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PIRACY AS A THREAT TO INTERNATIONAL PEACE AND SECURITY

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PIRACY AS A THREAT TO INTERNATIONAL PEACE AND SECURITY²

The study focuses on specific issues in the system of international security related to modern-day piracy. The first part examines the adequacy of the classical approach treating piracy as a common crime with an international element, comparing contemporary piracy to other illegal activities committed by non-state actors. The second part deals with the status of the threat to international peace and security potentially applicable to piracy. The essay concludes with a brief case study on the role of the UN Security Council in suppressing piracy off the coast of Somalia under norms of international security law.

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Introduction

The international community has long faced the need to suppress piracy⁴. Piracy was among first deeds to be qualified as crimes and to become the object of regulation under law—first customary, then national and international. As far back as Cicero, the formula *hostes humani generis* or *enemies of humankind* was used to describe sea robbers. Later, using Cicero's words, Gentili applied the Positivist Theory (Law as a Support for Policy) to the issue, while Grotius analysed the issue from the viewpoint of the Naturalist Theory (Law as a Moral Order Governing Policy)⁵.

However, not only historians of international relations focus on the subject now. Since the beginning of the 21st century different parts of the world have been affected by a new wave of piracy. These have taken place in the Gulf of Aden, the Gulf of Guinea, the Straits of Malacca, and Singapore and even in the Baltic Sea⁶. The boom in piracy off the Somali coast forced the UN Security Council to adopt a dozen and a half resolutions between 2008 and 2014—more than were adopted relating to some regional conflicts which had endured for decades.

In light of the UN Security Council's efforts, the analysis of piracy as an object of the norms of international security law has become more important. What are the consequences of such decisions? What must be the means of legal support to justify engaging state armed forces and contingents of international organizations (such as NATO and EU) in anti-piracy activities? Is it necessary to transfer piracy from the category of crimes with an international element to the category of threats to international peace and security? Lastly, do the anti-piracy norms stipulated by current international law and national legislation match the needs of countering piracy as it exists today?

⁴ United Nations Convention on the Law of the Sea, opened for signature December, 10, 1982 (available at <http://www.un.org/Depts/los/index.htm>; hereinafter *UNCLOS*) defines Piracy as follows:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

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

(Article 101)

⁵ Marcus Tullius Cicero (106 – 43 BC) - a Roman philosopher, politician, lawyer, orator, political theorist, consul and constitutionalist; Alberico Gentili (1552 – 1608) - an Italian jurist, one of the first writers on public international law; Hugo Grotius (Huigh de Groot, 1583 – 1645) – a Dutch statesman and diplomat, philosopher and theologian, one of founders of the international law tradition. For more details on the legal tradition as applied to piracy, see Chapter I *The Origins* at Rubin, *Alfred D. The Law of Piracy*. Newport, Rhode Island, Naval War College Press. 1988 (2nd ed. 1998).

⁶ See monthly, quarterly and annual reports on acts of piracy and armed robbery against ships collected by the International Maritime Organization *available at* <http://www.imo.org/KnowledgeCentre/ShipsAndShippingFactsAndFigures/Statisticalresources/Piracy/>

The majority of these questions are quite new,⁷ given the resurgence of the piracy threat in the last decade. The international community needs to elaborate new approaches to this issue taking into account the contemporary political and legal conjuncture, and the experience against other non-state threats of cross-border significance.

This essay studies specific issues in the system of international security related to contemporary piracy. The first section examines the adequacy of the classical approach which treats piracy as a common crime with an international element comparing piracy to other transnational illegal activities committed by non-state actors. The second section deals with the status of the threat to international peace and security, potentially applicable to piracy. It concludes with a brief case study on the role of the UN Security Council in suppressing piracy off the coast of Somalia under norms of international security law.

I

We would like to start with the claim that at the present time piracy is no longer just an ordinary criminal phenomenon. From our point of view, the scale of the threats and the damage caused every year do not simply allow sovereign states and the international community to treat it a common punishable action. This view narrows our perception of the challenge and the set of possible counteractions to eliminate it; the practice suppressing piracy does not end with the implementation of penal norms only. Criminal legal measures are just a part of applicable anti-piracy activities.

From the contemporary legal perspective, piracy belongs to the category of crimes. However, besides international criminal law, the customary definition of piracy codified by UNCLOS carries great weight for such branches of international law such as the law of the sea and international security law.

