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WORLD MARITIME UNIVERSITY

Malmö, Sweden

**THE INTERNATIONAL LAW RELATED TO
MARITIME SECURITY: AN ANALYSIS OF ITS
EFFECTIVENESS IN COMBATING PIRACY AND
ARMED ROBBERY AGAINST SHIPS**

by

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Latvia

A dissertation submitted to the World Maritime University in partial
fulfilment of the requirements for the award of the degree of

MASTER OF SCIENCE

in

MARITIME AFFAIRS

(MARITIME LAW AND POLICY)

2009

DECLARATION

I certify that all the material in this dissertation that is not my own work has been identified, and that no material is included for which a degree has previously been conferred on me.

The contents of this dissertation reflect my own personal views, and are not necessarily endorsed by the University.



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ABSTRACT

Title of Dissertation: **The international law related to maritime security:
an analysis of its effectiveness in combating piracy
and armed robbery against ships**

Degree: **MSc**

The dissertation is a study of international law related to maritime security. The objective of the dissertation is to identify some of the problems in combating piracy and armed robbery against ships arising from inadequate international law related to maritime security and to make recommendations for improving this body of law. The central issue discussed in the dissertation is the clarity of the different concepts describing illegal violence at sea.

The dissertation shows that the international law related to maritime security is fragmented and the definitions describing illegal violence at sea – unclear. It hampers the effective fight against illegal violence at sea, including acts which are called piracy and armed robbery under existing international law.

Consequently, the dissertation gives several recommendations for improving the international law related to maritime security. Together with other proposals it recommends that further research be focused on identifying what regime of jurisdiction is most appropriate for effective combat of one or another particular illegal act of violence at sea. Such research would allow enumerating in international law all those illegal acts of violence at sea, for which universal jurisdiction should be applied.

KEYWORDS: maritime security, piracy, armed robbery, SUA Convention, ISPS Code

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LIST OF ABBREVIATIONS

EEZ – exclusive economic zone

IMO – International Maritime Organization

ISPS Code – International Ship and Port Facility Security Code

SOLAS – International Convention for the Safety of Life at Sea, 1974 as amended, including the Protocol of 1988

SUA – Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988

UNCLOS – United Nations Convention on the Law of the Sea, 1982

WHO – World Health Organization

1. Introduction

The scene when pirates attack a ship is not just the stretch of imagination of the authors of Romance and feature films. Piracy has been a real phenomenon from the very beginning of maritime trade. The first documented evidence about pirates comes from the 14th century BC – it talks about the attacks of the Lukka people. The Lukkas were sea riders based on the coast of Lycia in Asia Minor (modern Turkey).¹

Unfortunately illegal violence at sea is reality also today. In 2008 there were 293 reported incidents of piracy and armed robbery against ships in the world², 49 vessels were hijacked³ and 889 crew members taken as hostages⁴. The statistics of the first half of 2009 indicate that piracy and armed robbery against ships around the globe have doubled. Especially, the seashore of Somalia has become dangerous area.⁵

The question then is how to make the situation better – better for seafarers whose life is threatened and better for ship owners and cargo owners whose property is threatened. Always before combating particular undesirable phenomenon the causes of it must be established. However, it is not easy to establish the causes of illegal violence at sea. The causes of illegal violence at sea are very varied. They have different roots, for example, cultural, political, economic, and technical.⁶ In addition, those causes may differ from place to place and from one period of time to

¹ Angus Konstam and Roger Michael Kean, *Pirates: Predators of the Seas*, New York: Skyhorse Publishing, 2007 at p. 32.

² ICC International Maritime Bureau, *Piracy and Armed Robbery Against Ships: Annual Report 1 January – 31 December 2008*, London: ICC International Maritime Bureau, 2009 at p. 6.

³ *Ibid.* at p. 9.

⁴ *Ibid.* at p. 13.

⁵ ICC International Maritime Bureau, *Piracy and Armed Robbery Against Ships: Report for the Period 1 January – 30 June 2009*, London: ICC International Maritime Bureau, 2009.

⁶ For broader analyses of the different causes of illegal violence at sea see, for example, Jayant Abhyankar, “Maritime Crime”, in Maximo Q. Mejia Jr. (ed.), *Contemporary Issues in Maritime Security: A Selection of Papers and Presentations from the Workshop-Symposium on the Practical Implementation and Critical Evaluation of the ISPS Code 11-15 August 2003 and the International Symposium on Contemporary Issues in Maritime Security 30 August to 1 September 2004*, Malmö: WMU Publications, 2005 at pp. 224-226; Steven Jones, *Maritime Security: A Practical Guide*, London: The Nautical Institute, 2006 at pp. 22-24; Peter Lehr and Hendrick Lehmann, “Somalia – Pirates’ New Paradise”, in Peter Lehr (ed.), *Violence at Sea: Piracy in the Age of Global Terrorism*, New York, London: Routledge, Taylor & Francis Group, 2007 at pp. 8-15.

another period of time. To minimize the risk of illegal violence at sea to the minimum all of the different causes must be effectively eliminated.

One of the causes of illegal violence at sea is inadequate international law related to maritime security. The main critics go to the inadequacy of such concepts as piracy, armed robbery and unlawful acts against the safety of maritime navigation – concepts used to describe illegal violence at sea. Those concepts are unclear, they partly overlap and at the same time they are addressed by different normative acts. This “jungle” of different unclear concepts in different normative acts addressing in fact the same problem – the problem of illegal violence at sea – causes great fragmentation of international law and with that uncertainty about the rights and duties of authorities responsible for combating particular violence.

The objective of this dissertation is to identify some of the problems in combating sea piracy (hereafter – piracy) and armed robbery against ships (hereafter – armed robbery) arising from inadequate international law related to maritime security and to make recommendations for improving this body of law. The central issue discussed in this dissertation is the clarity of the different concepts describing the illegal violence at sea.

To achieve the above mentioned objective, firstly, the piracy provisions of UNCLOS are analysed. Secondly, the definition of armed robbery under IMO Resolution A.922(22) “Code of practice for the investigation of the crimes of piracy and armed robbery against ships”, adopted on 29 November 2001 (further – Res. A.922(22)) is analysed. In general this dissertation does not address the “soft law”. Res. A.922(22) is made as an exception because it contains the definition of armed robbery. Understanding of the definition of armed robbery is essential for the objective of this dissertation. Further analyses of this dissertation touches the provisions of the SUA Convention and provisions of Chapter XI-2 of the SOLAS Convention – provisions which although they do not talk about piracy and armed robbery directly addresses those concepts through the concept of unlawful acts against the safety of maritime navigation and the concept of security incidents accordingly. The new Protocol of 2005 to the SUA Convention is not analysed in

this dissertation – as it is not yet in force internationally. At the end of the dissertation conclusions and recommendations are drawn.

Apart from primary sources such as relevant international conventions and Res. A.922(22), academic literature and some decided cases are analysed in this dissertation.

To achieve the above mentioned objective classical or pure legal analysis is used. For the conclusions of any analyses to be reasoned, the laws of formal logic must be followed. Therefore, this dissertation enriches the pure legal analyses with the conscious application of the rules of formal logic. Formal logic examines the internal interconnections of reasoning. It abstracts from the particular content of the idea and examines just the structure of reasoning.⁷ Or rather, formal logic allows thinking orderly. Well ordered thinking is a useful tool always, but especially useful it may appear in the situation when many similar concepts are used in a quite chaotic manner – just as it is in the above stated case of using different concepts to describe illegal violence at sea. This dissertation uses several aids adopted from the formal logic, for example, knowledge of the rules of defining the concepts and knowledge of the rules of logical relations between the concepts. For better obviousness of the logical relations between the concepts, Euler's circles are used. Euler's circles "represent each set referred to in a premise by a circle, and they represent the relation between the two sets by a simple topological relation between the circles"⁸.

⁷ Ivans Vedins, *Loģika*, Rīga: Avots, 2000 at p. 13.

⁸ Walter Schaeken et al. (ed.), *Deductive Reasoning and Strategies*, Mahwah, New Jersey: Lawrence Erlbaum Associates, 2000 at p. 235.

2. Piracy provisions of UNCLOS

2.1. Definition of piracy

The starting point of any research or practical action must be the clarity of concepts applied in this research or practical action. The clarity of concept can be achieved by its clear definition. Definition is the result of the logical operation which discloses the main content of the concept.⁹ The root “finis” in the Latin word “definition” means “ending”, “borderline”. It indicates that the aim of defining is to show the borderlines which separate a particular subject from other similar subjects.¹⁰ If those borderlines are not shown clearly the aim of defining is not reached and the concept remains unclear.

As it was determined above the objective of this dissertation is to identify some of the problems in combating piracy and armed robbery arising from inadequate international law related to maritime security and to make recommendations for improving this law. One of the concepts that such objective asks to clarify is the concept of piracy. If the concept of piracy is not clear, this consideration may turn into a theoretical “wall” against which many possible practical solutions for combating piracy smashes and become useless. Therefore, the first aspect which will be analysed in this dissertation will be the clarity of the definitions of piracy.

Even if the definition is clear, it still might not be adequate. It might not be adequate from the point of view of objectives it actually needs to serve. For example, even if it is assumed that it is set quite clearly that the act is piracy only when it is committed from one ship to another, the question remains – is it adequate from the point of view of objective to ensure secure seas? Perhaps something must be changed in the concept of piracy so that more acts would be embraced not only those committed from one ship to another. So, this chapter will analyse not only the

⁹ Ivans Vedins, *Loģika*, Rīga: Avots, 2000 at p. 113.

¹⁰ *Ibid.*

clarity of the existing definition of piracy, but also other aspects of its adequacy, such as probable necessity to widen it.

The definition of piracy under existing international law can be found in Article 101 of UNCLOS. Article 101 of UNCLOS states that:

Piracy consists of any of the following acts:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).¹¹

Mostly this definition is referred to as the only legally binding definition of piracy under international law. This is challenged with good reasons by some scholars who argue that parallel to the definition of piracy under UNCLOS there is the definition of piracy under customary law. However, in this dissertation the bases for further discussion will be the definition of piracy under UNCLOS. Debate on the correlation of Article 101 of UNCLOS and customary law will be shown at the same time as when those aspects of definition of piracy under UNCLOS will be discussed which are probably not in conformity with the customary law.

The definition of piracy under UNCLOS is very complicated. Therefore, to understand the content of the concept of piracy and problems related to it, first of all it is necessary to break up this definition into components – to analyse it. Only then will it be possible to synthesize all separate conclusions from this analysis in a one whole and try to develop perhaps a more appropriate definition of piracy. To be very precise, the definition of piracy under UNCLOS can be divided in more than 30 components (see Appendix 1). However, for more focused analyses some of the components of the definition of piracy under UNCLOS will not be analysed further and some of the components will be analysed in one group with others.

¹¹ *United Nations Convention on the Law of the Sea*, 10 December 1982, United Nations, *Treaty Series*, vol. 1833, p. 3.

Consequently, 4 groups of the components of the definition of piracy under UNCLOS will be analysed:

- 1) piracy as an illegal act of violence or detention, or any act of depredation;
- 2) piracy as an act committed for private ends;
- 3) piracy as an act committed by the crew or the passengers of a private ship against another ship, or against persons or property on board such ship („two ship rule”);
- 4) piracy as an act committed on the high seas or in a place outside the jurisdiction of any State.

2.1.1. Piracy as an illegal act of violence or detention, or any act of depredation

The definition of piracy under UNCLOS refers to piracy as an illegal act of violence or detention, or any act of depredation. Therefore, it is necessary to clarify what violence, illegal violence, detention, illegal detention, depredation and illegal depredation are and how those concepts correlate with each other. UNCLOS does not give an explanation how to interpret the above mentioned terms in the definition of piracy.

Interpretation of the term “violence”

At a first glance it might not seem necessary to explain the term “violence”, because everybody has a general understanding about what it is. However, the answer to the question what is violence is not as unambiguous as it might seem at a first glance. There exists debate among experts about what exactly constitutes violence.

According to Black’s Law Dictionary violence is “the use of physical force, usually accompanied by fury, vehemence or outrage”¹². According to the Paperback Oxford English Dictionary violence is “behaviour involving physical force intended

¹² Bryan Garner and Henry Black, *Black’s Law Dictionary*, 8th ed., Belmont: Thomson/West, 2004 at p. 1601.

to hurt, damage, or kill”¹³. According to the Cambridge Advanced Learner’s Dictionary violence is “actions or words which are intended to hurt people”¹⁴.

The main debate is about what outcome of an act there must be for this act to be considered violent. As it can be noticed from the above mentioned definitions, some experts are of the point of view that only intention to hurt people indicates violence. Others refer to the intent to hurt or damage as an outcome which indicates violence. That means that in their opinion an act can be considered violent even if it is not directed towards people, but is directed only towards property. Another issue is whether harm must be physical to consider it to be violent or also psychological harm can be considered as violent. Some experts seem to support the wider concept of violence more than the conventional one, which includes just physical harm. The wider concept of violence includes also the physiological harm (for example, threat and intimidation). The WHO follows this wider understanding of violence instead of the conventional understanding of violence. The WHO definition of violence states that violence is “the intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community, that either results in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment or deprivation”. This definition reflects a growing recognition among researchers and practitioners of the need to include in the definition of violence also the violence that does not necessarily result in injury or death, but that nonetheless poses a substantial burden on individuals, families, communities and health care systems worldwide.¹⁵

Piracy most often is related to the physical harm, threatened or actual. Therefore, most often the fact that a particular act was violent will not be challenged. However, there might be situations when the question about the existence of violence can arise and consequently the qualification of the act as piracy can be doubted. For

¹³ Catherine Soanes et al. (ed.), *Paperback Oxford English Dictionary, 6th ed.*, Oxford: Oxford University Press, 2006 at p. 855.

¹⁴ *Cambridge Advanced Learner’s Dictionary, 3rd ed.*, Cambridge: Cambridge University Press, 2008 <http://dictionary.cambridge.org/define_b.asp?key=violence*1+0&dict=A> (June 17, 2009).

¹⁵ Etienne G. Krug et al. (ed.), *World Report on Violence and Health*, Geneva: World Health Organization, 2002 at p. 5.

example, if the act is against a ship without the crew or passengers on it, some jurisdictions might not consider this as a violent act. But such situations then most probably will be covered by another concept used in the definition of piracy under UNCLOS – by the concept of depredation.

Although the interpretation of the term “violence” in the definition of piracy under UNCLOS does not seem to be the greatest issue of this definition, it still may cause some amount of confusion because of above mentioned unclear character of the concept of violence itself. One of the important requirements for a clear definition is not to use in it such terms which themselves require defining. If it is not possible to do without particular terms, they must be defined additionally. Otherwise, the error *obscurum per obscurius* (to explain unclear with unclear) arises.¹⁶ Therefore, if possible, term other than “violence” must be chosen to define piracy or at least the term “violence” itself must be defined additionally.

Interpretation of the term “illegal violence”

The general explanation of illegal violence is that it is the violence which is not authorized by the state. States usually authorize the violence necessary for policing. Policing usually is carried out by military forces or other governmental forces, such as police or border guard. In particular situations the law also recognises the violence applied by private persons, for example, in the cases of self defence, necessity or justifiable professional risk. So, in particular situations states as well as individual persons have the right to use violence. However, this right is not absolute. It is limited by the law. For example, self defence must be proportionate. If it is not proportionate, it may become illegal. In relation to piracy it means that measures to prevent an actual piracy attack must be proportionate to the character of the attack. Otherwise, the defending person itself may be accused and convicted of committing an offence.

Furthermore, the understanding of the term “illegal violence” in relation to piracy is difficult because what is considered to be illegal violence in one state might not be considered to be illegal violence in another state. The available defences

¹⁶ Ivans Vedins, *Loģika*, Rīga: Avots, 2000 at p. 130.

differ from state to state. For example, Canadian criminal law recognises such defences as defence of person and self-defence, defence of property, protection of persons administering and enforcing the law etc. Criminal law of South Africa recognises private defence, necessity, official capacity etc.¹⁷ Although those defences in general are similar in many countries, at the same time there are important differences in conditions which must be present for violence to be considered an act which falls under particular defence. Therefore, as UNCLOS does not give the answer what is illegal violence universally, the response of different states to similar violent acts might be different even if all those states are parties to UNCLOS – because of different perception of the term “illegal violence”. The aim of any international convention is uniformity and predictability of actions, but strictly speaking the use of the term “illegal violence” in the definition of piracy under UNCLOS does not allow reaching this aim.

Professor Rubin points to this problem by saying:

... it seems remarkably unhelpful to posit a definition of crime in the international legal order resting upon an undefined notion of illegality. ... the notion that whatever all “civilized” states condemn as “criminal” must be “criminal” under “international law” ... is simply too illogical, has too many internal inconsistencies, refusals of reciprocity, national or regional presumptions of exclusive, or at least very superior, insight into matters of law and morality, denigrations of the sovereign equality of states, implications that revolution by itself is somehow illegal, to require further analysis in this place.¹⁸

Professor Rubin in his above mentioned argument along with other things refers to “implications that revolution by itself is somehow illegal”. His point is that such implications are absurd. In general, he is right. However, it is also true that the question whether the violence used for revolutionary aims is legal is controversial. As if, the violence used for revolutionary aims is recognized not to be crime. But the problem is to identify which violence is indeed revolution. Brittin states:

The status of insurgency is not one to be conceded to any and every citizen who believes that the government of his country is tyrannical and should be overthrown. It takes something more than that. A recognition of insurgency by third states or the acknowledged open

¹⁷ Andrejs Judins, *Kriminālatbildības Izslēdzamības Apstākļi*, Rīga: Tiesu namu aģentūra, 2000 at pp. 235-240.

¹⁸ Alfred P. Rubin, *The Law of Piracy*, 2nd ed., New York: Transnational Publishers, Inc., 1998 at p. 380.

fighting for control of an area by an organized group against a sovereign state could be the additional factors required.¹⁹

The above discussion shows – the concept of illegal violence requires defining. Therefore, using this concept to explain other concepts – in our case the concept of piracy – without defining illegal violence itself again is the error *obscurum per obscurius* (to explain unclear with unclear).

Interpretation of the term “detention”

In the widest sense, detention is the holding of person or property in custody.²⁰ In this sense anybody can be the one who is detaining. In a more narrow sense, detention is associated just with the rights and duties of official institutions. For example, the Paperback Oxford English Dictionary defines detention as “the state of being detained in official custody”²¹.

Although the definition of piracy under UNCLOS does not give direct explanation in which sense the term “detention” is used in this definition, it is clear from looking at this term in the system with other components of the definition that it is used in its widest sense. The definition of piracy under UNCLOS states that piracy is an act committed by the crew or passengers of a private ship. It means that while drafting this definition, it was supposed that detention may be carried out not only by official institutions, but also by private persons – crew and passengers of private ships.

