law Review. Volume 102- Issue 6 2018 [95:2285]. P. 2307

[24] United Nations Conference on Trade and Development (UNCTAD). Maritime piracy. Part II. An overview of the international legal framework and of multilateral cooperation to combat piracy /Studies in Transport Law and Policy. 2014. No. 2. United Nations: New York and Geneva, 2014. URL: http://unctad.org/ttl/legal (visited at: 02 April 2019). P. 45.

[25] Paige T.P. The Implementation and Effectiveness of UNCLOS on Counter Piracy Operations // Journal of Conflict and Security Law. Pp. 1-35. P. 35.

[26] Piracy and armed robbery against ships. Report for the period 1 January - 30 June 2016. London: ICC IMB, 2012 // International Chamber of Commerce International Maritime Bureau (ICC IMB). [2016]. URL: http://www.icc-ccs.org/ (visited at: 02 April 2019); Piracy and armed robbery against ships. Report for the period 1 January – 31 December 2011. London: ICC IMB, 2012 // International Chamber of Commerce International Maritime Bureau (ICC IMB). [2016]. URL: http://www.icc-ccs.org/ (visited at: 02 April 2019); Piracy and armed robbery against ships. Report for the period 1 January - 31 December 2015. London: ICC IMB, 2016 // International Chamber of Commerce International Maritime Bureau (ICC IMB). [2016]. URL: http://www.icc-ccs.org/ (visited at: 02 April 2019).

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formally they were not piracy *stricto sensu*: the International Law Commission stated that piracy "cannot be committed within the territory of a State or in its territorial sea"[27]. Nevertheless, obligations of States to cooperate in the repression of piracy are certainly not limited to the high seas.

According to the UN Security Council resolutions 2018 of 31 October 2011 and 2039 of 29 February 2012, the region needs comprehensive approach to the maritime security in the Gulf along all the relevant national borders; and such comprehensive approach is to include appropriate financial issues. Step by step measures adopted by the UN are expected to produce positive results; while more than 40 attacks were committed in Gulf of Guinea in 2012 (31 – off the coast of Nigeria), the number of attacks in the Gulf has been decreasing gradually since 2013. In 2015, 26 attacks were committed in the Gulf of Guinea; and, again 20 and 46 and 34 were registered there in 2017, 2018 and 2019 respectively[28]. From a legal point of view, not all of these attacks are qualified as "*a crime of piracy"*.

It is asserted that the concept of piracy in the international law is very limited[29] due to the strict definition of piracy – in legal terms - given by UNCLOS. In fact, UNCLOS, there exist rigid rules for such a qualification: a) piratical acts are committed *only on the high seas* and *in exclusive economic zone* (not in *the territorial sea* nor in *the internal waters*); b) such acts are committed *for private ends*; c) criminal acts are committed *against another ship* (not against a port facility or on board of an aircraft).

Piracy: Only on the High Seas and in EEZ?

As noted above, according to the geographical scope of UNCLOS legal definition of piracy, this crime occurs only on the high seas or in EEZ or "in a place outside the jurisdiction of any State" (art. 101 (a)). The last words mean, according to the International Law Commission, "acts committed by a ship or aircraft on an island constituting *terra nullius* or on the shores of an unoccupied territory"[30]. Many other international legal instruments also highlight the geographical dimension of piracy[31]. As already observed, the basic legal qualification of a crime depends on whether it was committed on the high seas or in EEZ (it may be qualified as piracy) or within the state territorial sovereignty (in the territorial sea or in the internal waters of a particular coastal state). In the latter case such a crime cannot be qualified as piracy[32]. This "simple qualification", according to some authors, is considered as a gap in the international law, since many attacks are committed by pirates not on the high seas or in EEZ, but in the territorial sea and internal waters, i.e. within the territorial sovereignty of a coastal state[33]. It is reported that 80% of all attacks on sea vessels take place within the jurisdiction of coastal states[34].

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[30] UN Convention on the Law of the Sea 1982. A Commentary. Ed.-in-Chief M.H. Nordquist. Vol.III. Martinus Nijhoff Publishers. 1995. P. 184.

[31] United Nations Conference on Trade and Development (UNCTAD). Maritime piracy. Part II. An overview of the international legal framework and of multilateral cooperation to combat piracy /Studies in Transport Law and Policy. 2014. No. 2. United Nations: New York and Geneva, 2014. URL: http://unctad.org/ttl/legal (visited at: 02 April 2019). P.7.