⁷ We must admit that the legal framework for piracy is worked out much better than the political aspects connected to the issue. This can be considered as the consequences of regarding piracy primarily as a criminal phenomenon, not a challenge to international security what will be discussed later. As for previous substantial elaborations, the most comprehensive treatment of the law of piracy is considered to be ALFRED D. RUBIN, *The Law of Piracy* (2nd ed. 1998). There appeared a sufficient amount of works on piracy after 2008, the year that is believed to be the starting point of the climax in modern piracy. Some of them are: *Boot, Max*. *Pirates, Then and Now: How Piracy Was Defeated in the Past and Can Be Again* // *Foreign Affairs*. Vol. 88, No. 4 (July/August 2009). P. 94-107. *Ishii, Yurika*. *International Cooperation on the Repression of Piracy and Armed Robbery at Sea under the UNCLOS* // *Journal of East Asia and International Law*. Vol. 7. Issue 2. 2014. P. 335-350. *Kontorovich, Eugene*. *A Guantánamo on the Sea": The Difficulty of Prosecuting Pirates and Terrorists* // *California Law Review*. Vol. 98, No. 1 (February 2010). P. 243-275. *Kontorovich, Eugene*. *Piracy on the high seas-customary international law-UN Convention on the Law of the Sea-international law in US courts-international criminal law* // *American Journal of International Law*. Vol. 107. Issue 3. 2013. P. 644-649. *Massarella, Carmino*. *Piracy and International Maritime Crimes in ASEAN* // *International Journal of Marine And Coastal Law*. Vol. 28. Issue 4. 2013. P. 743-748. One of issues of the *American Journal of International Law* (Vol. 104, No. 3, July 2010) was devoted to contemporary piracy (including articles by *Kontorovich, Eugene & Art, Steven*. *An Empirical Examination of Universal Jurisdiction for Piracy*; *J. Ashley Roach*. *Counter Piracy off Somalia: International Law and International Institutions*; *Thuo Gathi, James*. *Kenia's Piracy Prosecution and others*). Unfortunately none of them paid respective attention to piracy as a threat to international peace and security.

Article 105 of UNCLOS⁸ acknowledges that concrete counter-piracy actions can be broader than measures under criminal law. The realization of every state's right to seize a pirate ship or aircraft and the property on board mentioned in the article goes much further than measures traditionally used to combat common crimes. It concerns the nature of the force and tools in use (habitually warships and aircraft on state service, whole subdivisions of tens or hundreds of persons), the character of measures (sometimes full combat operations) and the staff involved (not only law-enforcement agencies, but also frontier services and armed forces). For instance, to defeat pirates off the coast of Somalia the UN Security Council calls upon states and regional organizations to actively take part in the fight against piracy by deploying naval vessels and military aircraft, and through the seizure and disposition of boats, vessels, arms and other related equipment used in the commission of piracy and armed robbery off the coast of Somalia, or for which there is reasonable ground for suspecting such use⁹.

Article 105 settles one more norm. The courts of the state which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith¹⁰. Here we would like to underline two points. First, piracy trials go beyond criminal prosecution (at least, in determining the fate of what is seized from pirates). Second, from the construction of the norm it can be concluded that trials must be perceived as a right but not the duty of a state (the courts *may* determine the action to be taken—not *shall*). Consequently, in countering piracy UNCLOS affords an opportunity for extrajudicial actions.

These actions can include the repressive ways of combating piracy which have been known for many centuries. Reprisals have always been quite fast. Even if they were not exterminated during special operations, their lives were not kept safe for the forthcoming proceedings. Captured pirates were not often carried thousands miles away to appear before the royal court, but were *hung high and short*.

Even nowadays, some authoritative experts state that international law covers state duty to cooperate in the repression of piracy, which could be an arrest but also, for example, the

⁸ Article 105 of UNCLOS *Seizure of a pirate ship or aircraft* at http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm.

⁹ Item 9, Resolution 1846 of the UN Security Council (December 2, 2008) at <http://www.un.org/en/sc/documents/resolutions/2008.shtml>.

¹⁰ Article 105 of UNCLOS *Seizure of a pirate ship or aircraft* at http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm.

discharging of fire-arms at pirates, which is not prohibited by international law¹¹. We suggest such statements are reasonable.