Interpretation of the term “illegal detention”

Similarly to violence, detention is also illegal when it is not authorized by the state. Therefore, the identification of illegal detention meets with the same problems as identification of illegal violence.

¹⁹ Burdick H. Brittin, “Piracy and Terrorism at Sea: Commonalities and Differences”, in *Shipping Under Fire Conference, January 20-21, 1987*, Greece: Mediterranean Marine Consultants, 1987 at p. 59.

²⁰ Bryan Garner and Henry Black, *Black’s Law Dictionary*, 8th ed., Belmont: Thomson/West, 2004 at p. 480.

²¹ Catherine Soanes et al. (ed.), *Paperback Oxford English Dictionary*, 6th ed., Oxford: Oxford University Press, 2006 at p. 202.

Usually military and other governmental forces have the right to detain (within the limits set by law). In particular situations also private persons might have the right to detain. However, it must be kept in mind that conditions under which private persons are allowed to carry out detention again may differ from state to state. For example, Article 73 of the French Code of Criminal Procedure states: “In the event of a flagrant felony or of a flagrant misdemeanour punished by a penalty of imprisonment, any person is entitled to arrest the perpetrator and to bring him before the nearest judicial police officer.”²² Chapter 221, Section 101 of Hong Kong Criminal Procedure Ordinance states: “Any person may arrest without warrant any person whom he may reasonably suspect of being guilty of an arrestable offence”²³. As it can be seen, in one case citizen’s arrest is allowed just as preventive measure (to stop ongoing offence), but in another case it may be carried out also as a prosecution measure (to detain a person who is suspected of committing offence, without precondition that it is ongoing offence). In any case, citizen’s arrest must be carried out in proportion to the threat, otherwise it will be illegal.

In particular situations, private persons may detain not only other persons, but also goods. For example, Hong Kong Criminal Procedure Ordinance allows detaining another person’s property in the cases when the person suspects that with respect to such property any arrestable offence has been or is about to be committed.²⁴

Interpretation of the terms “depredation” and “illegal depredation”

Confusion in understanding the term “depredation” in the definition of piracy under UNCLOS may be caused by the existence of many similar terms, such as “ravage”, “pillaging”, “plundering”, “loot” etc. Dictionaries explain the term “depredation” by using those similar terms, which themselves actually are not absolutely clear. For example, Black’s Law Dictionary defines depredation as “the

²² *Code of Criminal Procedure, 1958* (France),
<http://195.83.177.9/code/liste.phtml?lang=uk&c=34&r=3912#art17071> (June 18, 2009).

²³ *Criminal Procedure Ordinance, 1899* (Hong Kong),
http://www.legislation.gov.hk/BLIS_IND.NSF/FB2D3FD8A4E2A3264825647C0030A9E1/DA62D62771068C44C8256483002860EB?OpenDocument (June 18, 2009).

²⁴ *Ibid.*

act of plundering; pillaging”.²⁵ The Concise Oxford Dictionary defines depredation as “despoiling, ravaging, or plundering”.²⁶ In the end the conclusion can be drawn that depredation is destructive action. This action might be plundering, destroying, or devastating. Therefore, the content of the concept of depredation is not the main issue in the definition of piracy under UNCLOS.

More confusion can be caused by the way how the parts of disjunction “any illegal act of violence or detention, or any act of depredation” are grouped. Such complicated disjunction can raise the question whether depredation must be illegal for it to be considered piracy or depredation is piracy even if it is not illegal. Menefee points to this issue by saying:

... while the definition speaks of “[a]ny *illegal* acts of violence [or] detention”, it applies to “*any* act of depredation” committed for private ends. This suggests that the holder of a letter of marque and reprisal could be considered a pirate *despite* State sanction of his activities.²⁷

The question is actually whether the terms “violence”, “detention” and “any depredation” in the definition of piracy under UNCLOS are in relationship:

- 1) **a v b v c** - which would mean that the word “illegal” refers to violence, detention as well as any depredation, or
- 2) **(a v b) v c** - which would mean that the word “illegal” refers only to violence and detention.

Grammatical interpretation points to the second option while common sense points to the first option. If any depredation is considered to be piracy, then the number of as if legal acts, for example, blowing up the ship by respective authorities to prevent environmental disaster, actually are excluded from the defences – because they fall under the definition of depredation.

²⁵ Bryan Garner and Henry Black, *Black's Law Dictionary*, 8th ed., Belmont: Thomson/West, 2004 at p. 473.

²⁶ Henry Watson Fowler and Francis George Fowler (ed.), *The Concise Oxford Dictionary*, 9th ed., Oxford: Clarendon Press, 1995 at p. 363.

²⁷ Samuel Pyeatt Menefee, “A Model National Law on Acts of Piracy or Maritime Violence”, in Proshanto K. Mukherjee, Maximo Q. Mejia Jr. and Gotthard M. Gauci (ed.), *Maritime Violence and Other Security Issues at Sea: Proceedings of the International Symposium Held at the World Maritime University, Malmö, Sweden, 26-30 August 2002*, Malmö: WMU Publications, 2002 at p. 103.

If, however, to follow common sense and agree that only illegal depredation can be considered to be piracy, then another question can be asked. Is there such illegal depredation, which at the same time is not illegal violence, or rather, whether there is necessity to refer to illegal depredation parallel to illegal violence in the definition of piracy under UNCLOS? It is the question of correlation of the terms “illegal violence”, “illegal detention” and “illegal depredation”.

Correlation of the terms “illegal violence”, “illegal detention” and “illegal depredation”

As there are three terms used parallel to each other in the definition of piracy under UNCLOS – “illegal violence”, “illegal detention” and “illegal depredation” – then initially it must be assumed that it is necessary. But is it? And even if it is necessary, can not those terms be arranged differently not to make the definition too complicated, too hard to read?

Correlation of the term “illegal violence” with the term “illegal detention” depends on which of the meanings of “violence” is followed – wide or narrow. As it was stated above, in the wider sense not only physical harm but also psychological harm and maldevelopment are considered to be violence. Under such interpretation any illegal detention is also illegal violence although not all illegal violence is illegal detention:

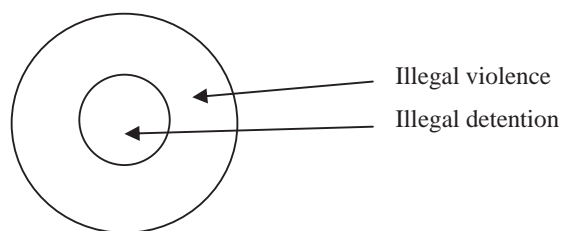


Figure 1 – Correlation of the terms “illegal violence” and “illegal detention” under the wide interpretation of the term “violence”

Under such interpretation there is no need to talk about illegal detention separately in the definition of piracy.

In a narrow sense, violent are just those acts which involve physical harm to persons. Not all illegal detentions cause physical harm. Therefore, under such interpretation of violence not all illegal detentions are illegal violence:

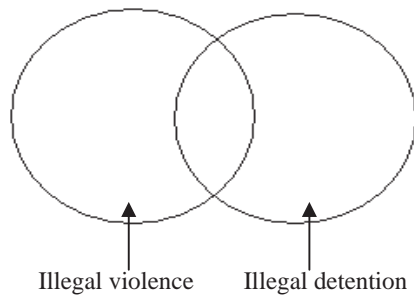


Figure 2 – Correlation of the terms “illegal violence” and “illegal detention” under the narrow interpretation of the term “violence”

As not every illegal detention is also illegal violence under this interpretation of the term “violence”, it is important to refer to illegal detention separately in the definition of piracy.

Where lays the concept of illegal depredation in interrelation with the concepts of illegal violence and illegal detention? Illegal detention is not illegal depredation (plundering, destroying, or devastating). Those concepts do not overlap:

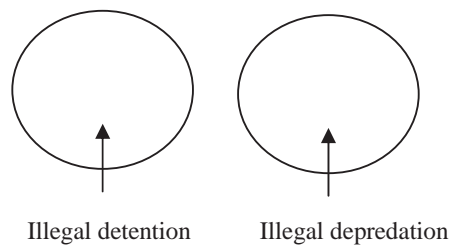


Figure 3 – Correlation of the terms “illegal detention” and “illegal depredation”

Illegal detention can be the component of illegal depredation, but it does not make illegal detention illegal depredation. It is similar to the radar being part of the ship, but it does not mean that radar is a ship.

Correlation of the terms “illegal depredation” and “illegal violence” is similar as the correlation of the terms “illegal detention” and “illegal violence”. If looking at violence in a wider sense, all illegal depredations are also illegal violence. If looking at violence in a narrow sense, some illegal depredations in some jurisdictions might be considered not to be violent, for example, destruction of property without harming any person physically.

To make the definition of piracy under UNCLOS less complicated, and with that follow the rule that the definition must be simple, it is better to interpret the term “violence” in a wide sense. It would allow referring in the definition of piracy under UNCLOS only to illegal violence, not to illegal violence, illegal detention and illegal depredation. To make sure that all parties understand violence in this wide sense, an explanation can be given separately showing that illegal detention and illegal depredation are parts of illegal violence.

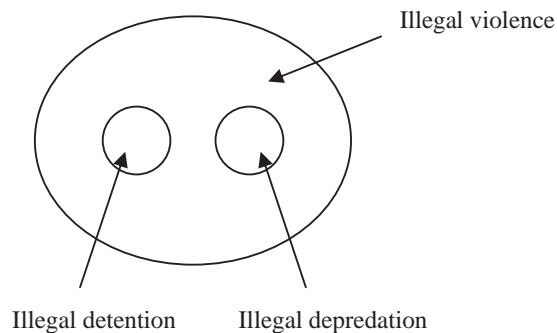


Figure 4 – Correlation of the terms “illegal violence”, “illegal detention” and “illegal depredation” under the wide interpretation of the term “violence”

2.1.2. Piracy as an act committed for private ends

The definition of piracy under UNCLOS refers to piracy as an act committed for private ends. Therefore, it is necessary to clarify what private ends are. It is said that the element of private ends is the one which separates piracy from maritime terrorism. Therefore, the correlation of the concept of piracy and the concept of maritime terrorism will also be analysed in this chapter.

Interpretation of the term “private ends”

Unfortunately the term “private ends” is very vague; it might be interpreted very wide as well as narrower. This fact makes the definition of piracy under UNCLOS unclear.

The analyses of the term “private ends” must be started by trying to understand part of what the wider concept it is. What are private ends – the motive or aim of the offender or maybe interest against which the offence is directed?

Although the motives and the aims are closely connected concepts, they are two different things. Motive is the main inner stimulus which pushes a person to an

act, for example, greed, revenge. Aim is the result what a person wants to reach by carrying out a particular act, for example harm to the state or getting another person's property. So, both – motives and aims – are features of the psychological attitude towards an act; however, these terms are not identical. They are rather in the relation of cause and consequences.

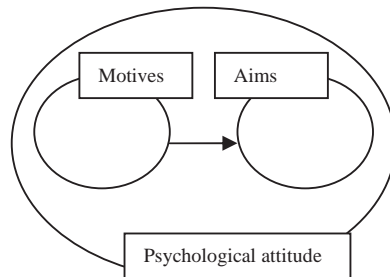


Figure 5 – Correlation of the terms “motives”, “aims” and “psychological attitude”

For example, the motive of an act may be disappointment about the lack of financial means, but the aim of an act at the same time may be to cause harm to the state.

The word “ends” in the term “private ends” in the definition of piracy under UNCLOS indicates that this definition talks about aims of the person who carries out an act not about the motives of this person to carry out this act. This nuance might appear to be important in qualifying an act to be piracy or not.

When it is clarified that the term “private ends” in the definition of piracy under UNCLOS refers to the psychological attitude of a person who carries out an act, the next question to answer is whether the psychological attitude – in our case the aim – can be another kind other than private? To answer this question it is necessary to understand whether there are public aims. It is recognized that there exists social consciousness. Therefore, it can be concluded that there exist also social aims, aims of particular groups – public aims. However, it does not mean that public aims exclude private aims, or rather that public aims are something opposite to private aims. Although one might argue that public aims are something else other than the sum of private aims, the opposite argument also has its grounds. Even if public aims are something else other than the sum of private aims, private aims are an important part of any public aim, because public aims can not exist without

individuals who form the society in its totality and different groups of it. If a person truly associates himself/herself with the particular group, the aims of this group are also his/her individual aims. Therefore, the concept of private ends can not be completely separated from the concept of public aims. These are not opposite concepts, but rather are in the relationship of part and the whole. Especially it must be kept in mind in relation to the criminal offences. In the case of criminal offence the psychological attitude of individual person is evaluated, a judge usually does not impose penalty to the group as a subject of crime.

From the discussion above it seems that it would be more appropriate to move the feature which tries to separate private and public aspects of an act from the subjective side of an offence to the objective side of an offence. It is easier to say whether the object of the crime is private or public, rather than start the above showed analyses about whether the psychological attitude of a private person can also be public. The object of the crime is those interests against which crime is directed, that goodness which is protected by law. For example, the security of the state, which is the direct interest against which terrorism is directed, is public object, the proprietary interests and the health and the life of a person, which are direct interests against which robbery is directed, are private objects.

It can be assumed that the definition of piracy under UNCLOS actually wants to indicate private or public character of the interests against which an act is directed rather than psychological attitude of offender, but then the wording is not accurate. Thus it is necessary to talk about piracy as an act committed “against private interests” not “for private ends”. Any act is carried out “for private ends”, even those which are carried out “against public interests”, because every act in the end is privately motivated and has private aims, even if they are part of public aims (social aims, collective aims).

If following the above described interpretation of the term “private ends”, then all acts are carried out for private ends and, therefore, referring to private ends in the definition of piracy under UNCLOS is redundancy of words. However, the term “private ends” in the definition of piracy under UNCLOS is often interpreted in

another way. The term “private ends” is treated as an opposite to the term “public ends”. Such approach is not necessarily incorrect, because not only linguistics must be used while trying to understand some terms in particular legal norms, but at the same time also systemic and teleological interpretation must be used, especially if linguistics does not give clear result. Systemic interpretation means that the term must be interpreted in the context with other terms. Teleological interpretation means that the term must be interpreted in the light of its object and purpose. Article 31, paragraph 1 of the Vienna Convention on the Law of Treaties states that “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”²⁸. If the reference to the private ends is incorporated in the definition of piracy under UNCLOS, then it must be assumed that there is purpose for it. To find this purpose it is necessary to understand what acts the drafters of the particular legal norm considered to be committed not for private ends, but for public ends.

Murphy states that “the requirement that a pirate act had to be committed for “private ends” had its origin in the distinction between piracy and privateering”²⁹. Privateering was the usage of war permitting privately owned and operated vessels, sailing under commission of a belligerent government, to capture enemy shipping.³⁰ The letters of marque and reprisal (commission issued by a government) distinguished privateer from pirate. Declaration of Paris (1856) abolished privateering, but “the distinction between private and public ends was maintained because courts (and states) wanted to differentiate between piracy and acts of maritime depredation carried out by insurgents or rebels”³¹.

Murphy continues by arguing that formulation which steams most logically from the pirate-privateer distinction is referring to piracy as an act undertaken

²⁸ *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, *Treaty Series*, vol. 1155, p. 331.

²⁹ Martin Murphy, “Piracy and UNCLOS: Does International Law Help Regional States Combat Piracy?”, in Peter Lehr (ed.), *Violence at Sea: Piracy in the Age of Global Terrorism*, New York, London: Routledge, Taylor & Francis Group, 2007 at p. 159.

³⁰ Janice E. Thomson, *Mercenaries, Pirates, and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe*, Princeton, New Jersey: Princeton University Press, 1994 at p. 21.

³¹ *Supra* note 29 at p. 160.

without due authority not as an act committed for private ends.³² If the intention of drafters of the definition of piracy under UNCLOS was by referring to the private ends separate piracy from the acts undertaken without due authority, then this reference is not necessary. This is because then this reference is actually identical to the reference to illegal violence. And if they are identical, then using both of them in the definition of piracy under UNCLOS is tautology (repetition of meaning, using different words to say the same thing twice).

Some experts go even further in narrowing the meaning of the term “private ends” in the definition of piracy under UNCLOS. From their analyses it can be concluded that not only the lack of authorization of the particular act from the side of a state is essential for an act to be considered piracy. In addition, intent to have financial benefit by committing the act must be proven. Under such interpretation an act is considered to be piracy only if it is committed with the intent to plunder (*animus furandi*) or for the sake of personal gain (*lucri causa*).³³

Referring to *animus furandi* and *lucri causa* as essential elements of piracy has a long history. There are works of scholars as well as precedents which support this interpretation. For example, the American case *United States v. Smith*³⁴ is one which is cited by those who support a particular interpretation. However, it can not be said that there had never been opposition to this interpretation. For example, in the American case *United States v. The Malek Adhel*³⁵ it was held:

... if he wilfully sinks or destroys an innocent merchant ship, without any other object than to gratify his lawless appetite for mischief it is just as much a piratical aggression, in the sense of the law of nations, and of the Act of Congress, as if he did it solely and exclusively for the sake of plunder, *lucri causa*. The law looks to it as an act of hostility, and being committed by a vessel not commissioned and engaged in lawful warfare, it treats it as the act of a pirate, and of one who is emphatically *hostis humanis generis*.

³² Martin Murphy, “Piracy and UNCLOS: Does International Law Help Regional States Combat Piracy?”, in Peter Lehr (ed.), *Violence at Sea: Piracy in the Age of Global Terrorism*, New York, London: Routledge, Taylor & Francis Group, 2007 at p. 160.

³³ Proshanto K. Mukherjee, Maximo Q. Mejia Jr., “The ISPS Code: Legal and Ergonomic Considerations”, in Maximo Q. Mejia Jr. (ed.), *Contemporary Issues in Maritime Security: A Selection of Papers and Presentations from the Workshop-Symposium on the Practical Implementation and Critical Evaluation of the ISPS Code 11-15 August 2003 and the International Symposium on Contemporary Issues in Maritime Security 30 August to 1 September 2004*, Sweden: WMU Publications, 2005 at p. 37.

³⁴ *United States v. Smith*, (1820) 5 Wheat., 153, 161.

³⁵ *United States v. The Malek Adhel*, (1844) 2 How., 210.232.

In another American case *The Ambrose Light*³⁶ the Federal Court decided that:

... an armed ship must have the authority of a State behind it, and if it has not got such an authority, it is a pirate even though no act of robbery has been committed by it.

To give more evidence also the case of *In re Piracy Jure Gentium*³⁷ can be brought to attention. Distinguished Lords Sankey, Atkin, Tomlin, Macmillan and Wright stated in this case:

When it is sought to be contended ... that armed men sailing the seas on board a vessel, without any commission from any State, could attack and kill everybody on board another vessel, sailing under a national flag, without committing the crime of piracy unless they stole, say, an article worth sixpence, their Lordships are almost tempted to say that a little common sense is a valuable quality in the interpretation of international law.