[32] Geiss R., Petrig A. Piracy and armed robbery at sea: the legal framework for counter-piracy operations in Somalia and the Gulf of Aden. Oxford: Oxford University Press, 2011. 321 p. P. 222.

[33] Todd P. Maritime fraud and piracy. 2nd ed. London: Lloyd's List, 2010. 329 p. P. 3.

[34] Talley W., Rule E. Piracy in shipping // Talley W. Maritime safety, security and piracy. London: Informa, 2008. 344 p. PP. 89-101. P. 94.

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In light of this fact, the IMB's definition of piracy includes criminal acts committed not only on the high seas or in EEZ, but also unlawful acts against vessels in internal waters and territorial seas[35]. Does this mean that the UNCLOS rules on piracy are ignored? Is it a tragedy for a legal stability in the World Ocean? In our opinion, that is not the case if piracy-related international laws are interpreted within a broader legal framework, including customary rules. According to this broad approach, a pirate does not become an angel or a law-abiding national after his vessel crosses the outer limit of the territorial sea. A criminal remains a criminal.

However, because of these formal geographical limitations of piracy introduced by UNCLOS, inefficiency and insufficiency of the treaty rules of international law applicable to combat against piracy[36] are emphasized in legal teachings[37]. Applicable customary rules mitigate, however, this inefficiency and insufficiency.

Notion of "for Private Ends": How to Interpret?

The "private ends" requirement in the UNCLOS definition of piracy refers to the personal or private gain of a criminal. Such a requirement has a historical basis: in the past, some states employed pirates and used them against their enemy states[38].

The reference to "private ends" in the UNCLOS seems to distinguish between the legal concepts of piracy and politically motivated acts. This distinction is generally in line with the case law. However, in 1986 the Belgic Court of Cassation ruled a decision against a vessel of Greenpeace accused of committing "an act of piracy" against a vessel of Holland for polluting, according to Greenpeace, the environment. However, under international law, the question remains whether Greenpeace attacked the Holland vessel "for private ends", that is, whether the environmental motives fit the definition of the UNCLOS term "for private ends"[39].

In *Castle John v. NV Mabeco* (1986) acts of violence committed by environmental activists were also qualified as "piracy", although, again, this qualification seems far from being legally accurate in the context of the obligation to protect the marine environment as an *erga omnes* obligation[40]. Does that mean that national courts do not apply qualification rules provided by UNCLOS?

Interestingly enough, the Cassation Court of Belgium found out that Greenpeace activists' actions were committed "for private ends", and "may be considered as piracy"[41]. Indeed, the word "may" in the court's documents implies flexibility.

As noted in Part II of the UNCTAD document on maritime piracy entitled *an overview of the international legal framework and of multilateral cooperation to combat piracy*, "politically motivated acts (…) do not fall within the

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[37] Mezhdunarodnoe pravo: ucheb. Otv.red. Kovalev A., Chernichenko S. 3-e izd. M.: TK Velbi, Izd-vo Prospekt, 2008. 832 p. P. 354.

[38] Qureshi W.A. The Prosecution of Pirates and the Enforcement of Counter-Piracy Laws Are Virtually Incapacitated by Law Itself//19 San Diego Int'l L.J.95 (2017). URL: http://digital.sandiego.edu/ilj/vol19/iss1/5 (visited at: 02 April 2019). P. 104.

[39] Golitsyn V. Maritime security (case of piracy)//Hestermeyer H. [et al.] Coexistence, Cooperation and Solidarity. Lieber Amoricum Rüdiger Wolfrum. Vol.II. Leiden: Martinus Nijhoff Publishers, 2012. 2211 p. PP. 1157 - 1176. P. 1172.

[40] Castle John and Nederlandse Stichting Sirius v. NV Mabeco and NV Parfin, Belgium Court of Cassation (1986) 77 ILR 537.

[41] Castle John and Nederlandse Stichting Sirius v. NV Mabeco and NV Parfin, Belgium Court of Cassation (1986) 77 ILR 537.

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international law definition of piracy"[42]. In our opinion, attempts to include environmental actions into the strictly legal notion of piracy are neither acceptable nor supported by the main sources of international law. A s*tricto sensu* approach to the interpretation of the "for private ends" requirement is recommended.