In Russia for example, criminal prosecution can only occur under the Russian Criminal Code. However, there are no constraints against using other branches of national law or norms of international, firstly customary, law. The presence of Article 205 on terrorist acts¹² in the Russian Criminal Code does not limit this to the prosecution of specific individuals for specific crimes. The provisions of the Federal Law on Countering Terrorism are valid in the whole territory of Russia and includes anti-terror measures up to the downing of aircraft used by terrorists¹³. In the United States, the PATRIOT Act¹⁴ appeared in answer to the September 11, 2001 attacks and bears a similar character by containing norms of different branches of law. This proves once again that implicating criminal legal tools is just one of possible options for countering piracy even at the national level.

We stated that contemporary piracy is more than just a crime. It requires a special appraisal and attitude in order to maximize the efficiency of international community's efforts in countering this threat. However, does piracy represent a single and unique phenomenon or are there any other crimes with an international element similar to it, both by their nature and in how they could be defeated?

We suppose that it is possible to give a positive answer to the second part of the question keeping in mind the experience the international community has had dealing with terrorism¹⁵ and other non-state threats, for example the risk that non-state actors may acquire, develop, traffic in, or use weapon of mass-destruction (WMD) and their means of delivery. The motivations to use an analogical approach here will be presented in the following comparison of situations in suppressing new challenges and threats to international security with the focus on the approaches and measures taken by the UN Security Council. The comparison is aimed at highlighting the

¹¹ Interview with prof. Vylegzhanin, head of the International Law department of the MGIMO-University (*Вешать пиратов на реях нельзя судить. Эксперт МГИМО: Александр Вылегжанин*) at <http://www.mgimo.ru/news/experts/document171758.phtml>

¹² See The Criminal Code of the Russian Federation (Уголовный кодекс Российской Федерации) at <http://www.consultant.ru/popular/ukrf/>

¹³ The Federal Law of March 6, 2006 on Countering Terrorism available at http://www.consultant.ru/document/cons_doc_LAW_173583/ (in Russian)

¹⁴ See the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001* at <http://www.gpo.gov/fdsys/pkg/PLAW-107publ56/pdf/PLAW-107publ56.pdf>

¹⁵ In general, terrorism and piracy have much in common criminologically. Both phenomena descend from non-state actors whose philosophy is extreme and violent anti-etatism. Thus, contemporary international law underlines non-states origins of piracy (it can occur not but on board a private ship or a ship whose crew has mutinied and taken control of the ship – see Articles 101-102 of UNCLOS).

As for the ends of terrorism and piracy, they are different: political and mercenary accordingly. For instance, the Russian Criminal Code let assume that the mercenary aims of crimes as stipulated by Article 227 *Piracy* distinguish them from deeds criminalized under Article 211 *Hijacking of an Aircraft, a Sea-faring Ship, or a Railway Train*. The latter is considered to be a crime of a terrorist nature, because it is aimed at violating public security, intimidating the population, or exerting influence on governmental decision-making.

repeating algorithm which was used by the international community in the cases of countering terrorism and illicit WMD-trafficking and how it is being reproduced now to suppress piracy.

The world's reaction to the September 11, 2001 attacks is the starting point for our reasoning, from that moment a complementary approach could be found in global counter-terrorism policies. Combating terrorism as a criminal legal phenomenon was carried out under the norms of each jurisdiction. Those efforts were supplemented by norms of international criminal law generally applicable to the international countering all kinds of crimes (such as the issues of mutual assistance in criminal matters, extradition, and the transfer of sentenced persons). At the same time the supra-national processes of codifying customary law and elaborating new norms on anti-terrorism took place. Within the UN and its specialized bodies a dozen universal anti-terrorism conventions and protocols were adopted¹⁶; moreover regional organizations agreed upon treaties on countering terrorism¹⁷. The build up of a comprehensive international anti-terrorist system began even before the tragic events of September 11, 2001. Nevertheless, we believe that the strikes on New-York, Washington and Pennsylvania specifically triggered the principal shift in organizing international anti-terrorist cooperation.