If the intent of drafters of the definition of piracy under UNCLOS would have been to show that an act can not be considered to be piracy unless it is committed with the aim to get financial benefit, then other wording is needed to indicate it – words like “piracy as an act committed with the aim to get financial benefit” instead of words “piracy as an act committed for private ends”, because the private ends are not just financial.

All the above described possible interpretations of the term “private ends” in the definition of piracy under UNCLOS do not allow drawing a clear borderline between the concept of piracy and other similar concepts. The concept of maritime terrorism is one of them. To try to make this borderline clearer correlation of the terms “piracy” and “maritime terrorism” must be analysed.

Correlation of the terms “piracy” and “maritime terrorism”

Understanding of the correlation of the terms “piracy” and “maritime terrorism” has crucial practical significance, because universal jurisdiction can be exercised only for combating piracy. If maritime terrorism is not piracy, universal jurisdiction can not be applied for combating it.

Menefee indicates:

Since the coming into force of the 1958 Geneva Convention on the High Seas (generally paralleled by the provisions of the 1982 United Nations Convention on the Law of the Sea),

³⁶ *The Ambrose Light*, 25. Fed. Rep. 408.

³⁷ *In re Piracy Jure Gentium*, (1934) A.R. 588.

it has been forcefully argued, and widely accepted, that so-called ‘political acts’ ... cannot constitute piracy *jure gentium*.³⁸

That is to a large extent true. Many authors indicate without showing any counterarguments that piracy and maritime terrorism are two completely different offences – terrorists seek attention, inflicting as much harm and damage as possible to achieve their political objectives, whereas pirates simply seek economic gains; focus of terrorism is damage to property and/or injury to individuals for political reasons, while that of piracy is theft; terrorism attacks targets which possess symbolic significance, while piracy seeks targets with material significance³⁹. Those authors in fact follow the interpretation of the term “private ends” in its narrow sense – showing that piracy is related to the aim to get financial benefit opposite to terrorism which is related to political aims. Such approach can be illustrated in the following way:

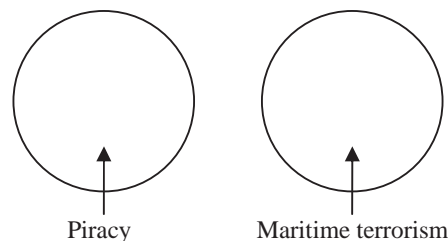


Figure 6 – Correlation of the terms “piracy” and “maritime terrorism” under narrow interpretation of the term “private ends”

Under this approach it is argued that piracy and terrorism are offences which are carried out against two different interests and with two different psychological attitudes. Looking from this perspective, it seems right to separate piracy and maritime terrorism as two different offences. But on the other hand, it is necessary to take into consideration the specific character of the piracy. Piracy actually incorporates different violent crimes, for example, robbery, murder, mayhem, illegal

³⁸ Samuel Pyeatt Menefee, “Piracy, Terrorism, and the Insurgent Passenger: A Historical and Legal Perspective”, in Natalino Ronzitti (ed.), *Maritime Terrorism and International Law*, Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1990 at p. 59.

³⁹ Vijay Sakhuja, “Sea Piracy in South Asia”, in Peter Lehr (ed.), *Violence at Sea: Piracy in the Age of Global Terrorism*, New York, London: Routledge, Taylor & Francis Group, 2007 at p. 34; Wayne K. Talley and E. M. Rule, “Piracy in Shipping”, in Wayne K. Talley, *Maritime Safety, Security and Piracy*, London: Informa, 2008 at p. 89.

detention. There must just be a specific condition for these offences to be recognized as piracy – the offence must be committed on the high seas or in a place outside the jurisdiction of any state and it must be committed from one ship to another:

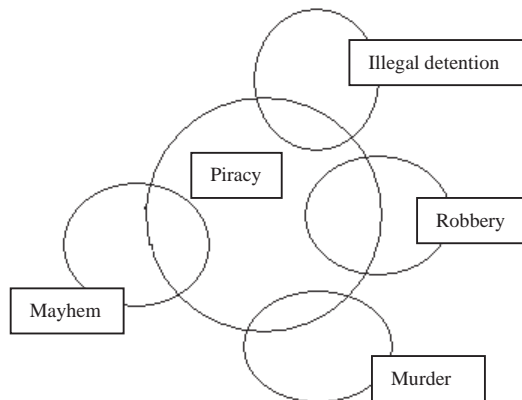


Figure 7 – Correlation of offence of piracy and other offences of illegal violence

The above mentioned argument can serve for the conclusion that piracy actually is not a crime but just a designation for specific jurisdiction necessary to combat illegal violence on the high seas and in places outside the jurisdiction of any state. The Harvard Research in International Law, the enormous scientific work carried out by Harvard Group prior to the 1958 Convention on the High Seas was adopted, which “included every possible thought and idea in existence at the time of its preparation”⁴⁰, draws the same conclusion:

... the Group stated that the theory of its draft convention would be that piracy is not a crime under international law, but that it is merely the basis of some extraordinary jurisdiction in every state to seize, prosecute and to punish persons, and that the purpose of the convention was to “define this extraordinary jurisdiction in general outline.” Even if the draft convention were adopted universally, there still would not exist a legal crime of piracy ...⁴¹

So, if looking at piracy with the eyes of the Harvard Group, the main question actually is not what piracy is, but rather over what crimes there must be universal jurisdiction. Consequently, if it is necessary and reasonable to exercise universal jurisdiction over maritime terrorism in particular territory (for example, on the high seas) or under particular conditions (for example, when terrorism is carried out from

⁴⁰ Barry Hart Dubner, *The Law of International Sea Piracy*, vol.2, Hague, Boston, Hingham: Martinus Nijhoff Publishers, 1979 at p. 37.

⁴¹ *Ibid.* at p. 44.

one ship to another), then this particular type of maritime terrorism can be included in the concept of piracy. However, it must be kept in mind that the above mentioned conclusion can be drawn only if the wide interpretation of the term “private ends” in the definition of piracy under UNCLOS is followed. Such approach can be illustrated in the following way:

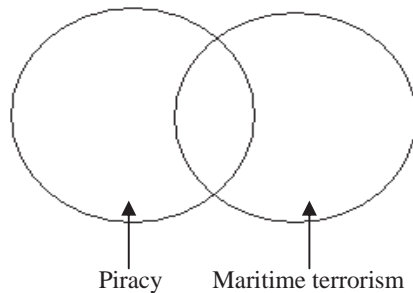


Figure 8 – Correlation of the terms “piracy” and “maritime terrorism” under the wide interpretation of the term “private ends”

Some experts who support the view that maritime terrorism can be considered to be piracy argue that despite all counterarguments maritime terrorism has actually never been excluded from the concept of piracy. They say that even if maritime terrorism is excluded from the concept of piracy by the definition of piracy under UNCLOS, it is still a part of the concept of piracy under customary law. For example, Halberstam states:

Thus, while there was no authoritative definition of piracy, it may fairly be concluded that under the prevailing view of piracy in customary international law, terrorist acts ... would not have been exempt. Even those publicists who urged, and those states that accepted, an exemption for insurgents extended it only to insurgents whose acts were directed against a particular state.⁴²

Some argue that terrorist acts are always directed against a particular state and therefore there is no basis for exercising universal jurisdiction over terrorism, even if it is carried out on the high seas or in a place outside the jurisdiction of any state.⁴³ For example, Hall states:

Primarily the pirate is a man who satisfies his personal greed or his personal vengeance by robbery or murder in places beyond the jurisdiction of a state. The man who acts with a

⁴² Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 Am.J.Int'l L. 269, 286 (1988) at p. 276.

⁴³ Steven Haines, “The Law of the Sea and Maritime Crime”, in Brian A. H. Parritt (comp.), *Crime at Sea*, London: The Nautical Institute, 1996 at p. 21.

public object may do like things to a certain extent, but his moral attitude is different, and the acts themselves will be kept within well-marked bounds. He is not only not the enemy of the human race, but he is the enemy solely of a particular state.⁴⁴

As counterargument can be mentioned the fact that terrorism today is not “kept within well-marked bounds”, it is not limited to particular state. From purely internal matters of a particular state it has become a threat to all states; often it is committed, for example, outside the state against which it is directed or against nationals of another state than one against which it is as if directed. The general perception of terrorism has changed; terrorism now is perceived more than matter of aggression in general, rather than a criminal matter. Dr. Jacobsson states: “after the September 11 incident, the status of terrorism changed from what is used to be earlier as a national criminal offence and the question is as to how we do it in the maritime context”⁴⁵. But if the terrorism is a matter of aggression which encroaches also upon third parties, it is a threat to all states. And if it is a threat to all states, it might be considered to be piracy (offence which requires universal jurisdiction to be applied). Salonio and Sinha state:

Since terrorism today is global in scope, the development of measures and their coordination should also appropriately globalize.⁴⁶

At the end of all discussions on the issue whether maritime terrorism can be considered to be piracy, it can be concluded that neither UNCLOS, nor customary law, nor the doctrine of maritime law give clear answers. The Harvard Group in their research concluded in relation to the topic of piracy that “there is no settled law of nations concerning the topic, in fact, *there is a great deal of learned controversy*

⁴⁴ Gotthard M. Gauci, “Piracy – Legal and Theoretical Problems”, in Proshanto K. Mukherjee, Maximo Q. Mejia Jr. and Gotthard M. Gauci (ed.), *Maritime Violence and Other Security Issues at Sea: Proceedings of the International Symposium Held at the World Maritime University, Malmö, Sweden, on 26-30 August 2002*, Malmö: WMU Publications, 2002 at p. 46.

⁴⁵ Marie Jacobsson, “Terrorism at Sea”, in Proshanto K. Mukherjee, Maximo Q. Mejia Jr. and Gotthard M. Gauci (ed.), *Maritime Violence and Other Security Issues at Sea: Proceedings of the International Symposium Held at the World Maritime University, Malmö, Sweden, 26-30 August 2002*, Malmö: WMU Publications, 2002 at p. 163.

⁴⁶ Lucio Salonio and Rajeev Sinha, “International, Regional and National Approaches Towards Maritime Security Issues of Terrorism”, in Proshanto K. Mukherjee, Maximo Q. Mejia Jr. and Gotthard M. Gauci (ed.), *Maritime Violence and Other Security Issues at Sea: Proceedings of the International Symposium Held at the World Maritime University, Malmö, Sweden, 26-30 August 2002*, Malmö: WMU Publications, 2002 at p. 221.

which could lead to any of several varying conclusions ...”⁴⁷. Unfortunately, it remains true even now, because conventions adopted after the work of the Harvard Group did not give answers to the questions which on a doctrinal level were discussed also before adoption of these conventions. In some aspects these conventions even brought additional questions, for example, the question whether there is a piracy in the EEZ.

Due to the unclear character of the definition of piracy and different existing practices in its interpretation, the question is still open: What exactly constitutes piracy and what is excluded from it? From the practical point of view, it seems more appropriate to include maritime terrorism committed on the high seas or in a place outside the jurisdiction of any state in the concept of piracy. Only the cases which do not involve any third party could be excluded from this concept – to keep balance with the principle of the sovereignty of states. Such approach would also allow diminishing the problems of qualifying offences which have elements of different crimes, for example, terrorism and robbery (robbing ships to finance terroristic attacks, robbing ships to train for terroristic attacks). If the robbery on the high seas or in a place outside the jurisdiction of any state as well as terrorism on the high seas or in a place outside the jurisdiction of any state is piracy, then it is not necessary to evaluate and separate all nuances of psychological attitude toward a particular offence. It is especially important at the stage of immediate response to the offence. This response must be timely. If at the stage of adjudication there might be time to make a thorough evaluation of the psychological attitude of an offender, at the stage of enforcing practical countermeasures to the ongoing violence, there is no time and necessary experts for such evaluation. Therefore there must exist similar jurisdiction to possibly similar looking violence, otherwise enforcement institutions can be reserved in applying jurisdiction to any violence, because they will be afraid not to exceed their authority.

⁴⁷ Barry Hart Dubner, *The Law of International Sea Piracy*, vol.2, Hague, Boston, Hingham: Martinus Nijhoff Publishers, 1979 at p. 46.

2.1.3. Two ship rule

The definition of piracy under UNCLOS refers to piracy as an act committed by the crew or the passengers of a private ship against another ship, or against persons or property on board such ship. This body of qualities is called “two ship rule”.

The view is held that for an act to be considered piracy it must be carried out from one ship to another. Or rather, as Hansen states it, “piracy involves using a ship to attack another ship”⁴⁸. It means that under this perception “piracy can not occur on board a single vessel”⁴⁹.

The classical example of an act which occurred on board a single vessel is *Achille Lauro* case, which took place in October 1985. The *Achille Lauro* was an Italian-flagged cruise ship. Hijackers – members of the Palestine Liberation Front – boarded the ship in Genoa, posing as tourists. Later, when the ship was on the high seas, they seized it and held the ship’s crew and passengers as hostages. They threatened to kill the passengers unless Israel released 50 Palestinian prisoners. They also threatened to blow up the ship if a rescue mission was attempted. When their demands had not been met, the hijackers shot one of the passengers – Leon Klinghoffer, a Jew of U.S. nationality – and threw his body overboard.⁵⁰ For the development of the events of *Achille Lauro* incident see also Appendix 2.

The justification for “two ship rule” in the definition of piracy under UNCLOS is said to be the notion that any ship is always under jurisdiction of its flag state and any offence committed on board the ship falls under domestic not international law. Murphy says:

⁴⁸ Hans Tino Hansen, “Distinctions in the Finer Shades of Gray: The „Four Circles Model” for Maritime Security Threat Assessment”, in Rupert Herbert-Burns, Sam Bateman and Peter Lehr (ed.), *Lloyd’s MIU Handbook of Maritime Security*, Boca Raton: Auerbach Publications, 2008 at p. 76.

⁴⁹ Samuel Pyeatt Menefee, “A Model National Law on Acts of Piracy or Maritime Violence”, in Proshanto K. Mukherjee, Maximo Q. Mejia Jr. and Gotthard M. Gauci (ed.), *Maritime Violence and Other Security Issues at Sea: Proceedings of the International Symposium Held at the World Maritime University, Malmö, Sweden, 26-30 August 2002*, Malmö: WMU Publications, 2002 at p. 104.

⁵⁰ Gotthard M. Gauci, “Piracy – Legal and Theoretical Problems”, in Proshanto K. Mukherjee, Maximo Q. Mejia Jr. and Gotthard M. Gauci (ed.), *Maritime Violence and Other Security Issues at Sea: Proceedings of the International Symposium Held at the World Maritime University, Malmö, Sweden, 26-30 August 2002*, Malmö: WMU Publications, 2002 at p. 45.

Many writers, the drafters of UNCLOS Article 101 included, have tried to draw distinction between piracy and the takeover of a ship from within either by the crew (mutiny) or the passengers (internal seizure), which are domestic offences, but the line is far from clear.⁵¹

And indeed “the line is far from clear”. There are a number of possible arguments which allow proving that takeover of a ship from within can also be considered to be piracy. Menefee shows two of those arguments: one resultant from the interpretation of UNCLOS, another resultant from the customary law.

Menefee argues that the second part of Article 101(a) of UNCLOS does not mention the “two ship rule”. While the first part of Article 101(a) of UNCLOS states that piracy is an act directed on the high seas, against another ship, or against persons or property on board such ship, the second part of Article 101(a) of UNCLOS states that piracy is an act directed against a ship, persons or property in a place outside the jurisdiction of any state.⁵² The problem is that both parts of Article 101(a) of UNCLOS are constructed differently. Under such construction it turns out that in places outside the jurisdiction of any state takeover of a ship from within is piracy, but on the high seas it is not piracy. Such different approach to the high seas and the places outside the jurisdiction of any state seems not to have any basis.⁵³ Therefore, it can be assumed that the actual intention of the drafters was either to apply the “two ship rule” for both territories, or not to apply the “two ship rule” for both territories and consequently that either there is a drafting mistake in the first part of Article 101(a) of UNCLOS or in the second part of Article 101(a) of UNCLOS. Unfortunately, it is not easy to understand which part is inaccurate.

In addition, it can be argued that the second part of Article 101(a) of UNCLOS covers also the high seas, because also the high seas are “place outside the jurisdiction of any state”. Such argument can be based on Article 100 and Article 105 of UNCLOS, which after mentioning high seas mention other place outside the

⁵¹ Martin Murphy, “Piracy and UNCLOS: Does International Law Help Regional States Combat Piracy?”, in Peter Lehr (ed.), *Violence at Sea: Piracy in the Age of Global Terrorism*, New York, London: Routledge, Taylor & Francis Group, 2007 at p. 164.

⁵² *United Nations Convention on the Law of the Sea*, 10 December 1982, United Nations, *Treaty Series*, vol. 1833, p. 3.

⁵³ Samuel Pyeatt Menefee, “Piracy, Terrorism, and the Insurgent Passenger: A Historical and Legal Perspective”, in Natalino Ronzitti (ed.), *Maritime Terrorism and International Law*, Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1990 at p. 60.

jurisdiction of any state. It indicates that also the high seas are considered to be place outside the jurisdiction of any state. If so, the contradiction becomes even bigger – one part of Article 101(a) states that takeover of a ship from within on the high seas is piracy, another part of Article 101(a) states that it is not.

The evidence that takeover of a ship from within can not be completely excluded from the concept of piracy can also be found in customary law. Menefee argues that:

The fact that piracy issues have been argued in *every* prior passenger takeover which has been investigated would suggest some justification for not recognizing the exclusivity of the *Convention* if its definition of piracy cannot be found to encompass the subject.⁵⁴

As an example of the case where takeover of a ship from within was considered to be piracy can be mentioned the *Montezuma* case, which took place in November 1876. *Montezuma* was Spanish steamer, which ran between Havana and Puerto Rico. About eleven Cuban revolutionaries, posing as passengers, embarked the steamer. When the steamer was on the high seas, they killed the captain, first mate, first engineer, and the supercargo, and took possession of the steamer. Then *Montezuma* proceeded to Central America for recoaling and arming of the vessel. In return for coal Cubans disposed of part of the ship's cargo. Spain requested several countries to treat the insurgents as pirates. Great Britain agreed. And subsequent legal opinion ratified the correctness of treating the case of the *Montezuma* as one of piracy *jure gentium*.⁵⁵

As another author apart from Menefee who supports the view that also takeover of a ship from within can be considered to be piracy is Brittin. He states:

The requirement for “another ship”, ostensibly the “pirate ship”, in my judgement seems too limiting, for it makes a technical point of how the pirates arrived aboard the victim ship. It would appear that just how or where the “pirates” got aboard is of little consequences as long as their purpose was to take control by use or threat of violence. The primary test of piracy is the act itself and not the mechanics of setting the stage for the act. The current requirement

⁵⁴ Samuel Pyeatt Menefee, “Piracy, Terrorism, and the Insurgent Passenger: A Historical and Legal Perspective”, in Natalino Ronzitti (ed.), *Maritime Terrorism and International Law*, Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1990 at p. 61.