Nevertheless, the opposite approach was demonstrated in the 2013 dispute between the *Institute of Cetacean Research Group* and the *Sea Shepherd Conservation Society*. The so-called "whale hunting case" was tried in the United States court. Members of the Sea Shepherd Conservation Society damaged Japanese whaling ships in their attempts to stop whaling for environmental reasons whereas the Japanese ship-owner claimed that the ship was conducting research whaling. The US environmental society opposed this kind of whaling because the society was against any whale hunting, whether for commercial or other purposes. The environmental activists did not make any private profits by stopping the Japanese ships. In this case, however, the US court again found out that the private ends "included" the environmental goals[43].

The Term "against another Ship"

The "two-ships" requirement of UNCLOS (pirate ship and victim ship) for legal qualification of an act as an act of piracy means that at least two such vessels are to be involved if an act of piracy is referred and also that the first ship attacks the second one. This requirement excludes from crimes of piracy "internal hijackings" or the forceful taking of control of a ship by members of its crew or passengers[44].

Also holding a ship's crew and other passengers by a group of passengers for ransom purposes does not fall within the definition of piracy. The same is true for the commitment of military action against a ship by warships or other authorized vessels on government service. For example, on the Italian ship "Achille Lauro" some passengers demanded release of Palestinian prisoners, and their acts were regarded as an offense of hijacking, not a piracy[45].

The 2005 SUA Convention (the 1988 SUA Convention amended by the 2005 Protocols) uses a more general term, i.e. "unlawful acts against the safety of maritime navigation". The documents of the International Maritime Organization define as armed robberies offenses which are committed within territorial waters or internal waters (for example, the IMO resolution A. 1025(26) of 2 December 2009 took this approach by introducing the *Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships*)[46].

Enforcement Measures against Piracy

It is asserted that, in a sense piracy, means denationalization[47]. As already observed, contemporary international law considers, an act of piracy to be an international crime; pirates are considered as enemies of all law-abiding

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[43] Qureshi W.A. The Prosecution of Pirates and the Enforcement of Counter-Piracy Laws Are Virtually Incapacitated by Law Itself // 19San Diego Int'l L.J.95 (2017) URL: http://digital.sandiego.edu/ilj/vol19/iss1/5 (visited at: 02 April 2019). PP. 106-107.

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[46] Qureshi W.A. The Prosecution of Pirates and the Enforcement of Counter-Piracy Laws Are Virtually Incapacitated by Law Itself//19 San Diego Int'l L.J.95 (2017) URL: http://digital.sandiego.edu/ilj/vol19/iss1/5 (visited at: 02 April 2019). PP. 108-111.

[47] Gebert H. Die voelkerrechtliche Denationalisierung der Piraterie. Kiel: Universitaetsbuchdruckerei von Schmidt & Klaunig, 1914. 68 S. S. 26.

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States; pirates are liable to be captured and punished by any state; by committing piracy a vessel loses the protection of any State.

As a general rule, reflected in articles 92 and 94 of UNCLOS, there is a principle of exclusive flag-State jurisdiction over ships on the high seas. It is a common understanding that legal rules on piracy are one of the exceptions to this principle: it is not applicable if there are reasonable grounds for suspecting that a foreign ship on the high seas is engaged in piracy, even if such a ship is flying a foreign flag (art. 110 of UNCLOS).

Article 19 of the Convention on the High Seas 1958 and article 105 of UNCLOS provides that every State may seize a pirate ship. The rule is considered as one of the enforcement measures[48]. The aim of such measures is to repress the international crime of piracy[49]. According to art. 105 of UNCLOS, appropriate means include seizing pirate ships and arresting persons and seizing property on board[50]: indeed, court's proceedings may be necessary for such actions, according to national law of this or that state. In our opinion, art. 105 does not provide limitations regarding actions relevant to repression of piracy. Such limitations are not consistent with applicable customary rules of international law.

As noted above, in terms of universal jurisdiction, piracy has a wider consequence as a universal crime: the courts of every state "*may* decide upon the penalties to be imposed" on pirates (art. 105); it's a *right*, not an *obligation*.

Every state *must* cooperate to repress piracy and *must* apply against pirates' appropriate measures. Such measures are taken according to the national law of States: they *may* include the decision of an officer of a warship to put pirates to death at sea, where the crime is committed in specific circumstances. Or, if possible, an officer of a warship may arrest a pirate and take him into custody and deliver a pirate to the port for further prosecution. However, authors usually avoid to consider such situations[51]. In the internal waters and the territorial sea, however, universal jurisdiction is usually not applied[52].

Combating Piracy: is there "the Best available Practice"?