After these attacks the UN Security Council adopted resolutions 1368 and 1373 dated September 12 and 28, 2001 respectively, which qualified the terrorist assaults as a threat to international peace and security. The right of Washington to resort to armed self-defence under Article 51 of the UN Charter was legitimated, a regime of sanctions against Al-Qaeda was introduced, and all nations were obliged to take a set of practical anti-terrorism measures including those related to their internal competences. Therefore, for the first time since the UN Charter was adopted, its norms forming international security law (Chapter VII)¹⁸ were activated for combating criminal non-state actors. Thus, the tools of international law to guarantee peace and security were used as case-law for eliminating a concrete non-state criminal legal phenomenon.

¹⁶ For more information, see the UN fact sheet *United Nations Action to Counter Terrorism* including *International Legal Instruments* at <http://www.un.org/en/terrorism/instruments.shtml>.

¹⁷ European Convention on the Suppression of Terrorism available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/090.htm>, Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism available at <https://treaties.un.org/doc/db/Terrorism/csi-english.pdf>, Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that Are of International Significance available at <http://www.oas.org/juridico/English/treaties/a-49.html>, SAARC Regional Convention on Suppression of Terrorism available at <https://treaties.un.org/doc/db/Terrorism/Conv18-english.pdf>, The Arab Convention for the Suppression of Terrorism available at http://www.ciaonet.org/cbr/cbr00/video/cbr_ctd/cbr_ctd_27.html.

¹⁸ Chapter VII: *Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression* includes capabilities to take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations (Article 42) (<http://www.un.org/en/documents/charter/chapter7.shtml>).

Another example is the countering the illegal trafficking of WMD and their components. Since the middle of the 20th century, when this threat became real, the complementary approach started to develop. The international community led by states—legal owners of WMD—built up a full-scale regime of non-proliferation and arms-control¹⁹. Each state established in its own jurisdictional appropriate conditions to put a stop to illicit WMD trafficking, by criminalizing such deeds and realizing criminal responsibility in law-enforcement practices.

The crash of this scheme (maybe not as obvious to the public as in the case of anti-terrorism) took place in 2004 when the UN Security Council adopted resolution 1540²⁰. By developing the logic of resolutions 1368 and 1373 (2001) the Council considered the problem of non-proliferation and the risk that non-state actors may acquire WMD to be a threat to international peace and security. Resolution 1540 stipulated a set of actions obligatory for every state to diminish the threat, and for the establishment of a plenipotentiary committee consisted of all the UN Security Council members. Thus, the international community again witnessed a situation when nations tried to minimize a criminal threat by establishing a special political and legal regime of combating non-state actors on the basis of international security law (resolution 1540, and anti-terrorist resolutions 1368 and 1373 contain the direct reference to Chapter VII of the UN Charter).

In these two cases, the algorithm of the international community's reaction is schematically the same. There is a criminal phenomenon whose particular character reveals when once it terminates to be just an ordinary kind of crime, in particular its consequences acquires international scale. Countering these types of phenomena with the use of international and national law does not provide the expected result because they cannot reach any significant reduction of the danger level, which becomes evident for both experts and in public opinion. As a result, the competent international institution – the UN Security Council takes *ad hoc* decisions to give the criminal phenomenon the status of a threat to international peace and security. Such a qualification becomes the basis for engaging the full norm arsenal of international security law to combat the particular criminal threat under Chapter VII of the UN Charter.

There an attempt to boost the efficiency of combating concrete criminal problems by an *ad hoc* complementation of the traditional regulation under internal penal law and international criminal law with the norms of international security law which were not formerly used for resolving such problems.

¹⁹ For further information, see the UN fact sheet *Nuclear, Chemical and Conventional Weapons Disarmament* at <http://www.un.org/en/sections/priorities/nuclear-chemical-and-conventional-weapons-disarmament/index.html>.

²⁰ Available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1540%282004%29

We are speculating about *alien* norms of international security law and *non-standard* approaches here because the international security law incorporated in the UN Charter was initially formed and then built up for decades to regulate the behaviour of state actors and to counter threats created by them.

There had been the distinct divide between different branches of law, and diversifying concretely the objects of regulation and law-enforcement: international security law and international criminal law, with the relevant norms of national criminal law attached. The former is the tool to eliminate threats from states and their alliances, the latter is against threats from individuals and private bodies. (It is clear that non-state origins of threats presuppose the complexity of their characteristics, and for combating some of them tools at the national level are sufficient while for others the surplus value of international law instruments is necessary).