⁵⁵ *Ibid.* at p. 55.

presents the arresting ship with the burden of trying to determine just how the boarding took place, before acting to stop the violence or theft.⁵⁶

Menefee as well as Brittin have well founded arguments against the “two ship rule”. However, it must be considered that it is not enough just to cross off the “two ship rule” from the definition of piracy. Prior to that, it must be shown where the new borderline for universal jurisdiction lies. Is the robbery of one passenger on board the ship cruising on the high seas also piracy? If the “two ship rule” is simply crossed off from the definition of piracy than robbery of one passenger on board the ship cruising on the high seas becomes piracy. Obviously it is not the aim to apply universal jurisdiction to such comparatively little violence on board a single vessel. But what kind of violence on board the single vessel must be considered to be piracy then? What potential consequences must there be for offence to be called piracy and universal jurisdiction to be applied? It seems much harder to draw the borderline for universal jurisdiction somewhere between such subjective concepts as “extremely violent illegal violence” and “less violent illegal violence”. It is much easier to draw this line at such objective things as railing of the ship, which must be crossed or be intended to be crossed on the high seas for an act to be considered to be piracy.

However, attempt must be made to define precisely those crimes for which universal jurisdiction should be applied irrespective of such technical condition as the boarding of victim ship by offenders. This technical condition is not the one which separates two very distinctive acts from the point of view of jurisdiction which can be applied. Both types of acts (acts carried out from one ship to another and acts carried out on board a single vessel) in general can be treated as falling under the territorial jurisdiction of the victim ship – under the principle of objective territoriality or under the principle of subjective territoriality respectively.

⁵⁶ Burdick H. Brittin, “Piracy and Terrorism at Sea: Commonalities and Differences”, in *Shipping Under Fire Conference, January 20-21, 1987*, Greece: Mediterranean Marine Consultants, 1987 at p. 57.

2.1.4. Piracy as an act committed on the high seas or in a place outside the jurisdiction of any state

The definition of piracy under UNCLOS refers to piracy as an act committed on the high seas or in a place outside the jurisdiction of any state. Therefore, it is necessary to clarify what the high seas are and how they differ from a place outside the jurisdiction of any state.

From Article 86 of UNCLOS it can be concluded that the high seas are all parts of the sea that are not included in the EEZ, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.⁵⁷ Paragraph 1 of Article 87 of UNCLOS indicates that “the high seas are open to all States”. Article 89 of UNCLOS indicates that “no State may validly purport to subject any part of the high seas to its sovereignty”. High seas regime is based on the philosophical notion of common heritage of mankind. Under this notion the high seas are immune from appropriation by any state, but open to the use of all states – *res communis*.

Differently from the concept of the high seas, a place outside the jurisdiction of any State relates to the notion of *terra nullius*. A place outside the jurisdiction of any state was explained by the Commentary to the Draft Articles of the International Law Commission as referring to an island constituting *terra nullius* or the shores of an unoccupied territory.⁵⁸ Island constituting *terra nullius* is Antarctica. *Terra nullius* differently from *res communis* is treated as owned by no one and consequently as something that can be claimed by anyone. For those territories which are under the status of *terra nullius* “possibility remains open that one day, certain states may decide to stake claims there, present themselves as bona fide coastal polities, and assume all attendant legal entitlements”.⁵⁹

⁵⁷ *United Nations Convention on the Law of the Sea*, 10 December 1982, United Nations, *Treaty Series*, vol. 1833, p. 3.

⁵⁸ International Law Commission, *Report of the International Law Commission to the General Assembly* [8th Session 23 April–4 July 1956] [1956/II] 8 UNYBILC 253, 282.

⁵⁹ Christopher C. Joyner, *Antarctica and the Law of the Sea*, Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1992 at p. 90.

Unfortunately, the shores of an unoccupied territory lay in the middle of the notions of *res communis* and *terra nullius*. On the one hand, according to the above mentioned explanation of the high seas under UNCLOS, the shores of an unoccupied territory are the high seas and respectively *res communis*. On the other hand, such interpretation theoretically precludes any possibility for a coastal sovereign to arise. There is a large amount of truth in the words that “for the present time, the common heritage of mankind approach falls short of providing a juridical solution for extending zones of maritime jurisdiction offshore the unclaimed sector.”⁶⁰ Article 101(a)(ii) of UNCLOS and its commentary allow assuming that the aim of UNCLOS was not preclude possibility for the coastal sovereign to arise. However, it would be more appropriate to show that such possibility exists in the separate legal norm, not the one which talks about piracy and even asks for commentary to understand it clearer.

Notwithstanding all problems over possibility for a new coastal sovereign to arise, from the definition of piracy it can be concluded that an act can be considered to be piracy if it occurs on the high seas, in Antarctica or on the shores of unoccupied territories – whatever status they would have: status of high seas or other specific status. Looking at this statement from the reverse point of view, it means that act can not be considered to be piracy if it occurs in the EEZ, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. However, one must be careful when including EEZ in the list of territories where piracy can not occur. Paragraph 2 of Article 58 of UNCLOS, the part of UNCLOS about the legal status of EEZ, sets that: “Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part”.⁶¹ As the provisions of piracy are part of Articles referred to in Paragraph 2 of Article 58 of UNCLOS, it can be concluded that piracy

⁶⁰ Christopher C. Joyner, *Antarctica and the Law of the Sea*, Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1992 at p. 91.

⁶¹ *United Nations Convention on the Law of the Sea*, 10 December 1982, United Nations, *Treaty Series*, vol. 1833, p. 3.

provisions apply also in the EEZ.⁶² Some authors argue even that piracy provisions apply in the EEZ not just through Article 58 of UNCLOS, but through Article 100 and Article 105 of UNCLOS. Those authors argue that the EEZ can be considered to be a place outside the jurisdiction of any state. For example, Liljedahl states:

Although the provisions of piracy have been placed in UNCLOS part VII on High Seas, the rights and duties of every State in order to cooperate in the repression of such activity and to arrest the persons involved (Art.100, 105) are fortunately not limited to the high seas as the provisions particularly mention “on the high seas, *or in any place outside the jurisdiction of any State*”. Therefore all pirate ships or aircraft being outside the territorial sea of a State may be seized by ships or aircraft of all States ...⁶³

However, other authors express their doubts about such conclusions. For example, Galdorisi and Kaufman state: “As a relatively new regime in international law, the precise nature and full extent of coastal and other nations’ rights and responsibilities in the EEZ are still evolving.”⁶⁴ And as “the precise nature and full extent of coastal and other nations’ rights and responsibilities in the EEZ are still evolving” at the moment nobody can be absolutely sure whether applying piracy provisions in EEZ are compatible or incompatible with the rights and responsibilities of coastal state in those territories.

The question is also open whether Paragraph 2 of Article 58 of UNCLOS:

- 1) makes piracy like acts in EEZ piracy, or
- 2) just allows applying to piracy like act in EEZ the same legal consequences as to piracy.

From the analyses it appears more likely that the second from the above mentioned options is the correct one. Such conclusion is derived from the fact that EEZ is not mentioned in Article 101 of UNCLOS, which defines piracy, but is related to piracy provisions just by such technique as analogy. Applying analogy indicates that events

⁶² See, for example, Barry Hart Dubner, “Human Rights and Environmental Disaster – Two Problems that Defy the „Norms” of the International Law of Sea Piracy”, *Syracuse Journal of International Law*, Vol. 23, No. 1, pp. 11-12.

⁶³ John Liljedahl, “Transnational and International Crimes: Jurisdictional Issues”, in Proshanto K. Mukherjee, Maximo Q. Mejia Jr. and Gotthard M. Gauci (ed.), *Maritime Violence and Other Security Issues at Sea: Proceedings of the International Symposium Held at the World Maritime University, Malmö, Sweden, 26-30 August 2002*, Malmö: WMU Publications, 2002 at pp. 122.

⁶⁴ George V. Galdorisi and Alan G. Kaufman, “Military Activities in the Exclusive Economic Zone: Preventing Uncertainty and Defusing Conflict”, *California Western International Law Journal*, 2002, vol. 32, p. 254.

under consideration are very similar, but they are not identical. By some legally important qualities they are alike, but by some legally less important qualities they still differ (if all qualities would be the same, events would be identical and there would not be need for analogy). So, although in the case of applying analogy two different events are involved, the legal consequences for them are the same:

Event A (quality a, quality b, quality c) = consequences E

Event B (quality a, quality b, quality d) = consequences E⁶⁵

Accordingly, although legal consequences for piracy like acts in the EEZ are the same as for piracy, piracy like acts in the EEZ is not piracy. Unfortunately, with that conclusion piracy like acts in the EEZ remain without one clear term with which to refer to them. Those acts can neither be called armed robbery, because, as it will be shown later, armed robbery occurs “within a states jurisdiction over such offences”, but coastal states jurisdiction in the EEZ is limited mainly to exploration and exploitation of natural resources and do not amount to piracy like offences.

Acts of illegal violence in the territorial sea, internal waters and archipelagic waters according to UNCLOS do not fall under the concept of piracy. But there are a number of experts who say that it is an unfortunate mistake which has appeared due to the little attention to the questions of piracy during the setting of the new regime of maritime zones. States made gains from the rights to exercise their control over larger territories – wider territorial sea, the EEZ and archipelagic waters – but possible consequences from incapability to control these large territories were not considered carefully enough.

Prior to the current regime of maritime zones under UNCLOS, the territorial sea of the state was just 3 nautical miles from the baselines. Now, the territorial sea can be 12 nautical miles from the baselines (Article 3 of UNCLOS) and the EEZ can be 200 nautical miles from the baselines (Article 57 of UNCLOS), so the high seas and also piracy starts just after those huge territories. Acts of illegal violence in the territories where recently they were considered to be piracy are not piracy any more. Mejia describes this situation as a gerrymandering of the oceans that made Article

⁶⁵ Ivans Vedins, *Loģika*, Rīga: Avots, 2000, pp. 40-42.

101 of UNCLOS impotent and obsolete.⁶⁶ As the majority of acts of illegal violence at sea today take place within the territorial waters or even in the internal waters of a particular state, then strictly speaking there is almost no piracy in the world today.⁶⁷

Today, with the changes in maritime zones, illegal violence in the territory as large as 12 nautical miles from the coast has become as if it were an internal matter of the coastal state and the flag state, but at the same time it has not lost its international character. Acts of illegal violence even in territorial sea of a particular state first of all “beats” international shipping. To keep an order in its territorial sea might not be priority of the coastal state, whose society perhaps even does not suffer from the acts of illegal violence in its territorial sea, but it will always be priority of those who pass through those waters. Jones points to this problem by saying:

Littoral states, those having a coastline in a particular area do have legal responsibilities to ensure the freedom of innocent passage, but in the main piracy is simply seen as a crime against “foreign” crews, ships and cargo, and so is not viewed as a major concern.

The truth is somewhat different. Piracy is not just a problem for the states of one region, piracy affects all shipping nations ...⁶⁸

The question then is: Is it just for international shipping and particularly seafarers and passengers on board the ships to suffer because of lack of resources or lack of will, or lack of established power of the coastal state to combat acts of illegal violence in their territorial sea? It does not seem just. But are the lack of resources or lack of will, or lack of established power of some coastal state to combat acts of illegal violence in their territorial sea grounds enough for making exceptions to the principle of state sovereignty and allowing every state to combat illegal violence in particular waters? It can be argued that states already have agreed on some compromises in favour of international shipping. For example, Paragraph 2 of Article 8 of UNCLOS provides that: “Where the establishment of a straight baseline

⁶⁶ Maximo Q Mejia Jr, *Law and Ergonomics in Maritime Security*, Doctoral Thesis, Division of Ergonomics and Aerosol Technology, Department of Design Science, Lund University, 2007 at p. 42.

⁶⁷ Jayant Abhyankar, “Maritime Crime”, in Maximo Q. Mejia Jr. (ed.), *Contemporary Issues in Maritime Security: A Selection of Papers and Presentations from the Workshop-Symposium on the Practical Implementation and Critical Evaluation of the ISPS Code 11-15 August 2003 and the International Symposium on Contemporary Issues in Maritime Security 30 August to 1 September 2004*, Malmö: WMU Publications, 2005 at p. 223.

⁶⁸ Steven Jones, *Maritime Security: A Practical Guide*, London: The Nautical Institute, 2006 at p. 14.

in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters.”⁶⁹ This is an approach which theoretically could have been applied also in relation to the universal jurisdiction over acts of illegal violence at sea. Universal jurisdiction over those acts could have been left where it was prior to the new regime of maritime zones – starting from the 3 nautical miles from the baselines. However, such approach is not likely to get universal support, because combating acts of violence involves applying force, but foreign force in territory is a very sensitive question, even now when there is general tendency of more relaxed positioning (for example, joint naval exercises is evidence for it)⁷⁰.

It is necessary to try to find a midway between the interests of secure international shipping and the interests to protect the state sovereignty. As it was shown earlier the base for calling some illegal acts of violence at sea piracy is the necessity to apply universal jurisdiction to them. Such necessity can exist not only in relation to particular acts carried out on the high seas or places outside the jurisdiction of any state. Such necessity can also exist in relation to particular acts carried out in the territorial sea, archipelagic waters or even internal waters. Therefore, it can be argued that for more effective combating of illegal violence at sea the line which separates the violence over which universal jurisdiction can be applied from the violence over which universal jurisdiction can not be applied must not be drawn based purely on the division of the sea into particular zones. It must rather be drawn primarily based on the capacity of the flag states and coastal states to combat particular illegal acts of violence effectively. However, it also is necessary to keep the balance with the principle of states’ sovereignty. Therefore, universal jurisdiction in the territorial sea, archipelagic waters and internal waters could be applied only in exceptional circumstances – when it is obvious that the coastal state is

⁶⁹ *United Nations Convention on the Law of the Sea*, 10 December 1982, United Nations, *Treaty Series*, vol. 1833, p. 3.

⁷⁰ Armin Steinbach, “Cooperation in Maritime Security and the Sovereignty Implications”, *The Journal of International Maritime Law*, 2008, 14.

not able to combat illegal violence at sea and situation can not be improved with other methods, for example, regional cooperation. Application of universal jurisdiction in the territorial sea, archipelagic waters and internal waters could be made the subject for permission given by the United Nations on case to case bases.

2.2. Duty to cooperate in the repression of piracy

Article 100 of UNCLOS states that:

All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.⁷¹

The legal norm of Article 100 of UNCLOS does not have much value by itself. It is just a general announcement of necessity to cooperate and does not give even hints about possible forms of cooperation. It might be an adequate approach. UNCLOS is called the “constitution” of the law of the sea. UNCLOS does not and must not embrace each and every detail of this huge legal discipline – law of the sea. However, it also means that UNCLOS can not be effective without additional normative acts parallel to UNCLOS. In relation to the cooperation for repression of piracy it means that if there are no additional normative acts in force parallel to UNCLOS, which set the cooperation between the states in more details, then the Article 100 of UNCLOS is useless.

The main problem of all piracy provisions of UNCLOS, including the one about cooperation, however, is inescapable return to the unclear character of the definition of piracy under UNCLOS. If it is not clear for regression of what one must cooperate, then there is no starting point from which to develop this cooperation.

2.3. Universal jurisdiction over piracy

Article 105 of UNCLOS states that:

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine

⁷¹ *United Nations Convention on the Law of the Sea*, 10 December 1982, United Nations, *Treaty Series*, vol. 1833, p. 3.

the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.⁷²

This article sets universal jurisdiction over piracy.

2.3.1. The rationale for universal jurisdiction over piracy

The participants in the Princeton Project on Universal Jurisdiction⁷³ propose the following definition of universal jurisdiction:

... universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrators, the nationality of the victim, or any other connection to the state exercising such jurisdiction.⁷⁴

There are two possible rationales for universal jurisdiction over a particular crime:

- 1) the seriousness (heinousness) of the crime at issue, the prosecution and punishment of which gives rise to the common interest among the members of the international community or the interest of the international community as a whole;
- 2) the absence or uncertainty of a jurisdiction capable of being effectively exercised over the crime in question.⁷⁵

It is quite essential to understand the rationale for setting universal jurisdiction over piracy. If the piracy is considered to be extremely heinous, the possibility to exercise universal jurisdiction in the territorial sea, archipelagic waters or even in internal waters can not be excluded. If the piracy is not considered to be extremely heinous, universal jurisdiction as if has no basis for being applied in the territorial sea, archipelagic waters or internal waters, because these waters are under the jurisdiction of particular state. UNCLOS seems to acknowledge that piracy is not extremely heinous, because it restricts the possibility to apply universal jurisdiction over piracy only to places outside the jurisdiction of any state. Also several experts, although not

⁷² *United Nations Convention on the Law of the Sea*, 10 December 1982, United Nations, *Treaty Series*, vol. 1833, p. 3.

⁷³ Princeton Project on Universal Jurisdiction – project of the Princeton University which brought together a working group that considered the question of universal jurisdiction and its limits.

⁷⁴ Stephen Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law*, Philadelphia: University of Pennsylvania Press, 2006 at p. 21.

⁷⁵ Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes Under International Law*, Antwerpen: Intersentia, 2005 at p. 106.

all, agree that universal jurisdiction is applied to piracy not because of its heinousness. For example, Kontorovich states:

... piracy was not regarded as particularly heinous. The same behaviour that pirates engaged in – armed robbery of civilian shipping – was often authorised and encouraged by every maritime nation in the form of privateering. ... The widespread tolerance and even encouragement of privateering indicates that historically there was a tolerance of sea robbery incompatible with the kind of universal repulsion that modern commentators claim motivated its universal cognizability.

... piracy, by definition, was simply robbery at sea. ... robbery has never been considered one of the most depraved crimes. While piracy was universally cognizable, many other far more repugnant offenses were not, further undermining the theory that heinousness was the rationale for piracy's jurisdictional treatment. ... specific offences ...: war crimes, genocide, and the like were always considered worse than sea robbery. Yet historically the law of nations failed to extend universal jurisdiction to those offenses.⁷⁶

Sunga supports similar view. He distinguishes the rationale for piracy and for war crimes by acknowledging only the second rationale (absence or uncertainty of effective jurisdiction) for piracy and first rationale (seriousness of the crime) for war crimes.⁷⁷

So, rationale for universal jurisdiction over piracy is rather the second of the above mentioned options. Consequently, universal jurisdiction can be exercised only in places outside the jurisdiction of any state.