Let us cite one of the numerous "SOS Campaigns" caused by piracy: "The SOS Save Our Seafarers campaign, launched by BIMCO, the International Chamber of Shipping (ICS), the International Shipping Federation (ISF), Intercargo, INTERTANKO and the International Transport Workers' Federation (ITF), is aimed at encouraging millions of people around the world to heap pressure on their national governments to crack down on piracy. They are calling on YOUR help"[53].

[48] König D., Salomon T.R., Neumann T., Kolb A.S. Piraterie und maritimer Terrorismus als Herausforderungen für die Seesicherheit: Objektive Rechtsunsicherheit im Völker-, Europa- und deutschen Recht URL: https://d-nb.info/1013880013/34 (visited at: 02 April 2019). P. 49

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[53] Citing from: Mednikov V.A. Otsenka riskov svyazannih s piratstvom./Aktualnie voprosi pravovogo regulirovaniya borbi s piratstvom i aktami voorugennogo razboya morskix sudov. (Assesments of risks relating to piracy. /Current issues of legal regulation of battle against piracy and armed robbery at sea.) Ed. A.Kuznetsov. "Morskie vesty Rossii (Maritime news of Russia)". Moscow. 2012. (in Russian). P. 122.

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The global community's more coordinated and more efficient efforts are a legal necessity because all states have the obligation under international law to act against pirate ships[54]. As noted, article 100 UNCLOS 1982 contains the obligation of states to cooperate in the repression of piracy "*to the fullest possible extent*". This provision, according to a number of authors, is not sufficient to oblige every state to effectively contribute to the repression of piracy. However, is it really a gap in international law applicable to the repression of piracy or rather is it a general shortage of treaty rules in the contemporary anti-piracy regime?

Yes, international law is more effective in the form of cooperation (even from a pragmatic view, the unilateral solution of the problem of piracy by one coastal state in the waters off its coast theoretically may be possible only by means of huge financial costs)[55]. Collaboration of all states in solving this problem is an urgent necessity. For legal basis of such a collaboration we strongly suggest that the modern anti-piracy legal regime should include not only UNCLOS anti-piracy articles but also customary rules of international law, described above.

As asserted by neglecting the anti-piracy measures, a state does not perform in good faith its duty under international law[56]. We add to this that *pacta sunt servanda* principle (art. 26 of the Vienna Convention on the Law of Treaties) is also a principal of international customary law. In a combat with criminality at sea it is necessary not only to cooperate in the repression of piracy already developed, but also to heighten *the preventive measures*. Scholars suggest that additional anti-piracy measures are to be taken for these purposes. They include a more accurate identification of the personality of people getting onboard (and their luggage); development of security plans; alternative shipping routes; higher speed of vessels combating piracy; "security dogs" on board the ship; etc. Furthermore, better organization of day-and-night watching is suggested, especially regarding the approaching small boats and also better technical devices making possible quick requests for assistance[57].

It is also recommended to increase *financing of programs* which address combating piracy and other maritime crimes, including establishment of anti-piracy funds on international level. Such additional financial programs might be used to finance the anti-piracy patrolling by warships: the patrolling of marine areas near the shore of Somalia showed that armed crews of naval vessels may protect the merchant and fishing ships effectively[58], but States are sometimes reluctant - for financial reasons - to send their warships for such anti-piracy patrolling. From time to time proposals are made to allow to use weapons by a crew of a merchant ship on the international legal level. Many national flags, however, do not allow merchant vessels to carry weapons aboard, which is also prohibited by the Protocols 2005 to the SUA Convention, 1988 and by the IMO, as noted above[59]. The question of responsibility may arise if such rules are not performed.

[54] König D., Salomon T.R., Neumann T., Kolb A.S. Piraterie und maritimer Terrorismus als Herausforderungen für die Seesicherheit: Objektive Rechtsunsicherheit im Völker-, Europa- und deutschen Recht URL: https://d-nb.info/1013880013/34 P. 17

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The change of route of the freight vessel (as an additional anti-piracy measure) means for a ship-owner additional costs and a waste of time. For example, an alternative route for the Strait of Malacca may be the Lombok Strait and the Sunda Strait, but that means for a ship-owner three additional days of transportation[60]. It is not surprising, therefore, that many ship-owners prefer to go through "pirate zones" paying additional insurance. Correspondingly, piracy activity on specific maritime routes leads to increasing transport costs and insurance premiums[61]. One of the new alternatives is to replace routes Europe to/from Asia with the Northern Sea Route, *now totally free from piracy*. Taking into account huge environmental changes in the Arctic Region,[62] however, the Arctic Coastal States need to take urgent *preventive measures* with a view to creating *de lege ferenda* an effective security system both on the *Northern Sea Route* (along Russian coasts), on the *North-West Passage* (in the Canadian waters) and on *other Arctic routes*, including even cross-polar arctic navigation in future. This "*anti-piracy precautionary approach*" has not yet been addressed in the Arctic Law currently in force[63].