In discussing this issue, we are constantly linking criminal acts to international criminal law. International security law is also linked with criminal issues which appeal traditionally to the norms of this branch in international crimes. Within its plenary powers under the UN Charter²¹, the Security Council combats international crimes extrajudicially, for instance by introducing sanctions against delinquent states. Accordingly, it is possible to describe the influence of international security legal norms on crimes with an international element. At the same time, it is possible to give examples of the reverse processes. There were exceptional moments in history when international crimes themselves provoked a responsive formulation of norms of international security law—crimes of the Nazi regime triggered unprecedented law-making and law-enforcement at the end of World War II²².

However, even in such cases, the above-mentioned divide was not erased. The general rule was quite simple: for state subjects of international crimes—the law of international security; for subjects of crimes of international significance—international and national criminal law (see the table below)²³.

²¹ See Articles 24-26 of the UN Charter at <http://www.un.org/en/documents/charter/chapter5.shtml>

²² For further details see our work Varfolomeev A. A. *The Enduring Importance of the Nuremberg Tribunal in Combating Old and New Threats to International Peace and Security // International Affairs: A Russian Journal of World Politics, Diplomacy and International Relations*. 2012. Vol. 58. No.1. P. 137-142.

²³ It is necessary to note, that at the moment there is no general doctrinal classification of crimes with the international element accepted by different schools of international law and international studies. As it is evident that all the transnational punishable actions cannot fall into one category of international crimes, some scholars narrow the latter notion following the jurisdiction of the International Criminal Court (“*The mandate of the Court is to try individuals (rather than States), and to hold such persons accountable for the most serious crimes of concern to the international community as a whole, namely the crime of genocide, war crimes, crimes against humanity, and the crime of aggression, when the conditions for the exercise of the Court’s jurisdiction over the latter are fulfilled*” – see the fact sheet *Understanding the ICC* at <http://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf>). Others claim existing *universal crimes* of powerful actors (See Einarsen, Terje. *The Concept of Universal Crimes in International Law*. Oslo: Torkel Opsahl Academic Publisher. 2012. 361 pp.). We support the classification of crimes with the international element elaborated and accepted by the majority of the Russian

Delicts	Delinquents	Branches of Law
International crimes	State	Law of international security
	Individuals (personalization of responsibility for crimes committed on behalf of a state)	International and national criminal law
I n t e r n a t i o n a l C r i m i n a l J u r i s d i c t i o n		
Crimes of International Significance	Individuals and groups of individuals (acting on behalf of no state)	International and national criminal law

The table, which describes the division of legal responsibility for countering crimes with an international element, helps to estimate the processes of convergence between the law of international security and international criminal law. Taking into account the conclusions made earlier it is possible to assert that an attempt is being made to counter crimes of international significance with the measures that might have been used before to combat only international crimes.

In other words, we are witnessing a new tendency where norms codified to stop the illegal activities of delinquent states are used to combat specific of crimes of international significance; first, terrorism, then illicit WMD trafficking, now piracy.

International criminal jurisdiction has started covering not only individuals who personalize the responsibility of their states for international crimes, but also individuals who commit crimes of international significance on behalf of no state²⁴. As mentioned above, this convergence as a response to the new challenges and threats is happening *ad hoc*. International practices count only a few samples of implicating the norms of international security to reinforce the efficiency of anti-criminal cooperation.

II

doctrine's representatives. It divides the delicts punishable under international law into two groups: *international crimes* as such and *crimes of international significance*. The principal perception is shown in the table, for further details see, for instance, International Law Reading Book by prof. Kolossov and prof. Krivchikova (*Международное право: Учебник. Отв. ред. Ю.М. Колосов, Э.С. Кривчикова. – М.: Междунар. Отношения, 2001*).

²⁴ The trend as revealed by Dr. Yuri Kolossov, professor of the Moscow State University of International Relations of MFA of Russia (see *Международное право: Учебник. Отв. ред. Ю.М. Колосов, Э.С. Кривчикова. – М.: Междунар. Отношения, 2001. P. 296*).

We would now like to go back to the threat of piracy and show how the algorithm for cases of terrorism and illicit WMD-trafficking is used in this situation. The law conjuncture in the case of piracy is quite similar to the situation with terrorism and illicit WMD-trafficking. The fundamentals of the international legal regime governing piracy set out in the law of the sea, and the necessary components of national criminal law²⁵. Nevertheless, two moments needed for some adjustments are the subjective origins of piracy and jurisdictions it must fall within.