It can be argued even further – that there is no base at all for exercising universal jurisdiction over piracy. Such statement can be based on the argument that also acts from one ship to another on the high seas or places outside the jurisdiction of any state are acts within the jurisdiction of a particular state – a state against whose ship the offence is committed. The doctrine states that the territorial principle, which is a widely recognized principle on which the state can base its jurisdiction, applies not only when a material element of an offence occurs within the territory (subjective territoriality), but also when a significant effect of an offence impacts on the asserting state's territory (objective territoriality).⁷⁸ Although arguments against

⁷⁶ Eugene Kontorovich, "The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation", *Harvard International Law Journal*, Vol. 45, Nr. 1, Winter 2004 at pp. 186-187.

⁷⁷ Lyal S. Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations*, Dordrecht, Boston, London: Martinus Nijhoff Publisher, 1992 at p. 103.

⁷⁸ John Liljedahl, "Transnational and International Crimes: Jurisdictional Issues", in Proshanto K. Mukherjee, Maximo Q. Mejia Jr. and Gotthard M. Gauci (ed.), *Maritime Violence and Other Security Issues at Sea: Proceedings of the International Symposium Held at the World Maritime University, Malmö, Sweden, 26-30 August 2002*, Malmö: WMU Publications, 2002 at pp. 116.

universal jurisdiction over piracy might sound like opposition to the fight against piracy, those “cool-headed” arguments must not be lost in the emotional calls to the fight against piracy. It must always be kept in mind that universal jurisdiction might have not only positive impacts, but also negative impacts. Bossiouni states:

While there is no doubt that it is a useful and, at time, necessary instrument of international criminal justice, it is also attended by various dangers. If used in a politically motivated manner or simply to vex and harass leaders of other states, universal jurisdiction could disrupt world order and deprive individuals of their basic right. Even with the best intentions, universal jurisdiction could be used imprudently, creating unnecessary frictions between states and abuses of legal processes.⁷⁹

Notwithstanding all above mentioned arguments, it can also be argued that in the particular situations the second rationale can serve as a basis for universal jurisdiction even in the territories under the jurisdiction of particular state – in the situations when this particular state is not capable to exercise its jurisdiction effectively. It is also possible to argue that the particular acts of illegal violence at sea are serious crimes, the prosecution and punishment of which gives rise to the common interest among the members of the international community, because these acts “beats” international shipping (the “artery” of the international trade). Consequently, it can be argued that there are both rationales for universal jurisdiction over particular acts of illegal violence at sea.

2.3.2. Ships entitled to exercise universal jurisdiction over piracy

Universal jurisdiction over piracy can be exercised only by warships or other government ships. Article 107 of UNCLOS states:

A seizure on account of piracy may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.⁸⁰

The idea of this legal norm in general is adequate – it precludes private persons to start to establish “justice” and with that potentially hamper innocent shipping. However, it would be more appropriate to refer not only to the status of the ship

⁷⁹ M. Cherif Bassiouni, “The History of Universal Jurisdiction and Its Place in International Law”, in Stephen Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law*, Philadelphia: University of Pennsylvania Press, 2006 at pp. 39-40.

⁸⁰ *United Nations Convention on the Law of the Sea*, 10 December 1982, United Nations, *Treaty Series*, vol. 1833, p. 3.

which can exercise universal jurisdiction, but also the status of officials who can do it, because on the warship or other government ship there can also be persons who are not authorized to seize on account of piracy.

2.3.3. Liability for seizure without adequate grounds

Seizure of a pirate ship can be considered to be illegal not only when it is carried out by a ship other than a warship or other government ship. It can also be considered to be illegal if it is carried out by a warship or other government ship, but without adequate grounds. Article 106 of UNCLOS states:

Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure.⁸¹

This legal norm sets state liability for seizure of a ship without adequate grounds.

The above mentioned legal norm again returns to the problem of unclear character of the definition of piracy under UNCLOS. If the person does not know for sure what acts are considered to be piracy, this person can have doubts about the existence of adequate grounds for seizure of a ship. Further, being afraid of liability under Article 106 of UNCLOS, this person can be too reserved to seize the particular ship. Such reserved attitude reduces the effectiveness of combating piracy.

On the one hand, the vague character of the definition of piracy under UNCLOS is a good ground for finding that particular interpretation of the definition which justifies a particular seizure. However, on the other hand, such “justice” subordinated to particular event does not seem to be the just approach to those possibly innocent ships, which are seized or are intended to be seized. Persons must know exactly for what acts particular sanctions can be applied to them for those sanctions to be just. Rubin states:

... all criminal acts must be defined by statute or by such clear and consistent practice that an accused can fairly be thought to know the rule s/he is supposed to have violated: *nullem crimen sine lege; nulla poena sine lege*.⁸²

⁸¹ *United Nations Convention on the Law of the Sea*, 10 December 1982, United Nations, *Treaty Series*, vol. 1833, p. 3.

⁸² Alfred P. Rubin, *The Law of Piracy*, 2nd ed., New York: Transnational Publishers, Inc., 1998 at pp. 391-392.

Looking from this point of view to the Article 106 of UNCLOS, it can be argued that any seizure of a ship suspected to be pirate ship has no adequate ground, because the concept of piracy itself is not clear.

2.3.4. Limitations of universal jurisdiction to adjudicate

The Article 105 of UNCLOS states that the court of the state which carried out the seizure may decide upon the penalties to be imposed. This article does not say that any state can decide upon the penalties to be imposed to pirates. It indicates the intention of the drafters to limit the universal jurisdiction to adjudicate – not to allow those states which do not have any connection with the particular act of piracy to decide on penalties for this act.

Many authors who describe universal jurisdiction over piracy do not mention this limitation. They talk about universal jurisdiction over piracy as if it would not have such limitation. However, such limitation seems to have some practical rationale under it. Court proceedings can be more effective if they are carried out by the same state which gathered all the evidence before the stage of adjudication. If it is not so, then different technical problems can arise which can delay or even preclude adjudication, for example, evidence gathered by the officials of one state might not be recognized by the court of another state, or the evidence might be in a foreign language and in need of translation.

3. The definition of armed robbery

Another concept apart from piracy which needs to be clarified for fulfilling the objective of this dissertation is the concept of armed robbery. The definition of armed robbery is given in paragraph 2.2 of Annex of Res. A.922(22). Before starting to analyze paragraph 2.2 of Annex of Res. A.922(22), it must be emphasized that Res. A.922(22) is “soft law”. It means that none of the provisions of Res. A.922(22) is legally binding. They all have just recommendatory character. The purpose of Res. A.922(22) is “to provide IMO Member States with an *aide-mémoire* to facilitate the investigation of the crimes of piracy and armed robbery against ships”⁸³.

Paragraph 2.2 of Annex of Res. A.922(22) states that:

Armed robbery against ships means any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, directed against a ship or against persons or property on board such a ship, within a State’s jurisdiction over such offences.⁸⁴

The definition of armed robbery under Res. A.922(22) (further – the definition of armed robbery) has similarities with the definition of piracy under UNCLOS. It speaks for itself, because the definition of armed robbery was created to address piracy like offences within the territory where there is no piracy according to the definition of piracy under UNCLOS. However, there are also important differences between the definition of armed robbery and the definition of piracy under UNCLOS, and those differences are not related just to the territory where particular act can be carried out, but also to other qualities. A number of components of the definition of piracy under UNCLOS are missing in the definition of armed robbery, for example, the component that an act must be committed for private ends and components related to aircraft.

Components of the definition of armed robbery (already groped similarly as in the case of piracy) can be listed as follows:

- 1) armed robbery as any unlawful act of violence or detention or any act of depredation, or threat thereof;

⁸³ International Maritime Organization. *Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships*, A 22/Res.922.

⁸⁴ *Ibid.*

- 2) armed robbery as an act directed against a ship or against persons or property on board such a ship;
- 3) armed robbery as an act other than “piracy” committed within a State’s jurisdiction over such offences.

3.1. Armed robbery as unlawful act of violence or detention or any act of depredation, or threat thereof

Armed robbery under Res. A.922(22) similarly to piracy under UNCLOS is defined as an unlawful act of violence or detention or any act of depredation. However, the issue about possible different perception of the terms “violence”, “illegal violence”, “detention”, “illegal detention”, “depredation” and “illegal depredation” in different states is not as actual in relation to armed robbery as in relation to piracy, because armed robbery are offences carried out within a State’s jurisdiction over such offences. It means that in those cases the answer to the question what is violence, illegal violence, detention, illegal detention, depredation or illegal depredation must be found in the national law of the state which is exercising its jurisdiction over particular offence. Of course, this national law might not be clear in determining the above mentioned concepts. However, at least in the case of armed robbery the issue about understanding those concepts does not become even more complicated because of the necessity to understand what they mean universally.

In addition to unlawful act of violence or detention or any act of depredation, also the threat concerning those unlawful acts is listed in the definition of armed robbery as an element which may constitute armed robbery. According to the Black’s Law Dictionary the word “threat” has three meanings. Under the first meaning threat is “a communicated intent to inflict harm or loss on another or on another’s property”. Under the second meaning threat is “an indication of an approaching menace”. Under the third meaning threat is “a person or thing that might well cause harm”⁸⁵.

⁸⁵ Bryan Garner and Henry Black, *Black’s Law Dictionary*, 8th ed., Belmont: Thomson/West, 2004 at p. 1519.

It is not absolutely clear which meaning of the word “threat” is used in the definition of armed robbery. However, the general characteristic of the armed robbery suggests that at least two of the above mentioned meanings can be given to the word “threat” in the definition of armed robbery.

Under the first meaning of the word “threat” armed robbery is a communicated intent to inflict violence or detention or any act of depredation. However, it must be taken into consideration that not any declaration of an intention to inflict violence or detention or any act of depredation can be considered to be armed robbery. This declaration must pass the test of credibility. Credibility is the quality that makes something worthy to belief⁸⁶.

Under the second meaning of the word “threat” armed robbery is an act which indication of approaching violence or detention or any act of depredation. This act can be, for example, attempt or preparation to carry out an attack. The definition of piracy under UNCLOS does not mention threat as an element which allows qualifying the act as piracy. That has led to the doubts whether the attempt to carry out particular unlawful acts can be qualified as piracy or an act can be qualified as piracy only when there are actual consequences. For example:

On January 4, 1931, on the high seas, a number of armed Chinese nationals were cruising in two Chinese junks. They pursued and attacked a cargo junk which was also a Chinese vessel. The master of the cargo junk attempted to escape ... the pursuers were eventually taken in charge ... They were brought as prisoners to Hong Kong and indicted for the crime of piracy. The jury found them guilty subject to the following question of law: ‘Whether an accused person may be convicted of piracy in circumstances where no robbery has occurred’. The Full Court of Hong Kong on further consideration came to the conclusion that robbery was necessary to support a conviction of piracy and in the result the accused were acquitted.⁸⁷

On November 10, 1933 the question whether actual robbery is an essential element of the crime of piracy *jure gentium* was referred by His Majesty in Council to the Judicial Committee for their hearing and consideration. Judicial Committee held that:

Actual robbery is not an essential element in the crime of piracy *jure gentium*. A frustrated attempt to commit a piratical robbery is equally piracy *jure gentium*.⁸⁸

⁸⁶ Bryan Garner and Henry Black, *Black’s Law Dictionary*, 8th ed., Belmont: Thomson/West, 2004 at p. 396.

⁸⁷ *In re Piracy jure gentium*, (1934) A.R. 588.

⁸⁸ *Ibid.*

To avoid questions similar to those asked in the above mentioned cases the innovation of the definition of armed robbery in comparison with the definition of piracy – referring to the threat – might be useful. Such innovation means that the concept of armed robbery does not ask for an actual act for armed robbery to be considered accomplished. The person can be accused of and convicted for armed robbery even if there has been just an attempt of a particular act or even if there has been just preparation for a particular act.

3.2. Armed robbery as an act committed for any ends

The definition of armed robbery does not refer to private ends or any other ends as necessary element for an act to be considered armed robbery. It means that also maritime terrorism falls under the concept of armed robbery, if other conditions set down in the definition of armed robbery are fulfilled.

However, the definition of armed robbery has also been interpreted in a different way – because of the use of the word “robbery” in it. Some experts are of the view that the word “robbery” in the definition of armed robbery clearly suggests that the motive of an act is financial gain.⁸⁹ This argument, of course, has some rational motive, because indeed robbery has always been associated with financial gain. This can be seen from the definitions of robbery under national law of different states. However, it does not mean that the other meaning can not be given to this word. A particular term can be defined differently for different purposes. To understand the meaning of the term in a particular document first of all it is necessary to look how it is defined in this particular document, not how it is defined in other documents. In the definition of armed robbery the word “robbery” in no way is knit together with the motive of financial gain. To associate armed robbery with the motive of financial gain this quality in the definition of armed robbery must appear

⁸⁹ Maximo Q. Mejia Jr., “Defining Maritime Violence and Maritime Security”, in Proshanto K. Mukherjee, Maximo Q. Mejia Jr. and Gotthard M. Gauci (ed.), *Maritime Violence and Other Security Issues at Sea: Proceedings of the International Symposium Held at the World Maritime University, Malmö, Sweden, 26-30 August 2002*, Malmö: WMU Publications, 2002 at p. 34; Jingjing Xu, “Piracy and Its Control Policies: A Law and Economics Perspective”, in Maximo Q. Mejia Jr. and Jingjing Xu (ed.), *Costal Zone Piracy and Other Unlawful Acts at Sea*, Malmö: WMU Publications, 2007 at p. 280.

in the explanation of the term (*definiens*), not in the term itself (*definiendum*), because the term itself does not have any quality before it is explained.

Notwithstanding the above mentioned fact, it is still argued that maritime terrorism can not be considered to be armed robbery, for example, Pugh argues that: “political violence, or ‘terrorism’ at sea has been considered as a separate issue (from piracy and armed robbery) in international law.”⁹⁰ Therefore, if possible, it is necessary to avoid giving new meanings to the terms, which in general are understood differently – not to cause different possible interpretations and with that confusion.

Some experts offer to use the term “costal zone piracy” instead of the term “armed robbery”.⁹¹ It allows avoiding the above mentioned contradiction. If the term “costal zone piracy” is used instead of the term “armed robbery”, then without any doubts the element of motive of financial gain is lost and maritime terrorism committed within the State’s jurisdiction over such offences can be considered to be armed robbery. However, the term “coastal zone piracy” contains in it other misleading associations. The words “coastal zone” associate to particular acts which can occur only in coastal areas. It is not so – as it will be shown later. The word “piracy” can be associated to the universal jurisdiction which can be exercised over particular acts, because as it was stated above the word “piracy” indicates the right to exercise universal jurisdiction. However, it is also not true – there is no right to exercise universal jurisdiction over acts which are called armed robbery under Res. A.922(22).

In addition, it is not advisable to use the term “armed robbery” parallel to the term “piracy”, or rather, to use those terms as terms which exclude each other, because armed robbery in its traditional meaning (not the one given to it by Res. A.922(22)) can be also piracy. If armed robbery is committed from one ship to another on the high seas or other places outside the jurisdiction of any state, armed

⁹⁰ Michael C. Pugh, “Piracy and Armed Robbery at Sea: Problems and Remedies”, *Low Intensity Conflict & Law Enforcement*, Vol.2, Summer 1993, No.1, pp. 4-5.

⁹¹ See, for example, Maximo Q. Mejia Jr. and Proshanto K. Mukherjee, “The SUA Convention 2005: A Critical Evaluation of Its Effectiveness in Suppressing Maritime Criminal Acts”, *Journal of International Maritime Law*, vol.12, Nr.3 at p. 183.

robbery is piracy. Of course, it can be confusing if in one meaning armed robbery is the part of the concept of piracy, but in another meaning it stands outside the concept of piracy.

Therefore, for the purpose of Res. A.922(22) it seems more appropriate to use the more general term such as, for example, “illegal violence at sea”, which then would include piracy and other acts of illegal violence at sea. It is not crucial to give a specific term to these “other acts of illegal violence at sea”.

3.3. Armed robbery as an act directed against a ship or against persons or property on board such a ship

The definition of armed robbery does not include the “two ship rule”. Consequently, the concept of armed robbery also includes violent offences which occur on board a single vessel.

In the case of armed robbery the presence or not presence of the “two ship rule” in the definition does not play such an essential role as in the case of piracy, because in the case of armed robbery it is not necessary to draw the borderline which indicates where the universal jurisdiction starts. The purpose of defining armed robbery is not to show those offences over which universal jurisdiction can be exercised. The definition of armed robbery is included in the code of practice, the purpose of which is to facilitate investigation of illegal violence at sea. For that purpose the scope of addressed crimes must be as wide as possible. The scope of addressed crimes is made as wide as possible with not including the “two ship rule” in the definition of armed robbery.

3.4. Armed robbery as an act other than an act of piracy committed within a State’s jurisdiction

The definition of armed robbery refers to armed robbery as an act other than an act of piracy committed within a State’s jurisdiction over such offences. This element of the definition of armed robbery is often interpreted so that armed robbery

is piracy like offences in the territorial sea and internal waters.⁹² It is true, but is it a complete description of the places where armed robbery can occur? The definition of armed robbery does not refer to the territorial sea and internal waters. Instead of that it refers to the place “within a State’s jurisdiction”. Such wording allows arguing that armed robbery is also those acts of illegal violence which occur on board the single ship even when she is on the high seas. According to Article 94 of UNCLOS a flag state is obliged to effectively exercise its jurisdiction over its ships even when they are on the high seas. It means that illegal violence committed on board the single ship on the high seas is committed “within a State’s jurisdiction”. The fact that the intention of the drafters of the definition of armed robbery was not to restrict it to the territorial sea and internal waters can be proven also by referring to paragraph 5.5 of Annex of Res. A.922(22). It shows that armed robbery can also occur on the high seas and places outside the jurisdiction of any state. This paragraph states:

In cases of piracy and armed robbery against ships outside territorial waters, the flag State of the ship should take lead responsibility, and in other cases of armed robbery the lead should be taken by the State in whose territorial waters the attack took place.⁹³

Under the above mentioned interpretation also the words “other than an act of piracy” get some meaning in the definition of armed robbery. As it was stated earlier, it is not absolutely clear whether all acts of illegal violence which occur on a single ship (what is “within a State’s jurisdiction”) are excluded from the concept of piracy (for example, internal hijacking might be not excluded). Under such circumstances to be sure that concepts of armed robbery and piracy do not overlap (which is an absolutely correct approach from the point of view of classification and defining) it is necessary to mention that armed robbery is just those acts of illegal violence which are not considered to be piracy. Also in the case when an act is committed from one ship to another – once offenders are on board, they are in place “within a State’s jurisdiction”, the offence is still continuing and it can be

⁹² See, for example, Martin Murphy, “Piracy and UNCLOS: Does International Law Help Regional States Combat Piracy?”, in Peter Lehr (ed.), *Violence at Sea: Piracy in the Age of Global Terrorism*, New York, London: Routledge, Taylor & Francis Group, 2007 at p. 155.