Another question is whether professional security structures are to be involved in anti-piracy legal policy. Private security firms charge ship-owners approximately USD $30,000- 60,000 per trip. The IMO supports such projects, and ship-owners often use the services of major private security firms such as Blackwater[64]. Using private security forces for safety of merchant shipping also raises certain issues in international law. A merchant vessel with armed personal as a part of its crew does not become a warship. The results of this research suggest that armed security staff on board a merchant ship is without prejudice to the peace, good order or security of the coastal State, so there is no prejudice to the right of innocent passage of such a ship under article 19 of UNCLOS.

By turning to private firms to ensure a ship's safe passage through "troubled waters", ship-owners try to avoid its capture by pirates and subsequent ransom payments. Importantly, there is no ransom-related rule of international law[65]. In fact, a ship-owner paying ransom actually finances piracy, which is why law discourages the practice of paying ransom by ship-owners, since in that way ship-owners themselves contribute to the development of the piracy business. However, from practical and commercial points of view, it is often cheaper for a ship-owner to accept the demands of pirates and to pay ransom rather than to wait when he gets his ship and crew back within the framework of state efforts of combating piracy.

In a broader context, the concept of "maritime violence" was developed in international law not so long ago, highlighting the common elements of all crimes committed at sea, and not only piracy[66]. Further development of the concept, calling for codification of treaty rules of international law for struggle with all crimes committed at sea[67]. According to this concept, the notion of *crimes at sea* includes the following crimes: piracy; terrorist attacks at sea;

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[66] Murphy M. Small boats, weak states, dirty money: the challenge of piracy. New York: Columbia University Press, 2009. 539 p. P. 45.

[67] Romashev J.S. Bor'ba s piratstvom i vooruzhennym razboem na more (pravovye osnovy i praktika). Moscow: Izdatel'stvo «TransLit», 2012. 336 p. P. 215.

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illegal maritime transportation of weapons and drugs; armed robbery at sea; slave trade (with the use of ships); illegal migration (with the use of vessels); illegal transportation by sea of weapon of mass destruction, and so on.[68] This concept covers virtually all violent criminal acts at sea[69], including illegal attacks committed using devices remote-controlled from the shore[70]. The concept of maritime violence, however, is still not fully formulated in international law doctrines. There may be doubts whether it is rational to consider on equal legal footing: a) a pirate and b) the captain of a vessel persuaded to take hungry immigrants aboard. In addition, in our opinion, today there are no customary rules of international law applicable to combating any act of "marine violence".

V. CONCLUSION

The successful experience of combating piracy in some areas, such as waters of the coasts of Somalia, Malacca strait and South-Eastern Asia, may be applied to other problematic regions of the world, including co Eastern African and Latin American coasts, in the context of general international law applicable to the repression of piracy. Given that areas where pirates carry out frequent attacks against merchant vessels change its location from time to time and that one of the reasons of pirate activities (as indicated in UN documents) is poverty in Africa, Asia and Latin America, including their coastal regions, more comprehensive anti-piracy legal policy of States is needed.

Such a policy should include a better State-controlled monitoring of pirate activities, since ship-owners or crew members report only about half of the attacks.

In international treaty law, armed robbery against ships, i.e. attacks on vessels within the national jurisdiction of states, is strictly separated from piracy. As for the new regime for the suppression of all unlawful acts "against the safety of navigation", created by the SUA Convention, national legislators and courts are likely to take different positions, differentiating piracy and illegal transportation of immigrants, for example.

These above conclusions are consistent with the conviction expressed by some authors that not only definitions of piracy are to be reassessed. What is more important is not to limit piracy-related international law only to relevant international conventions and documents adopted by the UN, IMO and other intergovernmental organizations. The customary rules of international law remain the key element of the modern anti-piracy legal regime. Such a broad approach to legal basis applicable to combating piracy is also important for the development of *preventive measures* by the Arctic Coastal States in order to create *de lege ferenda* an effective security system both on the *Northern Sea Route* and in the *North-West Passage* and on *other arctic routes*, even cross-polar arctic navigation in future. Today, there is an urgent need for such an "*anti-piracy precautionary approach*".

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