Piracy is done by non-state actors—individuals or groups who act independently from any state authority²⁶. In our terminology, a crime of international significance as defined by international law²⁷ for private ends by the crew or the passengers of a private ship or a private aircraft. The logic that a subject of the delict has no ties with any state is fortified by the provision of Article 102 of UNCLOS which says that acts of piracy committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft²⁸. This norm exonerates the state from the responsibility for the unlawful actions of a mutinying government crew and generally prevents the application of international legal definition of piracy to the activity of state representatives, since in line with the ideology of international law illegal actions of violence committed by warships or any other government ships at the order and within the mandate must be treated as international crimes with responsibility of the state—up to the qualification of such acts as the aggression.

Besides the peculiarities connected with the subject of piracy we need to recap briefly the issue of jurisdiction.

During the first Conference for the Unification of Penal Law (Warsaw, 1927) it was noted that piracy is difficult to define in terms of its jurisdiction²⁹. To compensate for this, which often let subjects of criminal activities protract trial proceeding or avoid responsibility, the principle of universal jurisdiction was historically formed. It is exactly this mechanism which

²⁵ Roach, J. Asheley. Countering Piracy off Somalia: International Law and International Institutions // The American Journal of International Law. Vol. 104. No. 3. P. 397. See also our work Varfolomeev, Anton A., *The Reanimation of Piracy: Challenges of Adapting International Law Norms into Russia's Legal System* (December 31, 2014). Higher School of Economics Research Paper No. WP BRP 44/LAW/2014 . Available at SSRN: <http://ssrn.com/abstract=2563535> or <http://dx.doi.org/10.2139/ssrn.2563>.

²⁶ Prof. Rubin noted that “Piracy” is not a “war crime” historically or by any known definition applied in diplomatic practice or court case. Indeed, the term “piracy” was historically used to distinguish those who fought as privateers under the laws of war and those who had no valid commissions or sailed under the commissions of unrecognized powers and thus were subject not at all to the laws of war but to the normal criminal law of some state with the necessary legal interest to try them. See *supra* note 1, P. 294

²⁷ See *supra* note 6.

²⁸ Article 102 of UNCLOS *Piracy by a warship, government ship or government aircraft whose crew has mutinied at* http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm.

²⁹ Kolossov & Krivchikova. Op. cit. P. 429.

has remained the basis for the prosecution of pirates and as the original crime of universal jurisdiction, it has been the inspiration for the modern expansion of universal jurisdiction³⁰.

Article 105 of UNCLOS reaffirms and codifies this universal jurisdiction and the historical right of every state to seize a pirate ship or aircraft and the property on board, arrest the persons and decide upon the penalties to be imposed and the action to be taken with regard to the ships, aircraft or property³¹. The same article underlines that universal jurisdiction regarding piracy is applicable in international waters, or in any other place outside the jurisdiction of any state, where the whole international community takes collective responsibility for the security without infringing on the internal competences of any state.

In fact, claiming that universal jurisdiction is generally applicable to eradicate threats to maritime security in territorial waters could be used to justify interference in the internal affairs of sovereign states. Such situations are likely to happen as universal jurisdiction, in regards to piracy, authorizes states to arrest persons outside their own territories.

The first prosecution of piracy under universal jurisdiction in modern times was in 2001, in India, when the Mumbai Sessions Court, ruling that UNCLOS gave it jurisdiction, indicted pirates who seized the *Alondra Rainbow*, a Panama-registered, Japanese-owned tanker³². In Russia, the case of the dry cargo ship *Arctic Sea* remains the first and only application of universal jurisdiction to suppress piracy under the Russian Criminal Code³³.

We exemplify piracy as a threat to international peace and security with a Somali case since this is the severest piracy threat of recent times.

By the middle of the 2000s, the alarm was raised in different parts of the world about a surge in piracy. The International Maritime Organization (IMO) was among the first institutions to focus on the unprecedented intensity of the threat. Since 2005, its piracy reports have reported data about acts of piracy and armed robbery off the coast of Somalia³⁴. On November 29, 2007 the IMO Assembly adopted resolution A.1002 (25) in which it strongly urged governments to

³⁰ Kontorovich, Eugene & Art, Steven. An Empirical Examination of Universal Jurisdiction for Piracy // *The American Journal of International Law*. Vol. 104. No.3 (July 2010). P. 437.