⁹³ International Maritime Organization. *Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships*, A 22/Res.922.

misunderstood whether the act has become armed robbery now or it is still piracy. The reference “other than an act of piracy” gives an answer – it is still piracy, an act under universal jurisdiction.

However, not all experts agree with such interpretation. They argue that the reference “other than an act of piracy” is not necessary in the definition of armed robbery. For example, Franson says:

I have always been surprised by the words “other than an act of piracy” in the definition of armed robbery. The definition of piracy is in the part of UNCLOS, which deals with the high seas whilst armed robbery is something that occurs in the territorial seas and EEZ of countries, so the exclusion of piracy from the definition is a bit difficult to understand.⁹⁴

After quoting Franson it is necessary to revert also to the question whether piracy like offences in the EEZ can be considered to be piracy or armed robbery, or rather they do not fall under any of those concepts. Franson states that piracy like offences in the EEZ are armed robbery, just like they are armed robbery in the territorial sea. Such conclusion does not seem well founded, because the EEZ is not the place “within the State’s jurisdiction over such offences”. As it was indicated above, states have limited jurisdiction in the EEZ and piracy like offences do not fall under it. So, only offences on board a single ship in the EEZ (what is “within a State’s jurisdiction”) can be considered to be armed robbery. Offences carried out from one ship to another in the EEZ can not be considered to be armed robbery.

⁹⁴ Johan Franson, “Coastal Zone Piracy”, in Maximo Q. Mejia Jr. and Jingjing Xu (ed.), *Costal Zone Piracy and Other Unlawful Acts at Sea*, Malmö: WMU Publications, 2007 at p. 171.

4. SUA Convention

4.1. Unlawful acts under the regime of the SUA Convention

The SUA Convention does not talk about piracy or armed robbery. However, it addresses those offences through the concept of unlawful acts against the safety of maritime navigation (hereafter – unlawful acts). Therefore, the concept of unlawful acts must be clarified. It is also important to understand the correlation between the concepts of unlawful acts, piracy and armed robbery. Understanding of this correlation is vital for finding conflicts between the above mentioned concepts. Conflicts between the above mentioned concepts can hamper effective combating of illegal violence at sea.

Prior to starting to examine the concept of unlawful acts, it must be noted that although the title of the SUA Convention and its preamble indicate that this convention will address unlawful acts, the main text of the convention talks just about offences not about unlawful acts. From the overall content of the convention it can be understood that the offences listed in Article 3 of the SUA Convention actually are those unlawful acts about which the title and preamble talk. However, it seems strange that it is not clearly said in the convention. In addition, such drafting in fact gives a new, narrower meaning to the term “offence”. Offence in the conventional meaning is a violation of the law in general⁹⁵. The SUA Convention narrows the meaning of offence just to those acts which are listed in Article 3 of this convention. Taking into consideration the above mentioned facts, it can be said that the SUA Convention unnecessary generates not only one but two new terms – unlawful acts and offences – addressing the same phenomenon. It can also be said that under the SUA Convention the terms “unlawful acts” and “offences” are identical and therefore can be used interchangeable. In this dissertation the term “unlawful acts” is used.

⁹⁵ Bryan Garner and Henry Black, *Black's Law Dictionary*, 8th ed., Belmont: Thomson/West, 2004 at p. 1110.

4.1.1. Interpretation of the term “unlawful acts”

The SUA Convention does not give the definition of unlawful acts. A particular concept is disclosed by listing the acts which fall under this concept. Those acts are listed in Article 3 of the SUA Convention (see Appendix 3). In general, the approach of listing instead of defining seems a wise approach in the situation when the debate on how better define one or another offence committed at sea is ongoing and very conflicting. The definition of the concept is not the end in itself. Not always it is possible to develop an absolutely clear definition. There exist objective and subjective barriers for certainty, for example, differences in social values – because of them one society may perceive a particular act as unlawful, but another at the same time as lawful. Absolute clarity is just like the horizon which you can approach but can never reach. Therefore, in some situations using defining like techniques is a more adequate approach than trying to develop a definition. Explanation by listing is one of those defining like techniques. Explanation by listing allows perceiving the concept easier, because it shows the elements of the system immediately – it is not necessary to look for them under very general terms of definition.⁹⁶

However, although the explanation by listing in general can help to understand a complicated concept better, Article 3 of the SUA Convention is not very good help. Article 3 of the SUA Convention is drafted in a manner which still leaves the big range of uncertainty about the content of the concept of unlawful acts. It is because this article contains logical error. The main problem of the explanation of the concept of unlawful acts under Article 3 of the SUA Convention is the circular character of this explanation. Despite the large number of words in Article 3 of the SUA Convention, they actually explain little, because by just some words – “unlawful”, “likely to endanger the safe navigation of the ship” – it brings the explanation back to the zero point. Article 3 of the SUA Convention explains unlawful act against the safety of maritime navigation as unlawful act likely to endanger the safe navigation of the ship. It is obvious that such explanation is

⁹⁶ Ivans Vedins, *Loģika*, Rīga: Avots, 2000, p. 133.

useless as it uses the same terms in *definiendum* (what is to be defined) and *definiens* (what defines). It is the error *circulus in definiendo* (a circular definition). Consequently, nothing becomes clearer and a further analysis is needed – on the issue exactly what acts are unlawful (just like in the case of piracy) and on the issue exactly what acts endanger safe navigation of the ship. Attempts to find the answer to the question exactly what acts are unlawful faces the problems described already in Chapter 2.1.1 of this dissertation. Attempts to find the answer to the question exactly what acts endanger safe navigation of the ship faces additional problems.

On the one hand, it can be argued that any act of unlawful violence against the ship endangers its safe navigation. Under such interpretation the reference in the Article 3 of the SUA Convention to likelihood of endangering the safe navigation of a ship is redundancy of words. On the other hand, as the reference to likelihood to endanger the safe navigation of a ship is included in Article 3 of the SUA Convention, it is logical to assume that there are also such acts of unlawful violence against a ship which at the same time do not endanger the safe navigation of this ship. As a possible example might be mentioned attack of the ship when it is at anchor or port, and in that sense, “is not navigating”.⁹⁷

Different opinions on the issue whether an act can be considered to endanger the safe navigation of a ship and consequently fall under the regime of the SUA Convention exist because the convention itself does not explain what must be understood with the term “safe navigation”. The term is not so self-evident to use it in the explanation of another term without explaining this term itself. The ordinary meaning of the term “navigation” is “the process of planning, recording, and controlling the movement of a craft or vehicle from one place to another”⁹⁸. The question what is safe navigation is less clear. It is dependant on the understanding of the term “safety”. However, this understanding may differ.

⁹⁷ Donny Michael, “International Maritime Law and Maritime Security”, WMU Alumni Maritime Journal, 2004 at p. 86.

⁹⁸ Nathaniel Bowditch, *The American Practical Navigator*, Bethesda, MD: National Imagery and Mapping Agency, 2002 at p. 815.

In the maritime field the term “safety” usually is understood in its narrow sense – as measures for preventing or minimizing occurrence of accidents at sea that may be caused by substandard ships, unqualified crew, or operator error. This explanation excludes measures to protect against unlawful acts such as piracy and armed robbery. These measures in the maritime field are usually called security.⁹⁹ Under such interpretation of the term “safety” it can be argued that if the control over the ship is not lost and if the ship retains her seaworthiness, safe navigation of a ship is not endangered. It can be argued that safe navigation of a ship is not endangered even if the crew loses the control over her, but control is taken over by other professional crew (the crew of offenders). On the other hand, it can be argued that any unauthorized person on board the vessel makes the situation unordinary and therefore is a condition which can cause operator error. Therefore, it is not necessary for the crew to lose control over a ship for this ship to be under the present threat of an accident at sea.

In addition, as the SUA Convention itself does not give the explanation of the term “safety”, it can also be interpreted in a wider sense – so that the measures to protect against unlawful acts such as piracy and armed robbery becomes part of the concept of safety. Mejia states that “the international maritime community has historically treated security as a subset of safety and that only “the adoption of the ISPS Code may have elevated security to a status of importance in its own right”¹⁰⁰. As the SUA Convention was adopted before the ISPS Code, it can be concluded that under the SUA Convention security can be perceived as a part of safety. Also the Paperback Oxford English Dictionary talks about security as just one variety of safety: “the safety of a state or organization from terrorism and similar activity”¹⁰¹. If applying this definition to the maritime field, security can be defined as “the safety of a shipping company/vessel/crew/port against such threats as terrorism, piracy, and

⁹⁹ Proshanto K. Mukherjee and Maximo Q. Mejia Jr., “The Legal Framework of Maritime Security in International Law” in Valery N. Eremeev and Vadym N. Radchenko (ed.), *A Gateway to Sustainable Development*, Ukraine, Sevastopol: International Ocean Institute, 2004 at p. 148.

¹⁰⁰ Maximo Q. Mejia Jr., *Law and Ergonomics in Maritime Security*, Doctoral Thesis, Division of Ergonomics and Aerosol Technology, Department of Design Science, Lund University, 2007 at p. 50.

¹⁰¹ Catherine Soanes et al. (ed.), *Paperback Oxford English Dictionary, 6th ed.*, Oxford: Oxford University Press, 2006 at p. 680

other criminal activities”¹⁰². Under such interpretation of the term “safety” unmistakably any act of unlawful violence against a ship is an act against the safe navigation of that ship.

The above discussion shows that there can be different interpretations on the issue exactly what acts endanger the safe navigation of a ship. Only one of the acts listed in Article 3 of the SUA Convention is set free from the necessity to evaluate the likelihood to endanger the safe navigation of the ship – act of seizure or carrying out control over a ship by force or threat thereof or any other form of intimidation. For this offence the evaluation has been done already by the drafters of the convention. Preferably it should have been done for all unlawful acts listed in Article 3 of the SUA Convention.

4.1.2. Correlation of the concepts of unlawful acts, piracy and armed robbery

For better understanding of the correlation of the concepts of unlawful acts, piracy and armed robbery see Table “Similarities and differences between the concepts of unlawful acts, piracy and armed robbery” in Appendix 4.

After analyses of similarities and differences between the concepts of unlawful acts, piracy and armed robbery, it can be concluded that those concepts are in the following correlation:

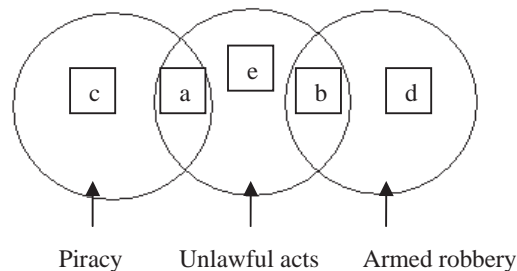


Figure 9 – Correlation of the concepts of unlawful acts, piracy and armed robbery

Part of unlawful acts at the same time is also piracy (a). Part of unlawful acts at the same time is also armed robbery (b). Parallel to that there are such acts of piracy which at the same time are not unlawful acts (c) as well as such acts of armed

¹⁰² Steven Jones, *Maritime Security: A Practical Guide*, London: The Nautical Institute, 2006 at p. 1.

robbery which at the same time are not unlawful acts (d). In addition to that, there are such unlawful acts which are neither piracy, nor armed robbery (e).

As a result similar acts are addressed by different regimes – (a) is addressed by UNCLOS and the SUA Convention and adequate “soft law”; (b) is addressed by the SUA Convention and adequate “soft law”; (c) is addressed just by UNCLOS and adequate “soft law”; (d) is addressed just by adequate “soft law” and (e) is addressed just by the SUA Convention. So, the SUA Convention actually creates not just one new regime, but 3 new regimes – (a) (b) and (e). It is obvious that such fragmented approach hampers the effectiveness of combating any acts of unlawful violence at sea, because in this “jungle” of far from clear legislation the person who needs to combat a particular act can lose his confidence about his rights and duties. Ideally all criminal offences at sea must be dealt with under one umbrella, even those which are not considered to be violent, for example, drug trafficking – so that there would be a clearer general regime of combating crimes at sea.

4.2. Jurisdiction over unlawful acts

There is no universal jurisdiction over unlawful acts, except those unlawful acts which at the same time are acts of piracy. The right to exercise universal jurisdiction over unlawful acts which at the same time are acts of piracy flows from Article 9 of the SUA Convention. Article 9 of the SUA Convention states:

Nothing in this Convention shall affect in any way the rules of international law pertaining to the competence of States to exercise investigative or enforcement jurisdiction on board ships not flying their flag.¹⁰³

Article 105 of UNCLOS – an article which sets the universal jurisdiction over piracy – matches up to the international law described in Article 9 of the SUA Convention. Therefore, Article 105 of UNCLOS is not affected by the SUA Convention.

In relation to other unlawful acts – other than those unlawful acts which at the same time are acts of piracy – the SUA Convention applies other principles than the

¹⁰³ *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 10 March 1988, IMO, <<http://www.admiraltylawguide.com/conven/suppression1988.html>> (July 7, 2009).

universality principle. Paragraph 1 of Article 6 of the SUA Convention requires State Parties to establish jurisdiction over unlawful acts based on:

- 1) the territorial principle – parts (a) and (b), and
- 2) the nationality principle, called also the active personality principle – part (c).

Paragraph 2 of Article 6 of the SUA Convention allows State Parties to establish jurisdiction over unlawful acts based on:

- 1) the residency principle – part (a);
- 2) the passive personality principle – part (b), and
- 3) the protective principle – part (c).

In addition, paragraph 4 of Article 6 of the SUA Convention requires State Parties to establish jurisdiction over unlawful acts based on representational principle.

All the above mentioned general principles on which the state should or may base its jurisdiction over crimes will not be discussed in detail as it is not the aim of this dissertation.¹⁰⁴ In general it can be said that the approach to the question of jurisdiction over unlawful acts chosen by the drafters of the SUA Convention is quite well balanced between the necessity to follow the principle of sovereignty and the necessity to combat unlawful violence at sea. The SUA Convention sets as compulsory only the jurisdiction based on the territorial principle and nationality principle, principles which are widely recognized, as well as representational principle. Other principles can be applied just with special notification. Paragraph 3 of Article 6 of the SUA Convention states: “Any State Party which has established jurisdiction mentioned in paragraph 2 shall notify the Secretary-General of the International Maritime Organization”¹⁰⁵. Under such regime, on the one hand, quite a few states which possibly can exercise jurisdiction over the acts of unlawful violence at sea are embraced. On the other hand, also the principle of necessity to

¹⁰⁴ For detailed description of the principles on which the state may base jurisdiction over crimes see, for example, John Liljedahl, „Transnational and International Crimes: Jurisdictional Issues”, in Proshanto K. Mukherjee, Maximo Q. Mejia Jr. and Gotthard M. Gauci (ed.), *Maritime Violence and Other Security Issues at Sea: Proceedings of the International Symposium Held at the World Maritime University, Malmö, Sweden, 26-30 August 2002*, Malmö: WMU Publications, 2002 at pp. 115-117.

¹⁰⁵ *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 10 March 1988, IMO, <<http://www.admiraltylawguide.com/conven/suppression1988.html>> (July 7, 2009).

have “standing” to complain prior to complaining is followed. Professor Rubin shows this principle as important for not bringing the society back to the imperialism when “holy alliance” of most powerful commercial and military states controlled the seas. Professor Rubin argues for the necessity to have “standing” to complain prior to complaining even in the cases of piracy. He states:

Absent the necessary legal interest or the delegation of authority, the “standing”, no third state can legally act as world supervisor, guardian or policeman. Any other position could properly be regarded legally as an officious intermeddling by the foreigner in the non-acting state’s domestic affairs or affairs between it and other legally interested actors, whatever the moral or political or economic interest of that foreigner.¹⁰⁶

Professor Rubin far-sightedly argues that although universal jurisdiction brings more certainty, “quest for certainty and stability, if carried too far, leads to even greater instability”¹⁰⁷.

4.3. Request for national law

UNCLOS does not obligate State Parties to develop the national law related to combating piracy. Res. A.922(22) as “soft law” just recommends developing national law related to piracy and armed robbery. The SUA Convention is more imperative as it obligates State Parties to make the unlawful acts punishable. Article 5 of the SUA Convention states:

Each State Party shall make the offences set forth in article 3 punishable by appropriate penalties which take into account the grave nature of those offences.¹⁰⁸

Differently from Res. A.922(22), which calls for adjustments of national law to enable apprehension and prosecution of offenders¹⁰⁹, Article 5 of the SUA Convention is not so all-inclusive, because it asks just for adequate penalties to be set.

It is possible to look critically to the fact that actually Article 5 of the SUA Convention leaves the fixation of exact penalties for unlawful acts to the discretionary

¹⁰⁶ Alfred P. Rubin, *The Law of Piracy*, 2nd ed., New York: Transnational Publishers, Inc., 1998 at p. 385.

¹⁰⁷ *Ibid.* at p. 377.

¹⁰⁸ *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 10 March 1988, IMO, <<http://www.admiraltylawguide.com/conven/suppression1988.html>> (July 13, 2009).

¹⁰⁹ International Maritime Organization. *Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships*, A 22/Res.922.

power of the State Parties. The requirement that penalties must take into account the grave nature of the offence is too general to lay a foundation for harmonized penalty systems in all State Parties. However, it might not be adequate to set universal penalties for unlawful acts, because those acts are not international crimes strictly speaking.

Also legal norms of Article 7 of the SUA Convention – an article which has the aim to ensure the effectiveness of later investigation or extradition – indicates some fields where there must be adequate national law in place for enforcement of the SUA Convention to be effective.

4.4. Request for cooperation

International legal norms on cooperation between states in combating unlawful acts are very important for effectively combating those acts, because effective cooperation between states together with adequate national law of each particular state are those pillars on which practical fight against illegal violence at sea rest.

The SUA Convention does not describe every single possible procedure of cooperation between states; provisions set just general principles. For international conventions it is adequate. Detailed procedures of cooperation between states can be included in the bilateral agreements and national law, which are instruments that can be drafted in accordance with already existing procedural mechanisms in a particular state. For example, the law which prescribes how to obtain the evidence upon request by another state may differ from state to state, but it is important to set in the international convention that a state has the duty to obtain the evidence upon such request. Notwithstanding the fact that the legal norms on cooperation between states under the SUA Convention are quite general, in comparison with other instruments of international law related to illegal violence at sea the SUA Convention establishes several aspects of cooperation in quite detailed manner. The legal norms on cooperation between states incorporated in the SUA Convention oblige states to cooperate at any time – at the stage of prevention, at the stage prior to the main

investigation, at the stage of main investigation as well as at the stage after the investigation.

Very welcome legal norms of the SUA Convention are legal norms included in Article 13 and Article 14. Article 13 and Article 14 of the SUA Convention oblige states to cooperate in the prevention of the unlawful acts against the safety of maritime navigation already at the stage of their preparation.¹¹⁰

One of the mechanisms of cooperation at the stage prior to the main investigation of unlawful acts is established in Article 8 of the SUA Convention. This article sets the right of the master of a ship of a State Party (flag state) deliver to the authorities of any other State Party (receiving state) any person who he has reasonable grounds to believe has committed an unlawful act. The receiving state in general can not refuse delivery. It can refuse delivery only if it gives the statement of the reasons for refusal.¹¹¹ Such legal mechanism allows setting the ship free from a suspected offender as soon as possible. That is reasonable, because the ship is not constructed and crewed for carrying the persons in custody. Therefore, while the suspected offender is on the ship, even if he is restricted in movement, there exists high security risk. Cooperation between the states prior to the main investigation of unlawful acts is required by the SUA Convention not just in the case when a suspected offender appears in the territory of particular state by delivery from the ship of another state. It requires cooperation also in other cases when a particular state has taken suspected offender into custody. Paragraph 5 of Article 7 of the SUA Convention states:

When a State Party ... has taken a person into custody, it shall immediately notify the States which have established jurisdiction in accordance with article 6, paragraph 1 and, if it considers it advisable, any other interested States, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry ... shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.¹¹²

¹¹⁰ *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 10 March 1988, IMO, <<http://www.admiraltylawguide.com/conven/suppression1988.html>> (July 14, 2009).

¹¹¹ *Ibid.*

¹¹² *Ibid.*

At the stage of main investigation just one state carries out investigation of particular unlawful act. However, it is hard for this state to do it in isolation from other states. The state carrying out the investigation of a particular unlawful act most probably will need the assistance of other states during the criminal proceedings, because an unlawful act almost always involves more than one state, for example, the victim ship may be from one state, the victim crew may be nationals of another states and offenders can be nationals of another states. Taking into consideration this fact Article 12 of the SUA Convention with good reasons sets an obligation for states to afford one another assistance in connection with criminal proceedings brought in respect of the unlawful acts, including assistance obtaining evidence at their disposal.¹¹³

Article 15 of the SUA Convention sets an obligation to states to provide the information related to a particular unlawful act and measures taken to combat it to the Secretary-General of IMO. Then the Secretary-General of IMO in accordance with paragraph 3 of Article 15 of the SUA Convention communicates this information in principle to the whole maritime society. With the help of this mechanism the cooperation between states continues even after the investigation of a particular unlawful act. Information achieved through IMO in accordance with Article 15 of the SUA Convention can be a very useful tool for assimilation of experience of other states, for finding drawbacks in the system of combating unlawful acts and for eliminating those drawbacks.

¹¹³ *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 10 March 1988, IMO, <<http://www.admiraltylawguide.com/conven/suppression1988.html>> (July 14, 2009).

5. Chapter XI-2 of the SOLAS Convention and the ISPS Code

On September 11, 2001 terrorists crashed hijacked commercial passenger airplanes into the Twin Towers of the World Trade Center in New York City and Pentagon just outside of Washington. This incident did not involve maritime domain, however, it witnessed and brought to the greater attention the risk of commercial vehicles, including ships, being used as a weapons in terrorist attacks. The events of 9/11 worked also as a catalyser on reviewing existing international law related to maritime security in general.

As a result, in 2002 IMO adopted security related amendments to the SOLAS Convention. Among other amendments the new chapter – Chapter XI-2 – was introduced. Through the newly introduced Chapter XI-2 of the SOLAS Convention also part A of the ISPS Code was made compulsory¹¹⁴.

First of all, for the purpose of this dissertation it is important to answer the question whether Chapter XI-2 of the SOLAS Convention and with that also the ISPS Code address piracy and armed robbery. The answer is – yes. Chapter XI-2 of the SOLAS Convention and the ISPS Code do not talk directly about piracy and armed robbery, but they address those concepts as well as the concept of unlawful acts through the concept of security incident. The term “security incident” is more general than the terms “piracy”, “armed robbery” and “unlawful acts”. The term “security incident” includes piracy, armed robbery, unlawful acts as well as other acts, for example, acts which threaten port facilities. Paragraph 1.13 of Regulation 1 of Chapter XI-2 of the SOLAS Convention states:

Security incident means any suspicious act or circumstance threatening the security of a ship, including mobile offshore drilling unit and a high-speed craft, or of a port facility or of any ship/port interface or any ship-to-ship activity.¹¹⁵

The correlation between the terms “piracy”, “armed robbery”, “unlawful acts” and “security incident” can be illustrated in the following way:

¹¹⁴ *The International Convention for the Safety of Life at Sea*, 1 November 1974, IMO, SOLAS: Consolidated Edition, 2004, London: IMO Publication, 2004, Annex, Chapter XI-2, Regulation 4, paragraph 1 and paragraph 2 and Regulation 10, paragraph 1.

¹¹⁵ *ISPS Code, 2003 Edition*, London: IMO Publications, 2003.

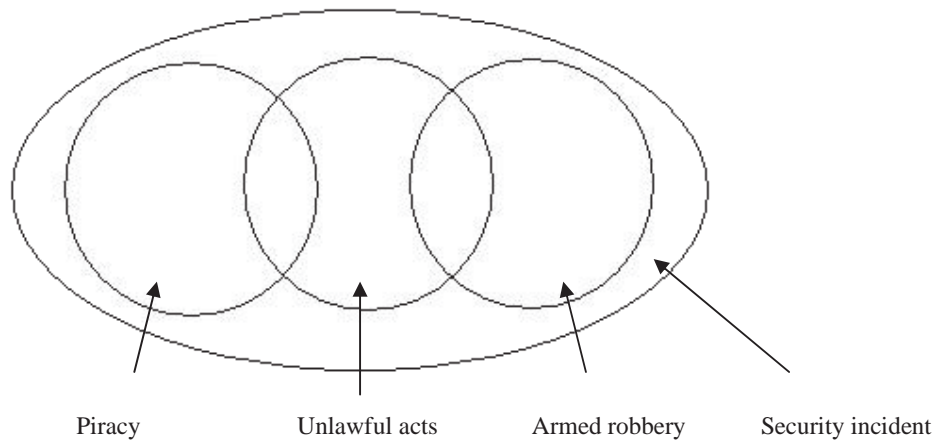


Figure 10 – Correlation of the terms “piracy”, “armed robbery”, “unlawful acts” and “security incident”

The picture above looks very promising. It gives the impression that Chapter XI-2 of the SOLAS Convention and the ISPS Code fully incorporates the legal norms related to piracy, armed robbery and unlawful acts and with that makes international law related to maritime security less fragmented. However, it is not so, because Chapter XI-2 of the SOLAS Convention and the ISPS Code do not address piracy, armed robbery and unlawful acts in the same aspect as UNCLOS, Res. A.922(22) and the SUA Convention. The main tendency of Chapter XI-2 of the SOLAS Convention and the ISPS Code is towards internal preventive and responding measures – preventive and responding measures from the side of shipping companies. Through Chapter XI-2 of the SOLAS Convention and the ISPS Code shipping companies are obliged to carry out ship security assessment (see paragraph 8 of part A of the ISPS Code), develop ship security plan (see paragraph 9 of part A of the ISPS Code), carry out training, drills and exercises on ship security (see paragraph 13 of part A of the ISPS Code) etc.¹¹⁶ The main tendency of UNCLOS, Res. A.922(22) and the SUA Convention is towards the response and prevention from outside, i.e., from the side of responsible authorities. The rights and duties of responsible authorities under Chapter XI-2 of the SOLAS Convention and the ISPS Code are indissoluble connected with the control or facilitation of the

¹¹⁶ *ISPS Code, 2003 Edition*, London: IMO Publications, 2003.

internal preventive and response measures against security incidents. The rights and duties of the responsible authorities under UNCLOS, Res. A.922(22) and the SUA Convention strictly speaking have no such connection. In general it can be said that Chapter XI-2 of the SOLAS Convention and the ISPS Code are international regulatory law, while UNCLOS, Res. A.922(22) and the SUA Convention are international criminal law.¹¹⁷ However, it must also be kept in mind that there exist different opinions on the issue whether piracy and other illegal acts of violence at sea can be considered international crimes. Identification of UNCLOS and the SUA Convention with the international criminal law can be misleading if following the opinion that piracy and other illegal acts of violence at sea are not international crimes strictly speaking. This opinion is supported, for example, by Schwarzenberger. He believed that international criminal law can not function outside each individual state and therefore international criminal law, in fact, is national criminal law¹¹⁸. Some authors disagree with this opinion. They state:

... prohibition of certain conduct by treaty or custom always entails the criminal liability under international law of the offender, irrespective of whether the prohibition conduct is defined as a universal crime or an offence to be further elaborated through domestic law. ... one should dismiss the notion espoused in 1950 by Schwarzenberg that international criminal law is 'merely a loose and misleading label for topics which comprise anything but international criminal law ...'¹¹⁹

Some experts argue that "the ISPS Code is procedural and should therefore be related to its substantive counterpart which should be found in the SUA Convention"¹²⁰. On the one hand, from the analyses above it can be concluded that such statement is not absolutely precise. The ISPS Code and the SUA Convention address different aspects of combating illegal violence at sea. Therefore, the ISPS Code can not be treated as procedural law of the substantive law in the SUA Convention. In fact, both these legal instruments contain legal norms of procedural

¹¹⁷ Maximo Q. Mejia Jr. and Proshanto K. Mukherjee, "Selected Issues of Law and Ergonomics in Maritime Security", *Journal of International Maritime Law*, Volume 10, Number 4, 2006 at p. 323.

¹¹⁸ Ilias Bantekas and Susan Nash, *International Criminal Law*, 2nd ed., London: Routledge Cavendish, 2003 at p. 8.

¹¹⁹ *Ibid.* at pp. 7-8.

¹²⁰ Proshanto K. Mukherjee and Maximo Q. Mejia Jr., "The Legal Framework of Maritime Security in International Law" in Valery N. Eremeev and Vadym N. Radchenko (ed.), *A Gateway to Sustainable Development*, Ukraine, Sevastopol: International Ocean Institute, 2004 at p. 154.

as well as substantive character, just in different aspects, for example, Articles 6 to 16 of the SUA Convention are to a large extent procedural. On the other hand, the fact that the ISPS Code is not procedural law of the substantive law in the SUA Convention automatically does not mean that the legal norms of the ISPS Code and the SUA Convention could not be integrated in one document or at least linked together with references. Such solution is not excluded because both – the ISPS Code and the SUA Convention – have a similar aim: to make the seas more secure. However, such solution is not absolute necessity. It is more important first of all to find the balanced position between UNCLOS, Res. A.922(22) and the SUA Convention, because those legal instruments all address combating of illegal violence at sea from the same aspect, namely response and prevention from outside. The aspect of combating illegal violence at sea addressed by the ISPS Code does not overlap with the aspects addressed by UNCLOS, Res. A.922(22) and the SUA Convention. Therefore existence of the ISPS Code separately from UNCLOS, Res. A.922(22) and the SUA Convention does not cause legal collisions. In addition, ship security system addressed by Chapter XI-2 of the SOLAS Convention and the ISPS Code from the point of view of its establishment and control is very similar to the ship safety system. Ship safety system traditionally has been addressed by the SOLAS Convention. Jones states: “while the aims of safety and security are different there is a large cross-over and elements of harmonisation between the two”¹²¹. As the ship security system and ship safety system from the point of view of their establishment and control are similar, to facilitate the understanding of those persons who will need to carry out establishment and control of the respective systems, it is advisable to have legal norms related to both those systems in one normative act.

From the all above mentioned it can be concluded that Chapter XI-2 of the SOLAS Convention and the ISPS Code bring even more fragmentation in the international law related to maritime security. For a general overview of fragmentation of international law related to maritime security see Appendix 5.

¹²¹ Steven Jones, *Maritime Security: A Practical Guide*, London: The Nautical Institute, 2006 at p. 80.

However, at the same time Chapter XI-2 of the SOLAS Convention and the ISPS Code bring additional contribution to the fight against the illegal violence at sea. In general, Chapter XI-2 of the SOLAS Convention and the ISPS Code allow establishing effective internal ship security system. Chapter XI-2 of the SOLAS Convention and the ISPS Code do not give template solution, but they allow shipping companies themselves to choose the most appropriate way for securing each of their ships. That is an adequate approach because the security threats may vary from ship to ship – depending for instance on the type of ship and the route of ship. It is not possible to stipulate each situation in the normative act. Further, it is also not advisable because security systems must be kept in strict privacy. Apart from normative acts, there are other sources through which the information on effective preventive measures can be obtained and then incorporated in the ship security plan, for example, practical guidelines developed by international organizations or the shipping industry itself.¹²² As Chapter XI-2 of the SOLAS Convention and the ISPS Code give a lot of discretionary power to the employees of shipping companies and officials of the authorities, the problem of Chapter XI-2 of the SOLAS Convention and the ISPS Code is not so much the legal norms of those normative acts but the potential unprofessionalism of the above mentioned people. Consequently, to improve the effectiveness of Chapter XI-2 of the SOLAS Convention and the ISPS Code education and training of employees of shipping companies and officials of the authorities is most important.

Parallel to the above mentioned opinion, it must also be noted that not all are comfortable with the big discretionary power given to them by Chapter XI-2 of the SOLAS Convention and the ISPS code. With such imprecise standards, ship owners do not feel protected against potentially possible liability for providing unseaworthy ships. They are afraid that in the case of a security incident their security risk assessment can be challenged; consequently, a ship can be recognized to be

¹²² See, for example, International Maritime Organization, *Guidance to Shipowners and Ship Operators, Shipmasters and Crews on Preventing and Suppressing Acts of Piracy and Armed Robbery Against Ships*, MSC.1/Circ.1334, 23 June 2009.

unseaworthy and the respective liability can be imposed on the ship owner.¹²³ The uncomfortable feeling of ship owners is understandable. However, it does not change the fact that the setting of detailed security standards in the normative act is not possible and is not advisable. The hope therefore is on experts, including experts from the industry itself, who will develop good methodology for security risk assessment. Then adequacy of particular security risk assessment could be proven by giving evidence that assessment was carried out by applying a particular valuable methodology.

Another important block of the legal norms in Chapter XI-2 of the SOLAS Convention, apart from the legal norms which incorporate the ISPS Code, are legal norms of Regulation 6. Regulation 6 of Chapter XI-2 of the SOLAS Convention requires the establishment of ship security alert systems. Doubtless a ship security alert system allows responding to the security incident more effectively. It allows getting to know about the particular security incident more in time and consequently to respond to it more in time. However, it must be kept in mind that the sending of alert signals does not mean immediate appearance of the help, for example, immediate appearance of the warships ready to provide assistance. The victim ship can be far away at sea; it can be in the territory of another state than the one which receives the alert signal; the potential rescue operation may endanger crew or passengers. Therefore, the organization of rescue operation in any case asks for a considerable period of time. For example, see in Appendix 6 the description of procedures which must be carried out in the Republic of Latvia after receiving the alert signal from the ship. Taking into consideration that the response from the outside to the existing threat can be dilatory, the first assistants in the case of a threat at sea are threatened themselves. Therefore, internal preventive measures against those threats are very important. That is exactly what the ISPS Code tries to address.

¹²³ Jens-Uwe Schröder et al., “Potential Consequences of Imprecise Security Assessments”, IAMU Journal Vol. 4, No. 2 March 2006, pp. 35-36.

6. Conclusions and recommendations

The international law related to maritime security in itself can help little in combating illegal violence at sea. The power of law is in its implementation. However, the existing law is one of the factors, which determines whether the implementation of the law (practical measures) is effective or not. Therefore, it is essential to have adequate international law related to maritime security (“good substructure”) before effective practical measures against illegal violence at sea (“the visible part of the house”) can be established. This dissertation aimed to help to develop “stronger substructure” for the practical fight against illegal violence at sea – by identifying particular problems in combating piracy and armed robbery arising from inadequate international law related to maritime security and making the recommendations for improving this body of law. The main focus of the dissertation was the issue of clarity of the concepts describing illegal violence at sea.

This chapter revisits the main problems discovered during the research and puts forward some brief recommendations.

6.1. The interpretation of the terms “illegal violence”, “illegal detention” and “illegal depredation”

This dissertation showed that the terms “illegal violence”, “illegal detention” and “illegal depredation” in the definition of piracy under UNCLOS may be interpreted differently in different states. The research also showed that the use of all three terms – “illegal violence”, “illegal detention” and “illegal depredation” – in the definition of piracy under UNCLOS makes this definition complicated and hard to read.

To avoid the above mentioned problems it is recommended that the term “illegal violence” be applied in the definition of piracy in its wide sense. In such sense illegal detention and illegal depredation become parts of illegal violence and consequently can be listed under the term “illegal violence” not parallel to it. In addition, international law should clearly identify which acts of violence at sea are considered to be illegal.

6.2. The narrow character of the definition of piracy under UNCLOS

The definition of piracy under UNCLOS is narrow. It restricts piracy only to those acts which are carried out for private ends, from one ship to another and on the high seas or other places outside the jurisdiction of any state. Such restrictions do not allow effective combating of illegal violence at sea. In addition, due to the unclear legal norms there exist a lot of contradictory opinions on the issue what acts are included in the concept of piracy and what acts are excluded from it. For example, due to the vague character of the term “private ends”, it is not clear whether maritime terrorism can be considered to be piracy; due to the conflict between the first part of Article 101(a) of UNCLOS and the second part of Article 101(a) of UNCLOS, it is not clear whether an act of illegal violence which occurs on board a single vessel can be considered to be piracy, and due to the unclear correlation between Article 58 of UNCLOS and Article 101 of UNCLOS, it is not clear whether an act of illegal violence in the EEZ can be considered to be piracy.

To solve the above mentioned problems it is recommended that piracy be defined as acts of illegal violence at sea over which universal jurisdiction can be exercised. To identify clearly acts of illegal violence at sea over which universal jurisdiction can be exercised and to list those acts in the international convention further research must be carried out. The objective of such research could be determining over what kind of acts of illegal violence at sea the application of the universal jurisdiction is absolutely necessary and over what kind of acts of illegal violence at sea the application of the universal jurisdiction is absolutely unacceptable due to the principle of state sovereignty. However, the main criterion for determining the acts over which universal jurisdiction can be exercised (piracy) must not be the aim of the offender, or the type of boarding of victim ship by offenders, or even the place where an act has been carried out. The main criterion must be the capacity of the flag states or coastal states to exercise their territorial jurisdiction over illegal violence at sea effectively. If in particular cases the flag state or coastal state is not able to exercise their territorial jurisdiction over illegal violence at sea effectively and this problem can not be solved by other mechanisms (for example,

regional cooperation), then the possibility of applying universal jurisdiction can not be excluded, irrespectively whether an act is committed for private or public ends, from one ship to another or on board a single vessel, on the highs seas or in any other maritime zone.