³¹ See *supra* note 7.

³² Kontorovich, Eugene & Art, Steven. *Op. cit.* P. 448.

³³ The indictment was declared by the Moscow City Court in December 2010. See the press-release of the Court (Сообщение пресс-службы Мосгорсуда от 3 декабря 2010 г.) at www.mos-gorsud.ru/news/?id=380

³⁴ See the web-resource *IMO Piracy reports (annual) 1996 – 2012* at [http://www.imo.org/KnowledgeCentre/ShipsAndShippingFactsAndFigures/Statisticalresources/Piracy/Pages/Piracy-reports-\(annual\)-1996-2012.aspx](http://www.imo.org/KnowledgeCentre/ShipsAndShippingFactsAndFigures/Statisticalresources/Piracy/Pages/Piracy-reports-(annual)-1996-2012.aspx)

increase their efforts to prevent and suppress, within the provisions of international law, acts of piracy and armed robbery against ships irrespective of where such acts occur³⁵.

The IMO called for the United Nations and the Security Council, as the main body responsible for maintaining peace and security, to pay attention to the threat of piracy. At the same time, the Somali Federal Government conveyed their consent for the Security Council to urgently assist in securing the territorial and international waters off the coast of the country for the safe conduct of shipping and navigation³⁶. Taking into account the scale of the piracy threat the UN Security Council qualified the situation in Somalia as a threat to international peace and security in the region. For the first time relating to piracy, the Council took the decision under Chapter VII of the UN Charter.

Practical measures introduced by the Security Council have had no parallel. States cooperating with the Somali government in their fight against piracy were allowed to enter their territorial waters for the purpose of repressing acts of piracy in a manner consistent with such action permitted in international waters and use within the territorial waters of Somalia all necessary means to repress acts of piracy and armed robbery³⁷. By Resolution 1851 (2008) the UN Security Council gave foreign states permission to hold anti-piracy special operations even on land in Somalia³⁸.

The permissions of the UN Security Council spread the operation of universal jurisdiction for prosecuting pirates into the sovereign space of Somalia. Having the consent of the Somali government, the Council sanctioned the practices that every state cooperating in suppressing piracy and forwarding a communication to the UN Secretary General may send its ships into the territorial waters and its forces onto Somali land to undertake all and any anti-piracy measures under international law.

On November 12, 2014, the Security Council decided to renew the authorizations granted to states and regional organizations cooperating with Somali authorities in the fight against piracy for a further period of twelve months³⁹.

Thus, the use of armed force off the coast of Somalia under the norms of international security law was approved by this series of UN Security Council anti-piracy resolutions . This

³⁵ See [http://www.imo.org/blast/blastDataHelper.asp?data_id=25332&filename=A1002\(25\).pdf](http://www.imo.org/blast/blastDataHelper.asp?data_id=25332&filename=A1002(25).pdf)

³⁶ See the preamble of the UN Security Council Resolution 1816 (2008) at [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1816\(2008\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1816(2008))

³⁷ Item 7 *ibidem*.

³⁸ See [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1851\(2008\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1851(2008))

³⁹ The UN Security Council Resolution 2184 (2008) available at <http://www.un.org/en/sc/documents/resolutions/2014.shtml>

became the vehicle of universal jurisdiction by extending the anti-piracy regime established for the high seas into the territory of Somalia.

Conclusions

Piracy is a criminal phenomenon with a long history. From a contemporary legal perspective, piracy belongs to the category of crimes. However, its rampancy, the scale of the imposed threats and damage caused every year do not allow sovereign states and the international community to treat it as common punishable action. Today piracy is more than just a crime given that suppressing this challenge in practice does not end with the implementation of only penal norms—criminal legal measures are just a part of the anti-piracy activities.

Since 2008, this claim is evidenced by the decisions of the international community on the methods to defeat piracy off the Somali coast. When the UN Security Council adopted resolution 1816 (2008) the norms of international security law were engaged in combating piracy under Chapter VII of the UN Charter.

The algorithm used by the Security Council against piracy, had been previously used in cases of terrorism and illicit WMD-trafficking (resolution 1368, 1373 and 1540 respectively).

In piracy we witness an example of the convergence of international security law and criminal law both national and international. Whether this *ad hoc* tendency transforms into a new inalienable characteristic of the international security system, and whether this method of handling non-state actors is efficient remains to be seen.

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