6.3. The definition of armed robbery

This study discussed how the definition of armed robbery can be confusing. The term “armed robbery” contains the word “robbery” in it – a word which traditionally has been associated with financial gain. At the same time the explanation of the concept of armed robbery under Res. A.922(22) is not knit together with financial gain. In addition, armed robbery in its traditional meaning can be a part of piracy, but under the definition in Res A.922(22) it is not a part of piracy. Some authors offer to use the term “coastal zone piracy” instead of the term “armed robbery”. However, this term is also misleading.

To solve the above mentioned problems it is recommended that the term “armed robbery” should not be used apart from its traditional meaning. It is not recommended that the term “coastal zone piracy” be used instead of the term “armed robbery”. To address acts of illegal violence at sea over which universal jurisdiction can not be exercised (acts which today are called armed robbery under Res A.922(22)) the one common name is not absolute necessity.

6.4. The SUA Convention

The concept of unlawful acts is unclear, because the explanation of this concept in Article 3 of the SUA Convention has circular character – it explains unlawful acts against the safety of maritime navigation as unlawful acts which are likely to endanger the safe navigation of the ship.

To solve the above mentioned problem it is recommended that it should clearly be identified in international law exactly which acts of violence at sea are considered to be unlawful/illegal, or rather, clearly identified exactly which acts endanger the safety of maritime navigation.

6.5. Chapter XI-2 of the SOLAS Convention and the ISPS Code

Chapter XI-2 of the SOLAS Convention and the ISPS Code set imprecise standards.

To solve the above mentioned problem it is recommended that the approach in general should not be changed, but at the same time the industry should be provided with well structured doctrinal knowledge and skills on effective utilization of the discretionary power given to it by Chapter XI-2 of the SOLAS Convention and the ISPS Code.

In general, this dissertation has put forth arguments to the effect that the international law related to maritime security is fragmented and has numerous other deficiencies. Doubtless, all those deficiencies need to be reduced as much as possible. It is hoped that the findings of this dissertation can help to do so, at least by awakening the interest in further research on the subject. At the moment there are several normative acts, which address the fight against illegal violence at sea. Acts of illegal violence at sea addressed by these normative acts overlap with each other. Consequently, from the point of view of applicable law, even more variations of acts of illegal violence at sea arise: piracy which is not unlawful act; piracy which is unlawful act; armed robbery which is not unlawful act; armed robbery which is unlawful act and unlawful act which is neither piracy, nor armed robbery. In addition, as was shown earlier, the borderlines between these acts often are not clear.

However, in the end it must also be noted that even if some aspects of the law are not absolutely clear, like it is with the law on illegal violence at sea, it is not always a good excuse for non action in a particular situation. There can neither be legal nihilism, which can cause social anarchy, nor can there be legal fetishism, which causes inability to orientate oneself in the real practical situation. It is impossible to write instructions for all possible situations. The only “instruction” in the cases when law is not clear enough is to reasonably evaluate the situation and act proportionally.

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Appendices

Appendix 1

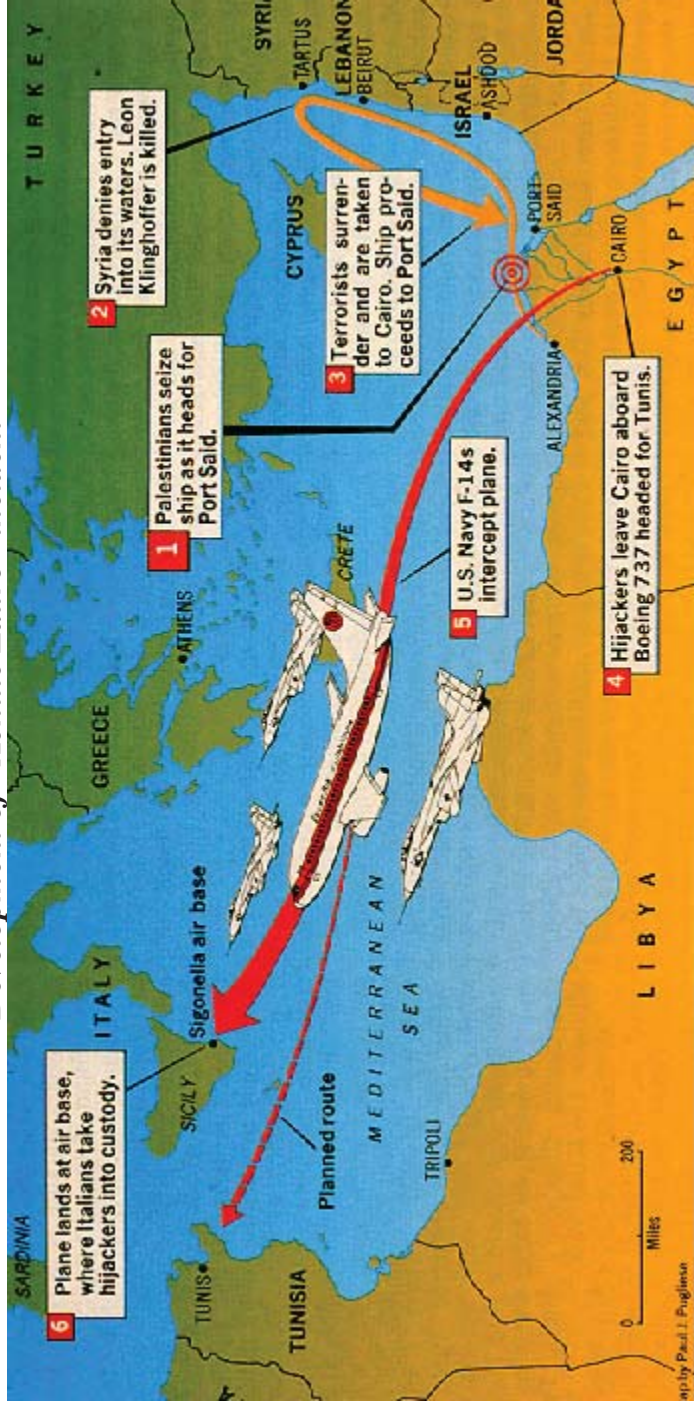
The components of the definition of piracy under UNCLOS

- 1) piracy as an act of violence;
- 2) piracy as an illegal act of violence;
- 3) piracy as a detention;
- 4) piracy as an illegal detention;
- 5) piracy as any act of depredation;
- 6) piracy as an illegal act of depredation;
- 7) piracy as an act committed for private ends;
- 8) piracy as an act committed by the crew;
- 9) piracy as an act committed by the crew of a private ship;
- 10) piracy as an act committed by the crew of a private ship against another ship;
- 11) piracy as an act committed by the crew of a private ship against an aircraft;
- 12) piracy as an act committed by the crew of a private ship against persons on board another ship;
- 13) piracy as an act committed by the crew of a private ship against persons on board an aircraft;
- 14) piracy as an act committed by the crew of a private ship against property on board another ship;
- 15) piracy as an act committed by the crew of a private ship against property on board an aircraft;
- 16) piracy as an act committed by the crew of a private aircraft against a ship;
- 17) piracy as an act committed by the crew of a private aircraft against another aircraft;
- 18) piracy as an act committed by the crew of a private aircraft against persons on board a ship;

- 19) piracy as an act committed by the crew of a private aircraft against persons on board another aircraft;
- 20) piracy as an act committed by the crew of a private aircraft against property on board a ship;
- 21) piracy as an act committed by the crew of a private aircraft against property on board another aircraft;
- 22) piracy as an act committed by the passenger of a private ship against another ship;
- 23) piracy as an act committed by the passenger of a private ship against an aircraft;
- 24) piracy as an act committed by the passenger of a private ship against persons on board another ship;
- 25) piracy as an act committed by the passenger of a private ship against persons on board an aircraft;
- 26) piracy as an act committed by the passenger of a private ship against property on board another ship;
- 27) piracy as an act committed by the passenger of a private ship against property on board an aircraft;
- 28) piracy as an act committed by the passenger of a private aircraft against a ship;
- 29) piracy as an act committed by the passenger of a private aircraft against another aircraft;
- 30) piracy as an act committed by the passenger of a private aircraft against persons on board a ship;
- 31) piracy as an act committed by the passenger of a private aircraft against persons on board another aircraft;
- 32) piracy as an act committed by the passenger of a private aircraft against property on board a ship;
- 33) piracy as an act committed by the passenger of a private aircraft against property on board another aircraft;

- 34) piracy as an act committed on the high seas;
- 35) piracy as an act committed in a place outside the jurisdiction of any State;
- 36) piracy as an any act of voluntary participation in the operation of a ship with knowledge of facts making it a pirate ship;
- 37) piracy as an any act of voluntary participation in the operation of an aircraft with knowledge of facts making it a pirate aircraft;
- 38) piracy as an act of inciting the above mentioned acts;
- 39) piracy as an act of intentionally facilitating the above mentioned acts.

Development of “Achille Lauro” incident¹²⁴



¹²⁴ Aaron Klein, “‘Peace Partner’ Helped Free Terrorist who Killed American. Leader of Infamous Achille Lauro Hijacking Released Yesterday from Italian Prison”, 30 April 2009 < <http://therealbarackobama.wordpress.com/2009/04/30/klein-peace-partner-helped-free-terrorist-who-killed-american-leader-of-infamous-achille-lauro-hijacking-released-yesterday-from-italian-prison/>> (26 June 2009).

*Article 3 of SUA Convention*¹²⁵

Article 3

1. Any person commits an offence if that person unlawfully and intentionally:
 - (a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
 - (b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or
 - (c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or
 - (d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or
 - (e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or
 - (f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or
 - (g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).
2. Any person also commits an offence if that person:
 - (a) attempts to commit any of the offences set forth in paragraph 1; or
 - (b) abets the commission of any of the offences set forth in paragraph 1 perpetrated by any person or is otherwise an accomplice of a person who commits such an offence; or

¹²⁵ *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 10 March 1988, IMO, <<http://www.admiraltylawguide.com/conven/suppression1988.html>> (July 7, 2009).

(c) threatens, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraph 1, subparagraphs (b), (c) and (e), if that threat is likely to endanger the safe navigation of the ship in question.

Similarities and differences between the concepts of unlawful acts, piracy and armed robbery

<div> <div>Act</div> <div>Condition</div> </div>	Piracy	Armed robbery	Unlawful act	Comments
	illegal	unlawful	unlawful	All concepts address illegal/unlawful acts
General outer form	<p>1) violence or detention or depredation against ship or persons or property on board ship;</p> <p>2) voluntary participation in the operation of the pirate ship;</p> <p>3) inciting or intentional facilitating of above mentioned acts</p>	<p>Violence or detention or depredation or threat thereof against ship or persons or property on board ship</p>	<p>1) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation;</p> <p>2) performs an act of violence on board a ship if that act is likely to endanger the safe navigation of that ship;</p> <p>3) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship;</p> <p>4) places or causes to be placed on a ship a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship;</p> <p>5) destroys or seriously damages maritime navigational facilities or seriously interferes with their operations, if any such act is likely to endanger the safe navigation of a ship;</p>	<p>Some piracy can not be considered to be unlawful act, for example, violence on board the ship on high seas if it is not likely to endanger safe navigation of a ship.</p> <p>Some piracy can be considered to be also unlawful act, for example, seizure of a ship from another ship on high seas.</p> <p>Some armed robbery can not be considered to be unlawful act, for example, damage to ship's cargo in territorial sea if it is not likely to endanger the safe navigation of a ship.</p>

			<p>6) communicates information which he knows to be false, thereby endangering the safe navigation of a ship;</p> <p>7) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in points 1 to 6;</p> <p>8) attempts to commit any of the offences set forth in points 1 to 7;</p> <p>9) abets the commission of any of the offences set forth in point 1 to 7 or is otherwise an accomplice of a person who commits such an offence;</p> <p>10) threatens, aimed to compelling person to do or refrain from doing any act, to commit any of offences set forth in points 2, 3 and 5, if that threat is likely to endanger the safe navigation of the ship in question.</p> <p>-</p>	<p>Some armed robbery can be considered to be also unlawful act, for example, placing on a ship a device in internal waters if it is likely to endanger the safe navigation of a ship.</p> <p>Some unlawful acts can be considered neither piracy, nor armed robbery, for example, destroying maritime navigational facilities.</p>
Special way of caring out an act	Ship to ship	-	-	<p>All piracy offences and all armed robbery offences are also unlawful acts, if they are unlawful acts under other conditions</p>

Special place of caring out an act	- High seas - Place outside the jurisdiction of any state	Place within the State's jurisdiction	-	All piracy offences and all armed robbery offences are also unlawful acts, if they are unlawful acts under other conditions
Special motive or aim of caring out an act	Private ends	-	-	All piracy offences and all armed robbery offences are also unlawful acts, if they are unlawful acts under other conditions

General overview of the fragmentation of international law related to maritime security

	Aspects addressed by legal norms	Types of incidents addressed	Types of ships addressed
Chapter XI-2 of SOLAS Convention and ISPS Code	Prevention and response from inside	Security incidents	<p>Following types of ships engaged on international voyages:</p> <ul style="list-style-type: none"> - passenger ships, including high-speed passenger craft; - cargo ships, including high-speed craft, of 500 gross tonnage and upwards; - mobile offshore drilling units. <p>Warships, naval auxiliaries or other ships owned or operated by a Contracting Government and used only on Government non-commercial service are excluded.</p>
Piracy provisions under UNCLOS	Response from outside	Piracy	All private ships
Res. A.922(22)	Response from outside	Piracy and armed robbery	<p>All private ships – in the case of piracy.</p> <p>All ships – in the case of armed robbery (no exceptions indicated)</p>
SUA Convention	Response and prevention from outside	Unlawful acts	<p>All ships (vessels of any type whatsoever not permanently attached to the sea-bed, including dynamically supported craft, submersibles, or any other floating craft) except:</p> <ul style="list-style-type: none"> - warships; - ships owned or operated by a State when being used as a naval auxiliary or for customs or police purposes; - ships which have been withdrawn from navigation or laid

			<p>up;</p> <p>- ships which are not navigating or scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States.</p>
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***Extract from the Cabinet of Republic of Latvia Regulation No.683
“Procedures for Ensuring the Operation of Ship Security Alert
Communication Network”¹²⁶***

24. If the Co-ordination Centre receives an alert signal from a ship whose flag is that of the Republic of Latvia and that is located in the waters within the jurisdiction of the Republic of Latvia, the persons responsible for the security of the ship shall perform the following operations:

24.1. the Co-ordination Centre shall inform the Security Police, State stock company “Ship and Port Security Inspection” and the shipping company in whose ownership or management the ship belongs (hereinafter – shipping company) regarding the receipt of an alert signal;

24.2. when information is received regarding the transmission of a ship alert signal, the shipping company shall communicate with the ship, using procedures to check the authenticity of the signal, to ascertain whether the threats to the security of the ship and the transmitted alert signal are true;

24.3. if the shipping company ascertains that the alert signal received from a ship is a false alarm (an alert signal has been transmitted in the absence of threats to the ship), the shipping company shall notify the Co-ordination Centre regarding this. The Co-ordination Centre shall convey such information further to the Security Police and the Ship and Port Security Inspection; and

24.4. if a shipping company ascertains that the threats to the security of a ship and a transmitted alert signal are true, the shipping company shall inform the Co-ordination Centre thereof; The Co-ordination Centre shall convey such information further to the Security Police and the Ship and Port Security Inspection;

¹²⁶ Republic of Latvia, Cabinet Regulation No. 683 „Procedures for Ensuring the Operation of Ship Security Alert Communication”, 22 August 2006, <http://www.ttc.lv/advantagecms/LV/tulkojumi/meklet_dokumentus.html?query=ship+secyrity+alert+system&resultsPerPage=10> (July 20, 2009).

24.5. when confirmation is received that the threats to the security of a ship and a transmitted alert signal are true, the Security Police shall summon the Ship and Port Security Committee, which shall include representatives from the Security Police, the Co-ordination Centre, the Ship and Port Security Inspection, the relevant shipping company and, if necessary, also representatives from other authorities (for example, the State Police, the State Border Guard, the State Fire-fighting and Rescue Service). The Ship and Port Security Committee shall be chaired by a representative of the Security Police; and

24.6. in accordance with the decision of the Ship and Port Security Committee, the Security Police shall take a decision regarding further action to avert the threat to a ship (hereinafter – decision regarding a response).

25. If the Co-ordination Centre receives an alert signal from a ship, whose flag is that of the Republic of Latvia and that is not located in the waters within the jurisdiction of the Republic of Latvia, the persons responsible for the security of the ship shall perform the following operations:

25.1. the Co-ordination Centre shall inform the Security Police, the Ship and Port Security Inspection, the relevant shipping company and the competent authority of the state within whose jurisdiction are the waters or the vicinity thereto in which the ship is located, regarding the receipt of an alert signal;

25.2. when information is received regarding the transmission of a ship alert signal, the shipping company shall communicate with the ship using procedures to check the authenticity of the signal, to ascertain whether the threats to the ship's security and the transmitted alert signal are true;

25.3. if the shipping company ascertains that the alert signal received from a ship is a false alarm (an alert signal has been transmitted in the absence of a threat to the ship), the shipping company shall notify the Co-ordination Centre regarding this. The Co-ordination Centre shall convey this information further to the Security Police, the Ship and Port Security Inspection and the competent authority of the state that was previously informed regarding the receipt of an alert signal;

25.4. if a shipping company ascertains that the threats to the security of a ship and a transmitted alert signal are true, the shipping company shall inform the Co-ordination Centre regarding this; The Co-ordination Centre shall convey such information further to the Security Police and the Ship and Port Security Inspection;

25.5. when confirmation is received that the threats to the security of a ship and a transmitted alert signal are true, the Security Police shall summon the Ship and Port Security Committee, which shall include representatives from the Security Police, the MRCC, the Ship and Port Security Inspection, the relevant shipping company and, if necessary, also representatives from other authorities (for example, the State Police, the State Border Guard, the State Fire-fighting and Rescue Service, the Ministry of Foreign Affairs). The Ship and Port Security Committee shall be chaired by a representative of the Security Police; and

25.6. in accordance with the decision of the Ship and Port Security Committee the Security Police shall take a decision regarding a response.

26. If the Co-ordination Centre receives information from another state, that a foreign ship, that is located in the waters within the jurisdiction of the Republic of Latvia or in the vicinity thereof, has transmitted an alert signal, the persons responsible for the security of a ship shall perform the following operations:

26.1. the Co-ordination Centre shall notify the Security Police and the Ship and Port Security Inspection regarding the information received;

26.2. The Security Police shall summon the Ship and Port Security Committee, which shall include representatives from the Security Police, the Co-ordination Centre, the Ship and Port Security Inspection, the Ministry of Foreign Affairs, the relevant State Embassy and, if necessary, also representatives from other authorities (for example, the State Police, the State Border Guard, the State Fire-fighting and Rescue Service). The Ship and Port Security Committee shall be chaired by a representative of the Security Police; and

26.3. in accordance with the decision of the Ship and Port Security Committee, the Security Police shall take a decision regarding a response.